IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1239

Filed: 3 July 2018

Polk County, No. 15 CRS 190

STATE OF NORTH CAROLINA

v.

SAMANTHA LUCILLE REYNOLDS, Defendant.

Appeal by Defendant from judgment entered 10 July 2017 by Judge J. Thomas Davis in Polk County Superior Court. Heard in the Court of Appeals 1 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Samantha Lucille Reynolds ("Defendant") filed a motion to suppress evidence supporting her indictment for driving while impaired, felony death by vehicle, and reckless driving to endanger. On 3 July 2017 the trial court orally denied Defendant's motion to suppress, and subsequently entered a written order on 7 July 2017. A jury convicted Defendant of felony death by motor vehicle and the trial court sentenced Defendant to 42 to 63 months' imprisonment. On appeal, Defendant contends the

trial court erred by: (1) denying Defendant's motion to suppress and (2) instructing the jury on appreciable impairment. We disagree.

I. Factual and Procedural Background

On 1 September 2015, a grand jury indicted Defendant on the charges of driving while impaired, felony death by vehicle, and reckless driving to endanger. Prior to trial, Defendant filed a motion to suppress the results of her alcohol and drug blood analysis tests.[1] Defendant's case came on for trial on 3 July 2017. Prior to jury selection, the trial court heard Defendant's motion to suppress.

The State first called Trooper Carlos Sama ("Sama") of the North Carolina Highway Patrol for *voir dire*. Sama was stationed in Polk County on 22 May 2015, and was "dispatched" to "a motor vehicle accident on N.C. 108 in the PTA of Midway Baptist Church." Upon his arrival at the accident, Sama talked to the "first responders" who told him the driver (the Defendant) was sitting "on the steps of the ambulance as you get in the side door." Sama then spoke to Defendant for a minute and then proceeded to "look at the scene."

Sama saw the car overturned and "was smashed on its roof." Sama saw a dead person in the vehicle. Paramedics strapped Defendant into a stretcher and loaded her into the back of the ambulance. Sama "read [Defendant] her implied-consent

[1] This motion is absent from the record. However, the trial court refers to the motion in its order denying it.

rights[2]." Defendant consented to have her blood drawn. Paramedics took Sama's SBI blood kit and sampled Defendant's blood. Paramedics then returned the completed blood kit to Sama.

The State next called James Guillermo ("Guillermo") with Polk County Emergency Services. Guillermo responded to the accident on 22 May 2015. Guillermo was present when Sama spoke to Defendant in the ambulance. Guillermo testified:

> So as far as the blood draw goes, the state trooper stepped into the ambulance. And he spoke with her and then stepped back out to get his equipment. Stepped back in and read - - that's a sheet that they read. I'm not sure what that sheet's called, but read all of that and discussed it with - - with my patient. And we - - we do not draw blood unless consent is gained from the state troopers. That's the only reason we draw it. If the patient says no, we do not draw it. If the patient says yes, that's the only reason we would draw blood.

Guillermo then rode with Defendant in the ambulance to the hospital. At no point was Defendant non-communicative.

Defendant next took the stand. Defendant recalled sitting on the ambulance's side steps and talking to Sama. Defendant took a breathalyzer test:

> I took one, and I told him - - he said, "Oh, you can do better than that." And I told him that I couldn't catch my breath and I had dirt in my mouth. And then he said, "Okay, we'll try again." And we did another breathalyzer test. And he

[2] The record on appeal does not contain a copy of the implied consent form Sama read to Defendant.

said, "Okay. You're okay. You're good."

Sama did not tell Defendant what she blew.[3]

Defendant stated:

> After I blew [Sama] kept asking me a couple more questions, like, do you know what time it is. And he asked me what - - what - - how fast I was going and who was in the car. He asked me if I had anybody with me. And he asked me who it was.

Defendant answered Sama and told him "Yes. I told him it was Brooke. And I just kept telling him to just leave me alone, to go help her."

Defendant did not recall Sama ever telling her she was charged with any crime, or him reading her any rights relative to taking a blood sample. Defendant also did not recall having her blood drawn. Defendant described how she felt when she was on the backboard in the ambulance:

> I was very irritable that they wouldn't leave me alone to go help her. I was very frustrated that they kept paying me attention and I didn't know what was wrong with her, because I was fine. I was perfectly fine. The only thing that was hurt was my ankle. It wasn't like I was going to die or anything. They shouldn't have been dealing with me at that time. They could have helped her or something.

Sama told Defendant her friend had died when Defendant was at the hospital, then charged Defendant with "the reckless driving and misdemeanor death by vehicle."

[3] Defendant blew a .07.

On cross, Defendant stated:

> I was not impaired that night. I was driving and the deer had ran straight out in front of me. Brooke yelled, "Deer!" And I swerved. And when I swerved back to try to come back on the lane it was just - - there was nothing I could do.
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> . . . .
>
> [The deer] came and stopped right in front of me. I mean, it was - - it was - - it was there. It came from the right bush, and it was just - - it just happened so fast.

Defendant also admitted to drinking alcohol and smoking marijuana that night.

At the close of *voir dire*, the State and defense counsel agreed Defendant was not under arrest when the EMT drew her blood. The trial court then stated, "So the only way to draw blood is, one ask for consent; two, go get a search warrant or under the regular rules for a search warrant; or, three, arrest her for an implied offense and then go through this process." The trial court reasoned, "So it all comes down to her consent, whether or not she, in fact, consented." The trial court concluded Defendant consented to the blood draw and denied Defendant's motion to suppress.

In its written order denying Defendant's motion to suppress, the trial court found:

> 5. When Trooper Sama returned to talk with the defendant the defendant was restrained on the back board and stretcher. The trooper informed the defendant that her friend was deceased. He read the defendant her implied consent rights as set on DHHS form 401 admitted into evidence, telling the defendant she would be charged with

> misdemeanor death by vehicle and reckless driving. The defendant indicated she understood her rights but the Trooper did not have her sign the form as a result of her being restrained on the back board. The Trooper in the presence of EMT Guillermo asked the defendant if she would consent to a blood draw for testing. The defendant then freely, voluntarily, and expressly consented to having her blood drawn. EMT Guillermo observed and heard the defendant consent to the blood draw. Had the defendant not consented EMT Guillermo pursuant to his department's protocol would not have taken the blood.
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> . . . .
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> 7. The defendant was never placed under arrest at the wreck scene and, even though she was told that she was going to be later charged, there was no reason for the defendant to believe that she was then under arrest. There was no criminal process issued for any crimes at the time of the defendant's blood draw in that Trooper Sama did not issue any such process until the next day.

The trial court concluded:

> 1. The defendant consented to, and freely and voluntarily gave, a blood sample for an alcohol blood test, and as a result a warrant was not first required for the blood draw, and that the blood sample taken from the defendant was not obtained in violation of any of the defendant's State or Federal Constitutional Rights.
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> . . . .
>
> 3. The defendant at the time of her consent was not under arrest nor under the functional equivalent of an arrest, nor was her movement restricted by law enforcement. In addition no criminal process was then issued nor was she charged. As a result giving of the statutory implied consent rights of NCGS § 20-16.2 were not yet applicable at the time the consent was obtained. Despite this the defendant

> was appropriately given her implied consent rights and NCGS § 20-16.2 was substantially complied with prior to the blood draw. As a result the defendant's statutory implied consent rights were not violated.

Following the denial of the motion to suppress, the trial court impaneled the jury and Defendant's trial began. The State first called Sama. When Sama arrived at the scene of the accident, fire and rescue workers were already there. Sama observed the car was "badly damaged," and "laying on its roof." After speaking to "those on the scene," Sama walked to the ambulance. Defendant was sitting on the ambulance's side steps. Sama talked to Defendant in order to "get her name, what happened, date of birth." Defendant answered his questions and told him "someone else was in the vehicle."

Defendant told Sama she and her passenger had been to Lake Lure. Sama talked to Defendant about what happened:

> [Defendant] said they had been in the Lake Lure. They had been at Larkin's, that they had played some volleyball, just hung out there. Then they were on their way back home. She said she was coming down on 108, that a deer came out in front of her and she was trying to avoid it.

While talking to Defendant, Sama could smell an odor of alcohol. Sama asked Defendant if she had been drinking. Defendant answered yes. She told him she had "a beer or two and split a shot" earlier that evening. Sama did not perform any field sobriety tests because Defendant told him her leg was hurting. Sama could see Defendant had "some bad abrasions" on her leg. Sama later got "an Alco-Sensor" and

had Defendant blow into it. The Alco-Sensor gave a positive "indication" for alcohol.

Because there was a fatality, Sama decided to ask Defendant to submit to a blood test. Sama left Defendant and went and got "the paperwork that [he] was going to need." When Sama returned to Defendant, a paramedic had put Defendant in the back of the ambulance on a stretcher. Sama told Defendant "that Megan or Brooke was dead, that we were going to be charging misdemeanor death by motor vehicle and that we were going to be requesting a blood sample." Sama then "read [Defendant] the implied consent rights form and then asked [for Defendant's consent]." Defendant consented. Next, "EMS took the blood kit. They drew the blood and returned the blood sample kit back to [Sama]." At the hospital, Sama read Defendant her Miranda rights and "told her that she didn't have to answer any questions if she chose not to."

The State next called Guillermo. Guillermo talked to Defendant and learned "she was ejected from the car during the wreck." Guillermo helped Defendant get on the stretcher, and moved her to the back of the ambulance. Sama then came to the ambulance. Guillermo described his observations of Sama and Defendant:

> [Sama was] [m]ostly just getting information. But at one point when he stepped up in he - - he had a document that he read to [Defendant] and gave her the information on it and asked her - - or asked her to submit to the blood draw. Which is normal in this type of situation, motor vehicle crash. It's not uncommon for them to ask us to do a blood draw.

Guillermo stated an EMS worker "will only do a blood draw if there's consent given by the patient[.]" Guillermo performed the blood draw on Defendant, and returned the kit to Sama.

The State called Megan Simms ("Simms"), a toxicologist with the North Carolina State Crime Lab. Simms analyzes a "biological specimen, meaning blood or urine for the presence of alcohol and other impairing substances." In testing for the presence of alcohol, "[Simms] sample[s] a portion of blood that is submitted." After testing, Simms "interpret[s] the data and then write[s] it all up in a report." The State submitted Simms's report as Exhibit Number 17. The alcohol report contained:

> The information from the agency, the State Highway Patrol, as well as the county of offense, the type of case, the subject name, the date the lab report was created, the crime lab number that is on there is the agency number affiliated with that report number, my name, the method of submission, the date of the offense, as well as the date that it was submitted to the laboratory and the alcohol results that were obtained.

The test showed Defendant's blood alcohol level was .11. After Simms tested Defendant's blood sample for the presence of alcohol, she then tested it for the presence of drugs. The test came back positive for "cannabinoids," which is associated with marijuana.

Following Defendant's cross examination of Simms, the State rested. Defendant then made a motion to dismiss for insufficiency of the evidence. The trial court denied Defendant's motion.

Defense counsel called Defendant to the stand. Defendant knew the victim, Brooke, well because she was one Defendant's "best friends." On the day of the accident, Defendant had just gotten her car from an auto shop. Defendant had to get the "ball joints" inside the tires replaced because her car "was making a real bad squeaking noise and stuff." Defendant's car was a 1999 V8 "Ford Mustang GT 35th Anniversary." Later that day, Defendant picked up Brooke in Greenville. After getting Brooke, Defendant drove to "Larkin's on the Lake." Defendant testified:

> [Brooke] had got a beer and I had - - I was going to just get a Malibu pineapple, but she seen this souvenir cup and she wanted it. And she didn't drink mixed drinks, she'd rather have beer, so she couldn't get that cup. So they had a list of drinks you could pick out, but I didn't want none of them. So I just ordered the Malibu pineapple, and they put it in the souvenir cup.

Defendant studied the receipt from Larkin's and stated, "[Brooke] had the crab stuffed mushrooms, and I had the rib-eye special. She helped me eat a little bit of my salad. And the 23-ounce Bud Lite was hers, and the two Malibu pineapple underneath was mine." Brooke and Defendant arrived at Larkin's "around 4:00" and stayed there until "around 6:00."

After Brooke and Defendant left Larkin's they drove to "downtown Chimney Rock." There, they visited a place called "the Tiki Bar[:]"

> [A]s soon as we pulled up we walked over there to the river and looked at it and then looked around at the games and went straight to the bar. And there was a special shot, it was called Fruity Loops shot. And we got that shot. And

> it was a split shot, we didn't want the whole shot. So instead of them making both of us a shot they split it in between both of us. And that was the 99 Bananas and Jim Beam[.]

Defendant said, "I'm like weird whenever it comes to shots, so I'll sip it first. And I didn't like it, because it was really strong and gross." Brooke drank her shot, but Defendant, "left [hers] there."

Brooke and Defendant, along with some other people, next played volleyball for about 45 minutes to an hour. Following the volleyball, they "ate chicken tenders and French fries again just to snack." After they ate, "[t]hen we had ordered our drinks. She had got a beer and I had got a Malibu pineapple." Brooke and Defendant joined another volleyball game and played for about two hours. After volleyball, they ordered more french fries.

Defendant then testified prior to the first volleyball game they met some guys. One of the guys "had rolled a joint and asked us if we wanted a hit. So they passed it around, and we hit it, me and Brooke both." Defendant quit drinking about 8:30 that evening, which was "about two hours before we left." They left the "Tiki Bar area" around "10:45, 11:00"

On the way home, they stopped at a gas station. Defendant testified:

> After - - after we left the gas station she was feeding me French fries when I was driving. And - - and then she was changing the radio on my phone. We had the phone hooked up to the radio. And I remember this one curve and Brooke screamed and said, "Sam, deer!" And it just came

> out and stopped right in front of me. And there was nothing I could do. And I just tried to swerve, because I didn't want to come back in and it hit her. It was on her side. And it was a really big deer. I didn't want it to come in and hit her. And after I swerved, you can - - that was it.

Defendant testified, "There was nothing I could do after I swerved." Next, Defendant recalled waking up. Defendant "was sitting up and [her] feet were in front of [her]." Defendant then stood up and "started screaming for Brooke." Defendant ran everywhere because she was "trying to find her."

Next, Defendant "heard a really soft voice coming from [a nearby] church." The voice said, "Everything is okay. Everything is going to be okay." Defendant wanted to believe it was Brooke's voice. Defendant ran to the church, but Brooke wasn't there. Defendant then ran back to her car. Defendant "started waving [her] hands for people to stop." Defendant then testified "it took five people, five people to stop to help us." Defendant's ankle was injured, but "[she] was okay[:]" Defendant testified:

> I landed on the cement in between my car and the church. And I was sitting straight up when I woke up, or the first thing I could remember I was sitting up. Like I had been just picked up and just sat there so gently. Like God had me in his hands. And I just don't understand why Brooke passed away and not me.
>
> . . . .
>
> I don't ever wear my seatbelt. It chokes me, and I just don't feel comfort with my seatbelt on. And Brooke always wore her seatbelt. Every time I got in the car with Brooke she would make me put my seatbelt on. Every time. And that night she didn't make me put my seatbelt on. That was the

> first time ever. Every time any of us got in any car with her in it, we would put our seatbelt on. And she made sure of it.

Defendant recalled seeing Trooper Sama later that night. Sama talked to Defendant while she sat on the side of the ambulance. He asked Defendant "my name and how old I am and where I'm from, where I was coming and going and why. He was asking me who was in the car with me." Later, at the hospital, Sama told Defendant Brooke had died. Also, at the hospital, Sama gave Defendant a "reckless driving charge and a misdemeanor death by vehicle charge." Sama did not arrest Defendant.

Defendant recalled Sama giving her a portable breath test while she was still sitting on the side of the ambulance:

> He gave - - he gave me the first time, and I still had dirt in my mouth and I couldn't blow that good, or - - or I couldn't catch my breath to blow hard enough for him. So he let me catch my breath, and I did it again. Once I blew the test, he looked at it and said, "Okay. That's good." He didn't give me a reading or anything on what it was.

Since the accident, Defendant has had difficulty eating and has been diagnosed with post-traumatic stress disorder.

On cross examination, Defendant could not recall having blood drawn. The State questioned Defendant:

> Q: You don't remember having blood drawn?
>
> A: I don't - - I remember the poking of the needle,

> but I don't remember that it was a blood test, because I remember telling the hospital - - the EMT guy that I was scared of needles.
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> Q: All right. You are aware that you had blood that was tested that was taken right there at the scene; is that right?
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> A: I am. I am aware of it.
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> Q: And that your blood, as we heard just a moment ago from the lady from the lab, State lab, is your blood alcohol level was 11 and you had marijuana in your system; right?
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> A: Yes, sir.
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> Q: And yet with those, you're being above the legal limit and having marijuana in your system, your testimony, and I think you were adamant about this, is that you were not impaired?
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> A: I was not impaired. I would never get behind the steering wheel of my car, anybody's car. I would never let anybody drive drunk, anybody. I'm very, very - - like, I would never have gotten behind that car to drive if I could not drive. I would have never. I couldn't - - I just - - you can't hurt people and other cars whoever is with you or yourself. And I'm a responsible person. Just because my blood alcohol has gotten this - - the points, I was not impaired that night.

Defendant next called Deborah Bradley ("Bradley"). Bradley lives about 500 feet from Midway Baptist Church on Highway 108 East. Around 11:00 p.m., the night of the crash, Bradley was watching the news on television. Bradley heard "a loud noise, a car go by." Seconds later, Bradley heard a "crash." Her husband "walked out

on the front porch and he seen the car. And he - - he heard Samantha hollering 'Brooke.' " Bradley then called 911. Bradley went with her husband to the scene of the accident. There, she prayed with Defendant, and stayed with Defendant, until Defendant was put inside the ambulance. In Bradley's opinion, Defendant "had to be in shock."

Defendant rested. Defense counsel then renewed his motion to dismiss based on insufficient evidence. The trial court denied Defendant's motion. During the charge conference, both parties agreed there was no evidence as to appreciable impairment. The trial court stated, "So the defendant agrees with that as well as the State that only the element as to the - - only the alcohol level requirement for driving while impaired will be noted, as opposed to the appreciable impairment which is not an element."

The following morning, prior to the close of the charge conference, the trial court stated:

> As I've discussed with counsel last night, I reviewed the case law in regard to appreciable impairment. That is the case of *State versus Phillips*, 127 N.C. App 391, it's a 1997 case. It talks about evidence of appreciable impairment. In that case it basically says evidence of improper driving, in this case leaving the scene of the road, also smell of alcohol and admission of consumption of alcohol is evidence of appreciable impairment.
>
> So it would be my contention that based on the evidence of this case that the additional prong of appreciable impairment in regard to the DWI portion of the

> death by vehicle, as well as driving while impaired instruction should be given to the jury.

The State indicated it was satisfied with that instruction. Defendant objected and argued there was insufficient evidence at that time to arrest. Defense counsel contended:

> [T]he only evidence before the Court was Trooper Sama testified basically there was not any appreciable impairment, that there was insufficient evidence at that time to arrest. She was not arrested on May 22nd or May 23rd, 2015, him being the investigating officer and him never testifying there was appreciable impairment, nor any level of impairment that I recall. I find that - - that the instruction flies in the face of the evidence that has come out in the trial of this action. Based on Trooper Sama's testimony he did not find appreciable impairment, and he was the man on the scene so to speak.

The jury returned unanimous guilty verdicts for felony death by vehicle and driving while impaired. The State informed the trial court Defendant had no prior record and would therefore be a Level I for sentencing. Defense counsel addressed the trial court:

> I ask the Court for leniency. I realize she apparently fits the guidelines for advanced supervised release. I'd ask the Court to consider that. I'd ask the Court to, in light of the fact that she has zero prior convictions of any kind whatsoever, that the Court consider an intermediate sanction in this case, because as the Court knows, it is allowed that even though it's a D felony, normally requiring an active sentence. The statute says intermediate punishment is authorized for a defendant who has a prior record Level I. She is that, Your Honor.

The State responded, "I ask that - - the only question I asked her during the sentencing phase was 'were you impaired?' And it still hasn't gotten through, Your Honor. So I would ask for the top of the presumptive range, Your Honor."

The trial court arrested the driving while impaired conviction since the "elements of that offense [are] included in the felony death by vehicle charge." The trial court then sentenced Defendant to a "42-month minimum, 63-month maximum term in the North Carolina Department of Corrections." The trial court stated:

> The Court will recommend for work release during her incarceration. Also too, recommend for psychological assessment, as well as any treatment that might result from that assessment. The Court will also recommend for substance abuse assessment and completion of any treatment that may be the result of the recommendations from that assessment.

Defendant timely filed written notice of appeal.

II. Standard of Review

When reviewing a trial court's ruling on a motion to suppress, this Court analyzes whether the trial court's "underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Allman*, 369 N.C. 292, 296, 794 S.E.2d 301, 304 (2016) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal. *State*

v. Biber, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). The trial court's conclusions of law are reviewable *de novo*. *Id.* at 168, 712 S.E.2d at 878. "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878 (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

III. Analysis

In her first assignment of error, Defendant contends the trial court erred in denying her motion to suppress since her consent to submit to the blood test was coerced and not voluntary. We disagree.

When a party challenges the validity of a consent to search, "the trial court must conduct a voir dire hearing to determine whether the consent was in fact given voluntarily and without compulsion." *State v. Brown*, 306 N.C. 151, 170, 293 S.E.2d 569, 582 (1982). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 170, 293 S.E.2d at 582 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973)).

Here, the trial court conducted an extensive *voir dire* and heard the testimony concerning the events leading up to the signing of the consent form. Both Trooper Sama and EMS worker Guillermo testified Defendant voluntarily consented to the

blood draw. The trial court made written findings of fact supporting its conclusion Defendant voluntarily consented to the blood test. On appeal, Defendant has neither taken exception to any of the trial court's findings, nor argued the findings are unsupported by the evidence. Therefore the trial court's findings of fact are binding. *Biber* at 168, 712 S.E.2d at 878. Defendant did not present any evidence to the trial court tending to show her consent was coerced or involuntary. Because the trial court's findings are supported by competent evidence, and because those findings support the trial court's ultimate conclusion Defendant's rights were not violated, we overrule this assignment of error.

In her second assignment of error, Defendant argues this Court should create a *per se* rule stating when an officer requests a blood draw under the implied consent statute without first charging a defendant with an implied consent offense, that consent is invalid. Specifically, Defendant contends because Sama had not yet charged Defendant with an implied consent crime, he did not have the authority to request Defendant to provide a blood sample; and therefore Defendant's consent is not valid. This issue was not raised below and, therefore, is not preserved for appeal. *State v. Lewis,* 231 N.C. App. 438, 444, 752 S.E.2d 216, 220 (2013). We make no decision on the merits of this legal assertion.

In her final issue on appeal, Defendant argues the trial court committed plain error "*per se*" in instructing the jury on the theory of appreciable impairment.

Specifically, Defendant contends there was insufficient evidence of appreciable impairment to warrant giving the jury an instruction on it. This issue is without merit.

As an initial matter, we note Defendant did object at trial to the appreciable impairment instruction. "Preserved legal error is reviewed under the harmless error standard of review." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). "North Carolina harmless error review requires the defendant to bear the burden of showing prejudice." *Id.* at 513, 723 S.E.2d at 331. "In such cases the defendant must show '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.' " *Id.* at 513, 723 S.E.2d at 331.

Plain error review, on the other hand, applies only "on appeal to unpreserved instructional or evidentiary error." *Id.* at 518, 723 S.E.2d at 334. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334. Moreover, our State Supreme Court has instructed plain error is to be "applied cautiously and only in the exceptional case." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Plain error will "often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]' " *Id.* at 660, 300 S.E.2d at 378.

Defendant's argument the trial court committed plain error is incorrect.

Because Defendant did object to the appreciably impaired jury instruction, and therefore preserved this issue for appellate review, this Court should review this assignment of error under the harmless error standard.

The North Carolina Pattern Jury Instructions for felony death by motor vehicle provide, in pertinent part:

> For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt:
>
> . . . .
>
> Third, that at the time the defendant was driving that [vehicle] [commercial vehicle] the defendant:
>
> (A) [was under the influence of an impairing substance. (*Name substance involved*) is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has taken (or consumed) a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.]

N.C.P.I. —Crim. 206.57A.

This Court has held "[a]n intoxilyzer test and field sobriety tests are not required to establish a defendant's faculties as being appreciably impaired under N.C. Gen. Stat. § 20-138.1" *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002). "An officer's opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer's

personal observation of an odor of alcohol and of faulty driving or other evidence of impairment." *Id.* at 721, 572 S.E.2d at 840.

Here, the State and Defendant presented evidence tending to show Defendant had been drinking alcohol prior to the accident. Specifically, Defendant testified she had two Malibu pineapple drinks at Larkin's. Defendant further testified she smoked marijuana around 6:30 or 6:45 at the Tiki Bar, and also had an additional Malibu pineapple drink. Defendant testified she stopped drinking around 8:30 that evening. The evidence also tended to show after Defendant drank alcohol and smoked marijuana, she was involved in a single vehicle accident upon leaving the Tiki Bar. Specifically, Defendant testified a deer was suddenly in front of her car, and she swerved to miss the deer. Furthermore, Sama testified he smelled alcohol when he spoke with Defendant at the scene of the accident. Defendant consented to blow into the "Alco-Sensor" device, which gave a positive indication for the presence of alcohol. In addition, the blood draw results provided some evidence at the time of the accident, Defendant's blood alcohol content (BAC) was above the legal limit of .08. While we recognize there is a conflict in the scientific measures used to gauge the blood alcohol content of Defendant at the crash site, this conflict needed to be and was resolved by the jury.

Under the impaired driving statute, N.C. Gen. Stat. § 20-138.1, there are two ways the State can demonstrate the offense of impaired driving: (1) BAC of .08 or (2)

a showing that consumption of an "impairing substance" caused defendant to lose his mental and/or physical faculties to such an extent there was appreciable impairment to either or both faculties (otherwise known as "appreciable" impairment). In *State v. Felts*, 5 N.C. App. 499, 500, 168 S.E.2d 483, 483-84 (1969), this Court stated the impairing effect on a person's mental and/or physical faculties caused by an impairing substance must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding one was impaired at the time of driving. Odor of alcohol alone is not enough for the State to prove impairment, but an odor of alcohol in connection with bad driving or other conduct showing appreciable impairment can be sufficient *prima facie* evidence to show a violation of North Carolina's driving statute. *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965).

We conclude, based on this evidence and the applicable law, there was sufficient evidence for a jury to find Defendant was appreciably impaired. The trial court therefore did not err, much less commit harmless or plain error, in instructing the jury on the theory of appreciable impairment. This assignment of error is overruled.

NO ERROR.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).