IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-236

Filed: 18 October 2016

Forsyth County, Nos. 14 CRS 60384, 14 CRS 735784

STATE OF NORTH CAROLINA

v.

KENDRA POTTS SMITH, Defendant.

Appeal by Defendant from judgment entered 8 October 2015 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.

Randolph and Fischer, by J. Clark Fischer, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Kendra Potts Smith ("Defendant") appeals her convictions for driving while impaired ("DWI") and speeding in excess of 80 miles per hour. She contends that the trial court erred by refusing to instruct the jury on the defense of compulsion, duress, or coercion, and that the trial court violated her Sixth Amendment right to a speedy trial. We disagree.

I. Facts and Procedural History

At approximately 2:20 a.m. on 23 October 2014, Defendant was stopped by Officer Patrick Treadwell ("Officer Treadwell") of the Winston-Salem Police Department for DWI. Treadwell first noticed Defendant as she approached the intersection of West First Street and Hawthorne Road in Winston-Salem at a "high rate of speed." Defendant stopped at the red light, then proceeded onto U.S. 421 where she began to exceed the posted speed limits of 45 and then 55 miles per hour. Officer Treadwell testified that his radar reading indicated that Defendant was travelling between 97 and 107 miles per hour, and that he was forced to reach speeds of 110 to 120 miles per hour to catch up to Defendant. Before being stopped, Defendant passed Wake Forest Baptist Medical Center, where she had worked as a nurse for the previous 20 years.

Upon stopping Defendant, Officer Treadwell could smell alcohol coming from her car. Defendant appeared "calm," but "dazed and confused," and Officer Treadwell could see that she had a cut and swollen bottom lip. Defendant told him that her "boyfriend" had hit her, and that she was attempting to go to her friend's home so that she could sleep before reporting for work at Baptist Medical Center at 4:30 a.m. When Officer Treadwell asked Defendant about the assault, she claimed that she had been allowed to leave her attacker's apartment and had not been followed. When asked specifically "[i]s someone after you?" Defendant replied "[n]o, no, I just got hit in the lip." Defendant did not wish to press charges, and she did not want EMS

attention for her lip. Officer Treadwell subsequently noticed that Defendant was unclothed besides her coat and a pair of boots, and that her clothes were beside her in the car.

After asking Defendant to exit the vehicle, Officer Treadwell administered several field sobriety tests, which Defendant failed. Later in the encounter, at approximately 4:00 a.m., Officer Treadwell administered an Intoxilyzer test, which indicated that Defendant's blood alcohol content was 0.13.

Defendant was cited for speeding 100 miles per hour in a 45 mile per hour zone and for DWI. She was found guilty of speeding and DWI in Forsyth County District Court on 25 November 2014 and was sentenced as a Level Four offender to 120 days imprisonment. The sentence was suspended and Defendant was placed on 24 months of unsupervised probation, given 48 hours of community service, fined, and forced to surrender her driver's license. On 1 December 2014, Defendant filed a notice of appeal seeking trial *de novo* in the Superior Court.

On 31 December 2014, Defendant filed a motion for speedy trial in Forsyth County Superior Court. On 28 September 2015, Defendant filed a motion to dismiss for violation of her constitutional right to a speedy trial, claiming that the delay in setting a trial date in the Superior Court "was attributable to prosecutorial negligence and willful delay by the State," and that she had been "substantially prejudiced . . .

through loss of employment, drainage of her and her family's financial resources and increased anxiety" as a result.

The case was called for trial on 5 October 2015. Before hearing the case against Defendant for speeding and DWI, the trial court heard evidence on Defendant's motion to dismiss. Defendant called Officer Treadwell, the State's only witness in its District Court case-in-chief, who testified that he left the police force and moved to Pennsylvania in May 2015, but was available for misdemeanor appeals trial dates every month from January to April 2015. Officer Treadwell also testified that he had returned to Forsyth County in June 2015 for a calendar date in which Defendant's case had not been called. The State responded by introducing paper copies of the Superior Court's calendars for the dates that Defendant had claimed were available to hear her trial to demonstrate, in the trial court's words, that "calendars tend to be lengthy." After hearing argument from both sides and taking the night to consider the evidence, the trial court denied Defendant's motion and issued a written order to that effect. The case then proceeded to trial before a jury.

At trial, Defendant did not deny driving under the influence on the night she was stopped. Instead, she testified that she was driving drunk in order to escape an assault. According to Defendant, after a night out at a local bar, she realized that she had too much to drink and asked a male acquaintance ("Cory") to drive her home. Cory instead drove her—in her car—to his apartment. After Defendant told him that

she did not want to sleep with him, Cory hit her in the face. Defendant then went into the bathroom, gathered her things, and fled into the apartment's outer hallway, where Cory attempted to restrain her and drag her back into the apartment. She eluded his grasp, ran to her car in a "panic that went off the charts," and drove off. Although Defendant testified that Cory had followed her no further than the apartment's hallway, she claimed she "felt like he was still following [her]" as she drove through downtown Winston-Salem. Defendant testified that she was terrified that Cory was going to murder her, and thus instead of stopping at the hospital or any other place, she was trying to "get to the nearest person" who made her feel safe.

Despite her fear, Defendant failed to file a police report about her assault on three different occasions. Beyond telling Officer Treadwell that she did not require assistance, Defendant testified that she did not tell the magistrate who heard her DWI case that she had been assaulted. A few days after her arrest, Defendant did call the police department and complained that no one had spoken to her about the assault, but then turned away the two detectives that came to her home to follow up with her about it.

After the close of evidence, Defendant requested that the trial court instruct the jury on the defense of compulsion, duress, or coercion. Again, the trial court heard argument from both Defendant and the State on the appropriateness of the defense before declining to so instruct the jury. Defendant was subsequently convicted by the

jury of DWI and speeding. She was once again given a suspended sentence of 120 days in prison, placed on 24 months of unsupervised probation, and ordered to do 48 hours of community service. After sentencing, Defendant orally gave notice of appeal to the trial court.

II. Jurisdiction

"A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal of as a matter of right when final judgment has been entered." N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Standard of Review

Defendant argues that the trial court erred in failing to instruct the jury on the defense of compulsion, duress, or coercion. Challenges to the trial court's "decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). In a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted). "An error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.'" *State v.*

Castaneda, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2015)).

Defendant also claims that the trial court violated her Sixth Amendment right to a speedy trial. "It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

IV. Analysis

A. Jury Instructions

Defendant contends the trial court committed error by refusing to instruct the jury on the affirmative defense of compulsion, duress, or coercion. After careful review, we disagree.

When a defendant seeks to rely upon an affirmative defense that lies "beyond the essentials of the legal definition of the offense itself," he bears the burden of proof in establishing its existence. *State v. Caddell*, 287 N.C. 266, 288-89, 215 S.E.2d 348, 362 (1975) (quoting *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1938)). Consequently, a trial court is only required to issue a jury instruction as to an affirmative defense "if it is a correct statement of the law and is supported by the evidence." *State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005). Even absent a request, the "failure to instruct upon a substantive or material feature of the evidence and law applicable thereto will result in reversible error . . . ." *State*

v. Ward, 300 N.C. 150, 155, 266 S.E.2d 581, 585 (1980) (internal quotation marks omitted).

Defenses raised by the evidence are considered substantive features of the case and require instruction. *State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 887-88 (2001). Instructions are required when there is "substantial evidence of each element of the defense when 'the evidence [is] viewed in the light most favorable to the defendant.'" *Hudgins*, 167 N.C. App. at 709, 606 S.E.2d at 446 (quoting *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222, *disc. rev. denied*, 353 N.C. 386, 547 S.E.2d 25 (2001)).

"Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Gray*, 337 N.C. 772, 777-78, 448 S.E.2d 794, 798 (1994) (internal quotation marks and citations omitted). Whether the evidence presented rises to the level of "substantial evidence" is a question of law. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

Consequently, when a requested instruction is refused, a "defendant on appeal must show . . . that substantial evidence supported the omitted instruction." *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792, *cert. denied*, 315 N.C. 189, 337 S.E.2d 864 (1985).

The compulsion, duress, or coercion defense rests upon the foundational principal that "the law ought to promote the achievement of higher values at the

expense of lesser values, and [that] sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." *State v. Thomas*, 103 N.C. App. 264, 265, 405 S.E.2d 214, 215 (1991). As a result, a defendant is entitled to this affirmative defense if he can show substantial evidence of three elements: (1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available. *Hudgins,* 167 N.C. App. at 710-11, 606 S.E.2d at 447.

Here, when viewed in the light most favorable to Defendant, there is substantial evidence to suggest that she was initially justified in driving away from Cory's apartment. Nonetheless, she failed to meet her burden of showing that she had no other acceptable choice but to drive while under the influence.

Defendant's predicament after her assault might fairly be termed a "duress of circumstances." *State v. Gainey*, 84 N.C. App. 107, 110, 351 S.E.2d 819, 820 (1987). After being attacked and pursued, a reasonable person could conclude that Defendant was acting to "protect [her] life, limb, or health." *Hudgins,* 167 N.C. App. at 710-111, 606 S.E.2d at 447.

However, Defendant did not provide evidence showing that she had no other alternative but to exceed the speed limit while intoxicated. Defendant presented only her testimony of her fear that she was pursued by her attacker beyond the hallway of his apartment house. At the same time, she stopped at a red light prior to entering

the highway and later told Officer Treadwell that she had been allowed to leave and had not been followed. Thus, we can only conclude that by the time she was stopped by Officer Treadwell, Defendant was no longer objectively "justifiably fearful" of her attacker at that point. *State v. Cooke*, 94 N.C. App. 386, 387, 380 S.E.2d 382, 383 (1989). Therefore, the evidence could not permit a reasonable inference that Defendant had no other acceptable choice but to continue driving.

As a result, we hold that the trial court committed no error in denying the requested instruction.

B. Speedy Trial

The Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI. The United States Supreme Court has instructed that the lower courts must look at four factors to determine whether a person's right to a speedy trial has been violated. *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 2192-93, 33 L. Ed. 2d 101, 116-18 (1972).

However, as a threshold inquiry, the Court must find that the delay has become "presumptively prejudicial" before engaging in a full analysis of the *Barker* factors. *Doggett v. United States*, 505 U.S. 647, 6512-52, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520, 528 (1992). In North Carolina, this Court has recognized that one year

is the boundary at which an ordinary delay becomes "presumptively prejudicial." *State v. Friend*, 219 N.C. App. 338, 344, 724 S.E.2d 85, 90 (2012).

For purposes of calculating the delay, the right to speedy trial attaches at the formal accusation of criminal behavior, either by arrest or indictment, and ends upon trial. *State v. Hammonds*, 141 N.C. App. 152, 159, 541 S.E.2d 166, 172 (2000). However, where the defendant appeals to Superior Court for trial *de novo*, the time runs from the appeal to Superior Court until the Superior Court trial. *Friend*, 219 N.C. App. at 344, 724 S.E.2d at 90.

Here, Defendant appealed to Superior Court on 1 December 2014, and came before the court for trial on 5 October 2015. Because her delay of just over ten months falls below the one year threshold, we hold that Defendant's claim that her right to a speedy trial was violated is without merit.

NO ERROR.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).