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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-615

Filed: 6 March 2018

Wake County, No. 15 CRS 6349

STATE OF NORTH CAROLINA

v.

JAMAR MEXIA DAVIS

Appeal by defendant from judgment entered 17 August 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 15 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M.A. Kelly Chambers, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

DAVIS, Judge.

Jamar Mexia Davis (“Defendant”) appeals from his convictions for transporting an open container of alcoholic beverage after consuming alcohol and driving while license revoked. After a thorough review of the record and applicable law, we affirm his convictions.

Factual and Procedural Background

The State presented evidence tending to establish the following facts: In the early morning hours of 4 October 2015, Officers Michael Simon and Kevin Pena — police officers employed by North Carolina State University — were patrolling the university campus in Raleigh, North Carolina. As they drove down Hillsborough Street, the officers noticed a gold Mercedes Benz S430 stopped on William Moore Drive. Because the vehicle was in the middle of the road, Officer Simon initiated a traffic stop.

As he approached the vehicle, Officer Simon observed that the car's brake lights and engine were on. He also saw Defendant slumped over the steering wheel of the vehicle. Officer Simon knocked on the driver's side window three times before Defendant woke up. Although Officer Simon instructed Defendant to turn the car off, he instead placed the vehicle in park. Defendant then attempted to exit the vehicle, but Officer Simon instructed him to remain seated inside the car.

Officer Simon asked Defendant for his license, and Defendant responded, "What's going on?" Upon speaking with Defendant, Officer Simon "noticed that his eyes were bloodshot and glassy, his words were slurred and mumbled, . . . the odor of alcohol [was] coming from his breath, and on the front of his shirt there was either drool or vomit." Officer Simon asked Defendant to step out of the car, and upon looking inside the car, he observed that in the center console was a red cup that

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contained “a small amount of liquid in it” and “smelled of alcohol.” On the floorboard of the passenger seat, there were “two . . . bottles of Johnny [sic] Bootlegger[,]” one of which had been opened. In the backseat of the vehicle, there was also “a 24 pack of Coronas” that had also been opened and from which two bottles were missing. After obtaining Defendant’s driver’s license, Officer Simon ran a search of Defendant’s license number and learned that his license had been revoked.

On 15 December 2015, a grand jury indicted Defendant for habitual driving while impaired, driving while license revoked, and transporting an open container of alcoholic beverage after consuming alcohol in violation of N.C. Gen. Stat. § 20-138.7(a). A jury trial was held beginning on 15 August 2016 before the Honorable Donald W. Stephens in Wake County Superior Court. Officers Simon and Pena testified for the State along with two other North Carolina State University officers.

Defendant testified on his own behalf. During direct examination, he stated that the car in which he was found belonged to his friend, Nick. He testified that Nick had driven him to a friend’s party and on the way the two of them stopped at a gas station to buy alcohol. After purchasing the alcohol, Nick and Defendant had an argument that resulted in Nick leaving Defendant alone in the car. Because Defendant was cold, he eventually moved into the driver’s seat to turn the vehicle’s heater on. On cross examination, Defendant admitted that he had taken “a few sips”

of a bottle of Johny Bootlegger but denied that he had consumed any of the Coronas or the alcohol contained in the red cup.

On 17 August 2016, the jury returned a verdict finding Defendant guilty of driving while license revoked and of the offense under N.C. Gen. Stat. § 20-138.7. The jury was deadlocked on the charge of driving while impaired, and the court declared a mistrial as to that charge.

The trial court consolidated Defendant's convictions and sentenced him to 20 days imprisonment. Defendant gave oral notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred by (1) sentencing him for a greater offense than that for which he was convicted; and (2) denying his request to view the personnel records of his arresting officers. We address each argument in turn.

I. Conviction Based on N.C. Gen. Stat. § 20-138.7

N.C. Gen. Stat. § 20-138.7 establishes two separate offenses related to the operation of a vehicle containing an open container of alcohol — one a misdemeanor and one an infraction. First, the offense of transporting an open container of alcoholic beverage after consuming alcohol (the “misdemeanor offense”) — the offense for which Defendant was indicted — contains four elements: (1) defendant was driving a motor vehicle (2) upon a highway or right-of-way of a highway (3) while an alcoholic

beverage was in the passenger area in other than the manufacturer's unopened original container and (4) drove while consuming alcohol or while alcohol remained in the defendant's body. N.C. Gen. Stat. § 20-138.7(a) (2017).

Second, the offense of possession of an open container of alcoholic beverage (the "infraction offense") consists of three elements: (1) defendant was in the passenger area of a motor vehicle (2) upon a highway or the right-of-way of a highway (3) and while in the passenger area, defendant either possessed an alcoholic beverage in other than the manufacturer's unopened original container or consumed an alcoholic beverage. N.C. Gen. Stat. § 20-138.7(a1).

Thus, the misdemeanor offense requires evidence that the defendant drove a motor vehicle containing an open container of alcohol and either consumed alcohol while driving or drove while alcohol remained in his body. The infraction offense, conversely, merely requires evidence that the defendant was in the passenger area of the vehicle while possessing an open container of alcohol or consuming an alcoholic beverage while inside the vehicle. N.C. Gen. Stat. § 20-138.7(a), (a1).

At trial, the court instructed the jury, in pertinent part, as follows:

And, finally, with regard to the charge of possession of an open container of an alcoholic beverage in the passenger section of the vehicle, I instruct you the defendant has been charged with possession of an open container of an alcoholic beverage in a vehicle while driving. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

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First, that the defendant was driving a motor vehicle. You will recall my previous definition of driving;

Second, that this vehicle was being driven upon a street or highway within the State;

And, third, that defendant possessed in the passenger area of that vehicle an open container of an alcoholic beverage. If the seal on a container of an alcoholic container has been broken, the container is opened within the meaning of the law.

So if you find from the evidence beyond a reasonable doubt that on or about the date alleged the defendant was driving a motor vehicle on a street or highway within this state and that he possessed in the passenger area of that vehicle an open container of an alcoholic beverage, then it would be your duty to return a verdict of guilty as to this charge. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to this charge.

Thus, the trial court failed to instruct the jury that it was also required to find that Defendant had driven a vehicle while consuming alcohol or while alcohol remained in his body — which, as noted above, is an element of the misdemeanor offense pursuant to N.C. Gen. Stat. § 20-138.7(a). Given this omission in the jury charge, Defendant argues that the trial court committed a sentencing error by sentencing him for the *misdemeanor* offense pursuant to N.C. Gen. Stat. § 20-138.7(a) despite having instructed the jury on the elements of the *infraction* offense pursuant to N.C. Gen. Stat. § 20-138.7(a1). While the State does not dispute that the trial court

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omitted an essential element under N.C. Gen. Stat. § 20-138.7(a) in its charge to the jury, it asserts that the issue Defendant has raised in this appeal constitutes an instructional error rather than a sentencing error.

We agree with the State that Defendant's argument is more properly characterized as an instructional error. The essence of Defendant's entire argument on this issue is that the trial court erred by failing to instruct the jury as to an essential element of his charged offense. We note that in several cases in which a defendant has raised analogous errors on appeal, our courts have reviewed the issue as a challenge to the trial court's jury instructions. *See, e.g., State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (trial court's failure to instruct jury on elements of first-degree rape as was charged in indictment constituted plain error); *State v. Bowen*, 139 N.C. App. 18, 25, 533 S.E.2d 248, 253 (2000) (trial court's instruction on elements of statutory sexual offense rather than first degree sexual offense as charged in indictment was plain error).

Because Defendant did not object at trial to the trial court's jury instructions, his only option on appeal was to seek review under the plain error doctrine. *See* N.C. R. App. P. 10(a)(2) ("A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict"). However, Defendant has failed to specifically and distinctly allege plain error in this appeal. *See State v. Burton*, __

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N.C. App. __, __, 796 S.E.2d 65, 68 (2017) (holding that defendant was not entitled to plain error review due to his failure to specifically and distinctly allege plain error in his appellate brief). Accordingly, Defendant has waived his right to plain error review.

Pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, this Court possesses the power to suspend the Rules of Appellate Procedure “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest” or where a case presents “exceptional circumstances.” N.C. R. App. P. 2; *see State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (“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*.” (citation and quotation marks omitted)).

In the present case, Defendant has not requested that we invoke Rule 2. However, even had he done so, we do not believe this case presents the extraordinary circumstances necessary for application of Rule 2. While admittedly the trial court erred in failing to instruct the jury that it was required to find that Defendant was driving while consuming alcohol or while alcohol remained in his body, the State’s evidence established that Defendant was found sitting in a car with the ignition on and admitted to having taken “sips” of whiskey within the two hours before he was found by officers. Moreover, when law enforcement officers found him, he had

bloodshot and glassy eyes. Thus, we decline to invoke Rule 2 *sua sponte* to address Defendant's argument.

II. Personnel Records

The final issue raised by Defendant concerns the personnel records of the officers involved in his case. At Defendant's request, the trial court conducted a review of these records and determined that they contained no material evidence favorable to him. Defendant now requests that this Court conduct its own *in camera* review of these records.

We have held that "[a] defendant is constitutionally entitled to all exculpatory evidence, including impeachment evidence, in the possession of the State. The State, however, is under a duty to disclose only those matters in its possession and is not required to conduct an independent investigation to locate evidence favorable to a defendant." *State v. Lynn*, 157 N.C. App. 217, 221-22, 578 S.E.2d 628, 632 (2003) (citations and quotation marks omitted). "On appeal, we examine the sealed records to determine if they contain information that is favorable and material to the defendant's guilt or punishment. This includes evidence adversely affecting the credibility of the State's witnesses." *State v. Scott*, 180 N.C. App. 462, 464, 637 S.E.2d 292, 293 (2006) (citation omitted), *disc. review denied*, 361 N.C. 367, 644 S.E.2d 560 (2007).

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Based upon our independent review of the records at issue, we are satisfied that no reasonable probability exists that the outcome of Defendant's trial would have been different had the personnel records been made available to him. *See Lynn*, 157 N.C. App. at 225, 578 S.E.2d at 634 (holding that trial court properly determined officer's personnel records did not contain exculpatory evidence).

Conclusion

For the reasons stated above, we affirm Defendant's convictions.

AFFIRMED.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).