IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1030

Filed: 31 December 2020

Buncombe County No. 17 CRS 002462

STATE OF NORTH CAROLINA

v.

ROBERT WAYNE DELAU, Defendant.

Appeal by Defendant from judgment entered 28 November 2018 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 25 August 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.

Joseph P. Lattimore for defendant-appellant.

MURPHY, Judge.

Appellate review of an alleged error is waived when a defendant has invited the error. Here, Defendant agreed to a stipulation regarding his blood alcohol concentration and consequently waived his right to appellate review concerning the

admission of the blood evidence obtained from an allegedly insufficient search warrant.

Additionally, it is error to admit a lay witness's opinion on a controverted issue that invades the province of the jury. However, an erroneous admission will not necessitate a new trial unless the defendant was prejudiced. Here, the trial court erred in admitting a police officer's lay witness opinion that Defendant was driving at the time of the accident, and a new trial is required as Defendant has demonstrated prejudice.

BACKGROUND

On 15 June 2017, Defendant Robert Wayne Delau ("Defendant") was on a moped that struck a stone wall and came to rest on the opposite side of the road. After being called to the scene, paramedic Michael Sprinkle found Defendant lying in the road complaining of back and leg pain.

Officer Henry Carssow ("Officer Carssow") and Officer Tyler Barnes ("Officer Barnes") responded to the accident. Officer Carssow attempted to interview Defendant and noticed a strong odor of alcohol emanating from Defendant. Defendant was subsequently placed in an ambulance and Officer Barnes entered the ambulance to identify the alleged driver of the moped. While in the ambulance, Officer Barnes also noticed a strong odor of alcohol. Neither officer was able to fully interact with or conduct field sobriety tests on Defendant because he was being

treated by paramedics. Due to the inability to conduct field sobriety tests and the lack of anyone else at the scene, Officer Carssow believed Defendant to be the driver of the moped and applied for a search warrant to obtain a sample of Defendant's blood.

The *Application for Search Warrant for Bodily Fluids* ("the warrant application") at issue here was signed by Officer Carssow and stated his years of service as an officer, as well as the number of incidents related to impaired driving he previously investigated. Information identifying the individual being searched as well as the time and place of the accident was included in the warrant application, but it did not mention or incorporate any other documents prepared by Officer Carssow. In addition, Officer Carssow checked a box that read, "I ascertained that the above-named individual was operating the described vehicle at the time and place stated from the following facts[.]" The space provided below the check box where the police officer can state their basis for believing the individual under investigation was driving was left blank on the warrant application. Additionally, Officer Carssow checked the boxes indicating Defendant had previously been convicted of an offense involving impaired driving, and he detected a strong odor of alcohol coming from Defendant's breath at the scene. A magistrate executed and signed the warrant, Defendant's blood was tested, and Defendant was subsequently cited with driving while impaired under N.C.G.S. § 20-138.1.

On 27 November 2018, Defendant filed a *Motion to Suppress* evidence obtained as a result of the search warrant, which the trial court denied. However, at trial, Defendant did not object when the evidence of his blood alcohol concentration was offered by the State. Additionally, Defendant later stipulated "the laboratory report revealed [Defendant's] blood ethanol concentration [was] 0.13 grams of alcohol per 100 milliliters."

At trial, Officer Carssow testified he believed Defendant was driving based on his examination of the accident scene, including Defendant being the sole injured party at the scene, his ownership of the moped, his position next to the moped, his use of a riding jacket, and the extent of his injuries. Defendant called two witnesses who testified Defendant was not driving the moped at the time of the accident. On 28 November 2018, Defendant was found guilty of driving while impaired under N.C.G.S. § 20-138.1 and sentenced to 36 months in the Misdemeanant Confinement Program.

Defendant timely appealed and asserts two issues on appeal. First, Defendant argues the trial court plainly erred by denying his *Motion to Suppress* because the warrant application failed to establish probable cause for the search warrant. Second, Defendant argues the trial court erred by admitting Officer Carssow's lay witness opinion Defendant was driving the moped at the time of the accident. On 20 October 2020, we entered an order which read:

> In light of our decision in State v. Berry, 235 N.C. App. 496, 761 S.E.2d. 700, (2014) rev'd on other grounds, 368 N.C. 90, 773 S.E.2d. 54 (2015), regarding the unavailability of plain error review when there is invited error via stipulation, the Court hereby orders that the Appellant may file a supplemental brief addressing whether Defendant-Appellant's stipulation as to blood alcohol content constitutes invited error. The Defendant may file a supplemental brief, not to exceed 2,500 words, not later than 4 November 2020. Within 14 days of service of Defendant's supplemental brief, if any, the State may file a supplemental brief, not to exceed 2,500 words.

ANALYSIS

A. Search Warrant

In his first argument, Defendant contends the trial court erred by denying his *Motion to Suppress* because the warrant application failed to establish probable cause for the search warrant.

Defendant concedes his counsel failed to preserve this question for appellate review, but pursuant to *State v. Larkin*, 237 N.C. App. 335, 339, 764 S.E.2d 681, 685 (2014), "specifically and distinctly argues on appeal that the trial court committed plain error." Generally, we "apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (quoting *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012)); *see also* N.C. R. App. P. 10(a)(4). However, "[a] defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review." *State v. Berry*, 235 N.C. App. 496, 503-04, 761

S.E.2d 700, 705 (2014), *rev'd on other grounds*, 368 N.C. 90, 773 S.E.2d 54 (2015) (citations omitted).

> A stipulation is a judicial admission, voluntarily made by the parties to admit evidence at trial. . . . The essence of plain error is the failure of a defendant to object, coupled with a fundamental error by the trial court in allowing the evidence to be received even in the absence of an objection. Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position. The conduct of [the] defendant in entering into a stipulation at trial and then seeking to repudiate it on appeal is more akin to invited error than plain error. . . . Therefore, although [the] defendant labels this issue on appeal as plain error, it is actually invited error because, as the transcript reveals, [the] defendant consented to the manner in which the trial court gave the instructions to the jury.

Id. at 503-504, 761 S.E.2d at 705 (internal quotation marks, alterations and citations omitted); *see also* N.C.G.S. § 15A-1443(c) (2019) ("A defendant is not prejudiced by . . . error resulting from his own conduct."); *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) ("[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.").

In the instant case, Defendant argues the trial court committed plain error by denying his *Motion to Suppress* and admitting the evidence of his blood alcohol concentration obtained from an allegedly insufficient search warrant. Defendant, however, freely entered into a written stipulation with the State that directly

referenced the evidence of his blood alcohol concentration obtained from the search warrant. The stipulated facts were:

> The State witness, Jacqueline Coley, is employed as a Forensic Scientist II for the North Carolina State Bureau of Investigation and is an expert in the field of drug toxicology. . . . [The] State witness, Jacqueline Coley, performed the analysis of the blood of the Defendant in full compliance with proper protocol for the performance of this chemical blood examination, and the Defendant does not question the results obtained from this blood chemistry analysis. . . . [T]he *laboratory report revealed a blood ethanol concentration [of] 0.13 grams of alcohol per 100 milliliters.*

(Emphasis added). Defendant consented to the language of the stipulation at trial and made no objection to the inclusion of his blood alcohol concentration obtained as a result of the search warrant. It would be inconsistent to allow Defendant to stipulate to the admission of the evidence and testimony regarding his blood alcohol concentration at trial and then argue on appeal the same evidence was erroneously admitted. Through this stipulation, Defendant waived his right to appellate review of any error that may have resulted from the admission and stipulation of the blood alcohol concentration resulting from the search warrant. Consequently, we do not review for plain error and dismiss this portion of Defendant's appeal.

B. Admission of Lay Witness Opinion

In his second argument, Defendant contends he is entitled to a new trial due to the trial court's alleged error in admitting Officer Carssow's lay witness opinion Defendant was driving the moped at the time of the accident.

1. Preservation

In order to preserve an issue for review on appeal a party must present "a timely request, objection or motion, stating the specific grounds for the ruling" and shall "obtain a ruling upon the party's request, objection or motion." N.C. R. App. P. 10(a)(1) (2020). The State argues Defendant failed to object to Officer Carssow's testimony and therefore waived this issue on appeal. However, the State misinterprets Defendant's argument on appeal. Defendant argues the trial court erred in admitting Officer Carssow's factual explanation for why he believed Defendant was driving. Officer Carssow's testimony regarding why he believed Defendant was driving was as follows:

> [Prosecutor:] So in a situation like this, you didn't see Mr. Delau driving. What circumstantial evidence did you believe you had at that time that he was, in fact, the driver of that moped?
>
> [Officer Carssow:] Correct. Pretty much starting from Mr. Delau wearing a helmet and having the jacket on -- the riding jacket for safety -- you know, safety equipment for riding a moped or motorcycle. His position next to the motorcycle -- or I'm sorry, the moped. The fact that the moped was owned by him. The fact that his -- extent of his injuries told me that I didn't believe anybody else could have been on scene. The speed at which both EMS and officers arrived on the scene which I believe prohibited --

> [Defense Counsel]: Objection, your Honor.
>
> THE COURT: Overruled.
>
> [Officer Carssow:] Prohibited, you know, too much time passing where other individuals are coming in and out where somebody else riding could have left the scene. Just -- what else?

Defendant objected to Officer Carssow's testimony regarding the factual basis as to why he believed Defendant was driving. Therefore, whether this testimony was erroneously admitted was preserved for appeal.

2. Opinion Testimony

Defendant argues the trial court erred by permitting Officer Carssow to testify Defendant was the driver of the moped based on his observations of the accident scene.

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016).

Under Rule of Evidence 701,

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear

> understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (2019). "Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). Additionally, "[t]he jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of [a law enforcement officer]." *State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002).

In *State v. Maready* we found the trial court erroneously admitted the opinion testimony of two police officers after the State called the officers to testify regarding their opinions of how an accident occurred. *State v. Maready*, 205 N.C. App. 1, 16-17, 695 S.E.2d 771, 782 (2010). The officers had not witnessed the accident "but gave their opinions indicating [the] [d]efendant was at fault based upon their examination of the scene of the accident." *Id.* at 17, 695 S.E.2d at 782. We noted "opinion testimony of this kind is incompetent[,]" as "[t]he officers were not proffered as experts in accident reconstruction." *Id.* This reasoning applies equally here where Officer Carssow was not qualified as an expert, but gave his opinion Defendant was driving based on his examination of the scene of the accident.

Additionally, in *State v. Denton*, we found an abuse of discretion and ordered a new trial where there was lay opinion testimony by a state trooper identifying the defendant as the driver of the vehicle. *State v. Denton*, 265 N.C. App. 632, 636, 829

S.E.2d 674, 678, *review denied, stay dissolved*, 373 N.C. 254, 835 S.E.2d 447 (2019). *Denton* involved the testimony of two police officers, one qualified as an accident reconstruction expert and the other not qualified as an expert who testified as a lay witness. *Denton*, 265 N.C. App. at 635, 829 S.E.2d at 677. The accident reconstruction expert testified "[h]e could not reach a conclusive expert opinion about who was driving at the time of the accident[]" while the lay witness officer testified "he believed [the] defendant was driving at the time of the crash because 'the seating position was pushed back to a position where [he] did not feel that [the purported passenger] would be able to operate that vehicle or reach the pedals.'" *Id.* Holding the admission of the lay witness's opinion was an abuse of discretion, we noted "[a]s a general rule, a witness must confine his evidence to the facts. . . . The jury is just as well qualified as the witnesses to determine what inferences the facts will permit or require." *Id.* at 638, 829 S.E.2d at 679 (quoting *Shaw v. Sylvester*, 253 N.C. 176, 180, 116 S.E.2d 351, 355 (1960)).

Here, Officer Carssow was in no better position than the jury to deduce whether Defendant was driving. Like in *Maready* and *Denton*, it was an abuse of discretion for Officer Carssow to testify Defendant was the driver of the moped based on his examination of the scene because he did not personally witness the accident and was not qualified as an expert. Officer Carssow's testimony impermissibly "invade[d] the province of the jury" by drawing inferences from the evidence to convey

an opinion as to Defendant's guilt. *Fulton*, 299 N.C. at 494, 263 S.E.2d at 610. As we noted in *Denton*, Officer Carssow's testimony was confined to what he observed after the accident and his testimony regarding his conclusion from these observations was incompetent. *Denton*, 265 N.C. App. at 638, 829 S.E.2d at 679. As the jury is charged with drawing its own conclusions from the evidence without being influenced by the conclusions of Officer Carssow, the trial court abused its discretion by permitting this testimony. Next, we must determine whether Defendant was prejudiced by this error.

3. Prejudice

"[E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial." *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009). "An error is not prejudicial unless 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]'" *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001) (quoting N.C.G.S. § 15A-1443(a)). "Where it does not appear that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless." *Id.* at 28, 550 S.E.2d at 16. "Prejudicial error will not be found if the other unchallenged and properly admitted evidence presented by the State against [the] [d]efendant is overwhelming, or the evidence erroneously

admitted is of relative insignificance." *State v. Phillips*, 836 S.E.2d 866, 875 (N.C. Ct. App. 2019) (internal quotation marks omitted).

Defendant argues this error was prejudicial because Officer Carssow's testimony was likely given more weight than other witnesses, resulting in a greater impact on the jury. In *State v. Belk*, we noted the jury likely gave "significant weight" to the opinion testimony offered by a police officer. *State v. Belk*, 201 N.C. App. 412, 418, 689 S.E.2d 439, 443 (2009). The officer in *Belk* gave lay witness opinion testimony by identifying the defendant as the suspect depicted in video surveillance footage. *Id.* at 414, 689 S.E.2d at 441. We found prejudice because "the State's case rested exclusively on the surveillance video and [the officer's] identification testimony." *Id.* at 418, 689 S.E.2d at 443.

Moreover, in *Denton*, we held the lay witness opinion testimony by a state trooper identifying the defendant as the driver of the vehicle "was not harmless." *Denton*, 265 N.C. App. at 640, 829 S.E.2d at 680. After determining the trial court abused its discretion, we held the defendant was prejudiced as "[t]he only issue in serious contention at trial was who was driving the car[,]" and "[t]he State's expert accident reconstruction analyst could not testify to a reasonable degree of certainty as to an opinion of who was driving[.]" *Id.*

As we recognized in *Belk*, the jury is likely to give "significant weight" to the opinion testimony of Officer Carssow given the role his testimony played in the State's

case and the conflicting evidence surrounding Defendant's guilt. *Belk*, 201 N.C. App. at 418, 689 S.E.2d at 443. The State failed to call any witnesses who observed Defendant driving, while Defendant called two witnesses who testified he was not driving. Additionally, like in *Denton*, whether Defendant was driving was the controverted issue in this case. Given this conflicting evidence on the controverted issue, Officer Carssow's testimony regarding whether Defendant was driving the moped "played a significant if not vital role in the State's case[.]" *Belk*, 201 N.C. App. at 418, 689 S.E.2d at 443. Had Officer Carssow's impermissible opinion testimony been excluded, "there is a reasonable possibility . . . a different result would have been reached at the trial[.]" N.C.G.S. § 15A-1443(a) (2019). We find Defendant was prejudiced by Officer Carssow's opinion testimony and must receive a new trial.

CONCLUSION

We do not review for plain error the trial court's denial of Defendant's *Motion to Suppress* where Defendant invited the error by stipulating to the blood alcohol concentration at trial. Defendant was prejudiced when the trial court abused its discretion by admitting Officer Carssow's lay opinion testimony, requiring a new trial.

DISMISSED IN PART; NEW TRIAL.

Chief Judge MCGEE concurs.

Judge DILLON dissents with separate opinion.

Report per Rule 30(e).

No. COA19-1030 – *State v. Delau*

DILLON, Judge, dissenting.

The majority concludes that Defendant invited any error with respect to the defective warrant. I agree. Alternatively, I conclude that any error did not rise to the level of plain error, as there was sufficient evidence to convict Defendant without the blood draw evidence.

The majority concludes, however, that the trial court erred by letting the investigating officer (the "Officer") opine that Defendant was the driver of the moped, where no one saw the crash, and that this error was prejudicial. I disagree that the admission of this testimony constituted reversible error.

My vote is, therefore, "no error." Therefore, I respectfully dissent.

Discussion

The Defective Warrant

I agree with the majority that any error in connection with the defective warrant was invited error.

Alternatively, presuming that the trial court erred in denying Defendant's motion to suppress the results of the blood draw based on the warrant being defective, I conclude that such error did not rise to the level of plain error in this case. The State's case largely did not rely on the blood draw evidence, as explained below.

Defendant was convicted of impaired driving under Section 20-138.1 of our General Statutes. The State may prove impairment *either* by presenting evidence that the defendant drove "[w]hile under the influence of [alcohol]" *or* by showing that the defendant drove with "an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a)(1)-(2) (2017). In this case, the trial court only instructed the jury on whether Defendant drove while "under the influence of [alcohol]," with no mention of determining whether his alcohol level was 0.08 or higher.

Regarding proof of impairment based on being under the influence, our Supreme Court has long held, even last year, that evidence that "a motorist has been drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental capacities, is sufficient *prima facie* to show [a violation of now Section 20-138.1]." *State v. Parisi*, 372 N.C. 639, 650, 831 S.E.2d 236, 244 (2019). *See State v. Rich*, 351 N.C. 386, 399, 527 S.E.2d 299, 306 (2000); *see also State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965).

There was sufficient evidence in this case, apart from the results of the blood test, from which the jury could have found Defendant guilty of driving under the influence of alcohol.

There was evidence that Defendant was the driver of the moped: Defendant was found near his crashed moped, he was wearing a helmet and riding jacket, he was the owner of the crashed moped, he had sustained injuries, and no one else was

around when Defendant was initially found injured at the crash scene. Defendant did offer testimonial evidence that a friend, who no one else saw at the scene, was driving the moped, but had left the scene uninjured to get help. But this conflict is for the jury to resolve.

There was evidence that Defendant had been drinking alcohol: witnesses testified that they sensed a strong odor of alcohol on Defendant's breath shortly after the crash.

There was evidence that Defendant was involved in faulty driving: the moped was found crashed, with no other vehicles around. Defendant did put on testimonial evidence that his friend was simply trying to avoid another vehicle. But, again, this discrepancy in the evidence was for the jury to sort out.

It is certainly possible that the jury considered Defendant's high alcohol concentration in the blood to find impairment, such that the trial court's denial of Defendant's motion to suppress the blood test results constituted "prejudicial" error. But the denial does not rise to the level of "plain" error, as there was sufficient evidence apart from the blood draw to sustain the jury's findings and especially since the jury was not even instructed on blood concentration as the basis to find impaired driving. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (concluding that defendant must show that absent error, the jury probably would have reached a different result).

Officer's Testimony

As explained above, there was sufficient circumstantial evidence from which the jury could have found that Defendant was the driver. The majority concludes that it was error to allow the Officer to state his opinion that Defendant was the driver and that this error was prejudicial. I disagree for a number of reasons.

I do not believe that it was error at all for the trial court to allow the testimony. The Officer was not expressly asked to give a formal opinion as to who was driving the moped. Rather, he was merely asked what circumstantial evidence led him to form his belief that Defendant was driving, *at the time* he sought the warrant. The Officer was merely giving background on his investigation and his thought process in obtaining the search warrant.

But assuming the Officer's testimony was improper, Defendant failed to state the grounds of his objection when the testimony was offered. And the grounds are not otherwise obvious in the context of the objection. *See* N.C. R. App. P. Art. II, Rule 10 ("[A] party must [state] specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). It could be that his counsel was, indeed, objecting to the Officer's opinion that Defendant was the driver based on a lack of foundation of the Officer's expertise to render an opinion. But it could be that his counsel was objecting to *some parts* of the circumstantial evidence recited by the Officer based on a lack of foundation. For instance, the Officer

stated that the circumstantial evidence included his understanding that Defendant was the driver, without stating how he came to understand that fact. Or it could be that his counsel was objecting to some or all the testimony based on relevancy: why is it relevant what the Officer was thinking when he sought the warrant? The basis of Defendant's objection simply is not obvious from the context.

Further, assuming the Officer's testimony was improper and was properly objected to, the error allowing the Officer to state his belief that Defendant was the driver during his trial testimony was not prejudicial. For instance, the warrant itself, which contained the Officer's "opinion" that he thought Defendant was the driver, was introduced without objection by Defendant. And Defendant's counsel asked the Officer extensively about his opinion statement *contained in the warrant* that he believed that Defendant was the driver. Accordingly, I do not think it was prejudicial that the jury heard the Officer testify at trial to the same thing that they were allowed to know through the warrant itself, that the Officer believed at the time he applied for the search warrant that Defendant was the driver. Further, I do not believe that the Officer's "opinion" that he thought Defendant was driving the moped was as significant as the testimonies – which involved opinions requiring more intricate analysis – in the cases cited by the majority which were found to be prejudicial.