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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-364

Filed: 17 April 2018

Mecklenburg County, No. 15CRS235569-70

STATE OF NORTH CAROLINA

v.

DONALD JAMESRAY JOHNSON, Defendant.

Appeal by defendant from judgment entered 3 November 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamara S. Zmuda, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

BERGER, Judge.

A Mecklenburg County jury found Donald JamesRay Johnson ("Defendant") guilty of driving while impaired and habitual impaired driving in November 2016. Defendant first argues on appeal that the trial court erred in denying his motion to dismiss the habitual impaired driving charge because the State failed to prove a prior

federal impaired driving charge was substantially similar to impaired driving offenses in North Carolina. Defendant also contends that the chemical analysis showing his blood alcohol concentration ("BAC") should not have been admitted because the device used to conduct the analysis was not properly maintained. We disagree.

Factual and Procedural Background

On October 2, 2015, Charlotte-Mecklenburg Police Officer Brittany Tysinger was dispatched to the scene of an accident involving two vehicles, one of which was driven by Defendant. Defendant informed Officer Tysinger that he had struck a concrete barrier and another vehicle in an attempt to avoid an accident. The apparent damage to the vehicles was inconsistent with the information provided by Defendant. While speaking with Defendant, Officer Tysinger observed that his speech was slurred and he had a strong odor of alcohol.

Officer Daniel Kennerly, a member of the Charlotte-Mecklenburg Police Department's DWI Task Force, was also at the accident scene. While Officer Kennerly spoke with Defendant, he noticed Defendant had a strong odor of alcohol; red, glassy eyes; was slow following his instructions; and had difficulty manipulating items in his hands.

Defendant admitted to drinking a 40-oz beer the afternoon before the accident. Officer Kennerly asked Defendant to perform field sobriety tests at the scene. Officer

Kennerly observed multiple clues of impairment during Defendant's performance on the horizontal gaze nystagmus test, walk-and-turn test, and one-legged stand test. This gave Officer Kennerly probable cause to arrest Defendant for impaired driving, and a subsequent breath test on the EC/IR II showed Defendant had a BAC of 0.20 grams of alcohol per 210 liters of breath.

Defendant was tried and convicted of impaired driving and habitual impaired driving. He was sentenced as an habitual offender to a term of eighteen to thirty-one months in prison. Defendant entered timely notice of appeal.

Analysis

I. Substantial Similarity

Defendant first contends the trial court erred in denying his motion to dismiss the habitual impaired driving charge. He argues that the State did not sufficiently prove substantial similarity between his 2010 federal conviction for impaired driving and the North Carolina offense of driving while impaired for the federal conviction to be used to convict him of habitual impaired driving. However, we must initially determine if Defendant properly preserved this argument for consideration on appeal.

"[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). "[M]atters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005) (citations and quotation marks omitted). "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." *Rolan v. N.C. Dep't of Agric. & Consumer Servs.*, 233 N.C. App. 371, 381, 756 S.E.2d 788, 794 (2014) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E.2d 836, 838 (1934)). "[T]he law does not permit parties to swap horses between courts in order to get a better mount [on appeal]." *Weil*, 207 N.C. at 10, 175 S.E.2d at 838.

"[W]here a theory argued on an appeal was not raised before the trial court, the argument is deemed waived on appeal." *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013) (citation, quotation marks, and brackets omitted). "[W]aiver . . . arises out of a party's failure to properly preserve an issue for appellate review." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194-95, 657 S.E.2d 361, 363 (2008). "[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." *Id.* at 195-96, 657 S.E.2d at 364.

Here, the State attempted to enter into evidence certified copies of three prior impaired driving convictions during the second phase of the trial. The trial court sustained Defendant's objection to introduction of a certified copy of his August 10,

2010 federal impaired driving conviction. However, a certified copy of Defendant's driving history was also admitted, which included the August 10, 2010 conviction for "driving while impaired" from the United States District Court for the Eastern District.

In his motion to dismiss at the close of the State's evidence at trial, Defendant argued the driving history presented by the State was "insufficient, as a matter of law, to be used to prove a conviction." Defendant unsuccessfully attempted to persuade the trial court that a certified copy of the judgment was required to sustain a conviction, not merely a copy of Defendant's driving history. Specifically, Defendant argued:

> Motion to dismiss, motion for insufficiency of the evidence. Please note our objections to the driving record being used for this purpose.
>
> And your Honor, I can argue, actually, on the motion to dismiss at the close of State's evidence. Your Honor, I, I think -- forgive me if I'm wrong, but I, I think that your Honor sees what the issue is here. I think that your Honor sees -- your Honor is aware of the judge -- the purported judgment. Your honor is aware of what's required in other types of cases that you've heard. You know the law. You know what is admissible. You know what's not.
>
> This driving record is insufficient, as a matter of law, to be used to prove a conviction. That's what judgments are for. These judgments that the State has produced, they leave no doubt. They leave no question. And they're independently verified. And they accurately and fully describe the defendant.
>
> This driving record describes -- lists his name, but then when you go to each, when you go to each individual conviction listed within the record, it says absolutely

> nothing about him. It doesn't say, you know, Donald, Donald Jamesray Johnson, date of birth 8/22/05, license number -- it doesn't say that. It doesn't say that at all.
>
> This driving record is insufficient as a matter of law. I'm asking that your Honor -- for the purpose that it's being offered for. The State, the State has not met its burden of production of evidence to send this to the jury. I'm asking your Honor to dismiss, to dismiss this charge based for insufficiency of the evidence.

At the close of all evidence, Defendant renewed his motion to dismiss. When asked to be heard, defense counsel stated, "Stand on the previous argument, your honor."

We note that Defendant attempts to "swap horses." Defendant's argument at trial concerned sufficiency of Defendant's driving history. Now on appeal, he contends the federal impaired driving conviction is not substantially similar to North Carolina's impaired driving offense. Defendant asserts that he is entitled to this better "mount" because his objection at trial was a general objection, thus preserving all arguments concerning sufficiency of the evidence.

It is correct that "[a] general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, thereby preserving the arguments for appellate review." *State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 531, *disc. review denied*, 369 N.C. 755, 799 S.E.2d 619 (2017). However, as this Court has stated, "[a] specific reference to one element

contrasts with cases in which a defense counsel makes a more generalized motion to dismiss for insufficiency of the evidence." *Id*.

Defendant's argument specifically focused on the accuracy and authenticity of the certified driving history, and the purported need for the State to produce a certified copy of the judgment for the federal impaired driving conviction. Because defense counsel failed to argue substantial similarity to the trial court, Defendant is not entitled to review by this Court. "Defendant's failure to argue the specific theory on appeal that was argued to the trial court has waived his right to appellate review on this issue." *State v. Golder*, ___ N.C. App. ___, ___, 809 S.E.2d 502, 509 (2018).

II. EC/IR II Maintenance

Defendant also argues that the State failed to prove that the EC/IR II instrument used to test Defendant's BAC had been maintained as required by North Carolina Department of Health and Human Services ("DHHS") rules. We disagree.

Evidence of the chemical analysis of a defendant's breath sample

> is admissible in any court or administrative hearing or proceeding if it meets both of the following requirements:
>
> (1) It is performed in accordance with the rules of the Department of Health and Human Services.
>
> (2) The person performing the analysis had, at the time of the analysis, a current permit issued by the Department of Health and Human Services authorizing the person to perform a test of the breath using the type of instrument employed.
>
> For purposes of establishing compliance with subdivision (b)(1) of this section, the court or administrative agency

> shall take notice of the rules of the Department of Health and Human Services. For purposes of establishing compliance with subdivision (b)(2) of this section, the court or administrative agency shall take judicial notice of the list of permits issued to the person performing the analysis, the type of instrument on which the person is authorized to perform tests of the breath, and the date the permit was issued.

N.C. Gen. Stat. § 20-139.1(b) (2017).

However, if a defendant objects to introduction of the breath analysis, the results are not admissible if the defendant demonstrates "preventive maintenance procedures required by the regulations of the [DHHS] had not been performed within the time limits prescribed by those regulations." N.C. Gen. Stat. § 20-139.1(b2)(2). DHHS preventive maintenance rules for the EC/IR II require, among other things, verification that "the ethanol gas canister is being changed before [the] expiration date, or the alcoholic breath simulator solution is being changed every four months or after 125 Alcoholic Breath Simulator tests, whichever occurs first." 10A N.C.A.C. 41B.0323(10) (2016).

At trial, Defendant objected to the introduction of the breath analysis on the grounds that the EC/IR II device used to test Defendant's breath sample was not in compliance with the preventive maintenance requirements of DHHS. Defendant questioned Officer Kennerly on *voir dire* about preventive maintenance requirements for the EC/IR II:

> [Defense Counsel]: Okay. So you're not the person who performs the preventative maintenance, but you do sign off that the maintenance has been performed?
>
> [Officer]: I recorded the date of the last maintenance. And also part -- as part of my training I realize that the instrument will, will shut off when it's gone past its, its date.
>
> [Defense Counsel]: When it's gone past its date?
>
> [Officer]: Yes.
>
> [Defense Counsel]: And you're familiar that the preventative maintenance requirements for that machine are four months, or 125 breath tests; is that correct?
>
> [Officer]: No, that's not completely correct. . . . The requirement for 125 breath tests only applies to instruments that have an accuracy check method of using a wet bath simulator. In other words, the glass jars we used to see on the instruments. *This instrument did not have that type of simulator*.
>
> . . .
>
> [Defense Counsel]: Thank you. And so how many breath tests had been performed on that device prior to you using it -- prior to its previous maintenance?
>
> [Officer]: I don't know.

(Emphasis added).

The trial court overruled Defendant's objection, and the State introduced evidence that Defendant's BAC was 0.20 grams of alcohol per 210 liters of breath. The State also produced evidence that the device used for Defendant's breath test

utilized a dry gas canister to perform accuracy checks, not the wet bath simulator solution. The dry gas canister is "a low-pressure air canister that holds a known amount of alcohol" and is used to perform calibrations. The dry gas canister on the machine used to conduct Defendant's breath analysis had not expired at the time it was used.

Defendant argues on appeal, as he did at trial, that the State failed to establish compliance with DHHS rules because Officer Kennerly did not testify that preventive maintenance had been conducted after 125 breath simulator tests. Defendant would be correct if the EC/IR II used here had a wet bath simulator. However, the testimony was clear that a dry gas canister simulator was used. As such, Officer Kennerly was required to demonstrate that he checked the canister and that the expiration date had not passed. The breath test at issue here was performed on October 2, 2015, and the dry gas canister had an expiration date of May 11, 2017. Thus, the requirements of 10A N.C.A.C. 41B.0323(10) were satisfied, and Defendant's contention is without merit.

Conclusion

Appellate review of the substantial similarity between Defendant's federal conviction and the North Carolina driving while impaired statute was waived because Defendant failed to preserve the issue. The trial court did not err in admitting the EC/IR II breath test which showed Defendant's BAC was 0.20g/210L because the

instrument used complied with DHHS rules. Defendant received a fair trial free from error.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).