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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-239

Filed: 17 April 2018

Onslow County, No. 14CRS055329

STATE OF NORTH CAROLINA

v.

LANNIE IVON FOY, Defendant.

Appeal by defendant from judgment entered 3 November 2016 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 21 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

Richard Croutharmel for defendant-appellant.

BERGER, Judge.

Lannie Ivon Foy ("Defendant") appeals a jury verdict convicting him of felony death by motor vehicle, driving while impaired, and misdemeanor hit and run. Defendant argues the trial court erred in admitting blood analysis evidence, in denying his motion to dismiss, and in instructing the jury disjunctively on driving while impaired. We disagree.

Factual and Procedural Background

On August 17, 2014, at approximately 3:00 a.m., Onslow County Sheriff Deputy Gerald Pennington, Jr. was dispatched to a traffic accident in which a pedestrian had been struck by a vehicle on Catherine Lake Road in Onslow County, North Carolina. Aaron Hurlburt, the pedestrian's husband, had made the emergency call when he discovered his wife's body in the drainage ditch on the side of Catherine Lake Road about a quarter of a mile from the Country Saloon. Mr. Hurlburt told the officers who arrived at the accident scene that his wife, Jamie Hurlburt ("victim"), had been walking home from the Country Saloon when she was struck by a vehicle. The officers determined that she was deceased by the time they arrived at the scene at approximately 3:15 a.m. Later, when the victim's body was moved, car parts were scattered beneath her in the grass.

Onslow County Sheriff Deputy Charles Duggan was dispatched to investigate a white Ford F-150 pickup truck abandoned on the shoulder of Catherine Lake Road near its intersection with Union Chapel Road, approximately half of a mile away from the accident. There was significant damage to the passenger-side front quarter-panel and headlight, as well as stains of yellowish-brown matter on the vehicle. Because the Ford appeared to have been involved in the accident, North Carolina State Trooper Matthew Bryan radioed the license plate number in to dispatch officers who reported that the truck was registered to Defendant. The Ford's windshield was

caved in on the passenger side, with strands of hair embedded in the broken glass. State Bureau of Investigation Agent Jonathan Lee later executed a search warrant to examine the Ford and its damage on the passenger-side area. Agent Lee collected physical evidence from the vehicle that was processed by the State Highway Patrol.

In the early morning hours of August 17, deputies went to speak with Defendant at the address listed on the Ford's registration. Both Defendant and his sister, Stella Foy, were at that address and Defendant spoke with the deputies. While Deputy Duggan spoke with Defendant, he noticed Defendant had a heavy odor of alcohol on his person and breath, had slurred speech, and staggered from side-to-side. Deputy Duggan spoke with Defendant for approximately thirty minutes at the residence while waiting for other officers to arrive.

Defendant waived his *Miranda* rights, and discussed the collision with Trooper Bryan. Defendant admitted that he had been at the Country Saloon that night, had consumed alcohol, and had driven his Ford on Catherine Lake Road. Defendant also admitted that he had hit something in the roadway, but assumed it was some type of animal. Based on the totality of the circumstances, Trooper Bryan formed the opinion that Defendant had consumed a sufficient quantity of an impairing substance, that he was impaired within a relevant time of driving home from the Country Saloon, and that he had hit the victim with his vehicle. Trooper Bryan therefore arrested Defendant for felony death by motor vehicle, felony hit and run involving injury and

death, and driving while impaired. Trooper Bryan had a paramedic from Onslow County EMS take a sample of Defendant's blood for further analysis at approximately 7:00 a.m. The sample was analyzed by the North Carolina State Bureau of Investigation Crime Laboratory, and found to have a blood alcohol level of 0.14%.

Through his training in accident collision investigation, Trooper Bryan was able to determine that the victim had been struck in the roadway by Defendant's Ford. An expert witness for the State qualified in physical evidence matching determined that the car parts recovered from underneath the victim matched parts from the front passenger-side of Defendant's vehicle.

Defendant testified at trial that he had gone to the Country Saloon the night of the accident to socialize, meet a friend, and drink a few beers. When the Country Saloon began to close for the night, Defendant drove his Ford home after determining that he was sober enough to drive. Defendant testified that on his way home he hit something, and this collision caused his truck to automatically shut off because a safety mechanism had been triggered. After the truck stopped on the side of the highway, a friend of Defendant, who had also been at the Country Saloon that night, drove him home. Defendant arrived home between 2:00 and 2:30 a.m., drank some homemade wine while watching a movie, and then went to bed.

Defendant was indicted for felony death by motor vehicle, felony hit and run involving injury and death, and driving while impaired on November 13, 2015, and

was found guilty of felony death by motor vehicle, misdemeanor hit and run, and driving while impaired. The trial court arrested judgment as to the charge of driving while impaired. Defendant was sentenced to fifty-nine to eighty-three months imprisonment. Defendant gave timely written notice of appeal from this judgment.

Analysis

I. Plain Error

Defendant contends first that the trial court erred in allowing the admission of blood analysis evidence that showed his blood alcohol content was 0.14% when the sample was taken. He argues that the blood sample used in that analysis was not collected within a relevant time of the allegedly-impaired driving and should have been excluded. Defendant concedes that no objection was presented to the trial court to contest the admission of the blood analysis evidence. Because no objection was made at trial, the alleged error is reviewed for plain error.

For an issue to be preserved for appellate review, Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure requires the appealing party to "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). In criminal cases, if an objection was not made and the issue is not deemed preserved by rule or law, the trial court action being challenged "nevertheless may be made the basis of an issue

presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

When this court is asked to apply the plain error standard of review in a criminal case, the burden is on the defendant to "convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Furthermore, the alleged error must be a "fundamental error[;] something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis, citation, quotation marks, and brackets omitted).

To sustain a conviction for felony death by motor vehicle, the State must prove "(1) [t]he person unintentionally cause[d] the death of another person, (2) [t]he person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and (3) [t]he commission of the offense in subdivision (2) of this subsection is the proximate cause of the death." N.C. Gen. Stat. § 20-141.4(a1) (2017). The impairment must be proved by the State by introducing evidence that the defendant drove

> any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or

> (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; or
>
> (3) With any amount of a Schedule I controlled substance . . . or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1(a) (2017).

Here, Defendant argues that the lapse of time between his driving and the taking of the blood sample necessitates the exclusion of the blood analysis. However, "the fact that approximately [five] hours had passed from the time Defendant operated the motor vehicle until the blood test was given goes to the weight to be given the result of the test, rather than to its admissibility." *State v. Patterson*, 209 N.C. App. 708, 713, 708 S.E.2d 133, 136-37 (citing *State v. George*, 77 N.C. App. 470, 473, 336 S.E.2d 93, 95 (1985)), *appeal dismissed, disc. review denied*, 365 N.C. 203, 709 S.E.2d 920 (2011). Even under circumstances that allow for the possibility of "other intervening events that could have compromised the blood sample during" this time period, it was not error for the trial court to allow the jury to weigh this evidence. *Id*. at 713, 708 S.E.2d at 136.

Defendant is unable to carry his burden here to show that the admission of the blood analysis evidence was error. Because he has failed to "convince this Court . . . that there was error," we therefore need not reach whether, "absent the error, the

jury probably would have reached a different result." *Jordan,* 333 N.C. at 440, 426 S.E.2d at 697 (citation omitted).

II. Motion to Dismiss

Defendant contends the trial court erred in denying his motion to dismiss the charges of driving while impaired and felony death by motor vehicle at the close of all evidence because the State did not introduce substantial evidence of appreciably impaired driving sufficient to prove Defendant's guilt. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation and internal quotation marks omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the

motion to dismiss should be allowed." *Id.* (citation omitted). "The trial court's function is to determine whether the evidence allows a reasonable inference to be drawn as to the defendant's guilt of the crimes charged." *Id.* at 67, 296 S.E.2d at 652 (emphasis, citation, and internal quotation marks omitted). "[T]he trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence . . . ." *Id.* at 67, 296 S.E.2d at 652-53 (citations omitted).

The elements the State must prove to sustain convictions for felony death by motor vehicle pursuant to N.C. Gen. Stat. § 20-141.4(a1) and driving while impaired pursuant to N.C. Gen. Stat. § 20-138.1 have been enumerated above. Here, Defendant has specifically challenged whether sufficient evidence that he was appreciably impaired by alcohol at the time he drove his Ford along Catherine Lake Road was introduced to satisfy subsection (a)(1) of the driving while impaired statute.

At trial, the State offered sufficient evidence that satisfied this and all other elements of the crimes charged. Testimony from Deputy Pennington, Deputy Duggan, and Trooper Bryan detailed the investigation: getting the emergency call, responding to the scene of the accident, finding Defendant's damaged vehicle, examining the victim's body, and interviewing Defendant at his house. The State introduced evidence tending to prove that the truck that hit and killed the victim was registered to and owned by Defendant. The State also presented evidence that

showed Defendant drove the truck the night of the accident on Catherine Lake Road. Defendant admitted to Trooper Bryan and testified at trial that he thought that he had hit an animal on the way home from the Country Saloon. The medical examiner offered evidence that the victim's injuries were consistent with blunt force trauma, most likely from a vehicle collision. The State's witnesses provided evidence that tended to show Defendant was directly involved, and that Defendant's involvement was the proximate cause of the victim's death. This evidence sufficiently satisfies the first and third elements of felony death by motor vehicle pursuant to N.C. Gen. Stat. § 20-141.4(a1).

As previously stated, the State's witnesses testified to sufficient evidence of Defendant's impairment, based specifically on the police officers' observations and impressions of Defendant at the time of his arrest. Defendant's own testimony of his alcohol consumption leading up to within an hour of the accident is further evidence from which the jury may infer that Defendant was appreciably impaired at the time he drove home.

Evaluating this evidence in the light most favorable to the State, giving the State all reasonable inferences that can be drawn from the evidence, the trial court did not err in denying Defendant's motion to dismiss before handing over the case to the jury for their deliberation. Each essential element of Defendant's charges was supported by sufficient evidence to allow a reasonable inference to be drawn as to

Defendant's guilt. Accordingly, we find no error in the trial court's denial of Defendant's motion to dismiss.

III. Disjunctive Instruction

Defendant finally alleges a constitutional violation of his right to a unanimous jury verdict. He does this by contending that the trial court erred in giving disjunctive jury instructions that relied on insufficient and prejudicial evidence. This argument assumes that he has prevailed on either of the two issues discussed above. Because we hold that the trial court neither erred in admitting the blood analysis evidence, nor erred in denying Defendant's motion to dismiss for lack of appreciable impairment evidence, we need not address this constitutional claim. Whenever there is evidence to support instructing the jury on both the appreciable impairment theory and the *per se* theory of impairment, no claim for this constitutional violation is viable. *See State v. Johnson*, 183 N.C. App. 576, 582-83, 646 S.E.2d 123, 127 (2007). Accordingly, this argument is dismissed.

Conclusion

The trial court did not err in admitting the blood analysis evidence to the jury because Defendant's challenge to admittance only attacks the weight, not the admissibility, of the evidence and this is a question for the jury. The trial court also did not err in denying Defendant's motion to dismiss because the State presented sufficient evidence of each element of the crimes charged and of the Defendant being

the perpetrator. Because Defendant is unable to prevail on these issues, he is unable to prove any constitutional violation of his right to an unanimous jury verdict. Therefore, we find Defendant received a fair trial free from error.

NO ERROR.

Chief Judge MCGEE and Judge DIETZ concur.

Report per Rule 30(e).