An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-529

Filed: 2 January 2018

Forsyth County, Nos. 15 CRS 58406 & 7065

STATE OF NORTH CAROLINA

v.

DELEXANDER MANSON HILL, Defendant.

Appeal by Defendant from judgment entered 27 September 2016 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Marie Hartwell Evitt, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Delexander Manson Hill ("Defendant") appeals following jury verdicts convicting him of felonious operating a motor vehicle to elude arrest, driving with license revoked, resisting a public officer, and attaining habitual felon status. Following the verdicts, the trial court sentenced Defendant to 120 to 156 months imprisonment. On appeal, Defendant argues the trial court erred by allowing lay

opinion testimony regarding the amount of damage to Defendant's vehicle and by applying the wrong standard to measure damages. Defendant also contends the trial court erred in failing to arrest judgment for the conviction of driving with license revoked. We find no error in part, and vacate and remand in part.

I. Factual and Procedural History

On 14 March 2016, a Forsyth County grand jury indicted Defendant for fleeing to elude arrest with a motor vehicle, driving with his license revoked, and resisting a public officer. For the charge of fleeing to elude arrest, the State alleged three aggravating factors: (1) Defendant drove recklessly; (2) Defendant drove negligently, which led to an accident causing property damage in excess of $1,000; and (3) Defendant drove under a revoked driver's license. On 26 September 2016, the Forsyth County Superior Court called Defendant's case for trial. Defendant pleaded not guilty to all charges. The evidence presented at trial tended to establish the following.

The State called Corporal J.B. Keltner ("Officer Keltner") of the Winston-Salem Police Department. On 9 September 2015, Officer Keltner was patrolling when he encountered Defendant traveling in the opposite direction at a speed of forty-five miles per hour, in a thirty-five mile per hour zone. Officer Keltner then pursued Defendant and turned on his lights, initiating a traffic stop. Defendant pulled his vehicle over to the side of the road and Officer Keltner approached the passenger side

of the vehicle. Officer Keltner then asked Defendant for his driver's license and vehicle registration, which Defendant did not have; but he provided Officer Keltner with his name, address, and date of birth.

Officer Keltner then ran Defendant's information through the North Carolina Department of Motor Vehicles ("NCDMV") database. The result showed Defendant's license was suspended and Defendant had an outstanding warrant for his arrest. After confirming the validity of the warrant, Officer Keltner re-approached Defendant's car and asked him to exit the vehicle. Defendant opened the door as if to exit, but then slammed the door and rapidly sped away. Officer Keltner testified Defendant "kicked up a cloud of dust right there at the scene . . . and he fishtailed slightly . . . ." He observed Defendant driving in the middle of a dual-lane street, and accelerating through a stop sign before making a left turn. Officer Keltner returned to his patrol vehicle to follow Defendant. He estimated Defendant was driving fifty miles per hour in a thirty-five mile per hour zone.

As Officer Keltner approached the next intersection, he noticed Defendant's taillights off the right side of the road, in the yard of a residence. Officer Keltner then saw Defendant exit the vehicle and flee on foot. Officer Keltner started to pursue Defendant on foot, but another officer, who arrived for back-up, told him to wait for a K-9 unit to respond. The K-9 unit did not locate Defendant that night.

Officer Keltner testified when he initially stopped Defendant's vehicle he noticed a dent in the middle of the back bumper and the trunk of the vehicle. Yet, upon returning to Defendant's vehicle after attempting to locate him on foot, he noticed "very significant damage to the front of [the] vehicle most of which was concentrated from the center of the vehicle over to the right front corner and quarter panel of the vehicle."

As part of his duties, Officer Keltner often completes wreck reports and estimates damage to vehicles. Based on his experience as an officer as well as his personal experience, Officer Keltner estimated the value of the damage to Defendant's vehicle was approximately five to six thousand dollars. At trial, Defendant objected to Officer Keltner's testimony on the theory he was not a qualified expert. The trial court overruled Defendant's objection. Defendant further objected to Officer Keltner's lay testimony regarding damages. The trial court again overruled Defendant's objection.

Following the incident, Officer Keltner completed an affidavit for seizure and impounding, as well as a probable cause affidavit, and in both he estimated the damage to be three thousand dollars. In forming his opinion as to the value of damage, Officer Keltner consulted a report completed by another officer at the time of the incident. This report estimated the damage to be one thousand, five hundred dollars.

On cross examination, Officer Keltner admitted he did not know the vehicle's fair market value, its mileage, the type of engine, or other details about the condition of the vehicle. Likewise, he did not know the cost to repair the vehicle. The State rested its case, and Defendant chose not to testify or present any evidence. The jury found Defendant guilty of all charges, as well as having obtained the status of habitual felon. The trial court consolidated Defendant's convictions into one judgment, and sentenced him to a minimum of 120 and a maximum of 156 months of imprisonment. After the entry of judgment, Defendant gave oral notice of appeal in open court.

II. Analysis

On appeal, Defendant first argues the trial court erred by applying the wrong standard to measure damages, and by allowing Officer Keltner to testify regarding the value of the damage to Defendant's vehicle. We find no error.

As an initial matter, the State contends Defendant failed to properly preserve this issue for appeal because he only objected to Officer Keltner testifying as an expert and the State did not tender him as an expert. To preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1)

(2017). Here, although Defendant initially objected on the basis the witness was not qualified to testify as an expert, he later objected and stated:

> If they are offering it as lay testimony then he is in no better position than the jury to make these determinations and they can look at the vehicle and they can look at the perceived damage to the front right corner . . . and they can make their own determination as to the value.

We conclude Defendant properly preserved for review the issue of whether Officer Keltner could offer lay testimony concerning the amount of damages.

"[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), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Pursuant to the North Carolina Rules of Evidence, a lay witness may testify in the form of "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. Gen. Stat. § 8C-1, Rule 701 (2015). However, "a witness, whether an expert or lay witness, 'may not testify that a particular legal conclusion or standard has or has not been met, ...'" *State v. West*, 202 N.C. App. 479, 484, 689 S.E.2d 216, 219 (2010) (quoting *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986).

Defendant argues the trial court erred in allowing Officer Keltner to testify regarding the damages, because he did not have specialized knowledge in valuing the damage of Defendant's vehicle. We decline to address this argument, as we conclude below Defendant did not suffer prejudice. However, we note our Supreme Court's recent decision in *United Community Bank v. Wolfe* is informative. There the court held in the context of a summary judgment motion concerning application of the North Carolina anti-deficiency statute, merely "asserting an unsubstantiated opinion regarding the foreclosed property's value is insufficient." ___ N.C. ___, ___, 799 S.E.2d 269, 273 (2017). The same principle is true concerning the value of damages in an automobile accident—an unsubstantiated opinion is insufficient.

Even *assuming arguendo* Officer Keltner's testimony was inadmissible, Defendant did not suffer any prejudice. Defendant was convicted of felonious operation of a motor vehicle to elude arrest in violation of N.C. Gen. Stat. § 20-141.5. This statute provides:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> . . . .
>
> (3) Reckless driving as proscribed by G.S. 20-140.

> (4) Negligent driving leading to an accident causing:
>
> a. Property damage in excess of one thousand dollars ($1,000); or
>
> b. Personal injury.
>
> (5) Driving when the person's drivers license is revoked.
>
> . . . .

N.G. Gen. Stat. § 20-141.5 (2015). Here, the State alleged three aggravating factors in support of Defendant's felony conviction: (1) Defendant drove recklessly; (2) Defendant drove negligently, which led to an accident causing property damage in excess of $1,000; and (3) Defendant drove under a revoked driver's license. Because the statute requires proof of two or more aggravating factors in order to enhance punishment from a misdemeanor to a felony, the State needed only to prove two of the three factors. *State v. Davis*, 163 N.C. App. 587, 590, 594 S.E.2d 57, 60 (2004), *disc. review denied*, 358 N.C. 547, 599 S.E.2d 564 (2004); N.C. Gen. Stat. § 20-141.5(b) (2015).

Here, the evidence tends to show Defendant drove with his license revoked. In order to prove Defendant drove with his license revoked in violation of N.C. Gen. Stat. § 20-28(a) "the State must prove beyond a reasonable doubt (1) the defendant's operation of a motor vehicle (2) on a public highway (3) while his operator's license is revoked." *State v. Richardson*, 96 N.C. App. 270, 271, 385 S.E.2d 194, 195 (1989). The State also must demonstrate "the defendant had 'actual or constructive knowledge of the . . . revocation in order for there to be a conviction under this

statute.'" *Id.* (quoting *State v. Atwood*, 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976)). "The State satisfies its burden of proof of a G.S. 20-28 violation when, 'nothing else appearing, it has offered evidence of compliance with the notice requirements of G.S. 20-48 because of the presumption that he received notice and had such knowledge.'" *State v. Curtis*, 73 N.C. App. 248, 251, 326 S.E.2d 90, 92 (1985) (quoting *State v. Chester*, 30 N.C. App. 224, 227, 226 S.E.2d 524, 526 (1976)). N.C. Gen. Stat. § 20-48 provides:

> [N]otice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. The giving of notice by mail is complete upon the expiration of four days after such deposit of such notice. . . . Proof of the giving of notice in any such manner pursuant to this section may be made by a notation in the records of the Division that the notice was sent to a particular address, . . . and the purpose of the notice. . . .

N.C. Gen. Stat. § 20-48(a) (Supp. 2016). Here, there was sufficient evidence to show Defendant drove with his license revoked. The evidence also tended to show Defendant drove his vehicle on several public roads in Forsyth County. The State submitted into evidence a certified copy of Defendant's driving record which indicates Defendant's license was permanently suspended on 9 December 2010. The State also submitted into evidence notices of revocation or suspension which were addressed to Defendant at the same address indicated in his driving record. The notices are

accompanied by an affidavit certifying they were mailed to Defendant on the date indicated in the notice. Thus, the notices of revocation meet the requirements of the statute and Defendant's receipt of the notices is presumed.

There was also sufficient evidence to demonstrate Defendant drove recklessly. N.C. Gen. Stat. § 20-140 delineates the offense of reckless driving as follows:

> (a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.
> (b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

N.C. Gen. Stat. § 20-140 (2015). Here, the evidence tended to show Defendant drove recklessly. Officer Keltner estimated Defendant drove fifty miles per hour in a thirty-five mile per hour zone. Defendant also "kicked up a cloud of dust . . . fishtailed slightly towards the right near where [another officer] was standing . . . and accelerated towards [a] stop sign . . . ." He drove in the middle of a dual-lane street, and he failed to stop at a stop sign. Therefore, even assuming the officer's testimony regarding the value of damage to the vehicle was inadmissible, the State presented sufficient evidence to prove two of the three aggravating factors: Defendant drove recklessly and his license was revoked. Thus, Defendant's conviction was properly elevated from misdemeanor to felony fleeing to elude arrest.

Defendant next argues the trial court erred by failing to arrest judgment for his conviction of driving while license revoked. Defendant contends the double jeopardy clause bars the trial court from sentencing him for both the offense of driving while license revoked and felonious fleeing to elude arrest, in which driving while license revoked was an aggravating factor.

"As a general rule, 'constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.'" *State v. Mulder*, 233 N.C. App. 82, 86, 755 S.E.2d 98, 101 (2014) (quoting *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010)). Additionally, to preserve an issue for review our appellate rules state a party must make "a timely request, objection, or motion [at trial], stating the specific grounds for the [desired] ruling." N.C. R. App. P. 10(a)(1) (2017). "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008).

Yet, Defendant argues the trial court's failure to arrest judgment is a fatal defect and thus, may be raised for the first time on appeal. Defendant relies on *State v. Sellers*, in which our Supreme Court stated:

> [a] motion in arrest of judgment predicated upon some fatal error or defect appearing on the face of the record proper may be made at any time in any court having jurisdiction of the matter. This is true even though the motion is made for the first time . . . at the hearing of the appeal from the judgment of the Superior Court.

273 N.C. 641, 645, 161 S.E.2d 15, 18 (1968). However, we considered this issue in *Mulder* and held "[a] double jeopardy problem is *distinct* from a 'fatal flaw which appears on the face of the record.'" *Mulder* at 86, 755 S.E.2d at 101 (quoting *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990)). This Court concluded "Defendant's double jeopardy argument cannot be raised for the first time on appeal on a motion for arrest of judgment because a double jeopardy problem does not constitute a fatal defect on the face of the record." *Id.* at 87, 755 S.E.2d at 101.

Thus, by failing to make a motion for arrest of judgment before the trial court, Defendant waived this issue for appellate review. Likewise, in *Mulder* the defendant did not raise the double jeopardy issue at trial, yet this Court invoked Rule 2 of the North Carolina Rules of Appellate Procedure, and reviewed the issue. *Id.* at 87, 755 S.E.2d at 101-02. Rule 2 provides "[t]o prevent manifest injustice to a party, . . . either court of the appellate division may, . . . suspend or vary the requirements or provisions of any of [the appellate] rules in a case pending before it . . . ." N.C. R. App. P. 2 (2017). Our Supreme Court has stated "Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). After careful review of Defendant's argument, we choose to exercise our discretion and invoke Rule 2 in order to prevent manifest injustice.

In *Mulder* the defendant "was convicted of speeding, reckless driving, and felony speeding to elude arrest based on the aggravating factors of speeding and reckless driving." *Id.* at 89, 755 S.E.2d at 102-03. We determined the aggravating factors constituted elements of speeding to elude arrest, therefore the defendant "was twice subjected to punishment for the 'same offense' . . . ." *Id.* at 91, 755 S.E.2d at 104. We held the defendant "was unconstitutionally subjected to double jeopardy" and arrested judgment and remanded the case for resentencing. *Id.* at 94-95, 755 S.E.2d at 106.

Here, because the aggravating factors constitute elements of fleeing to elude arrest, we conclude Defendant was subjected to double jeopardy when he was separately charged with driving while license revoked and felony fleeing to elude arrest. Therefore, we vacate Defendant's judgment and remand for resentencing.

III. Conclusion

For the reasons set forth above, we find no error in part, but vacate Defendant's judgment and remand the case to the trial court for resentencing.

JUDGMENT ARRESTED; REMANDED FOR RESENTENCING.

Judges STROUD and TYSON concur.

Report per Rule 30(e).