IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-730

Filed: 3 July 2018

New Hanover County, No. 13 CRS 009336

STATE OF NORTH CAROLINA

v.

AARON ROSS TAYLOR, Defendant.

Appeal by Defendant from judgment entered 5 October 2016 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 20 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for the Defendant.

DILLON, Judge.

Aaron Ross Taylor ("Defendant") appeals from the trial court's judgment entering a jury verdict finding him guilty of driving while impaired ("DWI"). Defendant contends the trial court erred by (1) dismissing his motion to suppress

where his blood was drawn unlawfully and (2) giving jury instructions unsupported by the evidence at trial. After careful review, we find no error.

I. Background

On 9 December 2013, police responded to an emergency involving a truck stopped in a travel lane of a busy intersection in Wilmington. One officer parked his vehicle to the right of the truck, while another parked in front of the truck. The officers discovered Defendant unconscious and unresponsive in the driver's seat of the truck with his foot on the brake pedal. The truck's engine was running.

As the officers attempted to awaken Defendant, Defendant's foot slipped off the brake pedal. The truck moved suddenly, striking one of the officers and crashing into the patrol car parked in front of it. Defendant slid out of the truck as it moved and sustained injuries to his head and shoulder as he struck the ground. He was transported to a hospital.

An officer visited Defendant at the hospital. There, Defendant consented to and blew positive on a breathalyzer test. Based on the positive breathalyzer result and reports that Defendant had been unconscious at the scene, the officer charged Defendant with DWI. Defendant signed an implied consent rights form and allowed a nurse to draw his blood. Police tested Defendant's blood and discovered a .11 blood alcohol concentration ("BAC").

At trial, Defendant moved to suppress any evidence of his BAC, contending that it was obtained without a warrant, consent, or probable cause. The trial court denied the motion. The first trial ended in a mistrial. On the day of the second trial, Defendant filed a new motion to suppress on the same grounds. Again, the trial court denied the motion. During the charge conference, the parties agreed only to jury instructions stating that Defendant could be convicted if his BAC was .08 or more, but the trial court also instructed the jury that it could convict Defendant if it found that he was "appreciably impaired." The jury found Defendant guilty of DWI. Defendant appeals.

II. Analysis

Defendant claims the trial court erred in essentially two respects. First, he contends that the trial court erred in summarily denying his amended motion to suppress because he presented new information that warranted reconsideration, and because his blood was drawn without a warrant, his consent, or probable cause. Second, Defendant argues that the trial court gave jury instructions that were not supported by the evidence in the case. We address each argument in turn.

A. Motion to Suppress

Defendant first challenges the trial court's denial of his amended motion to suppress evidence of his blood draw. Defendant asserts that the judge abused his discretion when he summarily denied the amended motion to suppress. Further,

Defendant alleges that consideration of the merits of his amended motion to suppress would have shown that the judge in his first trial improperly denied the first motion to suppress.

"A trial court's ruling on a request to renew a pretrial motion to suppress is subject to appellate review under an abuse of discretion standard." *State v. Wade*, 198 N.C. App. 257, 264-65, 679 S.E.2d 484, 488 (2009).

Defendant filed his amended motion to suppress on the day of trial, before jury selection. The judge immediately denied the motion, stating "you don't file motions on the day of trial." Then, at the end of the trial day, the judge explained that he was unable to reconsider Defendant's motion:

> [T]he reason the [trial court] didn't give more consideration to your motion [is] because this case was previously tried and mistrialed, and everything had been considered. So one superior court judge cannot overrule another one. For that reason, can't even be reconsidered. So for that fact, they were summarily denied.

Defendant argues that the trial court erred in its reasoning for denying his motion. Specifically, Defendant states that, since his new motion was based on a change in circumstances, the trial court *did* have the authority to consider its merits. *State v. Woolridge*, 357 N.C. 544, 549-50, 592 S.E.2d 191, 194 (2003) (holding that a second superior court judge can only reconsider a prior judge's ruling on a motion upon a showing of a "substantial change in circumstances . . . warrant[ing] a different or new disposition of the matter.").

Assuming, for the sake of Defendant's argument, that the trial court erred, we conclude that any such error at retrial was harmless. A substantial change in circumstances exists where new facts that "bear upon the propriety" of a prior decision have emerged, causing a "material change in conditions." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972). Defendant moved to suppress evidence of his BAC acquired from a blood draw, arguing that it was done without consent. The amended motion to suppress alleged that, between the hearing in the first trial and the beginning of the second trial, Defendant learned new information about beer cans found in Defendant's truck. Defendant also points out discrepancies between the investigating officer's testimony regarding the beer cans across multiple hearings and at trial. No other new facts were alleged in the amended motion to suppress. Defendant contends that this information amounts to "additional pertinent facts."

We do not agree that information regarding beer cans found in Defendant's truck at the time of arrest is pertinent to whether Defendant's blood draw was consensual. Whether a blood draw was consensual depends on the circumstances present at the time of the draw and whether a defendant freely gave his or her consent voluntarily without duress or coercion. *State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 653 (2017). We cannot say that the first judge, or any reasonable judge, would have come to a different conclusion if he had known about the beer cans in

Defendant's truck. Though the question of whether consent was voluntary is based on "a careful scrutiny of all the surrounding circumstances," *Id.* at 691, 800 S.E.2d at 653, the presence of beer cans in the truck has no bearing on whether Defendant freely gave voluntary consent at the hospital before the blood draw. Rather than raising a truly substantial change in circumstances, it seems Defendant simply "waited for another [j]udge to come around and took [his] chances with him." *Henry v. Hilliard,* 120 N.C. 479, 487, 27 S.E. 130, 132 (1897). Defendant failed to present a material change in conditions amounting to a substantial change in circumstances.

Defendant further alleges that the first judge erred by denying his motion to suppress before the first trial, contending that the officer had Defendant's blood drawn without a warrant, Defendant's consent, or probable cause. During the first trial, Defendant did not renew his objection to evidence of the blood draw when it was introduced at trial, and therefore did not properly preserve it for review. *See State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003). For this reason, we are limited to reviewing for plain error, to determine not only whether "there was error, but that absent the error, the jury probably would have reached a different verdict." *State v. Faison,* 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991). Assuming, for the sake of argument, that the first judge erred by denying Defendant's motion to suppress, we find that such error did not amount to plain error.

Conviction for DWI requires the State to show either that (1) the defendant had a BAC of .08 or more at a relevant time, or (2) the defendant drove "while under the influence of an impairing substance." N.C. Gen. Stat. § 20-138.1(a) (2015). Though the evidence of Defendant's BAC did show that Defendant had a BAC of .11 at the hospital, and was likely intoxicated when the officers found him in his truck, it was not the only evidence before the jury. When the officers arrived at the scene, Defendant was unconscious in his truck, parked in the middle of the road with the engine running, and would not respond to repeated attempts to awaken him. The officers were forced to break into the running vehicle, and Defendant suffered injury because he remained unconscious. Defendant later admitted that he should not have driven, and he had slurred his speech. Further, Defendant submitted to a portable breath test and tested positive for alcohol.[1] We find that, even absent evidence of Defendant's BAC, the remaining evidence was such that the jury would have probably reached the same result and found Defendant guilty of DWI under appreciable impairment.

B. Jury Instructions

[1] We note Defendant's contention that the positive result of the portable breath test was improperly admitted into evidence. Rather, North Carolina law states that "[t]he fact that a driver showed a positive or negative result on an alcohol screening test, *but not the actual alcohol concentration result*, . . . is admissible in a court []" to show that the Defendant consumed alcohol. N.C. Gen. Stat. § 20-16.3(d) (2015) (emphasis added). Here, the officer testified only that Defendant submitted to and tested positive on a portable breath test. No evidence of Defendant's particular alcohol concentration was admitted.

Defendant also contends that the trial court erred by giving a jury instruction that differed from what was agreed upon by the parties and that was unsupported by the evidence at trial. We review the trial court's decisions regarding jury instructions *de novo*, *State v. Levan,* 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990), to determine whether the instructions given could have misled or misinformed the jury. *State v. Mitchell*, 240 N.C. App. 246, 258-59, 770 S.E.2d 740, 748 (2015). The jury instructions must have been given in error, and also have presented a danger of misleading the jury. *Id.*

North Carolina law instructs that a jury may find a defendant guilty of DWI on either of two alternative theories: (1) the defendant had a BAC of .08 or more at a relevant time, or (2) the defendant drove "while under the influence of an impairing substance." N.C. Gen. Stat. § 20-138.1(a). It is proper for the trial court to give a disjunctive instruction "as to various alternative acts *which will establish an element of the offense*[,]" *State v. Lyons*, 330 N.C. 298, 303 412 S.E.2d 308, 312 (1991) (emphasis in original), as long as each alternative theory is independently supported by the evidence. *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007). If the trial court instructs the jury on alternative theories of guilt and one theory is not supported by the evidence, the defendant is entitled to a new trial in the event the record does not show which theory the jury used to reach its verdict. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990).

During the charge conference, the parties and the trial court agreed that the court would instruct the jury that it could convict if it found that Defendant's BAC was .08 or more, and did not discuss further instructions on appreciable impairment. However, before deliberations, the trial court instructed the jury on both of the alternative theories for DWI conviction. Defendant contends that this additional instruction improperly and materially deviated from what the trial court promised to instruct. We disagree.

Though the appreciable impairment theory was not discussed in the charge conference, we find that each of the theories presented to the jury was supported by the evidence. The evidence showed not only that Defendant's BAC was above .08, but also that Defendant was appreciably impaired while driving. Officers found Defendant unconscious behind the wheel of a vehicle, stopped in a lane of traffic with the engine running, and were unable to wake him after repeated attempts to do so.[2] When he regained consciousness at the hospital, Defendant had no recollection of how the accident occurred, but exhibited slurred speech and admitted that he should not

[2] Defendant points out that he has medical conditions that may cause sporadic unconsciousness, and that a defendant cannot be convicted of DWI where he or she is rendered unconscious solely because of a medical condition, such as diabetic shock. *See State v. Caddell*, 287 N.C. 266, 285, 215 S.E.2d 348, 360 (1975). The record shows that this point was argued before the jury at trial. Our review of the record shows no affirmative evidence that Defendant's condition was caused by a medical condition, other than his counsel's arguments that it could have been the cause. Further, these competing theories were before the jury at trial, and it is the jury's job to determine what it finds credible. *Sneed v. Lions Club of Murphy, N.C., Inc.*, 273 N.C. 98, 101, 159 S.E.2d 770, 772 (1968) ("[I]t is the province of the jury to weigh the evidence and to determine what it proves or fails to prove.").

have driven. Defendant also blew positive results on an alcosensor breath test. We conclude that the appreciable impairment theory was supported by the evidence and that, therefore, the trial court did not err in its jury instructions.

III. Conclusion

We hold Defendant failed to carry his burden to show the trial court committed prejudicial error in denying Defendant's amended motion to suppress because Defendant failed to show additional, pertinent facts warranting reconsideration. We also hold that the trial court committed no error in instructing the jury on each of the alternative theories of guilt for DWI, because each theory was supported by the evidence presented at trial.

NO ERROR.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).