NO. COA11-1366 **24TH DISTRICT**

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	**From Watauga County**
	)	**08 CRS 052295**
CHAD ETHMOND BRASWELL	)	

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BRIEF FOR THE STATE

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BRIEF FOR THE STATE

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ISSUES PRESENTED

I. DID THE TRIAL COURT PROPERLY DENY THE DEFENDANT'S MOTION TO SUPPRESS THE STATEMENTS MADE BY THE DEFENDANT AND THE RESULTS OF FIELD SOBRIETY TESTS PERFORMED BY THE DEFENDANT PRIOR TO THE DEFENDANT BEING ADVISED OF HIS MIRANDA RIGHTS?

II. DID THE TRIAL COURT PROPERLY DENY THE DEFENDANT'S MOTION TO DISMISS AT THE CLOSE OF THE STATE'S CASE AND THE CLOSE OF ALL THE EVIDENCE?

III. DID THE TRIAL COURT PROPERLY INSTRUCT THE JURY CONCERNING THE DUTY OF THE STATE TO PROVE THAT THE IMPAIRMENT OF THE DEFENDANT WAS DUE TO THE INGESTION OF CONTROLLED SUBSTANCES?

STATEMENT OF THE CASE

On or about 15 October, 2008, the defendant, Chad Ethmond Braswell, was charged with one count of Driving While Impaired in violation of N.C.G.S. § 20-138.1 and Failure to Stop at the Scene of a crash in violation of N.C.G.S. § 20-166(c). (R p. 6). The defendant pled guilty to one count of Driving While Impaired in exchange for the dismissal of the Failure to Stop at the Scene of an Accident on 10 February, 2011 in Watauga County District Court. (R p. 20). The defendant was sentenced as a Level II offender and was given a 12 month suspended sentence. (R pp. 22-23). The defendant was placed on supervised probation for a term of 18 months, was ordered to serve an active term of 7 days in the local jail and pay costs and a fine. (R pp. 22-23). The defendant gave notice of appeal to the Superior Court division in Watauga County on the same day. (R p. 23).

Proper notice of Grossly Aggravating and Aggravating factors, as well as prior record level and Notice of Intent to Introduce Certain Evidence at trial was served upon the defendant. (R pp. 25-28). The case was called to trial in Watauga County Superior Court on 12 July, 2011 before the Honorable Mark Powell, Superior Court Judge Presiding. (T p. 4). The defendant made objections to testimony about defendant's statements to officers while the accident was being investigated. (T pp. 16, 32). Judge Powell made findings of fact in regard to the stop and found that the defendant

was not in custody and did not therefore require Miranda warnings and overruled the defendant's objections. (T p. 23).

At the close of the State's evidence, the defendant made a Motion to Dismiss. (T p. 71). The trial court denied the defendant's motion. (T p. 72). At the close of all evidence, the defendant again made a Motion to Dismiss. (T p. 73). The trial Court again denied this motion. (T p. 76).

After much discussion about proposed jury instructions, the defendant did not object to the Judge instructing the jury that four of the five substances identified in State Bureau of Investigation [SBI] lab testing were impairing substances. (T p. 88). The defendant requested that the Judge instruct the jury as to their duty to determine whether the defendant was impaired due to these substances and the Judge agreed to do so. (T p. 81). Upon completion of the jury charge neither the State nor the defendant voiced any objections. (T p. 90).

The Court recessed until the next day and on the following day, the jurors requested to hear certain instructions again. (T pp. 93-95). The Judge read the jury the same instructions that were given at the previous charge. (T pp. 93-95). The defendant indicated that the instructions, as he recalled them, sounded slightly different on the previous day, however; did not formally object to the instructions. (T p. 95).

On 13 July, 2011 the defendant was convicted of Driving While

Impaired and Leaving the Scene of an Accident or Collision Resulting in Property Damage. (R pp. 35-36, T p. 96). Again the defendant was given a 12 month suspended sentence with 18 months of supervised probation, 7 days active, costs and a fine. (R pp. 45-46). The defendant gave notice in open court of his intent to appeal on 13 July, 2011 and also filed a Notice of Appeal on 22 July, 2011. (R pp. 41, 46, T p. 100).

On 13 July, 2011, Judge Powell entered the Appellate Entries. (R pp. 43-44). The Record on Appeal was filed with this Court on 14 November, 2011. The defendant filed a Motion for Extension of time to File Appellant's Brief. In an order, filed 15 December, 2011, this Court allowed the defendant's motion and ordered that the defendant's brief be filed on or before 3 January, 2012. defendant's appellate brief, dated 3 January, 2012, was filed with this Court on 4 January, 2012.

STATEMENT OF THE FACTS

Around 10:53 A.M. on 15 October, 2008, Officers Ragan and Watson of the Boone Police Department were advised of a vehicle accident on Highway 105 near the intersection of Highway 321 in Watauga County. (T pp. 15, 31). The victim, Mr. Lankford, was driving on Highway 105 in the direction of Highway 321 in his

Mitsubishi.[1] (T. p 7-8). He was moving into the left hand lane of travel on the five lane highway. (T p. 8). Mr. Lankford indicated that upon entering the left lane of travel he did not see any vehicles coming up behind him in the lane. (T p. 8). However, after entering the lane, Mr. Lankford noticed a "large white GMC truck increasing in speed and coming toward me". (T p. 8). Mr. Lankford attempted to move out of the way of the truck but at that point his Mitsubishi was struck from behind. (T p. 9). Mr. Lankford's vehicle ultimately jumped a curb and struck two cars in a parking lot before coming to rest. (T p. 9). Mr. Lankford's vehicle suffered severe damage to the back and left side, and was declared a total loss. (T p. 10). Mr. Lankford was able to indicate to police that the vehicle that struck him from behind was a white truck and that after the collision the truck continued to travel down Highway 105 without stopping. (T pp. 10-11).

Upon hearing the radio dispatch of a motor vehicle crash and the description of the white truck that had left the scene, Officer Watson of the Boone Police Department came in contact with a white truck traveling North on Highway 105. (T p. 15). Officer Watson saw a vehicle matching the description with matching damage less than five minutes after the call went out over the radio. (T pp.

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[1]Although at one point in his brief the defendant mistakenly lists the prosecutor as the victim in this case, the actual victim of the accident, Mr. Brian Lankford, testified that he was operating his Mitsubishi on Highway 105 driving in the direction of Highway 321. (T pp. 7-8).

15, 26). Following a stop of the defendant in his vehicle, Officer Watson noticed that the defendant had slow movements and responses to questions and droopy eyelids at the time he exited his truck following the traffic stop. (T p. 28)

Officer Ragan of the Boone Police Department came into contact with the defendant shortly after the defendant was stopped by Officer Watson. Officer Ragan did not advise the defendant of his Miranda rights because he was merely being detained for investigatory purposes and not under arrest. (T pp. 54-55). Upon being questioned about the accident, the defendant indicated to Officer Ragan that he did not believe he had damaged the other vehicle involved and thus made the decision not to stop. (T p. 32).

The defendant indicated that he had taken various prescription medications the morning of 15 October, 2008. (T p. 34). Due to the defendant's suspected impairment, Officer Ragan requested that the defendant complete standardized field sobriety tests. (T pp. 35-41). The defendant complied with this request and failed the one leg stand test by raising his arms for balance, raising his right foot and putting his foot down early. (T p. 37). The defendant failed the walk and turn test by swaying and stepping off of the line and only taking eight steps instead of ten. (T p. 39). The defendant also exhibited all six clues on the Horizontal Gaze Nystagmus test. (T p. 47). The defendant was subsequently placed under arrest for Driving While Impaired. (T p. 48).

The defendant was then transported to Watauga Medical Center where he was advised of his rights and submitted to a blood test. (T p. 50). The defendant's blood was drawn and sent to the SBI for analysis. (T p. 52).

At trial, Megan Hancock [Ms. Hancock], a chemical analyst working with the SBI, testified that the defendant's blood sample confirmed the presence of Carisoprodol, Meprobamape, Diazepam, Nordiazepam, and Methadone. (T p. 63). Ms. Hancock identified Carisoprodol as the active ingredient in Soma. (T p. 64). Ms. Hancock further identified Diazepam as a benzodiazepine and Methadone as an opiate. (T p. 65). The Court took judicial notice that three of the substances in the SBI lab report were scheduled drugs in Chapter 90 of the General Statutes. (T pp. 76-77, 80). The Court further found that these drugs were listed as impairing substances. (T pp. 76-77, 80). At trial, the defendant did not present any evidence.

ARGUMENT

I. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND RESULTS OF FIELD SOBRIETY TESTS WITHOUT MIRANDA WARNINGS

(Assignment of Error # 1, R p. 51).

With this assignment of error, the defendant contends that the trial court erred in denying his Motion to Suppress. The trial court did not commit reversible error in denying the defendant’s

motion.

A. Standard of Review

The scope of review on appeal from the denial of a defendant's motion to suppress is strictly limited to determining first whether the trial Court's findings are supported by competent evidence, in which case they are binding on appeal; and second, whether those findings support the trial Court's conclusions of law. State v. Hendrickson, 124 N.C. App. 150, 153, 476 S.E.2d 389, 391 (1996) (citing State v. Brooks, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)), appeal dismissed and disc. rev. improvidently allowed, 346 N.C. 273, 485 S.E.2d 85 (1997). Findings of fact are conclusive on appeal if "supported by competent evidence, even if the evidence is conflicting." State v Brewington, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (quoting State v. Eason, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), cert. denied, 513 U.S. 1096, 130 L. Ed. 2d 661, (1995)), cert. denied, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001).

B. The Trial Court Properly Denied defendant's Motion to Suppress Statements Made by the defendant and Results of Field Sobriety Tests Because the defendant Was Not in Custody and Thus Miranda Did Not Apply.

During direct examination of Officer Josh Watson, the defendant objected to questions regarding statements made by the defendant after being stopped for suspicion of leaving the scene of an accident. (T p. 16). The Judge excused the jury and allowed the defendant to question Officer Watson during voir dire regarding the

stop and subsequent investigation of the defendant. (T pp. 19-21). The defendant then made a motion to suppress any statements made by the defendant, contending that he was in fact in custody and not advised of his Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). (T p. 22).

Following arguments by both attorneys, The Court made findings that Miranda warnings were not required. (T p. 23, lines 23-24). The Court further made a conclusion of law that the statements were admissible. (T p. 23). When given the opportunity to argue the findings, the defendant did not object nor wish to argue further. (T p. 24).

Following voir dire, the jury was brought back into the courtroom and the direct examination of Officer Watson continued. Although the defendant requested a "continuing objection", he failed to object when the officer was asked about statements made by the defendant. (T pp. 25-26). Because continuing or pattern objections have not been recognized by this Court for unrelated evidence the defendant has not properly preserved this issue for appeal. State v. Bellamy, 172 N.C. App. 649, 662, 617 S.E.2d 81, 91 (2005); N.C. R. App. P. 10(a)(1) (2009).

During the direct examination of Officer Regan, the defendant again objected to the introduction of some of the statements made by the defendant during the course of the investigation. (T pp. 32-54). The defendant also objected to the some of the questions

regarding the standardized field sobriety tests conducted on the defendant. (T pp. 32-54). Again the Judge overruled these objections and allowed the testimony. The defendant again requested a "continuing objection" and thereafter did not object to questions concerning the medications taken by the defendant on the morning of the crash. (T p. 34). Again, because the defendant did not object again to the introduction of this evidence, it has not been properly preserved for appeal. N.C. R. App. P. 10(a)(1) (2009). The defendant also failed to object to the introduction of testimony regarding all of the standardized field sobriety tests, thus not preserving those issues for appeal. Id. (T pp. 37-42).

It is a clear rule that the State may not use statements made by a defendant, whether inculpatory or exculpatory, without showing that procedural safeguards against self-incrimination were first followed. In determining whether statements by a defendant are admissible the Court must look at many factors. One of these factors is whether or not the defendant was in custody and properly advised of his rights before making statements. In Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the United States Supreme Court held that statements made by a defendant who is in custody are not admissible absent a showing that the defendant was advised of various rights prior to making any statements. The Miranda rule only applies to "custodial interrogations". Id. at 444, 16 L. Ed. 2d at 706.

The test for ascertaining whether a defendant is in custody for the purposes of Miranda, the Court must look at the "totality of the circumstances" and determine whether there was a formal arrest or "restraint on freedom of movement of the degree associated with formal arrest." State v. Buchanan, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001). The North Carolina Supreme Court has expressly disavowed language in its prior cases which applied only a "free to leave" test to determine custody, and instead has based its analysis on the entirety of the objective circumstances. Id. An appellate court must therefore determine whether, based upon a trial court's findings of fact, "a reasonable person in the defendant's position would have believed that he was under arrest or was restrained in his movement to that significant degree". State v. Garcia, 358 N.C. 382, 597 S.E.2d 724 (2004).

The current facts indicate that the defendant was initially stopped by Officer Watson because his vehicle matched the description of one involved in a recent hit and run accident nearby. (T pp. 15, 26). Further, the officer testified that the vehicle damage that appeared fresh. (T pp. 15, 26). During the trial the defendant continually questioned the officer as to whether he was free to leave after the officer initiated the stop, and although Officer Watson testified that he was not, the questioning of the defendant in reference to the accident does not meet the definition of "custodial interrogation" and thus Miranda

does not apply.

In Berkemer v. McCarty, 468 U.S. 420, 439-440, 82 L.Ed. 2d 317, 334-35 (1984), the United States Supreme Court held that a motorist who is stopped in a routine traffic stop and is asked to leave his car is not in custody for the purposes of Miranda. Further, the Supreme Court noted that roadside questioning under circumstances similar to those in this case is permissible without Miranda warnings. Id. The Court acknowledged that a routine traffic stop "curtails the freedom of action" but declined to include these types of seizures in those requiring Miranda warnings. Id. at 438-439. During a routine traffic stop, "a driver is not considered in custody when he is asked a moderate number of questions and when he is not informed that his detention will be other than temporary". Id.

This Court has taken the analysis a step further and ruled that when a defendant is seated in the back of a patrol car and questioned about his alcohol consumption, he is not in custody for the purposes of custodial interrogation and Miranda. State v. Beasley, 104 N.C. App. 529, 532, 410 S.E.2d 236, 238 (1991). See also, State v. Mark, 154 N.C. App. 341, 571 S.E.2d 867 (2002). In Beasley a State Highway Patrolman stopped the defendant on suspicion of impaired driving. He requested that the defendant sit in his patrol vehicle and asked how many drinks he had consumed that evening. After the defendant answered the question he was

informed that he was being placed under arrest for Driving While Impaired. Id. at 532. Upon the defendant's objection, the court allowed the testimony, ruling that the defendant was not in custody during the traffic stop until he was informed that he was under arrest. Id. Similarly in Mark, 154 N.C. App. 341, 571 S.E.2d 867 (2002). This Court held that a defendant is not in custody when he is asked a moderate number of questions and not informed his detention will be anything other than temporary. Id.

In the present case, the defendant was initially stopped for suspicion of hit and run. Although repeatedly questioned by the defendant about whether the defendant was free to leave during this questioning, Officer Watson clarified that although he was not able to walk away during the investigation, the defendant was not handcuffed or detained and was merely stopped for the purposes of the investigation. (T pp.21-22). Officer Ragan was questioned in a similar manner and again reiterated that the defendant was being detained merely for the purposes of investigating a motor vehicle accident. (T p. 54). Officer Ragan reiterated that at no time during the initial investigation and concurrent investigation into possible impairment, was the defendant under arrest. (T p. 55). He was not placed in handcuffs or in either officer's patrol vehicle. He was not restrained or taken away from the original scene. He was always in a public place and never moved to another location for questioning. As the Court has previously stated, individuals

should expect some form of detainment for the purposes of investigation in traffic matters and it is not necessary to offer Miranda rights until the point at which they are in custody. Beasley, 104 N.C. App. at 532, 410 S.E.2d at 238 (1991); See also, Mark, 154 N.C. App. 341, 571 S.E.2d 867 (2002).

The defendant further argues that he should have been advised of his Miranda rights before he was asked to perform field sobriety tests. This Court has repeatedly held that field sobriety tests are not testimonial and thus are not "within the scope of the Miranda decision and the Fifth Amendment". State v. Flannery, 31 N.C. App. 617, 624, 230 S.E.2d 603, 607 (1976). This Court and the North Carolina Supreme Court have held that admission of the results of these tests does not violation the right against self-incrimination. Id. See also, State v. Paschal, 253 N.C. 795, 117 S.E. 2d 749 (1961). Thus the request by Officer Ragan for the defendant to perform field sobriety tests, did not require Miranda warnings.

As a final point in his first argument, the defendant maintains that the findings of fact made by Judge Powell as to the motion to suppress did not comply with the requirements of N.C.G.S. § 15A-977(f) (2009). The statute requires that a judge make a written order of findings of fact unless the judge provides his decision from the bench and there are no material conflicts of the evidence at the evidence. State v. Shelly, 181 N.C. App. 196, 205,

638 S.E.2d 516, 523, disc. review denied, 361 N.C. 367, 646 S.E.2d 768 (2007). The defendant implies in his brief that there was a material conflict in the evidence presented at the suppression hearing, however; does not give examples of where he believes the conflict to be. Further, upon making findings of fact the court asks counsel if they wish to argue any of the findings of fact and the defendant did not. (T pp. 23-24). The defendant did not object to any of the findings nor did he offer any evidence to contradict those findings.

The scope of review on appeal from the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings are supported by competent evidence and whether those findings support the court's conclusions of law. State v. Hendrickson, 124 N.C. App. 150, 153, 476 S.E.2d 389, 391 (1996) (citing State v. Brooks, 337 N.C. 132, 140-41, 446 S.E. 2d 579, 585 (1994)), appeal dismissed and disc. rev. improvidently allowed, 346 N.C. 273, 485 S.E.2d 85 (1997). In the current case, the trial court's findings were based on voir dire of the officer. The only evidence presented during voir dire was testimony from the officer, thus the findings are not disputed. Therefore, the conclusions of law are supported by competent evidence.

Further, N.C. R. App. P. 10(a)(1) (2011) states "in order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating

the specific grounds for the ruling party desired the court to make . . . ." Here the defendant failed to object to the findings of fact or request written findings. (T p. 24). Failure to object at trial makes this issue subject to dismissal for failure to properly preserve an issue for appellate review. The defendant failed to properly preserve this issue for appellate review, and as such this issue should be dismissed. For the reasons set forth above the court did not commit prejudicial error by denying the defendant's motion to suppress statements and results of field sobriety tests without Miranda warnings.

II. THE STATE PRESENTED SUBSTANTIAL EVIDENCE OF EACH ELEMENT OF DRIVING WHILE IMPAIRED PURSUANT TO N.C.G.S. § 20-138.1 AND FAILURE TO STOP AT THE SCENE OF A CRASH PURSUANT TO N.C.G.S. § 20-166(c), AND DENIAL OF THE DEFENDANT'S MOTION TO DISMISS AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL EVIDENCE WAS PROPER.

Assignment of Error # 2 and 3, R p. 51).

A. Standard of Review

In a motion to dismiss at the close of the State's evidence, all evidence must be considered in the light most favorable to the State. State v. Cutler, 271 N.C. 379, 156 S.E.2d 679 (1967). "In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense." State v. Carr, 122 N.C. App. 369, 371-72, 470 S.E.2d 70,

72 (1996). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." State v. Patterson, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). All evidence, whether direct or circumstantial, must be considered by the trial court, in the light most favorable to the State, with all reasonable inferences to be drawn from the evidence in favor of the State. State v. Rose, 335 N.C. 301, 439 S.E.2d 518, cert. denied, 512 U.S. 1246, 129 L. Ed. 2d 88, 114 S. Ct. 2770 (1994). See also, State v. Parker, 143 N.C. App. 680, 686, 550 S.E.2d 174, 178 (2001).

The trial court "need only satisfy itself that the evidence is sufficient to take the case to the jury" and "[i]f there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt." State v. Franklin, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990). "If there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." State v. Everhardt, 96 N.C. App. 1, 11, 383 S.E.2d 562, 568 (1989), affirmed, 326 N.C. 777, 392 S.E.2d 391 (1990). Any alleged contradictions or credibility issues were for the jury to decide. State v. Smith, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) ("Contradictions and discrepancies are for the jury to resolve and

do not warrant dismissal.")

B. Driving While Impaired N.C.G.S. § 20-138.1

In order to prove that the defendant was driving while impaired, the State must show that the defendant drove any vehicle on a highway, street, or public vehicular area while under the influence of an impairing substance. N.C.G.S. § 20-138.1. The defendant contends that the State did not meet the burden of proving each of these elements.

In proving the first element, this Court has defined driving to mean when one is in actual physical control of a vehicle that is in motion or that has the engine running. State v. Fields, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). See also, State v. Mabe, 85 N.C. App. 500, 355 S.E.2d 186 (1987). In the current case, the defendant was observed by Officer Watson driving on Highway 105 near Highway 321. (T p. 15). Officer Watson identified the vehicle as one matching the description of the vehicle involved in the hit and run and then further testified that upon stopping the vehicle the defendant was behind the wheel. (T p. 16). The defendant was later identified in court by Officer Watson as the individual operating the truck on 15 October, 2008. (T p. 16).

The legislature has defined pursuant to statute, a vehicle as a "device in, upon, or by which any person or property is or may be transported or drawn upon a highway." N.C.G.S. § 20-4.01(49). This definition includes all cars, trucks, buses, motorcycles,

mopeds, golf-carts. Id. The testimony in this case was clear that the defendant was stopped while operating a white full sized GM truck. (T p. 15). This vehicle would clearly fall within the definition of a vehicle for the statute, thus this element was met by the State.

The third element required for Driving While Impaired is that the State prove that the defendant was operating the vehicle on a highway, street or public vehicular area. N.C.G.S. § 20-138.1. The terms highway and street are synonymous for the purposes of this statute and encompass the entire width between property or right-of-way lines when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. N.C.G.S. § 20-4.01(13). In the present case, Officer Watson testified that he first encountered the defendant's vehicle on Highway 105, which was described previously by Mr. Lankford as a five lane highway in Watauga County. (T p. 8, 15). Because this was a commonly used public highway with no evidence to rebut the same, the third element is met by the State.

The final element necessary for the Driving While Impaired conviction is that the defendant is under the influence of an impairing substance. N.C.G.S. § 20-138.1. An impairing substance is defined as alcohol, a controlled substance under Chapter 90 of the General Statutes or any other drug or psychoactive substance capable of impairing a person's physical or mental faculties.

N.C.G.S. § 20-4.01(14a). Megan Hancock from the State Bureau of Investigation testified that she tested the sample of blood from the defendant and found the presence of Carisoprodol, Meprobamape, Diazepam, Nordiazepma and Methadone. (T p. 63). The SBI lab report indicating the presence of these drugs in the defendant's blood was admitted into evidence. (T p. 70, R pp. 13-14). The Court took judicial notice that 3 of these drugs are listed in Chapter 90 of the General Statutes as Schedule II controlled substances and are thus impairing substances. N.C.G.S. § 90-90. (T p. 76). Officer Ragan testified that the defendant exhibited signs of impairment, including failing field sobriety tests and seeming disoriented and swaying. (T pp. 33, 35-39). The State clearly met this final element by showing that the defendant had in his system various impairing substances and exhibited behavior consistent with impairment.

In his brief, the defendant argues that based on his first argument some evidence would not have been considered in determining whether the State had met its burden. At the close of the State's evidence in the light most favorable to the State all elements of the crime charged were met. Thus denial of the motion to dismiss at that point was proper. The defendant chose not to present any evidence or rebut any of the assertions made at trial and thus at the close of all evidence the State had still met its burden and met every element of Driving While Impaired.

Because the defendant merely argues that but for the purported violation of his Miranda rights, certain evidence would not have been admitted, the State cannot further argue regarding the elements. The defendant gives no examples of how each element was not met except to argue that his Miranda rights were violated.

C. Failure to Stop at the Scene of a Crash N.C.G.S. § 20-166 (c).

Once again, in a motion to dismiss at the close of the State's evidence, all evidence must be considered in the light most favorable to the State. In a motion to dismiss at the close of the State's evidence, all evidence must be considered in the light most favorable to the State. State v. Cutler, 271 N.C. 379, 156 S.E.2d 679 (1967). "In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense." State v. Carr, 122 N.C. App. 369, 371-72, 470 S.E.2d 70, 72 (1996). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." State v. Patterson, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). All evidence, whether direct or circumstantial, must be considered by the trial court, in the light most favorable to the State, with all reasonable inferences to be drawn from the evidence in favor of the State. State v. Rose, 335 N.C. 301, 439 S.E.2d 518, cert. denied, 512 U.S. 1246, 129 L. Ed. 2d 88, 114 S. Ct. 2770 (1994). See also, State v. Parker, 143 N.C.

App. 680, 686, 550 S.E.2d 174, 178 (2001).

This statute requires that the driver of any vehicle, when the driver knows or reasonably should know that the vehicle which the driver is operating is involved in a crash which results in damage to property or injury or death, shall immediate stop the vehicle at the scene of the crash. N.C.G.S. § 20-166(c). The State must prove six elements to be successful on this charge. First, that the defendant was driving a vehicle, second, that he was involved in a crash, third, that he knew or should have known that the vehicle was involved in a crash, fourth, that property was damaged, fifth, that he failed to immediately stop at the scene of the crash and finally that the failure to stop was willful or intentional.

In the current case, Mr. Lankford testified that he was struck by a white GMC truck from behind, causing his vehicle to jump a curb and hit two other vehicles parked in a parking lot. (T p. 9). He further testified that the truck who hit him from behind continued down the highway and failed to stop. (T p. 10). Mr. Lankford finally testified that his vehicle was a total loss due to the accident. (T p. 13).

Officer Watson testified that he stopped a truck matching the description of the one involved in the accident in the vicinity of the original accident. (T p. 15). He noted fresh damage to the front of the vehicle matching that which would have been the natural result of the collision. (T p. 15). Officer Watson further

testified that when he stopped the truck in the vicinity of the crash, the defendant, Mr. Braswell, was driving the vehicle. Officer Ragan finally testified that when asked about the collision, the defendant stated that "he didn't think he had damaged the other vehicle and that is why he did not stop." (T p. 32).

The evidence in the light most favorable to the State would show that the defendant was in fact driving a vehicle, a GMC truck, that was involved in a crash with Mr. Lankford. The defendant made statements to Officer Ragan indicating that he clearly knew he had been in an accident, did not immediately stop at the scene of the accident and that this failure to stop was willful and intentional. Mr. Lankford testified as to the damage to his vehicle, that it was a total loss, thus meeting the element of property damage. Therefore, the State met its burden of proving the necessary elements of this charge at the close of the State's evidence as well as at the close of all evidence.

III. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE JURY CONCERNING THE DUTY OF THE STATE TO PROVE THAT THE IMPAIRMENT OF THE DEFENDANT WAS DUE TO THE INGESTION OF CONTROLLED SUBSTANCES.

(Assignment of Error # 4, R p. 52).

According to the North Carolina Rules of Appellate Procedure, a party "may not make any portion of the jury charge or omission

therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict." N.C. R. App. P. 10(a)(2) (2009). Further, the party must state "distinctly that to which objection is made and the grounds of the objection." N.C. R. App. P. 10(a)(2) (2009). The defendant was given an opportunity at the charge conference to object to portions of the jury instructions as the judge planned to give them and did not do so. (T pp. 80-83).

Although the defendant contends that he requested a specific instruction on the State's burden to prove that the defendant's impairment was caused by ingestion of impairing substances, the defendant did not submit any sample instructions to the Court, nor did he object to the instructions as the Judge gave them. (T pp. 80-83). The defendant did not include any proposed instructions in his record on appeal.

During the charge conference the defendant did not request a particularly jury instruction in reference to the drugs, but instead requested language be added indicating that the drugs are listed as impairing substances "but it is up to the jury to determine whether or not on this occasion with this individual the evidence indicates that they were impairing." (T p. 81). The Judge instructed the jury that they must determine if the defendant consumed "a sufficient quantity of an impairing substance to cause the defendant to lose the normal control of his bodily or mental

faculties or both." (T p. 88). This instruction would appear to be exactly what the defendant was requesting and when given the opportunity to object to the instructions the defendant declined to do so. (T p. 90). During their deliberations, the jury requested to hear the instructions for both offenses again. (T p. 93). The Judge read the instructions to the jury again and when asked if either side objected, again the defendant declined to object to the instructions. (T p. 95).

Because the defendant did not object to the instructions, nor was a sample instruction provided in the record on appeal, the defendant has not preserved this issue for appeal pursuant to rule 10 of the Rules of Appellate Procedure. N.C. R. App. P. 10(a)(2) (2009).

In his brief, the defendant briefly contends that the failure to give the jury instruction amounted to plain error. The plain error rule is only to be applied in exceptional cases where the purported error is so grave that it denies the accused a fundamental right. State v. Black, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991). To find that a plain error has occurred the Court must be satisfied that but for the error, the jury would have reached a different verdict. Id. See also, State v. Walker, 316 N.C. 33, 340 S.E.2d 80 (1986). No such error can be seen in these facts. The State met its burden by introducing evidence of each element of each crime charged and the Judge instructed the jury as

requested by both attorneys. Thus no plain error exists for review.

CONCLUSION

This Court should affirm the judgment entered by the trial court.

Electronically submitted this the 3rd day of February, 2012.

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CERTIFICATE OF SERVICE

I, Carrie D. Randa, Assistant Attorney General, hereby certify that I have this day served the foregoing BRIEF FOR THE STATE upon the defendant by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his attorney of record as follows:

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This the 3rd day of February, 2012.

s/ ELECTRONICALLY SUBMITTED
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