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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-378

Filed 5 December 2023

Orange County, No. 20 CRS 52102

STATE OF NORTH CAROLINA

v.

KEVIN WAYNE TERRY

Appeal by defendant from judgment entered 1 November 2022 by Judge R. Allen Baddour Jr. in Superior Court, Orange County. Heard in the Court of Appeals 14 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Sean K. Lloyd, for the State.

Michelle Abbott, for defendant-appellant.

ARROWOOD, Judge.

Kevin Wayne Terry (“defendant”) appeals from judgment entered upon his conviction for felony fleeing to elude arrest with a motor vehicle (“fleeing to elude”). For the following reasons, we find no error in the trial, but we remand the judgment for correction to make it consistent with the verdict.

I. Background

During the early morning of 22 October 2020, multiple police officers from the Orange County Sheriff's Office Strike Team were surveilling a Waffle House parking lot in Hillsborough, North Carolina. Three officers testified that while monitoring the lot, they observed a man they knew as defendant walking around and conversing with Waffle House employees.

Deputy Matthew Andrews ("Andrews") testified that, when surveilling the lot from a "little over a hundred feet" away with binoculars, he identified defendant from "prior interaction." According to Andrews, he "had a straight view of the entire front area of the Waffle House" and "could zoom in to positively identify the people [he] was looking at[.]" Andrews testified he observed defendant in the parking lot for about an hour in an area that was "well lit enough for [Andrews] to see facial details[.]"

Lieutenant Brandon Lassiter ("Lassiter") testified that he observed defendant on two occasions: (1) while surveilling the parking lot from a hillside with binoculars and (2) while being in the lot with defendant. According to Lassiter, he was able to identify defendant from previous "conversations [he had] with [defendant] throughout [his] 19 years of being at the sheriff's office and being a citizen of Orange County." Lassiter further testified that the Waffle House parking lot had lighting during his surveillance and that with binoculars, he was able to "make out facial features[.]"

A third officer, Deputy Bernard Dodds ("Dodds"), testified that he observed

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defendant while surveilling the parking lot with binoculars from “about 50 yards” away where he “could see that whole area[.]” Dodds testified that he was familiar with defendant because he “had dealings with [defendant] as a cover officer on another call prior to that.”

Further, Andrews, Lassiter, and Dodds all testified that, after observing defendant in the parking lot for about an hour, they saw defendant move a motorcycle to a nearby Shell gas station and then later get on the motorcycle and drive off toward Interstate 85. The three officers testified that they then began pursuing defendant in patrol cars.

According to Dodds, after clocking defendant traveling at a speed of approximately 30 mile per hour over the legal limit, Dodds activated his patrol car’s blue lights and siren and attempted to pull the motorcycle over. Instead of stopping, the motorcycle sped up, hitting speeds “up to 125 miles per hour.” According to the dash camera video recording from Dodd’s patrol car, the officers’ pursuit of the motorcycle lasted approximately ten minutes until Lassiter “call[ed] the pursuit off, given the circumstances and the speeds” and “since [they] had positively identified everything to take out warrants.” According to the officers, defendant passed other cars at high speeds and drove through red traffic lights and a stop sign.

After the pursuit was called off, the officers determined that the motorcycle, which they testified defendant was driving, was not registered to defendant. Further, none of the officers photographed or filmed defendant while surveilling him in the

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Waffle House parking lot, nor did they obtain store security footage from the Waffle House or other nearby establishments.

When the State asked Lassiter if he was aware of whether defendant had a valid driver's license, Lassiter testified, "We had ran both subjects. And at the time, [defendant] did not have a valid driver's license." Similarly, when the State asked Dodds whether or not defendant had a valid driver's license on the date in question, Dodds testified that "he did not."

An arrest warrant for defendant was issued on 22 October 2020. On 15 February 2021, defendant was indicted on charges of (1) fleeing to elude, (2) aggressive driving, (3) speeding, (4) driving while license revoked, (5) driving left of center, (6) failing to stop at a steady red light, (7) failing to stop at a stop sign or flashing red light, (8) resisting a public officer, and (9) improper passing. During trial, the State elected to proceed against defendant only on the one count of fleeing to elude.

After closing arguments, the trial court provided the jury with the following instruction:

The defendant has been charged with the felonious operation of a motor vehicle to elude arrest. For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt:

First, that the defendant was operating a motor vehicle; second, that the defendant was operating that motor vehicle on a street or highway; third, that the defendant was fleeing or attempting to elude a law enforcement

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officer who was in the lawful performance of his duties. A sheriff's deputy is a law enforcement officer with authority to enforce the motor vehicle laws. A person flees or attempts to elude arrest or apprehension by a law enforcement officer when he knows or has reasonable grounds to know that an officer is a law enforcement officer, is aware that the officer is attempting to arrest or apprehend him, and acts with the purpose of getting away in order to avoid arrest or apprehension by the officer.

And fourth, that two of more of the following factors were present at that time: Speeding in excess of 15 miles per hour over the legal speed limit, or reckless driving which is driving without due caution or circumspection or at a speed or in a manner so as to endanger or be likely to endanger any person or property, or driving while his license is revoked.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant operated a motor vehicle on a street or highway while fleeing or attempting to elude a law enforcement officer who was in the law enforcement performance of his duties, and two or more of the following factors were present, speeding in excess of 15 miles per hour over the legal limit, reckless driving, driving while his license is revoked, and that the defendant knew or had reasonable grounds to know that the officer was a law enforcement officer, it would be your duty to return a verdict of guilty of felonious operation of a motor vehicle to elude arrest.

Neither defendant nor the State objected to the trial court's instructions. Following deliberations, the jury returned the following verdict: "[W]e, the jury, unanimously find [defendant] to be guilty of felony flee to elude arrest with a motor vehicle."

The trial court's judgment entered on 1 November 2022 specifically states that the defendant was found guilty, pursuant to trial by jury, of "ELUDE ARREST MV >=3

AGRV FCTRS” under § 20-141.5(b). The trial court’s judgment further sentenced defendant for a minimum term of ten months and a maximum term of twenty-one months. Defendant gave oral notice of appeal in open court.

II. Discussion

On appeal, defendant contends that the trial court erred by denying defendant’s motion to dismiss because there was not sufficient evidence that defendant was the perpetrator. Defendant also contends the trial court erred in instructing the jury on “driving while license revoked” (“DWLR”) as an aggravating factor of fleeing to elude because there was insufficient evidence of defendant driving while his license was revoked. We address each argument in turn.

A. Motion to Dismiss

Defendant argues that there was insufficient evidence to identify him as the individual who fled to elude arrest because (1) the officers’ identifications were made under unique and suboptimal conditions; (2) the officers did not sufficiently establish their familiarity with defendant’s appearance; and (3) the motorcycle was not registered to defendant. We disagree.

This Court reviews the trial court’s denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62 (2007) (citation omitted). “In ruling upon a motion to dismiss, the trial court must determine whether, upon consideration of all of the evidence in the light most favorable to the State, there is substantial evidence that the crime charged was committed and that defendant was the perpetrator.” *State v.*

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Beasley, 118 N.C. App. 508, 511–12 (1995) (cleaned up). “If the record developed before the trial court contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *State v. Massey*, 287 N.C. App. 501, 509–10 (2023) (cleaned up).

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78 (1980) (citations omitted). The term “substantial evidence” means “that the evidence must be existing and real, not just seeming or imaginary.” *State v. Powell*, 299 N.C. 95, 99 (1980) (citations omitted). In determining if evidence is substantial, this Court must “consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192–93 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Here, three officers identified defendant as the individual who fled from them on the motorcycle. The officers’ alleged observations of defendant were not brief; rather, they had been monitoring the parking lot and surrounding area for approximately an hour before the pursuit began. Although they observed the area from a distance of approximately thirty-five to fifty yards, the officers testified that (1) they used binoculars; (2) the observed areas had sufficient lighting for them to see facial characteristics; and (3) their vantage points provided them with line of sight to

the areas where defendant was walking around and where he later got on the motorcycle. Moreover, Lassiter testified that at one point he observed defendant in the parking lot from close range when Lassiter “was in the parking lot actually with [defendant].”

With respect to the officers’ familiarity with defendant, the three identifying officers testified that they had met defendant in the past. Although the officers did not provide specific details of the past meetings, their testimony indicated that they included conversations with defendant on more than one occasion. Lastly, defendant points out that because the motorcycle was registered to someone other than defendant, there was “prima facie evidence that the motorcycle was being operated by this other [person] at the time of the offense.” Although N.C.G.S. § 20-141.5(c) provides that such evidence is established in this situation, the State rebutted that evidence via officer testimony.

Accordingly, when viewing this evidence “in the light most favorable to the State,” it is a reasonable inference that defendant was the individual who fled to elude arrest, and the trial court did not err in denying the motion to dismiss. *Beasley*, 118 N.C. App. at 511.

B. Jury Instruction

Defendant next contends that the trial court plainly erred by instructing the jury on DWLR as an aggravating factor of fleeing to elude because the State presented no evidence that defendant’s license was ever revoked. We disagree.

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Our Supreme Court’s “precedent demonstrates that unpreserved issues related to jury instructions are reviewed under a plain error standard[.]” *State v. Collington*, 375 N.C. 401, 410 (2020) (citations omitted); *see also* N.C. R. App. P. 10(a)(4) (“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.”).

To demonstrate plain error, “the defendant must show that a fundamental error occurred at trial. To show fundamental error, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Maddux*, 371 N.C. 558, 564 (2018) (cleaned up). “Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.” *State v. Lawrence*, 365 N.C. 506, 518 (2012) (cleaned up). Therefore, “[g]enerally speaking, the rule provides that a criminal defendant is entitled to a new trial if the defendant demonstrates that the jury *probably* would have returned a different verdict had the error not occurred.” *Id.* at 507 (alteration in original) (citing *State v. Walker*, 316 N.C. 33, 39 (1986)).

Section 20-141.5 of the North Carolina General Statutes states, “It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public

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vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.” N.C.G.S. § 20-141.5(a) (2022). Subsection (b) of the statute states that if two or more “aggravating factors are present at the time the violation occurs, violation of [fleeing to elude] shall be a Class H felony.” § 20-141.5(b). The statute lists eight aggravating factors—three of which include (1) speeding in excess of 15 miles per hour over the legal speed limit, (2) reckless driving proscribed by N.C.G.S. § 20-140, and (3) DWLR. § 20-141.5(b)(1), (3), (5). To prove one exists, the factor “must only be shown to have been present at the time the violation occurs.” *State v. Dewalt*, 209 N.C. App. 187, 191 (2011) (cleaned up).

Subsection (d) of the statute states that “if the person was convicted on the basis of the presence of two of the aggravating factors[,]” the North Carolina Division of Motor Vehicles (“DMV”) “shall revoke, for two years, the drivers license of [the] person.” § 20-141.5(d). However, “if the person was convicted on the basis of the presence of three or more aggravating factors[,] then the DMV “shall revoke, for three years, the drivers license of [the] person.” *Id.*

We agree with defendant that the State did not provide sufficient evidence to prove that defendant was DWLR.¹ However, under § 20-141-5, fleeing to elude

¹ The only evidence presented by the State tending to support the finding of the DWLR factor was the testimony from Lassiter and Dodds that defendant’s driver’s license was invalid at the time of the offense. However, as defendant points out, an invalid license does not necessarily mean a license is revoked; rather, an invalid license could indicate defendant’s license was expired, or that defendant simply did not possess a license at that time.

constitutes a Class H felony if any two of the factors were present. Here, even in the absence of DWLR, the state presented sufficient evidence of two listed factors: (1) speeding in excess of 15 miles per hour over the limit and (2) reckless driving, which the trial court defined pursuant to the relevant statute.² Specifically, dashcam video evidence and officer testimony indicated that, while fleeing from law enforcement, defendant reached speeds of “up to 125 miles per hour[,]” and drove through red traffic lights and a stop sign without stopping.

Therefore, even assuming *arguendo* that the trial court erred by instructing the jury on DWLR in the absence of sufficient evidence showing DWLR, defendant did not “demonstrate[] that the jury *probably* would have returned a different verdict had the error not occurred” because the felony conviction under § 20-141.5 mandates only the showing of two factors. *Lawrence*, 365 N.C. at 507 (alteration in original). Accordingly, the trial court’s instructions did not constitute plain error.

C. Trial Court’s Error in the Judgment

Although the trial court did not commit plain error as to its jury instructions, it did err by stating in the judgment that defendant was found guilty by a jury of fleeing to elude with the presence of *three* aggravating factors.³ As discussed above,

² Section 20-140 of the North Carolina General Statutes states that “reckless driving” occurs when a “person 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[.]” § 20-140(b).

³ The trial court’s judgment states, “ELUDE ARRST MV>=3 AGRV FCTRS” under “Offense Description.”

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although the trial court instructed the jury on three of § 20-141.5's listed factors, the State presented sufficient evidence for only two of them. Moreover, the jury's verdict did not specify what factors were found and only indicated that it found defendant "guilty of felony flee to elude arrest with a motor vehicle[.]" which requires the presence of two factors. Where a verdict is returned convicting a defendant of one offense, but the judgment incorrectly reflects a conviction of another offense, the case must be remanded "to correct the judgment and make it consistent with the verdict." *State v. Durham*, 74 N.C. App. 121, 124 (1985) (citation omitted). Accordingly, this case must be remanded to correct the judgment to reflect two aggravating factors.

III. Conclusion

For the foregoing reasons, we find no error in the trial, but we remand for judgment correction.

AFFIRMED IN PART, REMANDED FOR CORRECTION OF JUDGMENT.

Judges WOOD and THOMPSON concur.

Report per Rule 30(e).