

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-978

Filed: 5 May 2020

Nash County, Nos. 17CRS050290, -91

STATE OF NORTH CAROLINA,

v.

WILLIAM EARL SILVER, JR., Defendant.

Appeal by Defendant from order entered 16 August 2018 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State-Appellee.*

*James R. Parish for Defendant-Appellant.*

COLLINS, Judge.

Defendant appeals from an order denying his motion to suppress. Defendant argues that the trial court reversibly erred by denying his suppression motion because the arresting officer did not have probable cause to arrest him. As Defendant has failed to preserve this issue for appellate review, we dismiss Defendant's appeal.

**I. Procedural History**

Defendant William Earl Silver, Jr., was indicted on 10 April 2017 for driving while impaired, habitual impaired driving, and driving while license revoked. On 19 October 2017, Defendant filed a motion to suppress seeking the suppression of all evidence obtained as a result of a warrantless search and seizure, including all statements he made. After a hearing on 14 August 2018, the trial court denied Defendant's motion. On 16 August 2018, the trial court entered a written order denying Defendant's motion.

The matter was called for trial immediately following the denial of Defendant's motion. On 15 August 2018, a jury returned a verdict of guilty of habitual impaired driving and driving while license revoked. Defendant was sentenced to a term of imprisonment of 19-32 months for habitual impaired driving, and a consecutive prison term of 20 days for driving while license revoked. Defendant filed written notice of appeal on 27 August 2018.

## **II. Factual Background**

Officer Marcus Brown, an off-duty Rocky Mount Police Officer and member of the U.S. Marshal's Fugitive Task Force, was traveling eastbound on U.S. Highway 64 in Nash County on 21 January 2017. There, Brown observed a black four-door passenger vehicle severely swerving from left to right, with its left turn signal on. Brown followed the vehicle for approximately ten miles and noticed its left turn signal was continuously blinking. Brown was afraid to pass the vehicle, as it continued to

swerve, and he eventually called 911. While on the phone with 911, Brown observed the vehicle swerve, almost strike another vehicle, lose control, spin around, and crash into the cable wires that divided the eastbound and westbound lanes. Brown did not see any obstructions in the roadway prior to the crash and did not recall seeing Defendant's brake lights before the wreck. The vehicle came to rest pointing west while on the eastbound side of Highway 64.

After seeing Defendant's wreck, Brown pulled off the highway and waited for law enforcement to arrive. During that time, Brown did not avert his eyes from the vehicle and identified Defendant as the driver of the vehicle. Brown also observed the illumination of a cell phone on the driver's side of the vehicle. Soon thereafter, Officer Durwood Radford II of the Spring Hope Police Department arrived on scene. As Radford approached the scene, Defendant exited the wrecked vehicle.

Upon arriving on scene, Radford observed the wrecked vehicle and Defendant standing by it. Before Radford was able to exit his patrol vehicle, Defendant walked toward him. Radford asked Defendant if he was okay and if he was driving the wrecked vehicle. Defendant did not respond, continued walking past Radford, past Brown's vehicle, and into the woods.

Radford exited his patrol vehicle and went to the driver's side of the wrecked vehicle. There, he observed that the window was open and he could smell a moderate odor of alcohol coming from the vehicle. Radford also confirmed that no one else was

inside the vehicle. Thereafter, Brown pulled up to Radford, pointed at the woods, and informed Radford that Defendant was the driver of the wrecked vehicle.

Radford approached the woods and saw Defendant running through the woods with a light. He commanded Defendant to stop, but Defendant continued to run, so Radford pursued him. When Radford was approximately 40 feet from Defendant, Radford activated his flashlight in strobe mode. Defendant ran into a tree and fell down. Radford asked Defendant why he was running, but Defendant did not answer. Radford observed that Defendant had bloodshot and watery eyes. Additionally, Defendant was breathing heavily, and Radford smelled a strong odor of alcohol coming from Defendant's breath.

Radford escorted Defendant out of the woods. As they exited the woods, Cody Williams, a Deputy with Nash County Sheriff's Office, arrived on the scene. Radford placed Defendant in the front passenger seat of Williams' vehicle, and Williams transported Defendant back to the scene of the accident, approximately 100 yards away. Williams could smell a strong odor of alcohol coming from Defendant, and noted that Defendant was breathing heavily and had bloodshot, watery eyes.

During this same time period, Trooper Bradley Boone, a recent graduate of Trooper School in the third phase of field training, responded to a call of a possible intoxicated driver traveling east on U.S. Highway 64. Field-training officer Trooper Michael Davidson accompanied Boone. While en route to the call, Nash County

dispatch advised the troopers that the vehicle subject to the call had wrecked, and that a Spring Hope Police Officer was in a foot chase with a subject in the woods. Upon arriving at the scene, Boone observed Radford place Defendant in Williams' vehicle. Davidson observed Boone speaking with Radford and Williams, and then begin to speak with Defendant. Davidson indicated that he stood a few steps behind Boone and was shadowing him, observing and evaluating how Boone was handling the call.

Boone asked Defendant what happened. Defendant did not speak, rolled his eyes, and shook his head. Boone observed that Defendant had red, glassy eyes, and had a moderate to strong odor of alcohol about him. Boone then investigated the wreck, saw no signs of braking and no one in or around the vehicle.

Boone returned to Defendant and attempted to perform field sobriety tests. Boone attempted to administer the horizontal gaze nystagmus (HGN) test, but Defendant closed his eyes and moved his head in both directions. Defendant complained that he was hurt, his neck was broken, and he wanted to go to the hospital. Boone then asked Defendant to perform a portable breath test (PBT), which Defendant refused. Boone received reports concerning Defendant's driving, wreck, and flight from the scene from Nash County dispatch, Brown, and Radford. Due to Defendant's reckless driving, wreck, odor of alcohol, red glassy eyes, and refusal to take the HGN test and PBT, Boone placed Defendant under arrest for impaired

driving. Boone put Defendant in an ambulance and read him his *Miranda* rights. Defendant was then taken to Nash Regional Hospital. There, Defendant refused all treatment and refused to provide his blood or urine to hospital staff. Defendant also refused to submit to blood testing after Davidson advised him of his implied consent rights.

A jury convicted Defendant of habitual impaired driving and driving while license revoked, and the trial court entered judgment upon those convictions. Defendant timely filed notice of appeal.

### **III. Discussion**

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress evidence seized as a result of his arrest, because the arresting officer did not have probable cause to arrest him.

"The law in this State is now well settled that 'a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.'" *State v. Hargett*, 241 N.C. App. 121, 124, 772 S.E.2d 115, 119 (2015) (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007)). Where a defendant fails to object when such evidence is offered at trial, his appellate review is limited to plain error. *State v. Muhammad*, 186 N.C. App. 355, 364, 651 S.E.2d 569, 576 (2007) (citation omitted); N.C. R. App. P. 10(a)(4). However, plain error review is only

available “when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4). Further, an assertion of plain error for the first time in a reply brief is insufficient to obtain plain error review. *State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485, *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014) (holding that assertion of plain error for the first time in a reply brief is insufficient to obtain such review).

At trial, Defendant failed to make a contemporaneous objection to Boone’s testimony regarding Defendant’s arrest on 21 January 2017. Defendant did not object to any of Boone’s direct examination testimony, and did not object to Boone’s testimony regarding his arrest of Defendant on 21 January 2017. At trial, Boone testified that he told Defendant that he was under arrest, and that once Defendant was under arrest, Boone read Defendant his *Miranda* rights. Additionally, Boone testified that Defendant was in his presence for fifteen to thirty minutes prior to the arrest. Moreover, Boone testified that he arrested Defendant for driving while impaired and driving while license revoked.

On appeal, Defendant did not ask this Court to review the issue under the plain error standard. When the State noted in its brief Defendant’s failure to argue plain error, Defendant attempted to cure this deficiency by asserting plain error in his reply brief. As Defendant failed to object to the evidence he sought to suppress in his pre-trial motion when it was offered at trial and failed to specifically and distinctly

allege plain error in his initial brief as required by our appellate rules, Defendant is not entitled to plain error review of this issue. *See State v. Powell*, 253 N.C. App. 590, 593, 800 S.E.2d 745, 748 (2017); *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

In the last lines of his reply brief, “Defendant asks the Court to apply Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of this argument.” An appellate court may address an unpreserved argument “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]” N.C. R. App. P. 2. However, “the authority to invoke Rule 2 is discretionary, and this discretion should only be exercised in exceptional circumstances in which a fundamental purpose of the appellate rules is at stake.” *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015) (internal quotation marks, citations, and ellipsis omitted). Defendant makes no argument that this case involves exceptional circumstances, and we discern none. We, in our discretion, decline to invoke Rule 2.

Defendant’s argument is dismissed.

DISMISSED

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).