An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1372

Filed: 7 August 2018

Wake County, Nos. 15-CRS-202498, 15-CRS-202500, 15-CRS-202504

STATE OF NORTH CAROLINA

v.

JESSIE ALSTON UPCHURCH, Defendant.

Appeal by defendant from judgments entered 1 May 2017 by Judge Thomas H. Lock in Wake County Superior Court. Heard in the Court of Appeals 6 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.

Michael E. Casterline for defendant-appellant.

BERGER, Judge.

Jessie Alston Upchurch ("Defendant") appeals from judgments entered upon his convictions for driving while impaired ("DWI"), assault, and assault on a government official. On appeal, Defendant contests the trial court's denial of his motion to suppress Defendant's arrest for lack of probable cause. After review, we affirm the trial court.

On June 15, 2015, Defendant was indicted for DWI, two counts of assault on a government official, and one count of assault inflicting physical injury on a law enforcement officer. After the jury had been empaneled for his April 2017 trial, the trial court held a hearing to consider Defendant's motion to suppress his arrest.

At the hearing, the State called Raleigh Police Officer Diana Painter ("Officer Painter"), who testified that, on January 31, 2015, she responded to a 911 call shortly after 6:00 a.m. at Waffle House on Westinghouse Boulevard. Officer Painter arrived at the scene less than ten minutes after she received the dispatch. The 911 call reported an intoxicated driver operating a white Mercedes with two tires either flat or missing. Upon arriving in the restaurant parking lot, Officer Painter observed the white Mercedes in a handicapped spot. She encountered the first officer on the scene, Officer Richard Livecchi ("Officer Livecchi"), who informed her that he had observed Defendant enter the Mercedes on the driver's side with a plate of food. When Officer Livecchi approached Defendant and asked to see his driver's license, Defendant could not find the license, but Officer Livecchi spotted it on the driver's side floorboard.

Officer Painter spoke with Gregory Leathers ("Leathers"), who had placed the 911 call. Leathers told her that he felt that Defendant was highly intoxicated because he observed Defendant drive the vehicle from one parking space in the lot to another.

Officer Painter entered the restaurant, and asked Defendant to speak with her outside. Defendant struggled to stand up out of his chair and stumbled several times

while walking toward Officer Painter. Once outside, Defendant was swaying while standing, and Officer Painter noticed Defendant had a strong odor of alcohol on breath and slurred speech. Defendant admitted that the white Mercedes was his, and that he had been driving. When Officer Painter asked him where he had come from, she believed he was trying to tell her he was coming from a bar downtown, but he was slurring his words such that she could not tell exactly what he was saying. Defendant also told her that he didn't know how the Mercedes got damaged and that he was trying to figure that out. Officer Painter did not give Defendant a field sobriety test because she feared he was so unsteady that he would injure himself. Defendant was arrested for DWI.

Officer Painter further testified that there was no front right tire on the Mercedes, the rear right tire was flat, and there was significant rim damage. She observed gouge marks in the asphalt of the parking lot, which followed a path from Westinghouse Boulevard to a back parking space, and then to the space where the Mercedes was parked, with the gouges going underneath the vehicle. She testified that Waffle House does not sell alcohol and that there were no open containers of alcohol located anywhere on the premises.

Defendant did not put on evidence during the hearing. Following *voir dire*, the trial court denied Defendant's motion to suppress his arrest, and the trial proceeded.

Defendant moved to dismiss the charges at the close of the State's evidence and the close of all evidence, both of which the trial court denied.

On May 1, 2017, the jury found Defendant guilty of DWI, assault on a government officer, and a lesser-included offense of simple assault. The trial court sentenced Defendant to serve in the Misdemeanant Confinement Program for a period of 24 months for DWI, 150 days for assault on a government officer, and 60 days for simple assault. Defendant gave oral notice of appeal.

In his lone issue on appeal, Defendant contends that the trial court erred in denying his motion to suppress.[1] Specifically, Defendant contends that the evidence in the case should have been suppressed as the product of an unconstitutional arrest because officers lacked probable cause. We disagree.

"[T]he Fourth Amendment requires the police to have probable cause before making an arrest." *State v. Mello*, 200 N.C. App. 561, 568, 684 S.E.2d 477, 482 (2009) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169, 31 L. Ed. 2d 110, 119 (1972)), *aff'd per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010). "'Probable cause' is defined as 'those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information[,] which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an

[1] Defendant also purports to challenge the trial court's denial of his motions to dismiss. However, Defendant does not pursue this argument in the body of his brief, and thus, Defendant has abandoned the issue. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

offense.'" *State v. Biber*, 365 N.C. 162, 168-69, 712 S.E.2d 874, 879 (2011) (quoting *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985)). "Whether probable cause exists to justify an arrest depends on the totality of the circumstances present in each case." *State v. Sanders*, 327 N.C. 319, 339, 395 S.E.2d 412, 425 (1990) (citation and quotation marks omitted), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991).

Here, Defendant's arrest was supported by probable cause. While it is true, as Defendant contends, that officers did not witness Defendant driving while intoxicated, such proof is not required to find probable cause for an arrest. *See State v. Tappe*, 139 N.C. App. 33, 36, 533 S.E.2d 262, 264 (2000) ("To justify a warrantless arrest, it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed." (citation and quotation marks omitted)).

The facts and circumstances known to Officer Painter prior to her arrest of Defendant were sufficient to justify her belief that Defendant had operated the white Mercedes while intoxicated: Officer Painter received dispatch from a 911 call reporting a highly intoxicated driver driving in the Waffle House parking lot, and she arrived at the scene less than ten minutes after receiving the dispatch. Due to the markings on the pavement and in the parking lot, the driver of the white Mercedes appeared to have driven the vehicle on public streets with one tire missing and another completely flat. The first officer on the scene observed Defendant leave the

restaurant and get into the driver's seat of the Mercedes, and found Defendant's license in the floorboard of the driver's seat. Defendant admitted to owning the Mercedes and had been driving earlier as Defendant seemed to state that he had come from a bar downtown. Defendant appeared so intoxicated to Officer Painter that she did not administer a field sobriety test for fear Defendant would injure himself. Finally, Waffle House did not serve alcohol and there was no alcohol recovered on the premises.

Based on the totality of the circumstances, Officer Painter had probable cause to arrest Defendant for DWI. The trial court therefore did not err by denying Defendant's motion to suppress.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).