IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1184

Filed: 7 August 2018

Cleveland County, No. 14 CRS 53429

STATE OF NORTH CAROLINA

v.

MAGGIE DAWN SMITH

Appeal by defendant from judgment entered 14 June 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 3 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the State.

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

DAVIS, Judge.

Maggie Dawn Smith ("Defendant") appeals from her conviction for driving while impaired. On appeal, she argues that the trial court (1) erred in denying her motion to dismiss; and (2) plainly erred in permitting the prosecutor to ask her whether she was able to present witnesses to corroborate her testimony. Defendant further contends that she received ineffective assistance of counsel. After a thorough

review of the record and applicable law, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: At approximately 2:00 a.m. on 26 July 2014, Trooper Charles Latham ("Trooper Latham") with the North Carolina State Highway Patrol was on duty in Shelby, North Carolina when he observed Defendant driving a motorized scooter on Dekalb Street. Dekalb Street was a divided four-lane road with two lanes of travel in each direction. Defendant was driving in the right lane. Trooper Latham saw Defendant weave slightly from side to side and activate her right turn signal before moving into the left lane. At that point, Trooper Latham turned on his blue lights and initiated a traffic stop. Defendant once again used her right turn signal to indicate a leftward movement when she turned left into a parking lot in response to the activation of the blue lights.

Upon approaching Defendant, Trooper Latham "immediately noticed her eyes were red and glassy" and smelled a "slight odor of alcohol about her breath." He asked Defendant if she had consumed any alcohol and Defendant responded in the negative. Trooper Latham then retrieved his Alco-Sensor breathalyzer test and instructed Defendant to breathe into it until he told her to stop. However, on three successive attempts Defendant failed to provide an adequate breath sample. Instead,

she gave only "short, brief, quick puffs of air" that were insufficient for the Alco-Sensor to produce a reading.

Trooper Latham "decided to move on and offer her a different test." He proceeded to perform the horizontal gaze nystagmus ("HGN") field sobriety test on Defendant. In the course of administering the HGN test, Trooper Latham observed that Defendant exhibited six out of six "cues of impairment."

After conducting the HGN test, Trooper Latham once again asked Defendant to breathe into the Alco-Sensor. Defendant "took a deep breath and [blew] until the instrument collected . . . [an] adequate sample, and it gave a positive result for alcohol." Following a five-minute waiting period, Trooper Latham attempted to administer a second "follow-up test" to ensure the accuracy of the Alco-Sensor's result. At that point, however, Defendant "reverted back" and twice more failed to give a sufficient Alco-Sensor sample. Trooper Latham then placed Defendant under arrest for driving while impaired and transported her to the Cleveland County Detention Center.

Upon arriving at the Detention Center, Defendant verbally waived her *Miranda* rights and agreed to answer Trooper Latham's questions. During her interrogation, Defendant stated that she was recovering from back surgery and that she had been prescribed Oxycodone by her doctor. She informed Trooper Latham that she had taken her prescribed Oxycodone dose at 6:00 p.m. the prior evening.

Defendant also admitted that she had, in fact, consumed alcohol several hours earlier, stating that she drank two six-ounce mixed drinks containing vodka and juice between 6:00 and 7:00 p.m. According to Defendant, after consuming the drinks she fell asleep between 7:30 and 8:00 p.m. and slept for approximately four hours.

After interrogating Defendant, Trooper Latham instructed her to blow into an Intoximeter. He told her to blow "as hard as you can as long as you can . . . for at least four seconds" in order for the machine to collect a sufficient sample. Despite multiple attempts, Defendant failed to blow long enough to provide the machine with an adequate breath sample.

On 22 September 2015, a bench trial was held before the Honorable Meredith A. Shuford in Cleveland County District Court. Defendant was found guilty of driving while impaired and was sentenced to 7 days imprisonment and placed on supervised probation for 18 months. Defendant appealed, seeking a trial *de novo* in superior court.

A jury trial was held beginning on 12 June 2017 before the Honorable Robert C. Ervin in Cleveland County Superior Court. Following the close of the State's evidence, Defendant moved to dismiss the driving while impaired charge. The trial court denied the motion. Defendant renewed her motion to dismiss at the close of all the evidence and the trial court once again denied her motion.

On 14 June 2017, the jury convicted Defendant of driving while impaired. The trial court sentenced her to 12 months imprisonment, suspended the sentence, and placed her on supervised probation for 18 months. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant makes three arguments. First, she argues that the trial court erred in denying her motion to dismiss. Second, she contends that the trial court plainly erred in allowing the prosecutor to shift the burden of proof by asking her whether she intended to present witnesses to corroborate her testimony regarding how much alcohol she consumed prior to her arrest. Finally, Defendant asserts that her trial counsel was ineffective for failing to object to the prosecutor's question and to request a curative instruction. We address each argument in turn.

I. Motion to Dismiss

Initially, Defendant contends that the trial court erred in denying her motion to dismiss because the State failed to present substantial evidence that she was appreciably impaired at the time Trooper Latham stopped her vehicle. We disagree.

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine "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[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

The offense of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 requires proof that "(1) [d]efendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002), *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). A person is "under the influence" if he has "drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties." *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985) (citation and quotation marks omitted). "An effect,

however slight, on the defendant's faculties, is not enough to render him or her impaired." *Id.* Rather, "[t]he effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired." *Id.*

This Court has recently examined the issue of appreciable impairment in the context of a motion to dismiss a driving while impaired charge on similar facts. In *State v. Lindsey*, __ N.C. App. __, 791 S.E.2d 496, *appeal dismissed and disc. review denied*, 369 N.C. 198, 794 S.E.2d 520 (2016), a police officer initiated a traffic stop at 2:47 a.m. because the defendant's license tag was expired. *Id.* at __, 791 S.E.2d at 498. Upon approaching the vehicle, the officer observed that the defendant had red, glassy eyes and a moderate odor of alcohol on his breath. *Id.* The officer then administered the HGN test and noted that the defendant exhibited five out of six cues of impairment. *Id.* at __, 791 S.E.2d at 498-99. At that point, the officer "made multiple attempts to conduct a portable breath test but defendant did not provide an adequate breath sample to register on the device." *Id.* at __, 791 S.E.2d at 499. The defendant informed the officer that he had consumed "three beers at approximately 6:00 the evening before." *Id.* After being arrested, the defendant subsequently refused to submit to an Intoximeter test at the police station. *Id.*

The defendant argued on appeal that the trial court erred in denying his motion to dismiss for lack of substantial evidence of impairment. We upheld the ruling of the trial court, concluding as follows:

> Here the evidence was that defendant pulled into a handicap[ped] spot, Officer Sykes noticed a moderate odor of alcohol coming from defendant's breath, defendant had red and glassy eyes, defendant admitted to consuming alcohol hours before, Officer Sykes noted five out of six indicators of impairment on the HGN test, and Officer Sykes believed that defendant was impaired. Viewing these facts in the light most favorable to the State, and despite other evidence tending to show defendant was driving properly and was steady on his feet, we hold the evidence in this case was sufficient to survive defendant's motions to dismiss.

Id. at __, 791 S.E.2d at 503-04.

We believe the facts of the present case mandate a similar result. Here, Defendant activated her right turn signal prior to making a leftward movement with her vehicle on two separate occasions before she was pulled over by Trooper Latham. Her eyes were red and glassy and she admitted to having taken Oxycodone and consuming two mixed drinks during the evening prior to her arrest. Defendant's Alco-Sensor test indicated the presence of alcohol on the single occasion in which Defendant was able to successfully provide an adequate breath sample. Moreover, while the officer in *Lindsey* noticed only five indicators of impairment when performing the HGN test, Trooper Latham observed that Defendant exhibited all six impairment cues. *Id.* at __, 791 S.E.2d at 498-99.

Thus, viewing the evidence in the light most favorable to the State — as we must — we are satisfied that the State presented sufficient evidence of Defendant's

appreciable impairment to survive her motion to dismiss. Therefore, the trial court did not err in denying Defendant's motion.

II. Shifting of Burden of Proof

Defendant next argues that the trial court plainly erred in permitting the prosecutor to ask her on cross-examination whether she could provide witnesses that would corroborate aspects of her testimony. Specifically, she contends that the following exchange was improper:

> [PROSECUTOR]: Okay. And is there anyone here with you today that can say that you didn't have anything to drink after 6:00 p.m. the day before?
>
> [DEFENDANT]: No.

Defendant did not object at trial to the prosecutor's question. Thus, our review of this issue is limited to plain error review. *See* N.C. R. App. P. 10(a)(4) ("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.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously

> affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Defendant asserts that the prosecutor's question improperly shifted the burden of proof "by requiring her to prove her testimony was credible and true." However, even assuming — without deciding — that the trial court erred in allowing the prosecutor's question, we are satisfied that any such error did not rise to the level of plain error.

The trial court properly instructed the jury that "the defendant is not required to prove her innocence; she is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt." Our appellate courts have repeatedly held that "[j]urors are presumed to follow the instructions given by the trial court." *State v. Hightower*, 340 N.C. 735, 749, 459 S.E.2d 739, 747 (1995). Based on our careful review of the record in this case, we are unable to conclude that the prosecutor's question "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotation marks omitted). Therefore, Defendant has failed to demonstrate plain error.

III. Ineffective Assistance of Counsel

Finally, Defendant argues that her trial counsel was ineffective for failing to object to the above-referenced question by the prosecutor and to request a curative instruction. We disagree.

In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

> Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

As discussed above, the trial court's alleged error in allowing the prosecutor's question did not constitute plain error because Defendant has failed to show that it had a probable impact on the jury's finding that Defendant was guilty. Therefore, even assuming *arguendo* that the performance of Defendant's counsel was deficient, she cannot demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 316, 626 S.E.2d at 286 (citations and quotation marks omitted); *see State v. Turner*,

237 N.C. App. 388, 397, 765 S.E.2d 77, 84 (2014) (holding ineffective assistance of counsel claim lacked merit where "there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial"), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 563 (2015). Accordingly, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).