

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1569

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 00CRS34493, 34494, 153450

LEE TAYLOR FARRAR

Appeal by defendant from judgment entered 15 October 2001 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Issac T. Avery, III and Assistant Attorney General Patricia A. Duffy, for the State.

Paul M. Green for defendant appellant.

TIMMONS-GOODSON, Judge.

Lee Taylor Farrar ("defendant") appeals from his conviction of two counts of second-degree murder and one count of felonious speeding to elude arrest. For the reasons that follow, we uphold defendant's convictions.

The State presented evidence at trial tending to show the following: On 31 July 2000, defendant was observed by Officer J.S. Cerdan ("Officer Cerdan") of the Charlotte-Mecklenburg Police Department, operating a motor vehicle at a high rate of speed on Wilkinson Boulevard. Officer Cerdan pursued the vehicle and activated his mobile video recorder and blue lights in order to

stop the vehicle. Defendant responded to the officer's blue lights and stopped his vehicle. The traffic stop was supported by Officer T.J. Borelli ("Officer Borelli") who was patrolling in a different vehicle.

Officers Cerdan and Borelli approached the stopped vehicle and Officer Cerdan ordered the defendant to turn off the engine and give him the keys. Defendant did not comply with Officer Cerdan's demand, but instead sped away from the scene. Defendant traveled at estimated speeds of seventy to ninety miles per hour on Wilkinson Boulevard with Officers Cerdan and Borelli in pursuit. In his attempt to evade the police, defendant did not stop at a red traffic light located at the intersection of Wilkinson and Old Steele Creek Road. As a result of defendant's failure to heed the stop light, his vehicle collided with a vehicle operated in compliance with the traffic signal in the opposite direction.

After the collision, defendant's car jumped a curb and hit an electrical box, causing a fire. The initial collision impacted the driver side door of the oncoming vehicle. As a result of the collision, the driver in the oncoming vehicle died at the scene of the accident, and his passenger was seriously injured. The passenger later died as a result of his injuries. Officer Cerdan arrived at the scene, drew his weapon, and ordered defendant out of the car. When defendant did not respond, Officer Cerdan pulled defendant from the vehicle and handcuffed him with the help of Officer Borelli. Defendant sustained injuries in the collision

which required hospitalization. Defendant had a North Carolina identification card but no driver's license.

Officer Robert A. Holl ("Officer Holl"), a police investigator with the Highway Interdiction Traffic Safety Unit, was assigned to investigate the traffic accident. Officer Holl responded to the Carolinas Medical Center to interview the victims of the accident. Unable to interview defendant at the hospital or the deceased victims, he traveled to the scene of the accident where he interviewed four police officers and witnesses who were present on his arrival. Officer Holl asked the police officers to submit written statements.

Officer C.E. Basic ("Officer Basic") submitted a written statement to Officer Holl detailing the events which occurred several hours prior to the accident as well as his observations at the scene of the accident. His statement recounted his attempt to stop defendant for a traffic violation several hours before defendant was involved in the fatal traffic accident. Officer Basic reported the following: (1) he stopped defendant's car, but defendant drove away when he approached the car; (2) he followed defendant's vehicle, but defendant did not stop; (3) defendant failed to stop at several red traffic signals and drove at a high rate of speed; (4) he continued to look for defendant and later responded to a traffic accident at Wilkinson and Old Steele Creek Road; (5) while at the scene assisting other officers, he recognized defendant's vehicle as the one he attempted to stop

earlier in the day; (6) he recognized defendant as the driver of the vehicle he attempted to stop.

On 11 August 2000, defendant was released from the hospital and arrested by the Charlotte-Mecklenburg police. Defendant was indicted for two counts of murder. Thirteen days before defendant's trial, Officer Busic was sent to Egypt on active military duty and was unavailable to testify at the trial. Over defendant's objection, Officer Busic's statement was admitted into evidence. Defendant was convicted of two counts of second-degree murder and felonious operation of a motor vehicle to elude arrest. Defendant was sentenced to active terms imprisonment of a minimum 251 months and a maximum of 311 months for each count of second-degree murder, said sentences to run consecutively. Defendant was also imprisoned for the minimum of twenty-five months and maximum of thirty months for felony speeding to elude arrest. Defendant appeals.

Defendant presents three issues for review, contending the trial court erred in (1) denying defendant's motion to dismiss the charges of second-degree murder for insufficient evidence; (2) admitting into evidence the out of court statement of Officer Busic; and (3) instructing the jury on involuntary manslaughter. For the reasons set forth herein, we conclude that the trial court committed no error.

In the first assignment of error, defendant argues that the trial court erred by denying his motion to dismiss the charges of

second-degree murder for insufficient evidence. Specifically, defendant argues that he did not possess the malice required for convictions of second-degree murder and thus, the State's evidence was insufficient to establish proof of that critical element. Defendant argues that in order to sustain a conviction of second-degree murder, the State had to prove that he was intoxicated, had a history of driving while intoxicated, or had a history of prior traffic convictions. We disagree.

In considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The standard of review for a "motion to dismiss based on insufficiency of the evidence is the substantial evidence test." *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993), *disc. review denied*, 336 N.C. 612, 447 S.E.2d 407 (1994). "The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* Substantial evidence is defined as the amount of "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Rick*, 342 N.C. 91, 98, 463 S.E.2d 182, 186 (1995). Whether the

State has carried its burden of proof of malice depends on the factual circumstances of each case. *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733 (1993). The term malice has many definitions, and our Supreme Court has described the term as follows:

[Malice] comprehends not only particular animosity "but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person." "[It] does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." In such a situation "the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist."

State v. Wrenn, 279 N.C. 676, 686-87, 185 S.E.2d 129, 135 (1971), cert. denied, 282 N.C. 430, 192 S.E.2d 839 (1972) (citations omitted).

In *State v. Rich*, 132 N. C. App. 440, 512 S.E.2d 441 (1999), affirmed, 351 N.C. 386, 527 S.E.2d 299 (2000), this Court addressed the precise issue of malice as raised by defendant. This Court adopted the position that "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief" are examples, any one of which may provide the malice necessary to convict a defendant of second-degree murder. *Id.* at 446, 512 S.E.2d at 446. The North Carolina Supreme Court affirmed our decision, holding

that we correctly determined that any one of the descriptive phrases provided in the malice instruction helps define malice and does not constitute "elements" of malice. Thus, the jury may infer malice from any one of those attitudinal examples. Rich, 351 N.C. at 393, 527 S.E.2d at 303. It is necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.

Examining the evidence in the light most favorable to the State, we conclude that there was substantial evidence of each essential element of second-degree murder. In the case at bar, sufficient evidence existed from which a jury could determine that defendant was guilty of two counts of second-degree murder. Defendant stipulated that the two decedents died as a result of injuries sustained in the traffic collision caused by his failure to stop his vehicle, which leaves no question that he is the perpetrator of the offense. Though defendant may not have specifically intended to injure others, his actions were nevertheless such that within a span of a few hours he fled law enforcement officers on two occasions. As defendant fled, his vehicle reached high speeds, traveled through a red light and struck another vehicle. On this evidence a jury could properly find this to constitute reckless disregard for the safety of others, satisfying the necessary example for malice. In addition to driving without a valid license, defendant ignored his duty to comply with applicable traffic laws and a valid police stop.

Defendant's actions indicated a lack of regard for the safety of other drivers. The State was not required to prove an actual intent to cause injury or the death of others. There was sufficient evidence from which a jury could find that defendant's actions reflected a "recklessness of consequences" and "a mind regardless of social duty deliberately bent on mischief." These factual circumstances provided the necessary examples of malice to convict defendant of second-degree murder. Thus, the trial court did not err in denying defendant's motion to dismiss.

In his next assignment of error, defendant challenges the trial court's admission of the out of court statement of Officer Busic. Defendant contends that the court's findings were insufficient to justify admission of the statement under the United States Constitution or under North Carolina Rule of Evidence 804(b)(5). We disagree.

North Carolina Rule of Evidence 804(b)(5) is a residuary exception to the hearsay rule and provides in pertinent part:

(b) Hearsay exceptions. - The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) Other Exceptions. - A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by

admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2001).

Our Supreme Court has discussed the analysis required for admission of evidence under Rule 804(b)(5) as follows:

After the trial court has resolved that the declarant is unavailable, it must then conduct a six-part inquiry to determine if the hearsay statements may be admitted into evidence. The trial court must determine:

"(1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;

(2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);

(3) That the statement possesses 'equivalent circumstantial guarantees of trustworthiness;'

(4) That the proffered statement is offered as evidence of a material fact;

(5) Whether the hearsay is 'more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means;' and

(6) Whether 'the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence.'"

State v. King, 353 N.C. 457, 479, 546 S.E.2d 593, 575 (2001) (quoting *State v. Ali*, 329 N.C. 394, 408, 407 S.E.2d 183, 191-92 (1991)) (alteration in original).

The third step of the analysis requires a determination of whether the statement of hearsay is trustworthy. In determining that a hearsay statement is trustworthy, a trial court should consider among other factors “(1) the declarant’s personal knowledge of the underlying event; (2) the declarant’s motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant’s unavailability.” *State v. Bullock*, 95 N.C. App. 524, 529, 383 S.E.2d 431, 434 (1989) (quoting *State v. Nichols*, 321 N.C. 616, 624, 365 S.E.2d 561, 566 (1988)).

“The notice requirement of Rule 804(b) (5) does not mandate a fixed period of time and ‘most courts have interpreted the notice requirement somewhat flexibly, in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence.’” *Bullock*, 95 N.C. App. at 528, 383 S.E.2d 431 at 433 (quoting *State v. Triplett*, 316 N.C. 1, 12-13, 340 S.E.2d 736, 743 (1986)). In order to be admissible under Rule 804(b) (5), the hearsay statement must possess “guarantees of trustworthiness” that are equivalent to the other exceptions contained in Rule 804(b). *State v. McLaughlin*, 316 N.C. 175, 179, 340 S.E.2d 102, 105 (1986).

Reviewing the statement of Officer Busic in light of the trustworthiness considerations reveals that he was at the scene of the incidents and had personal knowledge of the events of which he

wrote; that he was motivated to tell the truth at the time he prepared the statement in that the statement was prepared pursuant to his duties as a law enforcement officer; that on the day of the incident Officer Holl interviewed Officer Busic and other officers on the scene and requested that all officers submit a written statement; that Officer Busic provided the written statement approximately three to four days after the incident; that he did not recant the statement; and Officer Busic was unavailable to testify because of military obligations in Egypt.

In assessing whether an out of court hearsay statement possesses the requisite circumstantial guarantee of trustworthiness, the trial court must make findings of fact and conclusions of law. *State v. Dammons*, 121 N.C. App. 61, 65, 464 S.E.2d 486, 489 (1995). In the case *sub judice*, the trial court found that Officer Busic had personal knowledge of the events; that the statement given to Officer Holl by Officer Busic was true; Officer Busic had not recanted the statement; and he was unavailable to testify. The trial court further found that the State gave notice of its intent to use the officer's statement by filing a motion entitled "Notice of Intention To Offer Hearsay Pursuant To N.C. Gen. Stat. 8C-1, Rule 804(b)(5)." Defendant offered no evidence contrary to the court's findings. Given the requirements for admissibility of a statement under North Carolina Rule of Evidence 804(b)(5), we conclude that the trial court did not err in allowing the admission of Officer Busic's statement.

In his final assignment of error, defendant argues that the trial court's involuntary manslaughter instruction was plainly erroneous. Defendant asserts that there is a range of culpable negligence and "the court conveyed to the jury that culpable negligence is the ceiling of the involuntary manslaughter range, implying that anything higher must necessarily fall into the category of second-degree murder." We disagree.

At the conclusion of the evidence, defendant failed to object to the following instruction by the trial court on involuntary manslaughter:

For you to find the defendant guilty of involuntary manslaughter the State must prove two things beyond a reasonable doubt:

First, that the defendant's violation of the law governing the operation of a motor vehicle constitutes culpable negligence. Such violation would constitute culpable negligence if the violation is willful, wanton, or intentional. But where there is an unintentional or inadvertent violation of the law such violation standing alone does not constitute culpable negligence.

To constitute culpable negligence the inadvertent or unintentional violation of the law must be accompanied by recklessness of the probable consequences of a dangerous nature when tested by the rule of foreseeable foresight amounting altogether to a thoughtless disregard of the consequences or a heedless indifference to the safety of others.

When a defendant fails to object to jury instructions at trial, an error must be reviewed under the plain error rule. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). In applying the plain error rule, the defendant must show that there was error

and absent that error, the jury probably would have reached a different conclusion. *Id.*

"The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it" *Rich*, 351 N.C. at 393, 527 S.E.2d at 303 (quoting *State v. Wilson*, 176 N.C. 751, 754-55, 97 S.E. 496, 497 (1918)). When the jury charge as a whole presents the law fairly and clearly, certain expressions isolated from the charge may not afford ground for reversal. *Id.* at 394, 527 S.E.2d at 303.

The trial court's involuntary manslaughter instruction to the jury was not erroneous. When the instruction is read in its entirety, it correctly conveys the elements necessary for the jury to consider involuntary manslaughter. We cannot conclude that the jury was confused or, as argued by defendant, felt they had to convict defendant of second-degree murder rather than involuntary manslaughter. The trial court did not err in giving the jury instruction on involuntary manslaughter.

For the foregoing reasons, we conclude that the trial court committed no error.

No error.

Judges HUDSON and CAMPBELL concur.

Report per Rule 30(e).