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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-616

Filed 07 March 2023

Buncombe County, Nos. 18CRS711334, 18CRS90653

STATE OF NORTH CAROLINA

v.

TIMOTHY ARTHUR RABAS

Appeal by Defendant from judgment entered 17 February 2022 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State.

Hylar & Agan, PLLC, by George B. Hylar, Jr., for Defendant-Appellant.

WOOD, Judge.

Timothy Rabas (“Defendant”) appeals from a 17 February 2022 jury verdict and judgment finding him guilty of driving while impaired and driving while license revoked for an impaired driving revocation. On appeal, Defendant challenges a number of issues related to his driving while license revoked for an impaired driving

revocation conviction. For the reasons stated, we hold Defendant received a fair trial free from error.

I. Factual and Procedural Background

On the evening of 13 October 2018, Defendant was driving on Interstate 40 through Asheville, North Carolina. At approximately 7:20 p.m., Defendant was stopped, arrested, and cited by State Highway Patrol Trooper Brown (“Trooper Brown”) with driving while impaired and speeding at 84-mph in a 55-mph zone (the “first set of charges”). Defendant was transported to the Buncombe County Detention Center. Due to Trooper Brown’s suspicions of impairment, Defendant was taken into the Intoxilyzer room and provided with a copy of an Implied Consent Rights form. Trooper Brown read aloud the Implied Consent Rights form to Defendant, and Defendant signed the form at approximately 8:51 p.m. The form states, in relevant part, “Your driving privilege will be revoked immediately for at least 30 days if . . . the test result is 0.08 or more” Defendant underwent a breath test by blowing into the Intoximeter EC/IR II instrument (“breath testing instrument”) and his test results were recorded above 0.08. Defendant appeared before a magistrate for a bond hearing and was formally charged with speeding and driving while impaired; was booked by the jail staff; and subsequently, was released from custody that same evening.

After his release, Defendant asked Trooper Brown for a ride back to his vehicle, which was parked at a location off the Interstate. Trooper Brown declined the request

and, instead, provided Defendant directions to his vehicle's parked location. Defendant took an Uber back to his vehicle and proceeded to drive again, as he needed to be in Raleigh by 9:00 a.m. the next morning for work.

At approximately 11:00 p.m., Defendant was stopped by State Highway Patrol Trooper Grieve ("Trooper Grieve"), who had been alerted by Trooper Brown about Defendant's first set of charges and that Defendant might attempt to drive his vehicle despite his revoked driver license.

After observing Defendant texting while driving and failing to maintain lane control as he swerved and almost struck another vehicle, Trooper Grieve pulled Defendant over. Upon being stopped, Defendant handed Trooper Grieve a North Carolina identification card rather than a driver license. Smelling alcohol during his encounter with Defendant, Trooper Grieve began an investigation to determine whether Defendant was driving while impaired. Trooper Grieve asked Defendant to submit to a field sobriety test, which he did. Trooper Grieve also requested Defendant submit to a portable breath test, which Defendant refused. Based upon Trooper Grieve's observations of Defendant and his performance during the field sobriety test, Defendant was arrested a second time for driving while impaired. Defendant was again transported to the detention center where he read and signed a second Implied Consent Rights form and underwent a second breath test using the breath testing instrument. The result of Defendant's second breath test was greater than 0.08. Trooper Grieve charged Defendant with failing to maintain lane control, operating a

motor vehicle on a highway while his driver license was revoked for an impaired driving revocation, texting while driving, and driving while impaired (the “second set of charges”).

Defendant’s first set of charges were tried by a jury in Buncombe County Superior Court on 20 April 2021. During trial, the court declared a mistrial due to juror misconduct and an order memorializing this ruling was entered on 3 June 2021. Defendant subsequently filed a motion to dismiss the first set of charges pursuant to the Double Jeopardy Clause of the Fifth Amendment. The trial court granted Defendant’s motion and dismissed the charges on 18 November 2021.

Defendant’s second set of charges were tried in Buncombe County District Court on 19 November 2019, and the trial court found Defendant guilty of driving while impaired, driving while license revoked for an impaired driving revocation, texting while driving, and failure to maintain lane control. Defendant appealed his District Court convictions of the second set of charges to the Superior Court Division for a jury trial.

On 14 February 2022, a jury trial commenced in Superior Court to consider three of the second set of charges against Defendant; specifically, driving while impaired, driving while license revoked for an impaired driving revocation, and failure to maintain lane control. During the trial, conflicting testimony was given by Defendant and Trooper Brown about whether Trooper Brown told Defendant he could not drive after his driver license was revoked. Trooper Brown testified that he

explicitly stated to Defendant “he was no longer allowed to drive in the State of North Carolina [because] [t]hat privilege had been revoked. . . [and] that he could get a sober licensed driver to go back and retrieve his vehicle.” By contrast, Defendant denied that Trooper Brown told him he could not drive.

The State offered into evidence a copy of the Implied Consent Rights form which contained Defendant’s signature. Trooper Brown testified that he read this form out loud to Defendant and provided Defendant a copy to read alongside, before obtaining Defendant’s signature. He further testified that it is his standard process to give a copy of the form to an individual who can visually see and follow along with the Trooper’s verbal recitation of the form. According to Defendant, he did not receive the form from Trooper Brown. He testified that the Implied Consent Rights form he signed was part of the paperwork he was given by the magistrate after being formally charged for the first set of charges. Defendant testified that “[t]he paperwork [given by the magistrate]—I know that the paperwork says that my license was revoked. I know that, and I know that I signed papers that said that.”

At the close of the State’s evidence, Defendant moved to dismiss all three of the charges against him, arguing in relevant part, that the State had not shown sufficient evidence that his driver license had been revoked under applicable North Carolina law, as there was no order of revocation in evidence. The trial court denied Defendant’s motion to dismiss.

During the charge conference, Defendant’s trial counsel requested a jury

instruction on the defense of entrapment in connection with the charge for driving while license revoked. The trial court denied Defendant's request for the jury instruction, finding that the defense was inapplicable to the charge because there was "no evidence of acts of persuasion, trickery, or fraud by law enforcement, or that the concept, design, or idea of criminal conduct in this case originated in the minds of government officials."

After the charge conference and prior to closing arguments, Defendant's trial counsel requested that he be allowed to argue to the jury that there was no document in evidence alerting Defendant that his license was immediately revoked. In reference to State's Exhibit 4,¹ Defense counsel argued to the trial court, "[t]he document that's in evidence . . . says if you fail this test, your license will be revoked. There's not a document that says your license is now revoked." The trial court ruled that Defense counsel was not permitted to make such an argument to the jury, finding that counsel's argument "misstates the evidence; in this case, Exhibit 4." On 17 February 2022, the jury returned verdicts finding Defendant guilty on the charges of driving while impaired, driving while license revoked for an impaired driving revocation, and failure to maintain lane control. The trial court entered judgment against Defendant for the above offenses. Defendant was sentenced as a Level 2 DWI to a term of twelve months suspended and placed on supervised probation for twenty-

¹ State's Exhibit 4 is the Implied Consent Rights form signed by Defendant at 8:51 p.m. on 13 October 2018.

four months. On the remaining charges, he was sentenced to a term of forty-five days suspended and placed on supervised probation for a period of twenty-four months. Defendant timely filed and served notice of appeal on 3 March 2022.

II. Analysis

On appeal, Defendant challenges only his conviction for driving while license revoked for an impaired driving revocation (“DWLR for an impaired driving revocation”). Having failed to raise issues relating to his other charges from the 17 February 2022 judgment, Defendant has abandoned any such arguments. *State v. Harris*, 21 N.C. App. 550, 551, 204 S.E.2d 914, 915 (1974); N.C. R. App. P. 28(b)(6).

A. Defendant’s motion to dismiss for insufficiency of evidence.

We first note that pursuant to our Rules of Appellate Procedure, Defendant failed to properly preserve his motion to dismiss for appellate review. Rule 10(a)(3) states that “if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.” N.C. R. App. P. 10(a)(3). According to the trial transcript, at the close of the State’s evidence, Defendant’s trial counsel made a motion to dismiss the driving while license revoked for an impaired driving revocation charge. The trial court denied this motion, and Defendant then presented evidence. There is nothing in the record before us indicating Defendant’s trial counsel renewed his motion to dismiss at the close of all the evidence. Because Defendant presented evidence and failed to renew his motion to dismiss at the close

of all of the evidence, he failed to properly preserve this motion for appellate review before this Court. *See State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985); N.C. R. App. P. 10(a)(3). However, in order to “prevent manifest injustice” to Defendant, we exercise our discretionary authority pursuant to Rule 2 of our Rules of Appellate Procedure to reach the merits of Defendant’s argument. N.C. R. App. P. 2.; *State v. Batchelor*, 190 N.C. App. 369, 377, 660 S.E.2d 158, 164 (2008); *State v. Moncree*, 188 N.C. App. 221, 231, 655 S.E.2d 464, 470-71 (2008).

Defendant argues that the trial court should have granted his motion to dismiss because the State’s evidence was insufficient to support his conviction for driving while license revoked for an impaired driving revocation. We disagree.

The appropriate standard of review on a motion to dismiss is “whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citation omitted). In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn therefrom. *State v. Blagg*, 377 N.C. 482, 487-88, 858 S.E.2d 268, 273 (2021) (citation omitted). “Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.” *Olson*, 330 N.C. at 564, 411 S.E.2d at 595 (citation omitted). This Court can consider

direct or circumstantial evidence, or a combination thereof. *Blagg*, 377 N.C. at 488, 858 S.E.2d at 273. Under this standard, we affirm the denial of a motion to dismiss for insufficient evidence “[i]f the record discloses substantial evidence of each essential element constituting the offense for which the accused was tried.” *State v. Alford*, 329 N.C. 755, 759-60, 407 S.E.2d 519, 522 (1991) (citations omitted).

The criminal offense of DWLR for an impaired driving revocation is set forth in N.C. Gen. Stat. § 20-28(a1), which provides, in relevant part:

Any person whose drivers license has been revoked for an impaired driving revocation as defined in G.S. 20-28.2(a) and who drives any motor vehicle upon the highways of the State is guilty of a Class 1 misdemeanor. Upon conviction, the person’s license shall be revoked for an additional period of one year for the first offense, two years for the second offense, and permanently for a third or subsequent offense.

N.C. Gen. Stat. § 20-28(a1). A conviction for DWLR for an impaired driving revocation requires the State “to prove beyond a reasonable doubt that (1) a defendant operated a motor vehicle (2) on a public highway (3) while his driver’s [sic] license was revoked.” *State v. Green*, 258 N.C. App. 87, 92, 811 S.E.2d 666, 669 (2018) (citation omitted). Additionally, the State must prove a fourth element: “the defendant had actual or constructive knowledge of the . . . revocation in order for there to be a conviction under this statute.” *Id.* (quoting *State v. Cruz*, 173 N.C. App. 689, 697, 620 S.E.2d 251, 256 (2005)). Actual knowledge “brings the knowledge of a fact directly home to the party[.]” *State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d

253, 255-56 (2004) (citation omitted) (discussing notice requirements under N.C. Gen. Stat. § 15A-544.5). Constructive knowledge is “information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.” *Id.* (citation omitted).

On appeal, Defendant challenges the fourth element of DWLR for an impaired driving revocation, his knowledge of the revocation. Defendant argues that “[w]ithout any record of Defendant’s license revocation being offered into evidence during the State’s case in chief, there was insufficient evidence that [he] had the requisite knowledge that his license had been revoked to sustain [the DWLR for an impaired driving revocation] conviction.” Defendant contends that the State did not offer evidence of: the intoxilyzer breath test’s results related to the first set of charges; a revocation report that was prepared and signed by the law enforcement officer who conducted the intoxilyzer breath test; a revocation order from the criminal magistrate that was issued to Defendant related to the first set of charges; or “that a ‘notice’ from the Division of Motor Vehicles was provided to [Defendant] informing him that his license had been revoked, as required by N.C. Gen. Stat. § 20-48(a).” We disagree.

In the present case, the State’s evidence tended to show through the testimony of Trooper Brown that Defendant possessed actual knowledge of the revocation of his driver license. Trooper Brown testified under oath that he explicitly told Defendant: he should not drive; he was no longer allowed to drive in the State of North Carolina;

and his driving privilege had been revoked. After Defendant was released from the detention center, he asked Trooper Brown what “his next step would be”; Trooper Brown testified to advising him “that he could get an Uber or a taxi,” as Defendant was not permitted to drive. Additionally, the State also established Defendant possessed actual knowledge of the revocation of his driver license through the admission of State’s Exhibit 4, the Implied Consent Rights form the Defendant signed, into evidence. Based upon the plain language of the form, (i.e., if your test is 0.08 or greater, then your driving privilege is revoked immediately), combined with Defendant’s admission that his test result was greater than 0.08, gives rise to the inference that Defendant had actual knowledge that his driving privilege was revoked.

Defendant’s testimony at trial also gives rise to the inference of Defendant’s actual knowledge that his license was revoked. Defendant’s admission at trial that he signed the form further supports the inference that he had direct knowledge of the revocation. *See State v. Haas*, 131 N.C. App. 113, 116, 505 S.E.2d 311, 313 (1998) (noting defendant’s signing of a form was evidence of defendant’s knowledge of form’s contents). On cross-examination, Defendant testified about the paperwork given him by the magistrate, which included State’s Exhibit 4, “the paperwork—I know that the paperwork says that my license was revoked. I know that, and I know that I signed papers that said that.” Taken together, this evidence recounts a series of events that brought the knowledge of the revocation “directly home” to Defendant. *Poteat*, 163

N.C. App. at 746, 594 S.E.2d at 255.

This evidence further establishes Defendant's constructive knowledge that his driver license was revoked. Viewing the evidence in the light most favorable to the State, the jury could reasonably conclude that Defendant would have discovered his revoked driving privilege had he exercised due diligence by reading the Implied Consent Rights form before signing it, or simply listening as Trooper Brown read the form aloud to him. *See id.* at 746, 594 S.E.2d at 255-56.

Because Defendant possessed both actual and constructive knowledge of his immediately revoked driver license, there was substantial evidence to support this element of Defendant's DWLR for an impaired driving revocation conviction. Therefore, the trial court did not err in denying Defendant's motion to dismiss for insufficient evidence.

B. Defendant's prohibited arguments to the jury.

Next, Defendant argues that the trial court erred in prohibiting Defendant from arguing to the jury that there was no document in evidence showing Defendant that his license had been revoked. According to Defendant, because certain evidence, such as the magistrate's order that Defendant's driver license be revoked, was not offered into evidence by the State, this supports Defendant's arguments that "he did not know that his license was revoked after being arrested and charged with driving while impaired by Trooper Brown." We disagree.

Under North Carolina law, "control of the arguments of counsel rests primarily

in the discretion of the presiding judge.” *State v. White*, 307 N.C. 42, 51, 296 S.E.2d 267, 272 (1982) (citations omitted). Although the trial judge possesses this discretion, “counsel must be allowed wide latitude in their arguments which are warranted by the evidence and are not calculated to mislead or prejudice the jury.” *State v. Riddle*, 311 N.C. 734, 738, 319 S.E.2d 250, 253 (1984) (citing *State v. Adcock*, 310 N.C. 1, 20, 310 S.E. 2d 587, 598 (1984)). However, during a closing argument, an attorney “may not . . . express his personal belief as to the truth or falsity of the evidence” N.C. Gen. Stat. § 15A-1230(a). Discretionary rulings may only be reversed if the trial court’s “ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

After the charge conference, Defendant’s counsel requested that he be allowed to argue to the jury during closing arguments that no document was offered into evidence indicating that Defendant had knowledge that his license was revoked. Trial counsel acknowledged that State’s Exhibit 4 “says if you fail this test, your license will be revoked;” however, counsel reasoned to the trial court that “[t]here’s not a document that says your license is now revoked.” The trial court denied this request ruling that it “misstates the evidence; in this case, [State’s] Exhibit 4.” As previously discussed, State’s Exhibit 4, which was admitted into evidence, contained an explicit statement: “Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.”

Defendant signed State's Exhibit 4 at 8:51 p.m. on 13 October 2018. The record evidence further tends to show that Defendant tested greater than 0.08. Because closing arguments must be constructed from fair inferences and free from arguments that mislead and misinform the jury, the trial court properly exercised its discretion in prohibiting this argument. *See State v. Jones*, 355 N.C. 117, 135, 558 S.E.2d 97, 108 (2002); *State v. Lopez*, 363 N.C. 535, 538, 681 S.E.2d 271, 273-74 (2009).

C. Entrapment Defense.

Next, Defendant challenges the trial court's refusal to instruct the jury on the defense of entrapment. Defendant contends that based upon the words and actions of Trooper Brown, he was led to believe he could return to his parked vehicle and continue driving his vehicle to his next destination. We disagree.

We review *de novo* Defendant's challenges to the trial court's decision regarding jury instructions.² *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). The defendant bears "the burden of proving the defense of entrapment to the satisfaction of the jury." *State v. Keller*, 374 N.C. 637, 645, 843 S.E.2d 58, 64 (2020) (cleaned up).

Entrapment is "the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him." *State*

² We note that Defendant failed to state a standard of review for this argument in his brief, as is required by Rule 28(b)(6) of our Rules of Appellate Procedure. N.C. R. App. P. 28(b)(6). However, in our discretion, we have invoked Rule 2 to decide this appeal based upon the merits. *See Vaden v. Dombrowski*, 187 N.C. App. 433, 436-37, 653 S.E.2d 543, 545 (2007).

v. Stanley, 288 N.C. 19, 27, 215 S.E.2d 589, 594 (1975) (citations omitted). To be entitled to a jury instruction for entrapment, a defendant must produce credible evidence that 1) state agents induced him to commit the crime; and 2) the intention to commit the crime originated with the state agents (i.e., the crime was “the product of [their] creative activity”). *State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 749-50 (1978). When making the determination of whether there is some credible evidence of each element of entrapment, “we view the evidence in the light most favorable to the defendant . . . and we take the defendant’s testimony as true[.]” *Keller*, 374 N.C. at 645-46, 843 S.E.2d at 64 (citations omitted). “Discrepancies in defendant’s evidence or contradictory evidence offered by the State do not bar the availability of this defense.” *Id.* at 646, 843 S.E.2d at 64-65 (citation omitted). However, if a “defendant has a predisposition to commit the crime independent of governmental inducement and influence, the origin of the criminal intent lies with the defendant and the defense of entrapment is unavailable.” *Id.* at 645, 843 S.E.2d at 64 (cleaned up).

Here, the evidence in the record, taken in the light most favorable to Defendant and after resolving inconsistencies in Defendant’s favor, does not demonstrate that a state agent induced Defendant to believe he was allowed to drive so as to commit a crime. Instead, the evidence shows that Defendant expressed to Trooper Brown he needed to be in Raleigh by 9 a.m. the next day for work; Defendant gave his driver license to Trooper Brown during his first traffic stop, and later provided a North

Carolina identification card to Trooper Grieve during his second traffic stop. The record evidence further shows that after Defendant's first appearance before the magistrate, Trooper Brown told Defendant to report for his court date, gave him his keys, told him he was free to leave, gave Defendant directions to his car, and suggested Defendant could take an Uber to get to his vehicle. The evidence demonstrates that Trooper Brown provided Defendant an Implied Consent Rights form, which stated his license would be revoked if certain conditions were met; even if Defendant did not "read along" when Trooper Brown read the form aloud to Defendant, Defendant signed this form. Further, the record evidence does not show any inducement on the part of a state agent which caused Defendant to drive his vehicle. Instead, the choice was entirely Defendant's own. Therefore, we hold Defendant was not entitled to a jury instruction on the defense of entrapment. This argument is overruled.

D. Limitation of evidence related to Defendant's first DWI charge.

Finally, Defendant argues the trial court erred in not allowing his trial counsel to present evidence of the dismissal of the first set of charges. Defendant contends that during a pre-trial hearing, Defendant's trial counsel argued that he should be allowed to present evidence to the jury that the charges in the first case were dismissed. The trial court ruled that neither party could discuss the first case. However, Defendant did not make this pre-trial hearing part of the record on appeal and, thus, we are unable to review Defendant's challenge. N.C. R. App. P. 9(a)(3)(e).

Because this argument was not preserved for appellate review, it is dismissed.

III. Conclusion

Based upon the above reasoning, we conclude that Defendant received a trial free from error.

NO ERROR.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).