IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1132

Filed: 4 December 2018

Buncombe County, Nos. 14 CRS 710842-43

STATE OF NORTH CAROLINA

v.

CARLOS DEVITO PAYNE

Appeal by defendant from judgment entered 18 May 2017 by Judge Robert G. Horne in Buncombe County Superior Court. Heard in the Court of Appeals 2 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

PER CURIAM.

Where the evidence, when taken in the light most favorable to the State, was sufficient to show defendant's moped was a motor vehicle, the trial court did not err in denying defendant's motion to dismiss. Where defendant's driving record was relevant to proving the charge of driving with a revoked license, the trial court did not err in admitting the driving record.

On 24 January 2017, defendant Carlos Devito Payne was convicted in Buncombe County District Court for driving with a revoked license, speeding, driving an unregistered vehicle, and driving an uninsured vehicle. Defendant appealed to Buncombe County Superior Court for a trial *de novo*. On 16 May 2017, defendant was tried by a jury and convicted in Buncombe County Superior Court before the Honorable Robert G. Horne, Judge presiding, on charges of driving with a revoked license, driving an unregistered vehicle, and driving an uninsured vehicle.

The State presented evidence that on 18 September 2014, Officer Adam Cabe of the Asheville Police Department observed defendant traveling on a moped headed northbound on Hendersonville Road. Officer Cabe estimated, then confirmed with radar, that defendant was traveling approximately 50 miles per hour (mph) in a 35 mph zone and initiated a traffic stop. Officer Cabe ran a search of defendant's name though Division of Motor Vehicles (DMV) and the National Criminal Information Center (NCIC) databases and discovered that defendant's license had been permanently revoked. Officer Cabe also observed markings on the moped which showed that it had a 150 cubic centimeters (cc) engine and issued defendant citations for speeding,[1] driving with a revoked license, driving an unregistered vehicle, and driving an uninsured vehicle. At trial, defendant's certified driving record was admitted into evidence over defendant's objection.

[1] On 15 May 2017, the charge for speeding was later dismissed in Superior Court.

At the close of the State's evidence, defendant moved to dismiss the charges alleging that the State did not prove his moped was a motor vehicle. Defendant's motion was denied. Defendant testified that his moped had a 50 cc engine and was allowed to admit into evidence photographs of a moped with 50 cc decals. After defendant rested his case, he renewed his motion to dismiss which the trial court denied.

Defendant was found guilty of driving with a revoked license, driving an unregistered vehicle, and driving an uninsured vehicle. The trial court sentenced defendant to 120 days in custody. Defendant appeals.

On appeal, defendant argues the trial court erred by: (I) denying his motion to dismiss the charge of driving with a revoked license because the State did not present substantial evidence that defendant's moped was a "motor vehicle"; (II) denying his motion to dismiss the charge of driving an uninsured vehicle because the State did not present substantial evidence that defendant owned the moped, and (III) admitting his driving record because it contained highly prejudicial and irrelevant information.

I-II

Defendant argues that the trial court erred by denying his motion to dismiss because the State did not present substantial evidence to support the charges against

him–driving with a revoked license and driving an uninsured vehicle. Specifically, defendant argues the State neither proved that his moped was a motor vehicle with an engine greater than 50 cc or that the moped was owned by defendant. We disagree.

The standard of review for this Court to review the trial court's denial of a motion to dismiss for insufficient evidence is *de novo*. *State v. Woodard*, 210 N.C. App. 725, 709 S.E.2d 430 (2011). "Under a *de novo* review, the 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, 669 S.E.2d 290, 294 (2008).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). "The trial court should only be concerned that the evidence is *sufficient* to get the case to the jury," as opposed to examining the weight of the evidence. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (emphasis added). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and

resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

In the instant case, defendant was issued a citation for driving with a revoked license in violation of N.C. Gen. Stat. § 20-28(a)[2] and driving an uninsured vehicle in violation of N.C. Gen. Stat. § 20-313(a).[3] §§ 20–28(a) & 20–313(a) (2017).[4] The primary element at issue as to both offenses is classifying defendant's moped as a "motor vehicle."

Ownership, which defendant attempts to argue on appeal by contending there was a failure at trial to prove this element, applies only to driving an uninsured vehicle. We will not consider defendant's ownership argument on appeal due to his failure to object and preserve that issue at trial and such failure constitutes a waiver of that argument. *See* N.C. R. App. P. 10(a)(3) (2017).

Defendant, acknowledging his failure to properly preserve the issue, asks this Court to review his ownership argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. However, this Court will invoke Rule 2 only in

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[2] Under N.C.G.S. § 20-28(a), a defendant can be convicted for driving with a revoked license if "(1) he operated a motor vehicle, (2) on a public highway, (3) while his operator's license was suspended or revoked, and (4) had knowledge of the suspension or revocation." *State v. Woody*, 102 N.C. App. 576, 578, 402 S.E.2d 848, 850 (1991).

[3] Under N.C.G.S. § 20-313(a), a defendant can be convicted for driving an uninsured vehicle if: 1) he was the owner of the motor vehicle, 2) required to be registered, 3) operated the vehicle, and 4) did not have insurance to operate. *See* § 20-313(a) (2017).

[4] Now, all mopeds are required to be registered and insured. *See* N.C. Gen. Stat. §§ 20-53.4 and 20-309(a) (2017).

exceptional circumstances or to prevent manifest injustice. Defendant has not demonstrated such an exceptional circumstance exists to warrant invocation of the rule.[5] *See* N.C. R. App. P. 2 (2017).

Thus, we return to the main issue–whether there was substantial evidence presented that defendant's moped was a motor vehicle. To qualify as a moped under N.C. Gen. Stat. § 20-4.01, the vehicle must have "two or three wheels, no external shifting device, a motor that does not exceed 50 cubic centimeters [(cc)] piston displacement [("engine")] and cannot propel the vehicle at a speed greater than 30 miles per hour [(mph)] on a level surface." § 20-4.01 (27)(j) (2017). In contrast, a motor vehicle includes "[e]very vehicle which is *self-propelled*" and runs on the highway. N.C.G.S. § 20-4.01(23) (2017). A motor vehicle in North Carolina is required to be registered and show proof of insurance. *See* N.C.G.S. § 20-313 (2017).

The State's evidence established that defendant was cited for driving over 50 mph on a public highway when he was pulled over by Officer Cabe. Officer Cabe testified that he checked the engine marks on the moped defendant was driving, which indicated the moped had an engine that exceeded 50 cc engine. Officer Cabe also noted on the citation issued to defendant that day that the moped had a 150 cc engine. When viewed in the light most favorable to the State, the evidence was

[5] We note that defendant acknowledged ownership of the moped during a colloquy with the trial court: "As I was talking about Officer Cabe, he doesn't remember anything about my [moped]. And like I was telling him that day he pulled me over, my [moped], it can't [sic] even go no 55, or 50 miles an hour unless it's going downhill."

sufficient to establish that defendant's moped was a motor vehicle. Accordingly, we overrule defendant's argument.

III

Defendant also argues the trial court erred when it admitted State's Exhibit 3–his certified North Carolina Department of Motor Vehicles (DMV) driving record. Specifically, defendant contends that his driving record, which contains prior convictions and license suspensions, was inadmissible because it was irrelevant to the issue of whether defendant had a revoked license. Additionally, defendant argues it was highly prejudicial to publish his driving record to the jury because it contained convictions more than ten (10) years old. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 403 provides for relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." § 8C-1, Rule 403 (2017).

> The decision of a trial judge to admit evidence in the face of a Rule 403 objection is given much deference; exclusion on 403 grounds is left to the sound discretion of the trial judge and will be reversed only when the decision is arbitrary or unsupported by reason. While all evidence offered against a party involves some prejudicial effect, the fact that evidence is prejudicial does not mean that it is necessarily unfairly prejudicial. The meaning of unfair prejudice in the context of Rule 403 is an undue tendency to suggest decision on an improper basis, commonly,

> though not necessarily, as an emotional one.

State v. Rainey, 198 N.C. App. 427, 432–33, 680 S.E.2d 760, 766 (2009) (internal quotations and citations omitted).

Here, defendant has not demonstrated an improper basis for unfair prejudice. The State introduced a certified copy of defendant's driving record to prove an element of the charged crime of driving while license revoked. Based on defendant's driving record, it showed that he had a permanent suspension of his driver's license for impaired driving. At trial, defendant was offered the opportunity to stipulate to his license revocation to avoid having his driving record entered into evidence, but he declined. Defendant was also offered the opportunity to redact portions of his driving record, but he declined. Instead, defendant testified and used his driving record to assert that his license was not *legally revoked* in a previous case; he testified: "it [doesn't] have the date that I was arrested; it only has death by motor vehicle involved with DWI [on 8 June 2001]."

Given that defendant's driving record was relevant to establish revocation of his driving license and, by his own testimony, defendant admitted his license was permanently revoked for 17 years since his DWI conviction, defendant's argument of unfair prejudice from the admission of his driving record is without merit. Accordingly, as the trial court did not err in admitting defendant's driving record into evidence, we overrule defendant's argument.

NO ERROR.

Panel Consisting of Judges: BRYANT, DIETZ, and INMAN.

Report per Rule 30(e).