COA No. 23-281 TWENTY-EIGHT DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	From Buncombe County
v.	)	19 CRS 81058
	)	
JOHN PATRICK MOORER	)	
	)	

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DEFENDANT-APPELLANT'S OPENING BRIEF

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ISSUE PRESENTED

I. Whether the trial court plainly erred by allowing the jury to view a part of the arresting officer's body-worn camera footage that was irrelevant and unfairly prejudicial to Mr. Moorer.

STATEMENT OF THE CASE

At the 14 January 2022 session of Buncombe County District Court, Mr. Moorer was convicted of driving while impaired ("DWI") and sentenced to 30 days' imprisonment, suspended for 12 months of probation. He appealed to Superior Court, and the case was tried at the 8 August 2022 session of Buncombe County Superior Court, before the Honorable Richard L. Doughton. On 9 August 2022, the jury convicted Mr. Moorer of DWI. The trial court sentenced Mr. Moorer to 30 days' imprisonment, suspended for 12 months of probation. Mr. Moorer filed a written notice of appeal from the judgment on 12 August 2022.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

The ground for review is a final judgment in a criminal case pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444.

STATEMENT OF FACTS

The only witness at trial was Deputy Jeff Gilstrap of the Buncombe County Sheriff's office, who is attached to the DWI task force. (T p 38) During the State's opening, the prosecutor noted that "Deputy Gilstrap is one of our most highly qualified and highly trained officers in Buncombe County regarding DWI offenses." (T p 35)

Deputy Gilstrap testified that around 1:40 AM on 27 January 2019, he was patrolling in Asheville as part of his work as a member of the DWI taskforce. He was on Riverside Drive coming from the direction of the railroad switchyard headed toward the Woodfin area. He stated that prior to approaching the red light, he had passed two or three establishments which serve alcohol. He noticed a Chevy Astro van ahead of him which he estimated to be going about 30 mph, which he stated was 15 miles an hour under the speed limit. He testified that the van rode on the centerline for about 40 feet before correcting back. Then when the van made a right-hand turn onto Broadway, it turned wide, and as the van completed the turn, it went over the double yellow line into the opposite lane of travel for a short distance, and then came back into the travel lane. (T pp 43-45) Deputy Gilstrap put on his blue lights and Mr. Moorer pulled over to the side of the on-ramp of 26 West from Broadway Street. (T p 54)

There is no dashboard camera footage of Mr. Moorer's driving. According to Deputy Gilstrap, the dashboard camera in his cruiser was not working. However, he activated his body-worn camera after he pulled Mr. Moorer over. (T p 157) Thus, the video of Deputy Gilstrap's interactions with Mr. Moorer begins as Deputy Gilstrap approaches Mr. Moorer's car and continues until Mr. Moorer arrives inside the Buncombe County Detention Center. (T p 122;

State's Exhibit 12) Defense counsel did not object to the admission of the video, or any part of it, as substantive evidence. (T p 122-24)

Deputy Gilstrap testified that he smelled oil paint and alcohol as he approached the van. He also noted that Mr. Moore was accompanied by a female passenger who told him that she had been distracting Mr. Moorer by talking. Deputy Gilstrap asked Mr. Moorer to step out of the vehicle, and he complied. When Deputy Gilstrap asked Mr. Moorer if he had had anything to drink, he said that he had had a couple of beers. Mr. Moorer told Deputy Gilstrap that he had been painting bands as they performed at a show. There were two large paintings in the back of Mr. Moorer's van that were not dry yet. (R pp 32, 35) Deputy Gilstrap testified that he noticed that Mr. Moorer had bloodshot, watery eyes. (T pp 55-58)

Deputy Gilstrap then administered three field sobriety tests: horizontal gaze nystagmus ("HGN"), the walk-and-turn test, and the one-leg-stand test. (T pp 60-61) Deputy Gilstrap testified that he observed six out of six clues in Mr. Moorer's HGN test, four out of eight clues during the walk-and-turn test, and three out of four clues during the one-leg-stand test. After the field sobriety tests, throughout the remainder of their interactions, Mr. Moorer repeatedly stated that he carried out all three tests and passed them. (T p 126) Deputy

Gilstrap noted that field sobriety tests are not pass/fail tests but instead make use of clues. (T p 126)

After the other tests, Deputy Gilstrap then told Mr. Moorer to take the Alcosensor test, but Mr. Moorer refused. The video shows that Deputy Gilstrap became somewhat angry at this. (State's Exhibit 12) He then placed Mr. Moorer under arrest. Mr. Moorer then said he would take the test, but Deputy Gilstrap refused. (T pp 92-94)

Deputy Gilstrap put Mr. Moorer in his cruiser and searched Mr. Moorer's van. He found one opened beer and a beer cap. (T p 95) Deputy Gilstrap then drove Mr. Moorer to the Buncombe County Detention Center. (T p 96) Mr. Moorer cannot be seen in the video as Deputy Gilstrap drives him to the detention center because he is in the back seat. He also cannot be heard nearly as well as Deputy Gilstrap for the same reason. (State's Exhibit 12) However, as Deputy Gilstrap summarized, Mr. Moorer used some curse words in reference to Deputy Gilstrap, his job, and his performance of his job. (T p 96) The prosecutor noted that she was playing the video of the ride to the detention center to give "a sample of what the car ride was like." (T p 125)

At the detention center, Mr. Moorer agreed to a chemical analysis and did not ask for an attorney or witness. According to test tickets from the Intox EC/IR II, Mr. Moorer's blood alcohol level was .08. (T pp 112-13)

In her closing argument, the prosecutor argued,

> Now you may have in your mind some picture of what a drunk driver looks like, and it might be way different than what you just saw on that video. It might be somebody stumbling all over the place or not able to say their words or throwing up on the roadside. But our law says that a drunk driver is someone whose BAC, breath alcohol content is .08 or higher after driving. Someone with a .08 may not be throwing up on the roadside. They may not be stumbling all over the place. It may not look like what you thought it would look like before you came here today. But our law has decided that that is what is not acceptable in our community. And our law has decided that a .08 is driving while impaired.

(T p 181)

STANDARD OF REVIEW

This Court reviews unpreserved evidentiary challenges for plain error. *State v. Lawrence,* 365 N.C. 506, 518 (2012). To demonstrate plain error, the defendant must show that the error had a *probable* impact on the fact finder's determination of guilt. *Id.*

ARGUMENT

I. The trial court plainly erred by allowing the jury to view a part of the arresting officer's body-worn camera footage that was irrelevant and unfairly prejudicial to Mr. Moorer.

A. Analysis

Under North Carolina Rule of Evidence 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." N.C.G.S. § 8C–1, Rule 401. "Evidence is relevant if it has any logical tendency to prove a fact in issue." *State v. Goodson,* 313 N.C. 318, 320 (1985).

Evidence which is not relevant is not admissible. N.C.G.S. § 8C–1, Rule 402. Thus, evidence which has no "logical tendency to prove a fact in issue" is inadmissible. *State v. Mercer,* 317 N.C. 87, 93 (1986). "[I]f the only effect of the evidence is to excite prejudice or sympathy, its admission may be ground for a new trial." *State v. Mayhand,* 298 N.C. 418, 422 (1979).[1] "[T]he trial judge should exclude evidence which is foreign to the issues, or insufficient for legitimate use, or illegal as tending only to excite the passion, arouse the prejudice, awaken the sympathy, or warp the judgment of the jury." *State v. Wall,* 243 N.C. 238, 242 (1955)[2] (internal quotations and citations omitted).

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[1] North Carolina's Rules of Evidence were adopted in 1983. N.C. Gen. Stat. § 8C-1, Rule 803 (history). However, cases decided before the adoption of the Rules of Evidence but entirely consistent with them would appear to continue to be at least persuasive authority. Many cases decided prior to the adoption of the Rules of Evidence are included in "Notes of Decisions" for N.C.G.S. § 8C–1, Rule 401: for example, *Dellinger v. Elliot Bldg. Co.,* 187 N.C. 845 (1924) (noting that "the trial judge should exclude evidence which is foreign to the issues, or insufficient for legitimate use, or illegal as tending only to excite the passion, arouse the prejudice, awaken the sympathy, or warp the judgment of the jury").

[2] See note 1.

But in this case, the trial court allowed video evidence which showed Mr. Moorer cursing at Deputy Gilstrap for several minutes. This portion of the video was completely irrelevant because it did not make any fact in issue more or less likely. See *State v. Goodson,* 313 N.C. 318, 320. It did not prove any element of the State's case or rebut any defense. Thus, it was irrelevant and inadmissible. See *State v. Young,* 368 N.C. 188, 212 (2015) (noting that "there is no blanket rule prohibiting the admission of evidence concerning a defendant's conduct after the commission of a crime as long *as that evidence has a tendency to shed light on the issue of whether the defendant committed the crime*").

But as the prosecutor admitted, she played the video of the ride to the detention center to give "a sample of what the car ride was like." (T p 125) Although the ride may have been unpleasant for Deputy Gilstrap, "what the car ride was like" was not relevant to any issue in dispute. But it would have "tend[ed] [ ] to arouse the prejudice, awaken the sympathy, [and] warp the judgment of the jury." See *State v. Wall,* 243 N.C. 238, 242.

For example, in *State v. Hall,* this Court held that trial court erred by admitting testimony regarding the fact that the victim's wife cried when she heard of her husband's death because the testimony was irrelevant. 60 N.C.

App. 450, 457 (1983).[3] This Court explained, "Testimony which is offered solely [ ] for the purpose of improperly exciting prejudice against the defendant should not be admitted into evidence." *Id*.

The video of the ride to the detention center was not relevant to any disputed issue at trial, and its only effect would be to excite prejudice against Mr. Moorer. Therefore, even if the testimony had had any probative value, which it did not, any such value was substantially outweighed by the danger of unfair prejudice. See N.C.G.S. § 8C–1, Rule 403.

Thus the video was inadmissible because it was irrelevant under Rules 401 and 402, and, even if it had been relevant, it would have been unfairly prejudicial and thus should have been excluded under Rule 403.

B. Prejudice

To show plain error, the defendant must show both error and that "absent the error, the jury probably would have reached a different result." *State v. Jordan,* 333 N.C. 431, 440 (1993).

In this case, there is no video of Mr. Moorer's driving, and the video from Deputy Gilstrap's body-worn camera shows that Mr. Moorer did not appear to

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[3] See note 1.

be impaired. He is not slurring his speech or unsteady on his feet. He follows Deputy Gilstrap's instructions, and from the video, it is not apparent that he demonstrates clues of impairment. (State's Exhibit 12) In fact, the prosecutor found it necessary to argue to the jury,

> Now you may have in your mind some picture of what a drunk driver looks like, and it might be way different than what you just saw on that video. It might be somebody stumbling all over the place or not able to say their words or throwing up on the roadside. But our law says that a drunk driver is someone whose BAC, breath alcohol content is .08 or higher after driving. Someone with a .08 may not be throwing up on the roadside. They may not be stumbling all over the place. It may not look like what you thought it would look like before you came here today. But our law has decided that that is what is not acceptable in our community. And our law has decided that a .08 is driving while impaired.

(T p 181) Also, throughout Mr. Moorer's interactions with Deputy Gilstrap, he protests that he "passed" the field sobriety testing. (T p 126) The video appears to support Mr. Moorer's view. (State's Exhibit 12) While technically, as Deputy Gilstrap explained, one does not pass or fail field sobriety testing (*Id.*), Mr. Moorer's insistence that he "passed" reflects that, apparently along with the Prosecutor, he felt that he did not show signs of appreciable impairment.

Without the irrelevant part of the video, the jury would probably have reached a different result because the jurors' eyes and ears told them that Mr. Moorer was not appreciably impaired. Even the Prosecutor found it necessary to tell the jury that they should not rely on their perception of Mr. Moorer's

impairment. And minimal impairment, or a slight impact on defendant's faculties is insufficient to constitute legal impairment. "The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired." *State v. Harrington,* 78 N.C. App. 39, 45 (1985); *State v. Ellis,* 261 N.C. 606 (1964); *State v. Hairr,* 244 N.C. 506 (1956). *State v. Felts,* 5 N.C. App. 499 (1969) (new trial on other grounds).

Admittedly, under N.C. Gen.Stat. § 20–138.1, the State can prove an impaired driving offense either by "(1) showing appreciable impairment; or (2) showing an alcohol concentration of 0.08 or more." *State v. McDonald,* 151 N.C.App. 236, 244 (2002). Thus, because the video refuted that Mr. Moorer was appreciably impaired, the jury would need to rely on the other means of proving the offense of impaired driving: showing an alcohol concentration of 0.08 or more. See *id.*

However, in *State v. Narron,* this Court made clear that, while the jury was *permitted* to infer from the blood alcohol content ("BAC") results that Mr. Moore was driving while impaired, it was not *required* to do so. See 193 N.C. App. 76, 82-84 (2008). In *Narron,* this Court rejected the Defendant's argument that in § 20–138.1(a)(2), the provision that "[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" creates a mandatory presumption. This Court explained that the statute does

not create a presumption but rather "authorizes the jury to find that the report is what it purports to be" and to find it adequate proof of the defendant's alcohol concentration as reported in the results. 193 N.C. App. 76, 82-84.

In short, in *Narron,* this Court explained that the DWI statute only *allows* the jury to find BAC results "adequate proof of a fact at issue," *i.e.,* it "does not create an evidentiary or factual presumption, but simply states the standard for prima facie evidence of a defendant's alcohol concentration." 193 N.C. App. 76 at 83.

In addition, Mr. Moorer was prejudiced because the irrelevant video showed him "cursing" the *only witness at trial* who was also a law enforcement officer and also, according the State's opening, "one of our most highly qualified and highly trained officers in Buncombe County regarding DWI offenses." (T p 35) This was improper vouching because no matter how qualified Deputy Gilstrap might be, "[t]he credibility of a witness is a matter for the jury to decide." *State v. Coble,* 63 N.C. App. 537, 541 (1983). And further, our Supreme Court has recognized that the testimony of law enforcement officers already tends to carry great weight with the jury. *State v. Caballero,* 383 N.C. 464, 481 (2022). But the relevance to prejudice is not that it was improper, although it was, but that it gave the jury even more reason to be offended on behalf of

Deputy Gilstrap and against Mr. Moorer by the irrelevant evidence of Mr. Moorer's animosity toward Deputy Gilstrap.

In summary, the irrelevant part of the video would have caused the jury to be highly offended at Mr. Moorer, and the offense taken by the jury would be compounded by the State's improper vouching that Deputy Gilstrap is "one of our most highly qualified and highly trained officers in Buncombe County regarding DWI offenses." Because the video evidence refuted Mr. Moorer's impairment, had the prosecutor not vouched for Deputy Gilstrap and the jury not been shown the video of Mr. Moorer cursing Deputy Gilstrap, the jury probably would have acquitted Mr. Moorer. Thus, Mr. Moorer has demonstrated plain error and a new trial is required.

C. Preservation

Defense counsel did not object to the admission of the portion of the video which was irrelevant and unfairly prejudicial to Mr. Moorer. (T pp 123-24) Thus, Mr. Moorer requests that this Court review the issue for plain error. See *State v. Lawrence,* 365 N.C. 506, 516 (2012) (noting that, to obtain plain error review, the defendant must explicitly allege plain error) (citing N.C. R. App. P. 10(a)(4)).

CONCLUSION

WHEREFORE, Mr. Moorer respectfully requests that this Court vacate his sentence and remand this case for a new trial.

Respectfully submitted this 23rd day of May, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with N.C. R. App. P. 28(j)(2) because it is printed in 13 Century Schoolbook font and contains no more than 8,750 words in the body of the brief, footnotes and citations included, as indicated by the word-processing program used to prepare the brief.

Electronic Submission
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the foregoing has been filed by filed by uploading a copy of the same to the Court of Appeals electronic filing website.

I further hereby certify that a copy of the foregoing has been electronically served on the State by sending it via email to Elizabeth Arnette, Assistant Attorney General, at earnette@ncdoj.gov.

This the 23rd day of May, 2023.

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