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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-670

Filed: 16 April 2019

Duplin County, No. 14 CRS 52588

STATE OF NORTH CAROLINA

v.

DARWIN NEWKIRK

Appeal by defendant from judgment entered 24 January 2018 by Judge Imelda J. Pate in Duplin County Superior Court. Heard in the Court of Appeals 8 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State.

Leslie Rawls for defendant-appellant.

ARROWOOD, Judge.

Darwin Newkirk (“defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of operating a motor vehicle to elude arrest with two or more aggravating factors (“felony fleeing to elude arrest”) and his guilty plea to attaining habitual felon status. We find no prejudicial error.

I. Background

On 19 December 2014, North Carolina Highway Patrol Trooper John Gurganus observed a vehicle traveling approximately 70 miles per hour on westbound Highway 41, where the speed limit was 55 miles per hour. After confirming the vehicle's speed with his radar, Trooper Gurganus activated his blue lights and siren and attempted to initiate a traffic stop.

The vehicle, which was being driven by defendant, failed to stop, and a high-speed chase ensued. During the chase, defendant crossed the center line and accelerated to speeds of more than 100 miles per hour. The chase ended when defendant failed to reduce his speed while attempting a left turn, causing his vehicle to slide into a ditch. Trooper Gurganus took defendant into custody.

Defendant was indicted for felony fleeing to elude arrest and attaining habitual felon status. The case was called for a jury trial on 22 January 2018. After all of the evidence was presented, the jury began its deliberations. During those deliberations, the jury asked to examine the trial exhibits in the jury room. The trial court sent the exhibits to the jury over defendant's objection.

On 24 January 2018, the jury returned a verdict finding defendant guilty of felony fleeing to elude arrest with two or more aggravating factors. Defendant then pled guilty to attaining habitual felon status. The trial court sentenced defendant to a term of 67 to 93 months of imprisonment.

Defendant appeals.

II. Discussion

Defendant's sole argument is that the trial court erred by allowing the jury to review trial exhibits in the jury room over his objection. We agree, but conclude the error was not prejudicial.

"Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C. Gen. Stat. § 15A-1233(b) (2017). Since the consent of all parties is required by this statute, it is error "to allow the jury to take evidence into the jury room over a party's objection." *State v. Huffstetler*, 312 N.C. 92, 114, 322 S.E.2d 110, 124 (1984) (citations omitted), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

In this case, the jury sent the trial court a note "asking if they can have a copy of the exhibits, particularly, the sheet that shows the failure to appear. If at all possible, they want all the exhibits." "[T]he sheet that shows the failure to appear" was in reference to a 7 April 1997 letter from the North Carolina Department of Motor Vehicles informing defendant that his license was indefinitely suspended for failure to appear.¹ Defendant objected to the jury's request, but the trial court overruled the objection: "I'll note your objection, but I am going to allow the exhibits to go to the jury room." This was error. *See id.*

¹ Defendant disputed the authenticity of this document.

However, defendant still bears the burden of demonstrating that the trial court's error was prejudicial. *See id.* For this statutory violation, defendant must show "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2017). As a result, the error is harmless if there is "strong evidence against the defendant[.]" *State v. Cunningham*, 344 N.C. 341, 364, 474 S.E.2d 772, 783 (1996) (citation omitted).

Defendant was convicted of felony fleeing to elude arrest under N.C. Gen. Stat. § 20-141.5 (2017). Under that statute,

If *two or more* of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

(1) Speeding in excess of 15 miles per hour over the legal speed limit.

. . . .

(3) Reckless driving as proscribed by G.S. 20-140.

. . . .

(5) Driving when the person's drivers license is revoked. . . .

N.C. Gen. Stat. § 20-141.5(b) (emphasis added). The three aggravating factors listed above were submitted to the jury in this case. However, defendant only specifically addresses how the trial court's error was prejudicial as to the last factor, that defendant was driving with his license revoked.

There was strong evidence at trial of the remaining two aggravating factors that were submitted to the jury: that defendant was speeding in excess of 15 miles per hour over the limit and that he was driving recklessly. Trooper Gurganus testified that, during his time chasing defendant, defendant accelerated to speeds exceeding 100 miles per hour in an area where the speed limit was 55 miles per hour and crossed the center line completely so that he was in the lane meant for oncoming traffic. Defendant's actions clearly constituted reckless driving under N.C. Gen. Stat. § 20-140(b) (2017) ("Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."); *see also State v. Davis*, 163 N.C. App. 587, 591, 594 S.E.2d 57, 60 (concluding there was sufficient evidence of reckless driving when the defendant "drove at speeds well over the posted speed limit of thirty-five miles per hour, and that he swerved into the opposing lane of traffic at least once."), *disc. review denied*, 358 N.C. 547, 599 S.E.2d 564 (2004).

Since the presence of at least two aggravating factors was supported by ample evidence, we conclude that the trial court's violation of N.C. Gen. Stat. § 15A-1233(b) was harmless. *See State v. Leonard*, 213 N.C. App. 526, 536, 711 S.E.2d 867, 874 (concluding an alleged error with respect to a felony fleeing to elude arrest aggravating factor was harmless because there was sufficient evidence "to support a

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finding that at least two aggravating factors were present”), *disc. review denied*, 365 N.C. 353, 717 S.E.2d 746 (2011). Defendant received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).