IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-90

Filed: 20 November 2018

Onslow County, Nos. 16 CRS 27, 16 CRS 689, 16 CRS 52122, 17 CRS 537

STATE OF NORTH CAROLINA

v.

OLIVIA CATHERINE FRAZIER

Appeal by defendant from judgment entered 13 July 2017 by Judge Ebern T. Watson III in Superior Court, Onslow County. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State.

Paul F. Herzog, for defendant-appellant.

STROUD, Judge.

Defendant contends that the trial court erred by admitting into evidence marijuana found on defendant after a car accident and by failing to dismiss charges of driving while impaired and felony serious injury by vehicle because the State failed to prove that defendant was impaired. After careful review, we determine that

defendant did not preserve her relevance challenge to the marijuana evidence, and we find no error by the trial court in denying defendant's motion to dismiss.

I. Background

On 1 April 2016, defendant's minivan crossed into the opposite lane and struck the vehicle of an elderly couple in Onslow County. The accident occurred on a curve in a rural two lane road. Defendant and the elderly couple all suffered serious injuries. While defendant was being treated by paramedics, a glass pipe fell out of defendant's pocket. Defendant told the paramedics she had smoked marijuana approximately four hours before the accident. Defendant was transferred via helicopter to a regional trauma center. At New Hanover Regional Medical Center, urinalysis was conducted on defendant approximately one hour after the accident. Defendant tested positive for THC and negative for alcohol. Technicians treating defendant in the emergency department found and turned over to the hospital's police officer, Officer Richartz, a bag containing what he identified as marijuana.

Trooper Matos of the North Carolina Highway Patrol was dispatched to the accident scene. After completing an on-scene investigation, he went to the hospital and spoke with defendant approximately two hours after she arrived. Trooper Matos stated that defendant could not recall the specifics of the accident, but she admitted smoking marijuana hours before the accident. Defendant then consented to a blood test which tested positive for metabolites of marijuana.

Defendant was indicted on charges of reckless driving, possession of drug paraphernalia, simple possession of marijuana, two counts of felonious serious injury by motor vehicle, misdemeanor child abuse, driving while impaired, and speeding 80 in a 55 mph zone. The trial court dismissed the speeding and possession of marijuana charge, and the State took a voluntary dismissal on the misdemeanor child abuse charge. The jury found defendant guilty of all remaining charges, and the trial court sentenced her accordingly. Defendant gave notice of appeal in open court.

II. Admission of Evidence

Defendant argues that the trial court erred by admitting a bag that may have contained marijuana into evidence. While defendant contends we should review whether the bag containing what was identified by Trooper Matos as marijuana was relevant under a *de novo* standard of review, defendant has not properly preserved this issue for appeal. Defendant's argument is in substance a challenge to the chain of custody of both Exhibits 8 and 8A, and we review this issue for abuse of discretion. *State v. Hawk*, 236 N.C. App. 177, 180, 762 S.E.2d 883, 885 (2014) ("We review a trial court's decision to admit evidence over an objection concerning the chain of custody for an abuse of discretion."). "The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition." *State v. Taylor*, 332 N.C. 372, 388, 420 S.E.2d 414, 424 (1992).

At trial, the State explained that the marijuana was inside an evidence bag (inner bag) contained inside another evidence bag (outer bag). The inner bag containing the alleged marijuana was identified as Exhibit 8A, and the outer bag was identified as Exhibit 8.[1] When Exhibit 8A, the inner bag *containing marijuana,* was introduced into evidence, Defendant only objected on hearsay grounds:

> Q. So, Trooper Matos, this was previously marked as State's Exhibit No. 8. Would you look at that, please.
> A. Yes, sir.
> Q. And what is State's Exhibit No. 8?
> A. This is, again, our -- one of our evidence bags that I sealed up. *On the inside of it, it has the evidence bag that was given to me by Mr. Richartz with the New Hanover Sheriff's Department. And it's got Nurse Sara Strickland's name on it and then his name on it where the evidence actually came from that was given to him*.
> . . . .
> Q. Now, I'm going to *mark the plastic bag which was inside State's Exhibit No. 8, and it's State's Exhibit No. 8A*. Would you look at that, please.
> (State's Exhibit 8 identified.)
> A. Yes, sir. *This is the evidence bag that was given to me by Officer Richartz. Again, it's got the type of evidence, the description of the evidence that was found, who actually found the evidence*.
> MR. WELCH: Objection.
> Oh, withdrawn, Judge.
> A. *The suspect -- the suspect's name, who the evidence came from, and then the officer who actually sealed it up in this evidence bag, the date, and time that it was discovered*.

[1] Defendant also notes that the substance inside Exhibit 8A was never "properly identified by admissible evidence as the controlled substance, marijuana." The trial court dismissed the charge of simple possession of marijuana for this reason. But defendant has not presented any argument on appeal challenging the identification or admission into evidence of the substance in Exhibit 8 or 8A on this basis, so we will simply refer to the substance in the bag as marijuana.

> (State's Exhibit 8A identified.)
>
> MR. ASKINS: Okay. *Move to introduce State's Exhibit 8A.*
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> MR. WELCH: Judge, I think I object to that just because some of the markings he's described on there relate to potential hearsay evidence that was previously excluded, Your Honor.
>
> THE COURT: Overruled.
>
> (*State's Exhibit 8A admitted*.)
>
> MR. ASKINS: So is it admitted, Your Honor?
>
> THE COURT: I've overruled his objection, yes, sir.
>
> MR. ASKINS: Okay. Yes, sir.

(Emphasis added.) Therefore, at trial, the inner bag containing marijuana was removed from the outer bag. The inner bag was marked as Exhibit 8A; defendant objected based upon hearsay grounds to the markings on the bag; and that objection was overruled. Exhibit 8, the now empty outer bag, was not admitted at that time.

Later during the trial, the State was informed that Exhibit 8 had not been admitted into evidence and then defendant objected to the *empty outer bag* (Exhibit 8) on relevance grounds:

> MR. ASKINS: Before I can proceed, the clerk and the court reporter have told me that State's Exhibit 8, 26A and 27 were not admitted. I do move to admit State's Exhibits 8, 26A and 27.
>
> MR. WELCH: Judge, with regard to State's Exhibit 8, which I believe was the baggie identified by Officer Richartz, I would object to the admissibility of that. I don't believe that there's been any relevance associated with that bag at this point in this particular case, other than it being brought here to court.
>
> There's never been any testimony as to the source of it or connection to the defendant, Judge, so I would object to the admissibility of that under grounds of

relevance, Your Honor.
THE COURT: Overruled.
(State's Exhibit 8 admitted.)

On appeal, defendant argues only that the trial court erred in admitting Exhibit 8, the outer bag, and her argument is based only upon relevance, which was the basis of her objection at trial. Defendant has not challenged the admission of Exhibit 8A, the inner bag containing marijuana, but her argument on appeal is about the bag containing the marijuana. In addition, her objection to Exhibit 8A, the inner bag containing the marijuana, was based upon hearsay, not relevance. The State's brief also overlooks the distinction between the inner and outer bags, although its reference to Exhibit 8 as "a State Highway Patrol evidence bag containing an NHRMC evidence bag (Exhibit 8A) which contained a bag of a substance identified by Officer Richartz to be marijuana" seems to take some liberties with the record, since the testimony did not explicitly distinguish between a "State Highway Patrol" bag and an "NHRMC evidence bag." But the State is correct that the New Hanover Regional Medical Center officer placed the marijuana into the inner bag, and the State Highway Patrol trooper placed that bag into the outer bag. Since Defendant on appeal has challenged only Exhibit 8 – the outer bag – we will address only the admission of that exhibit, and since she argues only relevance, we will address only relevance. But we also recognize that the Exhibit 8A was *inside* Exhibit 8, and thus arguably a challenge to Exhibit 8 may include its contents, Exhibit 8A.

We first note the difficulty we have had determining why the bag of marijuana ended up as two separate exhibits, Exhibits 8 and 8A. These exhibits are not in our record, nor are there photographs of the exhibits. The Exhibits/Evidence log and court reporter's index of the exhibits do not clarify the distinction between the bags. The log identifies Exhibit 8 as "Evidence bag *containing* marijuana" and Exhibit 8A as "Evidence bag w/ marijuana." The court reporter's index of exhibits describes Exhibit 8 as "Evidence bag *containing* bag with substance." There is no testimony about any writing or markings on the outer bag, Exhibit 8. We do not know why the State would want to admit an empty plastic bag with no markings on it into evidence—perhaps counsel forgot which bag was which—but we have to rely upon the record before us. "Appellate review is based solely upon the record on appeal; it is the duty of the appellants to see that the record is complete." *Collins v. Talley*, 146 N.C. App. 600, 603, 553 S.E.2d 101, 102 (2001) (citations and quotation marks omitted).

Defendant's brief does not address her failure to object to the inner bag, Exhibit 8A. We conclude that the outer bag, Exhibit 8—apparently an empty plastic evidence bag with no writing on it—is not relevant to this case, but defendant has not shown how evidence of an empty bag prejudiced her in any way. Defendant does not make any hearsay arguments on appeal regarding Exhibit 8A nor does she ask this Court to review this issue for plain error. *Rolan v. N.C. Dep't of Agric. & Consumer Servs.*,

233 N.C. App. 371, 381, 756 S.E.2d 788, 794 (2014) ("As a general rule, a party may not make one argument on an issue at the trial level and then make a new and different argument as to that same issue on appeal."); N.C. R. App. P. 10(a)(4). Defendant failed to preserve the issue of whether the inner bag actually containing marijuana was properly admitted, since the only objection to Exhibit 8A was based upon hearsay, not relevance.

But it is quite obvious, based upon her argument, that defendant's intent both at trial and on appeal was to challenge the bag containing the marijuana, and the State understood this argument, since it makes a substantive response instead of simply noting that defendant is challenging the relevance of an empty plastic bag. We also recognize that Exhibit 8 contained Exhibit 8A. Considering the confusion both at trial and on the record regarding which bag contained the marijuana, we note that Exhibit 8A was relevant since it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). Defendant argues on appeal the bag of marijuana is not relevant because there was insufficient evidence linking the bag of marijuana to defendant. Although she does not use the term "chain of custody," her argument is essentially that the State failed to prove the chain of custody of the bag of marijuana. *See State v. Taylor*, 332 N.C. 372, 388, 420 S.E.2d 414, 423-24 (1992) ("The item offered must be identified

as being the same object involved in the incident and it must be shown that the object has undergone no material change. The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition. A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." (citations omitted)).

As best we can tell from the record, the markings on Exhibit 8A and testimony regarding Exhibit 8A show the chain of custody in accord with N.C. Gen. Stat. §90-95(g1).[2] The inner bag had a notation indicating that the bag was "from Sara Strickland to Corporal Richartz on 4-1-16." Corporal Richartz was involved in the collection of evidence from defendant when she was treated in the emergency room.

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[2] "Procedure for establishing chain of custody without calling unnecessary witnesses.—
(1) For the purpose of establishing the chain of physical custody or control of evidence consisting of or containing a substance tested or analyzed to determine whether it is a controlled substance, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.
(2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received. The statement may be placed on the same document as the report provided for in subsection (g) of this section."
N.C. Gen. Stat. § 90-95(g1)(1)-(2) (2017).

He testified about his collection of Exhibit 8A, the bag of marijuana, from Sara Strickland, an emergency room technician, on 1 April 2016. In the light most favorable to the State, it is reasonable to conclude that the marijuana was found on defendant herself, not in her car. He then placed the bag of marijuana, Exhibit 8A, into the hospital's evidence locker. A few hours later, he signed the evidence over to Trooper Matos.

According to the testimony, Trooper Matos put Exhibit 8A, the bag of marijuana, into another evidence bag, Exhibit 8. To the extent defendant argues the chain of custody did not clearly identify her connection to the marijuana, she is arguing only that the evidence was weak. However, "any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *Taylor*, 332 N.C. at 388, 420 S.E.2d at 424. This argument is overruled.

III. Driving While Impaired and Felony Serious Injury by Vehicle

Defendant contends the trial court erred by failing to dismiss the charges of driving while impaired and felony serious injury by vehicle because both charges require the element of impaired driving and the State failed to prove that defendant was appreciably impaired by marijuana at the time of the accident. Both offenses rely on the definition of impaired driving from N.C. Gen. Stat. § 20-138.1(a)(1), and we analyze these offenses together. N.C. Gen. Stat. § 20-138.1(a) (2017) ("A person commits the offense of impaired driving if he drives any vehicle upon any highway,

any street, or any public vehicular area within this State: (1) While under the influence of an impairing substance[,]); N.C. Gen. Stat. § 20-141.4(a3)(2) ("A person commits the offense of felony serious injury by vehicle if: . . . The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2[.]").

> [A] motion [to dismiss] presents a question of law and is reviewed *de novo* on appeal. The question for this Court is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

State v. Norton, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011) (citations and quotation marks omitted).

An impairing substance is defined as, "Alcohol, controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances." N.C. Gen. Stat. § 20-4.01(14a) (2017). Marijuana is a schedule VI controlled substance. N.C. Gen. Stat. § 90-94 (2017). This Court has determined that "[t]he effect [of impairment] must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired." *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985). Consumption of an impairing substance alone "does not render a person impaired." *See Id.* However,

"[o]ur Supreme Court has held that the fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138." *State v. Coffey*, 189 N.C. App. 382, 387, 658 S.E.2d 73, 76 (2008) (citation, quotation marks, ellipsis, and brackets omitted).

Defendant notes that unlike alcohol, there is no established level of metabolites in the blood to show impairment, so the evidence that she had smoked marijuana prior to the accident is insufficient to show she was actually impaired at the time of the accident. Accordingly, the State must present evidence other than defendant's use of marijuana to show she was appreciably impaired by the marijuana. Defendant compares her case to cases which hold that an odor of alcohol on a defendant alone is not sufficient to show that he was impaired by alcohol. *See Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970) ("An odor of alcohol on the breath of the driver of an automobile is evidence that he has been drinking. However, an odor, *standing alone*, is no evidence that he is under the influence of an intoxicant, and the *mere* fact that one has had a drink will not support such a finding." (citations omitted)). Defendant argues that Trooper Matos did not see her until she was at the hospital and that he based his opinion of impairment *only* upon her admission of smoking marijuana. Although this is one possible interpretation of the evidence, we must interpret the evidence in the light most favorable to the State.

Here, the evidence showed that defendant crossed a double yellow line into the opposite lane and collided head on with a vehicle, seriously injuring herself and the elderly occupants of the other vehicle. Defendant had trouble recalling the accident with paramedics and at the hospital. Defendant admitted to smoking marijuana prior to the collision to paramedics at the scene of the accident and to Trooper Matos at the hospital. Defendant's urine tested positive for THC and Defendant's blood tested positive for three metabolites of marijuana. The State's certified chemical analyst, Susan Crookham, testified that one metabolite, Delta-9-THC, meant that defendant had probably "smoked rather recently" before the blood draw. She also testified that Delta-9-THC has its peak effect between one and four hours after consumption. In addition, Trooper Matos testified that it was his opinion that defendant was impaired at the time of the accident:

> Q. So, Trooper Matos, based upon your training and experience, the observations you made at the scene, the evidence that you collected and the statements of Ms. Frazier, did you believe that she was impaired at the time of this collision?
> A. Yes, sir, I did.

Considering all of the evidence in the light most favorable to the State, we find substantial evidence that defendant drove while under the influence of an impairing substance in violation of N.C. Gen. Stat. § 20-138.1(a)(1) and N.C. Gen. Stat. § 20-141.4(a3)(2). The trial court did not err by denying defendant's motion to dismiss the charges of driving while impaired and felony serious injury by vehicle.

IV. Conclusion

We conclude defendant received a fair trial free of prejudicial error.

NO ERROR.

Judge ZACHARY concurs.

Judge MURPHY concurs in the result only.

Report per Rule 30(e).