IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-633

Filed: 21 June 2016

Onslow County, No. 14 CRS 50763

STATE OF NORTH CAROLINA, Plaintiff,

v.

OCTAVIUS LAMARR THOMPSON, Defendant.

Appeal by defendant from judgment entered 20 November 2014 by Judge Anna Mills Wagoner in Onslow County Superior Court. Heard in the Court of Appeals 20 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Sarah Holladay for defendant-appellant.

ZACHARY, Judge.

Octavius Thompson (defendant) appeals from judgment entered on his convictions for felony death by vehicle and driving while impaired, and from a finding of responsibility for failure to stop at a stop sign. On appeal, defendant argues that the trial court erred by denying his motion to suppress evidence of the blood test results in his hospital records, and by denying his motion for a mistrial based on the

introduction of the blood test results. We conclude that defendant failed to preserve these issues for appellate review, and dismiss defendant's appeal.

I. Background

On 1 February 2014, defendant was involved in a single vehicle accident in which he suffered serious injuries and his passenger was killed. Defendant was transported to Onslow Memorial Hospital, where Dr. John Gudger ordered blood drawn from defendant for medical purposes. However, Dr. Gudger determined that defendant required treatment at a larger facility, and the order for blood to be drawn had not been completed when defendant was discharged from Onslow Hospital and prepared for transit to a larger hospital.

While defendant was at the hospital, Trooper Matthew Bryan waited for several hours to see defendant. During this time, Trooper Bryant could have obtained a search warrant to draw blood from defendant, but did not do so. Shortly before defendant was transported to another hospital, while defendant was unconscious, Trooper Bryan asked the attending nurses to draw blood from defendant for use in criminal proceedings and provided a blood draw kit for that purpose. The nurse was not able to draw blood from defendant, but the ambulance's EMT obtained blood samples and gave some of the blood to Trooper Bryan and the rest to the attending nurses. A chemical analyst employed by the North Carolina State Crime Lab tested

the blood sample given to Trooper Bryan and determined that defendant's blood alcohol level was .12.

On 13 May 2014, defendant was indicted on charges of felony death by vehicle, driving while impaired, reckless driving, failure to stop at a stop sign, and seatbelt violation. On 8 August 2014, defendant filed a motion seeking suppression of "all blood and testing results" obtained from the blood that was drawn while he was in the hospital, on the grounds that the blood draw violated his rights under the Fourth Amendment. Following a hearing conducted on 18 August 2014, Judge Jack Jenkins entered an order on 2 September 2014 granting defendant's suppression motion and ordering that "the blood and test results of the blood draw requested by Trooper Bryan should be suppressed."

The State then filed a motion to compel Onslow Memorial Hospital to produce defendant's hospital records. On 6 October 2014, defendant filed a motion to suppress the hospital's records. The charges against defendant were tried before the trial court and a jury beginning on 17 November 2014. Prior to trial, the trial court denied defendant's motion to suppress the hospital records. At trial, Dr. Gudger testified that Onslow Hospital had tested the sample of defendant's blood and that the results showed defendant to have a blood alcohol level of .15. When the results of the blood test were first introduced, defendant objected, and after Dr. Gudger finished testifying defendant moved for a mistrial.

During the charge conference, the prosecutor announced that the State was not proceeding on the reckless driving charge, and the trial court dismissed the seat belt infraction. On 20 November 2014, the jury returned verdicts finding defendant guilty of felony death by vehicle and impaired driving, and finding defendant responsible for failing to stop at a stop sign. The trial court arrested judgment on the impaired driving conviction and sentenced defendant to 51 to 74 months in prison for felony death by vehicle. Defendant's post-trial motion for appropriate relief and motion to set aside the verdict were denied, and defendant appealed to this Court.

II. Preservation of Issues for Appeal

A. General Rule

To preserve an issue for appellate review, a party "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must "obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.' An objection made 'only during a hearing out of the jury's presence prior to the actual introduction of the testimony' is insufficient." *State v. Snead*, 2016 N.C. LEXIS 313, *10-11 (15 April 2016) (quoting *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (internal quotation omitted) (other citation omitted).

B. Plain Error

N.C.R. App. P. 10(a)(4) provides that:

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

A defendant has a heavy burden to obtain relief based on plain error:

> "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant. Therefore, the test for 'plain error' places a much heavier burden upon the defendant than [the burden] imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection."

State v. Cummings, 352 N.C. 600, 636-37, 536 S.E.2d 36, 61 (2000) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

III. Discussion

A. Failure to Preserve the Admission of Blood Test Results for Review

At trial, Dr. Gudger testified that the hospital had tested the blood sample obtained from defendant. When the prosecutor asked Dr. Gudger what the test results showed as to defendant's blood alcohol level, defense counsel interjected, "Your Honor, at this point, as I mentioned before, we object to this." In addition, after the presentation of the State's evidence, defendant moved for a mistrial, on the

grounds that the evidence of defendant's blood alcohol level was "improperly before the jury" and that the resultant "prejudice cannot be cured by any limiting instruction[.]"

However, in at least two other instances, defendant made no objection to the admission of the same evidence. First, following defendant's initial objection, the prosecutor continued to question Dr. Gudger:

> Prosecutor: So can you convert, Dr. Gudger, the reported concentration [of alcohol] of 154 to that standard which is used in the criminal laws of the State of North Carolina?
>
> Dr. Gudger: Yes.
>
> Prosecutor: And what is that?
>
> Dr. Gudger: . . . Translating this value to a percentage value, it would be .154 percent.
>
> Prosecutor: All right. Thank you, Dr. Gudger. I move to introduce State's Exhibit Number 13 into evidence, and I have no further questions.
>
> Clerk: Fourteen.
>
> The Court: Fourteen. Let 14 be received into evidence.

During this part of Dr. Gudger's testimony, Dr. Gudger testified that defendant's blood alcohol could be expressed as ".154 percent" without objection from defendant. More importantly, defendant failed to object to the introduction into evidence of the hospital records that recorded defendant's blood alcohol level.

In addition, defendant failed to offer any objection when Dr. Gudger was questioned on redirect examination about defendant's blood alcohol level:

> Prosecutor: So the other document that I placed in front of you, I'll just call it a lab sheet. Do you see that?
>
> Dr. Gudger: Yes.
>
> Prosecutor: Is that a part of the medical record as well?
>
> Dr. Gudger: Yes, it is.
>
> Prosecutor: Is it for the patient Octavius Thompson?
>
> Dr. Gudger: Yes, it is.
>
> Prosecutor: And does that document part of his medical record, indicate the results of the blood alcohol testing?
>
> Dr. Gudger: Yes, it does.
>
> Prosecutor: And you testified yesterday as to what the results were.
>
> Dr. Gudger: That's right.
>
> Prosecutor: What were the results of the blood-alcohol testing?
>
> Dr. Gudger: The result of the test was 154 milligrams per deciliter.

" '[I]t is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.' " *State v. Nobles*, 350 N.C. 483, 501, 515 S.E.2d 885, 896 (1999) (quoting *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979)). We conclude that by failing to object to the introduction of defendant's hospital records or to Dr. Gudger's testimony on redirect examination regarding defendant's blood alcohol level, defendant waived his earlier objection to the introduction of this evidence.

B. Plain Error Review is Not Available to Defendant

On page fourteen of his appellate brief, defendant makes the perfunctory assertion that if "this Court should deem the issue not sufficiently preserved, Mr. Thompson argues in the alternative that the trial court committed plain error," followed by a quote from *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012), stating the standard for plain error. This is the only reference to plain error in defendant's appellate brief.

Defendant argues that he was prejudiced by admission of the blood alcohol test results, contending that this was "inadmissible prejudicial evidence" and that without the challenged blood test evidence, the State could not "prove beyond a reasonable doubt" that defendant was an impaired driver.

However, defendant does not offer any argument or citation to authority in support of his conclusory assertion that admission of the blood test results was plain error. Defendant does not cite to or discuss any cases finding plain error, and does not specifically argue that admission of this evidence had a "probable impact" on the jury's verdict, that it "tipped the scales," or that the result would have been different absent introduction of this evidence. In addition, defendant does not acknowledge or discuss the fact that evidence of his blood alcohol was twice admitted without objection during the trial. In *Cummings*, 352 N.C. at 636-37, 536 S.E.2d at 58-59, our Supreme Court stated that:

> . . . [Defendant] provides no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done. The right and requirement to specifically and distinctly contend an error amounts to plain error does not obviate the requirement that a party provide argument supporting the contention that the trial court's [ruling] amounted to plain error, as required by subsections (a) and (b)(5) of Rule 28. N.C. R. App. P. 28(a), (b)(5). . . . Defendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule. By simply relying on the use of the words "plain error" as the extent of his argument in support of plain error, defendant has effectively failed to argue plain error and has thereby waived appellate review.

(citing *State v. Braxton*, 352 N.C. 158, 196, 531 S.E.2d 428, 450-51 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001) (other citation omitted). "[D]efendant failed to offer any support in his brief for the plain error assignment, and therefore he has abandoned that method of review." *State v. Tuck*, 173 N.C. App. 61, 70, 618 S.E.2d 265, 272 (2005) (citing *Nobles*, 350 N.C. at 514-15, 515 S.E.2d at 904 ("Although [defendant] . . . 'specifically and distinctly contended' . . . that the error amounted to plain error, defendant failed to argue in his brief that the trial court's instruction amounted to plain error. . . . Accordingly, defendant has waived appellate review of this assignment of error.")).

As discussed above, "[o]ur Supreme Court has held that a defendant who merely used the words 'plain error,' without offering any explanation or argument in support of such review, 'ha[d] effectively failed to argue plain error and ha[d] thereby

waived appellate review.' " *State v. Locklear*, 180 N.C. App. 115, 124, 636 S.E.2d 284, 289 (2006) (quoting *Cummings* at 637, 536 S.E.2d at 61). Because defendant failed to support his conclusory assertion that admission of his blood alcohol level was plain error with any argument or citation, "we have no legal basis upon which to review this alleged error. *See* N.C.R. App. P. 28(b)(6). It is not the role of this Court to craft defendant's arguments for him." *State v. Earls*, 234 N.C. App. 186, 192, 758 S.E.2d 654, 658 (citing *Viar v. North Carolina Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that "[i]t is not the role of the appellate courts, . . . to create an appeal for an appellant")), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 643 (2014). As a result, defendant's appeal must be

DISMISSED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).