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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-586

No. COA20-695

Filed 16 August 2022

Onslow County, No. 18CRS053675

STATE OF NORTH CAROLINA

v.

WESEWING RESER

Appeal by defendant from order entered 29 January 2020 by Judge Dawn M. Layton in Onslow County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Ryan C. Zellar, for the State-Appellee.

Aberle & Wall, by A. Brennan Aberle, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Wesewing Reser ("Defendant") appeals his conviction of driving while impaired ("DWI") after a trial by jury, contending the trial court improperly denied his motion to dismiss and that he was prejudiced by the trial court's decision to give the correct jury instructions as to DWI after defense counsel concluded closing arguments. After

careful review, we find the trial court properly denied Defendant's motion to dismiss. Furthermore, the trial court did not err by completely and accurately instructing the jury consistent with Pattern Jury Instruction 270.20A, in place of a draft instruction provided to counsel at the charge conference which included an incomplete statement of the applicable law. Defense counsel was aware the draft instructions contained an incomplete statement of applicable law and chose not to inquire of the court regarding the issue as permitted by N.C. Gen. Stat. § 15A-1231(b) (2021). No error.

I. Factual and Procedural Background

¶ 2 On 2 July 2018, Defendant was arrested for DWI. He was convicted in district court on 23 May 2019 and appealed *de novo* to superior court. At the 28 January 2020 session of Onslow County Superior Court, with the Honorable Dawn M. Layton presiding, Defendant was convicted of DWI after a trial by jury. He was found to be a level five for DWI sentencing and ordered to serve a suspended sentence of thirty days in jail, twenty-four hours of community service, and twelve months of unsupervised probation. Defendant gave oral notice of appeal at the conclusion of the trial.

¶ 3 The record tends to show the following facts. On 2 July 2018 at or around 1:48 a.m., Sergeant Thomas Marshburn ("Sergeant Marshburn") of the Onslow County Sheriff's Office was on duty and dispatched to the Scotchman gas station located near

the intersection of Highway 210 and Highway 17. At Defendant's jury trial, Sergeant Marshburn testified that upon arrival at the gas station, he approached a sedan that was located next to a gas pump. He testified the vehicle in question was "running and the headlights were on," but did not use the word "engine." He further testified that once he approached the vehicle, he noticed two individuals sitting in the vehicle, both of whom appeared to be sleeping. Sergeant Marshburn testified that Defendant was seated in the driver's seat of the vehicle. Upon speaking with Defendant, Sergeant Marshburn observed several clues that indicated impairment, including red, glassy eyes; a strong odor of alcohol on Defendant's breath; and slurred speech. After administering a variety of field sobriety tests, Sergeant Marshburn came to the opinion "Defendant had consumed a sufficient amount of an impairing substance to appreciably impair his mental or physical faculties." A preliminary breath test provided a positive indication of alcohol. Sergeant Marshburn placed Defendant under arrest and transported him to the Onslow County Jail, where Defendant submitted to a chemical breath analysis and registered a blood alcohol level of a 0.10.

¶ 4 At the conclusion of the State's evidence and again at the conclusion of all the evidence, defense counsel moved to dismiss, alleging the State "did not establish operation of the vehicle." The trial court denied both motions. At the conclusion of all the evidence, the trial judge conducted a charge conference wherein defense counsel, the prosecution, and the trial court discussed a proposed set of jury

instructions. During that discussion, the trial court provided a list of proposed pattern jury instructions, including Pattern Jury Instruction 270.20A for impaired driving. Defense counsel did not object or request amendment to any instruction other than his request to not include a statutory definition of "operator" in the jury instructions. The written draft jury instructions provided to the parties included instructions for the jury to consider whether Defendant was operating a vehicle on a "highway or street," and omitted the phrase "public vehicular area." Defense counsel did not ask the trial court whether the phrase "public vehicular area" would be included in the instructions to the jury.

¶ 5 During closing arguments, the trial court recognized the omission of the phrase "public vehicular area" in the draft instructions and remedied the omission in its instructions to the jury. As a result, the trial court instructed the jury consistent with Pattern Jury Instruction 270.20A and applicable law, namely whether "the defendant was driving [a] vehicle upon a highway, street or public vehicular area within the state." After the jury left the courtroom, the trial court acknowledged its addition of "public vehicular area," stating, "[f]or the record, I obviously made a correction in the jury instructions before I read them, but are there—is there any correction, requests, additions to the jury instructions as I gave them to the jury?" Defense counsel objected to the jury instruction by stating: "I was given—the verdict—I mean, the sheet that I have, street or highway, not [public vehicular area],

so it allowed me to argue just street or highway. . . . *I know what the law is* [but] I know what I approved." **(**emphasis added). Defense counsel did not state that he was objecting on constitutional grounds. The trial court stated: "The jury instructions that we—that I went through and gave a copy to counsel did not include public vehicular area. As Madam D.A. was doing her argument, I noticed that and corrected it and instructed the jury on the public vehicular area."

II. Jurisdiction

¶ 6 Jurisdiction lies in this Court as a matter of right over a final judgment of the Superior Court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2021) and N.C. Gen. Stat § 15A-1444(a) (2021).

III. Issues

¶ 7 The issues on appeal are whether: (1) the trial court properly denied Defendant's motion to dismiss because there was insufficient evidence Defendant was operating a motor vehicle, and (2) the trial court caused irreparable prejudice and substantially deprived Defendant of his right to a fair trial under the Sixth Amendment of the United States Constitution by providing an accurate and complete instruction consistent with Pattern Jury Instruction 270.20A and applicable law, but inconsistent with a written draft of jury instructions provided to counsel at the charge conference.

IV. Analysis

A. Denial of Defendant's Motion to Dismiss

¶ 8 Defendant first argues the State failed to present substantial evidence sufficient to establish Defendant was in "operation" of the vehicle, and the trial court therefore improperly denied Defendant's motion to dismiss. We disagree.

1. Standard of Review

¶ 9 To survive a motion to dismiss based on the sufficiency of the evidence, the State must present substantial evidence of (1) each essential element of the charged offense and (2) the defendant's being the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence" is defined as such "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Worley*, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009) (internal quotation marks and citation omitted). "In reviewing challenges to the sufficiency of evidence, [appellate courts] must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Fritsch*, 351 N.C. at 378–79, 526 S.E.2d at 455. "Contradictions and discrepancies [in the evidence] do not warrant dismissal of the case but are for the jury to resolve." *Id.* at 379, 526 S.E.2d at 455. "This Court reviews a trial court's denial of a motion to dismiss *de novo*[.]" *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted).

2. Discussion

¶ 10 This Court has held "the essential elements of DWI are: (1) [d]efendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this state; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002) (citing N.C. Gen. Stat. § 20-138.1). Alcohol is an impairing substance. N.C. Gen. Stat. § 20-4.01(14a) (2021). Defendant challenges only the first prong of this test: whether sufficient evidence was presented that Defendant was operating a motor vehicle. Despite the State specifically arguing at trial that Sergeant Marshburn testified the "engine" was running, Sergeant Marshburn never explicitly used the word "engine." The relevant question for this Court is whether the State presented sufficient evidence that a reasonable mind would accept to justify the conclusion that the engine of the vehicle in question was running. *See Worley*, 198 N.C. App. at 333, 679 S.E.2d at 861.

¶ 11 A person "drives" within the meaning of the statute if he is "in actual physical control of a vehicle which is in motion or which has the engine running." N.C. Gen. Stat. § 20-4.01(7), (25) (2021) (noting that the terms "operator" and "driver" are synonymous); s*ee State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985) (holding that a defendant sitting behind the wheel of a car in the driver's seat with the engine running drove within the meaning of the statute, despite defendant's claim that the car was running only to heat the car). In *State v. Hoque*, this Court found there was sufficient evidence the defendant was "driving" a vehicle within the

meaning of the statute when the car was found stationary on the road, the defendant was the only occupant, and the engine was running. 269 N.C. App. 347, 353, 837 S.E.2d 464, 471 (2020).

¶ 12 In the case at bar, Sergeant Marshburn did not testify as to whether the engine of the vehicle was running, only that "the vehicle was running and the headlights were on." When asked which individual was asleep in the driver's seat as he approached the vehicle, Sergeant Marshburn identified Defendant. Based on the plain language of Sergeant Marshburn's testimony, the jury could have reasonably inferred Sergeant Marshburn meant the engine of the car was running. *See Worley*, 198 N.C. App. at 333, 679 S.E.2d at 861. Therefore, Sergeant Marshburn's testimony amounted to substantial evidence the engine of the vehicle was running with Defendant seated at the wheel. *Id.* at 333, 679 S.E.2d at 861.

B. Correction of Jury Instruction

¶ 13 Defendant next contends the trial court's decision to correct the instructions given to the jury from the incomplete draft jury instructions provided to counsel during the charge conference, without an additional hearing after Defendant concluded closing arguments, caused irreparable prejudice and substantially deprived Defendant of his right to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution. Defendant asks this Court to reverse the judgment of the trial court or, in the alternative, remand for a new trial. For the

following reasons, we disagree with Defendant's contention he was deprived of his right to a fair trial.

1. Standard of Review

¶ 14 The assertion of an error relating to a right arising under the United States Constitution (a "federal constitutional error") is subject to harmless error review where the issue is properly preserved by objection. *See State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012). Under harmless error review, a federal constitutional error will be deemed harmless if "the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 1837, 144 L. Ed. 2d 35 (1999). Under both federal and state harmless error standards, the government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error. N.C. Gen. Stat. § 15A-1443(b) (2021); *O'Neal v. McAninch*, 513 U.S. 432, 437–39, 115 S. Ct. 992, 995–96, 130 L. Ed. 2d 947 (1995).

¶ 15 In other words, if Defendant establishes the existence of federal constitutional error below, the burden on appeal is no longer with Defendant, but with the State. In North Carolina, "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b); s*ee also State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S.

1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982) (error committed at trial infringing upon a defendant's constitutional rights is presumed to be prejudicial and entitles the defendant to a new trial unless the error committed was harmless beyond a reasonable doubt). "Overwhelming evidence of guilt may render constitutional error harmless." *Brown*, 306 N.C. at 164, 293 S.E.2d at 578 (citing *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969)). If this Court is not satisfied the error was harmless beyond a reasonable doubt, Defendant is entitled to a new trial. *See Brown*, 306 N.C. at 164, 293 S.E.2d at 578.

¶ 16 Conversely, if a defendant asserts an error on appeal relating to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant, rather than the State, to bear the burden of showing prejudice. N.C. Gen. Stat. § 15A-1443(a). "In such cases, the defendant must show '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.'" *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331 (quoting N.C. Gen. Stat. § 15A-1443(a)).

¶ 17 Our Supreme Court has "consistently held that '[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.'" *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018) (quoting *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010)); *see In re J.N.*, 381 N.C. 131, 2022-NCSC-52, ¶ 7 ("[T]he existence of a constitutional protection does not obviate the

requirement that arguments rooted in the Constitution be preserved for appellate review.”).

¶ 18 Objections must “stat[e] 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). “This specificity requirement ‘prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required.’” *State v. Delau*, 381 N.C. 226, 2022-NCSC-61, ¶ 26 (quoting *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019)). Additionally, it “‘contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party.’” *Id.*

2. Discussion

a. Existence of Constitutional Error

¶ 19 Defendant argues he has a constitutional right under the Sixth Amendment of the United States Constitution to have his counsel make a closing argument, and this right was prejudiced by an inaccurate depiction of which elements of the DWI instruction would be presented to the jury. Notably, Defendant does not argue that the trial court was obligated to present a written draft of the jury instructions to defense counsel prior to instructing the jury. The question of whether a trial court’s correction of written instructions provided to counsel at a charge conference, such

that the instruction reflects a full and accurate statement of the law, constitutes a violation of a defendant's constitutional rights appears to be an issue of first impression before this Court.

¶ 20 The State asserts that because Defendant never mentioned an alleged constitutional violation while objecting to the changed jury instruction, we should not consider this issue on appeal. We agree.

¶ 21 Defendant did not use or mention the words "constitution" or "Sixth Amendment" when making his objection. Words used or absence of particular words are not necessarily dispositive. *See State v. Lowery*, 278 N.C. App. 333, 341, 2021-NCCOA-312, ¶ 27 (where the "objection was general and did not specifically raise any constitutional ground for the exclusion of [certain testimony]" . . . the defendant failed to preserve the constitutional issue for appeal.) If it is clear from the context of a timely objection that it was based upon constitutional grounds, the issue would be properly preserved for review on appeal. *State v. Delau*, 381 N.C. 226, 2022-NCSC-61, ¶ 28.

¶ 22 Here, it is clear from the context that the objection was not rooted in constitutional grounds. Upon the trial court's acknowledgment of its corrected instruction to the jury, defense counsel stated: "I was given—the verdict—I mean, the sheet that I have, street or highway, not [public vehicular area], so it allowed me to argue just street or highway. . . . *I know what the law is . . . but I know what I*

approved." (emphasis added). The plain language of the objection betrays defense counsel's cognizance that the language in the written draft instructions deviated from the language of the applicable law.

¶ 23 Defendant does not dispute, and the record clearly reflects that the trial court informed counsel that it intended to give Pattern Jury Instruction 270.20A, the pattern instruction for the substantive offense of DWI. The trial court gave Pattern Jury Instruction 270.20A verbatim. After reviewing and discussing the draft instructions at the charge conference, if any question remained in defense counsel's mind regarding the substance of the DWI instruction, counsel's failure to inquire "whether the judge intend[ed] to include other particular instructions in [her] charge to the jury[]" further undermines any claims of constitutional error. *See* N.C. Gen. Stat. § 15A-1231(b).

¶ 24 Where the omission was known to defense counsel at the time the draft instructions were discussed, and defense counsel made no inquiry of the trial court as to the draft instructions, this Court finds the specific grounds for objection were apparent from the context. *See State v. Delau*, 381 N.C. 226, 2022-NCSC-61, ¶ 28. Rather than an objection sounding in constitutional concerns, defense counsel's objection stressed the deviation between the draft instructions provided at the charge conference and the complete language of Pattern Jury Instruction 270.20A provided to the jury. Defendant essentially argues that from the moment closing arguments

commenced, the trial court was bound to instruct the jury according to the terms of the draft instructions provided at the charge conference, including errors and omissions alike, rather than according to the applicable law. In short, Defendant's objection is the trial court instructed the jury on a full and accurate statement of the applicable law, which was supported by the evidence, rather than instructing according to the incomplete instruction provided in the draft. We are not persuaded.

¶ 25 Defense counsel failed to articulate or otherwise establish that his objection to the jury instructions was based on constitutional grounds. As no constitutionally based objection was made, the issue was not properly preserved for appellate review. *See Meadows*, 371 N.C. at 749, 821 S.E.2d at 407. We therefore decline to address Defendant's constitutional arguments as they were not properly preserved and are misplaced.

b. Existence of Prejudicial Error

¶ 26 Having determined Defendant's constitutional claims were not properly preserved, we instead consider Defendant's argument in the context of whether the trial court's conduct violated N.C. Gen. Stat. § 15A-1231 (2021) or N.C. Gen. Stat. § 15A-1232 (2021), resulting in prejudicial error.

¶ 27 N.C. Gen. Stat. § 15A-1231 provides in part:

> (a) At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions. A party tendering instructions must furnish

> copies to the other parties at the same time he tenders them to the judge.
>
> (b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. *A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury.* The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.
>
> (c) After the arguments are completed, the judge must instruct the jury in accordance with G.S. 15A-1232.

N.C. Gen. Stat. § 15A-1231 (emphasis added). "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232.

¶ 28 It is undisputed "public vehicular area" includes gas station parking lots. *See* N.C. Gen. Stat. § 20-4.01(32) (2021) ("Public Vehicular Area" includes "[a]ny service station . . . providing parking space"); *see also State v. Coleman,* 228 N.C. App. 76, 79, 743 S.E.2d 62, 65 (2013) (clarifying a gas station parking lot is a public vehicular area). The trial court included "public vehicular area" in its instructions to the jury in addition to "street or highway."

¶ 29 Once the jury retired to begin deliberations, the trial court noted its deviation from the draft jury instructions provided during the charge conference, and its decision to instruct the jury on a full statement of the applicable law, which includes operating a vehicle while intoxicated in a "public vehicular area." *See State v. Mark*, 154 N.C. App. at 345, 571 S.E.2d at 870. The trial judge acknowledged making a correction to the jury instructions before reading them to the jury. "The jury instructions that . . . I went through and gave a copy to counsel did not include public vehicular area. As Madam D.A. was doing her [closing] argument, I noticed that and corrected it and instructed the jury on the public vehicular area." After clarifying the sequence of events for the record, the trial court concluded, "[i]n my discretion, I changed it. I will note your objection for the record and we'll see."

¶ 30 In light of defense counsel's evident awareness of both (1) the omission in the draft instructions, and (2) the applicable law on the substantive offense of DWI, counsel's failure to inquire whether the trial court intended to correctly and completely instruct according to Pattern Jury Instruction 270.20A is significant. In fact, Defendant concedes the trial court delivered substantively correct instructions to the jury. It is clear from the record that defense counsel did not inquire whether the trial court would include "public vehicular area" in its instructions.

¶ 31 While instructing the jury, the trial court's deviation from the draft instructions to include a full statement of applicable law, which was supported by the

evidence, does not constitute error. The trial court complied with the provisions of N.C. Gen. Stat. §§ 15A-1231 and 15A-1232 in conducting a charge conference and fully explaining the applicable law to the jury. At the charge conference, the trial court was required to "inform the parties of the offenses, lesser included offenses, and affirmative defenses on which [the judge] will charge the jury." Here, the trial court did so, including specific mention of the instruction for the substantive offense of DWI, Pattern Jury Instruction 270.20A. Further, the trial court was required to "inform the parties . . . of what, if any, parts of tendered instructions will be given." N.C. Gen. Stat. § 15A-1231(b).

¶ 32 Here, neither the State nor Defendant tendered instructions to the trial court. Therefore, it follows that charging the jury verbatim to the pattern jury instruction the trial court indicated would be presented, Pattern Jury Instruction 270.20A, is not error. This is particularly true where defense counsel fails to avail themself of the opportunity to inquire at the charge conference whether other particular instructions will be provided to the jury. *See* N.C. Gen. Stat. § 15A-1231(b).

¶ 33 As the trial court fully complied with N.C. Gen. Stat. §§ 15A-1231 and 15A-1232, we discern neither prejudice nor error with respect to the trial court's decision to completely and accurately instruct the jury in accordance with applicable law.

VI. Conclusion

¶ 34 We therefore hold the trial court: (1) did not err in denying Defendant's motion

to dismiss, and (2) did not err by charging the jury in accordance with Pattern Jury Instruction 270.20A.

NO ERROR.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).