IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-746

Filed: 6 October 2020

Buncombe County No. 17 CRS 088632

STATE OF NORTH CAROLINA

v.

RICHARD IGNACIO MARTINEZ, Defendant.

Appeal by Defendant from judgment entered 31 July 2018 by Judge David L. Hall in Buncombe County Superior Court. Heard in the Court of Appeals 27 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General David L. Gore, III, for the State.

William D. Spence for defendant-appellant.

MURPHY, Judge.

The trial court did not err in denying Defendant's motion to dismiss a driving while impaired charge where, in addition to evidence Defendant was driving a vehicle on a North Carolina highway, the State presented evidence showing his alcohol concentration was .09 g/210L after the relevant traffic stop and arrest.

The trial court did not commit plain error by admitting into evidence Defendant's intended destination at the time of driving while impaired when, in light of the evidence presented, the reference did not have a probable impact on the jury's finding of guilt.

BACKGROUND

On 30 July 2017, Highway Patrol Trooper Keith Brown ("Brown") "activate[d a] radar device" to register Richard Ignacio Martinez ("Defendant") driving a black Nissan Frontier at 82 miles per hour in an area on I-240 in Buncombe County with a posted speed limit of 55 miles per hour. Brown pulled Defendant over, approached the vehicle, and noticed Defendant's eyes were glassy and his breath had a strong odor of alcohol. Defendant claimed he consumed two beers earlier that day. Brown asked Defendant where he was driving so fast, and Defendant stated he was hurrying to make it to Treasure Club, which Brown knew to be a strip club. Brown asked Defendant to exit the vehicle, administered numerous standardized field sobriety tests, and observed signs of Defendant's impairment. Brown asked Defendant to blow into the Alco FST IV device, a portable roadside instrument used to detect the presence of alcohol in an individual's breath. On 30 July 2017, Brown received training on properly using the device, as well as "perform[ing] all the necessary maintenance and required accuracy checks on th[e] device." When the device indicated Defendant's breath contained alcohol on two tests, Brown arrested

Defendant, transported him to the Buncombe County Jail, and administered an Intoxalyzer test, which produced a "test ticket" and "reported [Defendant's] alcohol concentration was .09." Defendant was cited for driving while impaired.

At trial, the State introduced Exhibit 3 into evidence, which was "the Intox[alyzer] ECIR II subject test ticket" for Defendant's alcohol concentration test. Exhibit 3, admitted into evidence and published to the jury, showed a printout of the Intoxalyzer ECIR II's finding of ".09 g/210L."

Intox EC/IR-II: Subject Test

BUNCOMBE COUNTY BUNCOMBE COUNTY JAIL
100

Serial Number: *008697*
Test Date: *07/30/2017*

Citation Number: *6742698-3*
Subject's Name: *MARTINEZ, RICHARD I*
Subject's Date of Birth: *07/05/1995*
Subject's Sex: *Male*
Driver's License State: *GA*
Driver's License Number: *059922594*

Analyst's Name: *BROWN, KEITH J*
Permit Number: *26081E*
Effective:
03/01/2017-03/01/2019

Officer's Name: *BROWN, KEITH J*
Type of Agency: *SHP*
Agency: *STATE HIGHWAY PATROL*
Test Type: *Breath Test*

Lot Number: AG716202
Exp Date: 06/11/2019

Test	g/210L	Time
DIAG	Pass	2:55am
AIR BLK	.00	2:56am
ACCY CHK	.08	2:57am
AIR BLK	.00	2:58am
SUB TEST	.09	2:59am
AIR BLK	.00	3:00am
SUB TEST	.09	3:01am
AIR BLK	.00	3:03am

Reported AC: .09 g/210L

Upon the admission and publication of Exhibit 3, Brown testified "[Defendant's] reported alcohol concentration was .09." Brown was the only witness to testify at trial and explained how the Intoxalyzer ECIR II functioned, the regular maintenance of the machine, and it was functioning properly on the night of Defendant's arrest. Brown testified he is "a chemical analyst . . . certified to operate the Intoxalyzer ECIR II . . . breath test instrument."

After the State rested, Defendant moved to dismiss and argued the State failed to present sufficient evidence to convict Defendant of driving while impaired. The trial court denied the motion and Defendant did not present any evidence. Defendant renewed his motion and the same was denied. The trial court instructed the jury using Pattern Jury Instruction Crim. 270.20A; specifically, the jury was required to find "that at the time [Defendant] was driving the vehicle, [Defendant] had consumed sufficient alcohol that at any relevant time after the driving [Defendant] had an alcohol concentration of .08 or more grams of alcohol per 210 liters of breath" in order to convict Defendant of driving while impaired. N.C.P.I.--Crim. 270.20A (2019). The jury convicted Defendant of driving while impaired and the trial court entered judgment with a suspended sentence.

Defendant appeals his conviction of driving while impaired under N.C.G.S. § 20-138.1. He asserts two issues on appeal. First, Defendant argues the trial court erred in denying his motion to dismiss at the close of evidence because there was not

sufficient evidence of Defendant driving under the influence with an alcohol concentration of .08 or more grams of alcohol per 210 liters of breath. Second, Defendant argues the trial court plainly erred by allowing the State to present evidence to the jury he was driving to a "strip club" at the time of the traffic stop.

ANALYSIS

A. Motion to Dismiss

1. Standard of Review

We review the "trial court's denial of [Defendant's] motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When ruling on a defendant's motion to dismiss, the trial court must determine whether [the State presented sufficient] evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.*; *see* N.C.G.S. § 15A-1227 (2019). To be sufficient, the State must present "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).

"As always, [in our review of a ruling on] a motion to dismiss, we must view the evidence in the light most favorable to the [S]tate and allow the [S]tate every reasonable inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980).

2. Sufficient Evidence

Defendant argues the trial court erred in denying his motion to dismiss due to the State's failure to present evidence that, at the time of driving, his alcohol concentration was ".08 or more grams of alcohol per 210 liters of breath." Specifically, Defendant claims the State failed to prove this by not including the specific language "grams of alcohol per 210 liters of breath" in its presentation of the evidence. Defendant concedes State's Exhibit 3 shows a printout of the Intoxalyzer ECIR II's finding of ".09 g/210L," but argues the lack of an explanation to the jury resulted in their not receiving evidence that ".09 actually meant .09 grams of alcohol per 210 liters of breath."

N.C.G.S. § 20-138.1 provides in relevant part:

> (a) Offense.--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:
>
> . . .
>
> (2) *After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more*. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]

N.C.G.S. § 20-138.1 (2019) (emphasis added).

N.C.G.S. § 20-4.01 defines "Alcohol Concentration" as "[t]he concentration of alcohol in a person, expressed either as: [g]rams of alcohol per 100 milliliters of blood; [or g]rams of alcohol per 210 liters of breath." N.C.G.S. § 20-4.01(1b) (2019).

Here, to survive Defendant's motion to dismiss, the State was required to present sufficient evidence of the following elements: (1) Defendant drove a motor vehicle; (2) upon a highway within North Carolina; and (3) when Defendant's alcohol concentration was .08 or more. *See* N.C.G.S. 20-138.1(a)(2) (2019). A trial court properly declines to dismiss a defendant's driving while impaired charge when the State presents sufficient evidence of those three elements. *See State v. Marley*, 227 N.C. App. 613, 616-17, 742 S.E.2d 634, 636-37 (2013). Defendant makes no argument on appeal regarding the first two elements and instead focuses on the third element, arguing the State's evidence of Defendant's relevant alcohol concentration level was insufficient due to a lack of reference to grams of alcohol per 210 liters of breath.

Viewing the evidence in the light most favorable to the State, State's Exhibit 3 provided sufficient evidence for the jury to determine the third element of the driving while impaired charge was met—"that at any relevant time after the driving [Defendant] had an alcohol concentration of .08 or more grams of alcohol per 210 liters of breath." The printout of the Intoxalyzer ECIR II's finding of ".09 g/210L" in State's Exhibit 3, when viewed in the light most favorable to the State, was sufficient evidence to support the third element of driving while impaired. Even absent an

explanation to the jury of what the quantities referred to in State's Exhibit 3 meant, the State provided sufficient evidence of each element of the charge and that Defendant perpetrated the offense, upon which a reasonable juror could find Defendant guilty. The evidence was sufficient to show Defendant's alcohol concentration was .09 grams of alcohol per 210 liters of breath, and the trial court did not err in denying Defendant's motion to dismiss.

B. Plain Error

1. Standard of Review

"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 [R]ecord, the error had a probable impact on the jury's finding" of a defendant's guilt. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted). 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) (reaffirming the plain error standard from *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). "[P]lain error is to be applied cautiously and only in the exceptional case, [and] the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 564, 819 S.E.2d at 371 (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

"[T]he . . . plain error standard of review applies only when the alleged error is unpreserved . . . [and] the defendant must specifically and distinctly contend that the alleged error constitutes plain error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (internal citations and quotation marks omitted); *see also* N.C. R. App. P. 10(a)(4) (2020).

"Generally[,] evidence is relevant if it has *any* logical tendency, however slight, to prove a fact in issue in the case. On the other hand, evidence which has no tendency to prove a fact in issue in the case is inadmissible." *State v. Perry*, 298 N.C. 502, 510, 259 S.E.2d 496, 501 (1979) (internal citations omitted); *see* N.C.G.S. § 8C-1, Rules 401-02 (2019). "Whether evidence is relevant is a question of law, [and] we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010).

2. Prejudice

Defendant argues the trial court plainly erred by allowing into evidence references to his destination on the night of his DWI. According to Defendant, the State referenced the "Treasure Club," "Gentleman's Club," and "strip club" to prejudice the jury against him. He argues the admission into evidence of those references was plain error, because the evidence was irrelevant under N.C.G.S. § 8C-1, Rules 401 and 402, and in the alternative improperly prejudicial under N.C.G.S. § 8C-1, Rule 403.

At trial, the strip club was referenced five times—once in opening statements, three times in Brown's testimony, and once in the Driving While Impaired Report ("DWIR"). The strip club references at issue were as follows:

> [Statement 1 – Opening Statements]
>
> [State:] [Defendant t]ells [Brown] that he's headed to Treasure Club is why he's driving so fast. He wants to get there before they close. In fact, you'll hear him mention a couple times. [Defendant] seems more concerned about getting to the strip club than he does with this investigation.
>
> [Statement 2]
>
> [Brown:] I asked him where he was coming from. I don't have it written down on here. To the best of my memory, I want to say I believe he said Waynesville, but I'm not for sure on that, but he did advise me that they were heading to the Treasure Club or the Gentleman's Club on Swannanoa River Road.
>
> [Statement 3]
>
> [Brown:] [Defendant] seemed to be very concerned about making it to his final destination, because he questioned me several times about how long I was going to take . . . . So that -- to me that made me feel as if where they were trying to -- or where he was trying to go was more important than the potential DWI charges that he could be looking at.

[Defense Counsel:] Object to that statement, your Honor.

THE COURT: Sustained. Disregard [Brown's] opinion in that regard, Ladies and Gentlemen.

[Statement 4]

[Brown] He told me he was going to the Gentleman's Club.

[DWIR – State's Exhibit 4]

[Brown:] I asked [Defendant] where he was going in such a hurry and he advised me to the Treasure Club (Gentleman's Club)[.] He advised me he was just trying to make it before 2:30 otherwise they wouldn't let them in. [Defendant] advised me he was the DD so that's why he only drank two beers and was driving so fast. [Defendant] asked me how long this was going to take and if they would still be able to make it to the Treasure Club. . . . [Defendant] advised me the backseat passenger had not drank anything because his wife would be mad if she knew he went to the strip club. [Defendant] asked me if I could let his buddy drive his truck and they just go onto [sic] the strip club.

On appeal, Defendant makes a specific and distinct contention that the references to Defendant going to a strip club are plain error.

Upon reviewing the entirety of the Record, even if the references were irrelevant, the evidence that Defendant was on his way to a "strip club" when pulled

over was not so prejudicial as to have a probable impact on the jury's guilty verdict, such that it probably would have reached a different result if the evidence had been excluded. The possibility that evidence casts a defendant in a negative light to the jury does not mean the evidence is unduly prejudicial. *See State v. Thompson*, 254 N.C. App. 220, 224-25, 801 S.E.2d 689, 693-94 (2017) (holding the admission of a photograph of the defendant "making the gesture known as 'the middle finger' . . . [did not have] a probable impact on the jury's verdict" and was not plain error). As analyzed above, the State presented evidence (1) Defendant drove a car (2) on a North Carolina highway (3) when Defendant's alcohol concentration was .08 or more. Evidence of Defendant's destination while he drove his car on a North Carolina highway with an alcohol concentration of .08 or more is not unduly prejudicial when it casts Defendant in a possibly negative light.

Further, Defendant does not give reasons

> on why this is an exceptional case or why this [alleged error] will seriously affect the fairness, integrity, or public reputation of judicial proceedings. . . . Without any information on this portion of plain error review, we cannot impart any meaningful review for plain error. Thus, this issue is taken as abandoned and is dismissed.

State v. Patterson, 839 S.E.2d 68, 72 (N.C. Ct. App. 2020). Any error in admitting references to Defendant going to a strip club does not rise to plain error.

CONCLUSION

The State presented sufficient evidence concerning each element of the driving while impaired charge. When viewed in the light most favorable to the State, Defendant's alcohol concentration as shown on the Intoxalyzer ECIR II's reading of ".09 g/210L" was sufficient to survive Defendant's motion to dismiss.

The trial court did not commit plain error by admitting into evidence references to Defendant driving to a strip club, as these references did not have a probable impact on the jury's verdict.

AFFIRMED.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).