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NO. COA02-60

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

Lee County
Nos. 00 CRS 3752, 52704,
52705, 52817

MICHAEL ANTHONY DAMMONS

Appeal by defendant from judgment entered 25 July 2001 by Judge John R. Jolly, Jr. in Lee County Superior Court. Heard in the Court of Appeals 9 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Bruce T. Cunningham, Jr. for defendant-appellant.

TYSON, Judge

I. Facts

On 21 June 2000, Michael Anthony Dammons (defendant) was driving from work to his home along Charlotte Avenue in Sanford. Shaquwnda Thomas (Shaquwnda), seven years old, rode her bicycle into the path of defendant's vehicle as defendant approached the intersection with Fourteenth Street. Although defendant applied his brakes, his vehicle collided with Shaquwnda resulting in serious injuries to her.

Robert McGehee was delivering mail two blocks from the scene of the accident and testified that defendant's vehicle was

traveling down Charlotte Avenue at "about 45 miles per hour" and was increasing in speed. Thirty-five miles per hour is the posted speed limit at that location.

Thomas McGinty, an officer with the Sanford Police Department, arrived on the scene, noted an odor of alcohol about defendant and that defendant's speech was "slightly slurred." Officer McGinty asked defendant to perform a series of field sobriety tests after transporting him to the police station. He testified that defendant swayed from side to side on the balance test, staggered to the right on the walk-and-turn test, and hesitated in touching his nose with his right hand, completely missing his nose one time, and hesitated two times with his left hand on the finger-to-nose test. Defendant also admitted to consuming alcohol, "one quart" of Colt 45 malt liquor. Defendant voluntarily submitted to an Intoxilyzer test which twice registered at 0.10. McGinty testified that defendant was cooperative.

On 17 July 2000, defendant was indicted for driving while impaired, careless and reckless driving, assault with a deadly weapon inflicting serious injury, driving while his license was revoked, exceeding the posted speed limit, and being an habitual felon. Defendant pled guilty to driving while his license was revoked.

At the end of the State's evidence, the trial court granted defendant's motion to dismiss the charge of careless and reckless driving. Defendant did not offer any evidence. The jury convicted defendant of driving while impaired, assault with a deadly weapon

inflicting serious injury, and exceeding the posted speed limit. The jury then found defendant guilty of being an habitual felon. Defendant was sentenced to 24 months for driving while impaired, 120 days for driving while license revoked, and 116 to 149 months for assault with a deadly weapon inflicting serious injury. Defendant appeals. We find no prejudicial error.

II. Issues

Defendant contends that the trial court (1) violated defendant's constitutional rights by considering defendant "presumptively guilty" of assault with a deadly weapon inflicting serious injury, (2) erred in denying defendant's request for a jury instruction on insulating negligence, (3) erred in punishing defendant as a class C felon without adjudicating him to be an habitual felon, and (4) erred in sentencing defendant in both the presumptive range and the aggravated range without finding that aggravating factors outweighed mitigating factors.

III. Assault with a deadly weapon inflicting serious bodily harm

Defendant contends that "the use of the 'per se' alcohol concentration prong of the offense of driving while impaired as a building block for the charge of assault with a deadly weapon inflicting serious injury, which arose out of an automobile accident, resulted in the defendant being considered presumptively guilty of assault, in violation of the defendant's rights secured by the due process clause of the Fourteenth Amendment to the United States Constitution." We disagree.

N.C. Gen. Stat. § 20-138.1 (2001) provides two methods for a person to commit the offense of impaired driving: (1) driving "[w]hile under the influence of an impairing substance" or (2) driving "[a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." Defendant concedes his guilt of impaired driving under the second prong of the statute. However, he asserts that the State cannot use a violation of this second prong as a basis for the assault charge because there is no showing of "willful" by the State.

Our Supreme Court has held that "a driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of [assault with a deadly weapon inflicting serious injury] provided there is either an actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied." *State v. Jones*, 353 N.C. 159, 164-65, 538 S.E.2d 917, 922-23 (2000) (citing *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955)). Further, the Court in *Jones* noted that "[N.C. Gen. Stat.] § 20-138.1, which prohibits drivers from operating motor vehicles while under the influence of impairing substances, is a safety statute designed for the protection of human life and limb and that its violation constitutes culpable negligence as a matter of law." *Id.* at 165, 538 S.E.2d at 923 (citing *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 93 (1985)). Defendant concedes that proof of conviction of impaired driving under the

first prong of the statute can be properly used to show defendant's culpable negligence to support the assault charge.

Here, the State presented evidence that defendant had an odor of alcohol about him, his speech was slightly slurred, and he admitted to consuming alcohol. Defendant performed multiple sobriety tests at the police station. He swayed during the one legged stand balance test. During the walk-and-turn test, defendant "was swaying when he was walking -- swaying a little bit, and he was staggering to the right. He couldn't stay on the line. He was staggering to the right." During the finger-to-nose test, "[w]ith his right finger to his nose, he was hesitant both times. He didn't go right to it. He slowed down to touch it. And on his left, he completely missed it one time and two times he was hesitant." Defendant registered a 0.10 on the Intoxilyzer test both times it was administered.

There is sufficient evidence of defendant driving his vehicle while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1(a)(1). The jury found defendant guilty of driving while impaired and driving in excess of the posted speed limit. There is substantial evidence in the record from which the jury could have found defendant to be "appreciably impaired" in addition to defendant's "alcohol concentration of 0.08 or more." There is no evidence that the "per se" violation that defendant complains of under the second prong of the impaired driving statute is the sole basis for his impaired driving conviction that supplies the criminal or culpable negligence to support the wilful element of

assault with a deadly weapon inflicting serious injury conviction. Defendant seriously injured Shaquwnda while operating his vehicle, a deadly weapon, in a culpably or criminally negligent manner. This assignment of error is overruled. We do not reach the issue of whether a conviction solely under the second prong of N.C. Gen. Stat. § 20-138.1 without other evidence of impairment is sufficient to supply the "willful" element of defendant's assault with a deadly weapon inflicting serious injury conviction.

IV. Jury Instruction on Insulating Negligence

Defendant argues that "in light of evidence that the victim rode her bike from a subservient street through a stop sign onto a dominant street and into the path of the defendant's vehicle, the trial court erred in denying the defendant's request for an instruction on insulating negligence." We disagree.

"In order for negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains a proximate cause, sufficient to find him criminally liable." *State v. Hollingsworth*, 77 N.C. App. 36, 39, 334 S.E.2d 463, 465 (1985) (citing *State v. Ellis*, 25 N.C. App. 319, 212 S.E.2d 909 (1975)). In *Hollingsworth*, the defendant contended that the victims' voluntary entrance into the vehicle of a visibly intoxicated individual insulated him from criminal negligence. *Id.* This Court held "this negligence would be, at most, a concurring proximate cause of the deaths of [the victims], and would not insulate defendant from criminal liability" although

there was evidence from which a jury could find the victims were negligent. *Id.* at 39, 334 S.E.2d at 466. We held that failing to instruct on intervening negligence was not error. *Id.*

Here, defendant asserts that Shaquwnda was negligent by riding her bicycle through a stop sign onto a dominant street and into the path of defendant's vehicle. Presuming there was evidence to show such negligence, it would be at most a "concurring proximate cause." *Id.* Defendant's impaired driving remained a proximate cause of the serious bodily injury. This assignment of error is overruled.

V. Habitual Felon

The defendant contends that the trial court judge never adjudicated defendant as an habitual felon and erred in sentencing defendant as an habitual felon. Defendant asserts that because the trial court did not check box number 5 on form AOC-CR-601, which states the trial court "adjudges the defendant to be an habitual felon to be sentenced as a Class C felon pursuant to Article 2A of G.S. Chapter 14," defendant was not "adjudged" guilty as required by N.C. Gen. Stat. § 15A-1331(b) before sentencing. We disagree.

Although the trial court did not check box 5, it found that the jury convicted defendant of being an habitual felon. This Court has held "that by use of the word 'adjudged' in G.S. 15A-1331(b) with respect to determining when a defendant has been 'convicted' of an offense, the legislature was not referring to the formal entry of judgment by the court but rather to the return by the jury of a verdict of guilty." *State v. Fuller*, 48 N.C. App.

418, 420, 268 S.E.2d 879, 881, *disc. rev. denied*, 301 N.C. 403, 273 S.E.2d 448 (1980). While the proper procedure is to check box number 5 on form AOC-CR-601, any error in sentencing defendant as an habitual felon was harmless in light of defendant's jury conviction of being an habitual felon. This assignment of error is overruled.

VI. Sentencing

Defendant assigns error to his sentence for the assault with a deadly weapon inflicting serious injury conviction, a Class E felony. N.C. Gen. Stat. § 14-32(b). Defendant contends that the trial court failed to find that aggravating factors outweighed mitigating factors and erred in sentencing defendant to an aggravated sentence. We disagree.

We held that defendant was properly convicted of being an habitual felon which enhances the sentence for the assault to a Class C felony. N.C. Gen. Stat. § 14-7.6. Defendant has not challenged the trial court's finding of a prior record level III. The presumptive range for the minimum sentence for a Class C felon with prior record level III is 93-116 months. N.C. Gen. Stat. § 15A-1340.17(c). "The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range." *State v. Parker*, 143 N.C. App. 680, 685-86, 550 S.E.2d 174, 177 (2001).

A trial court is not required to either make findings of aggravating and mitigating factors or to find that aggravating factors outweigh mitigating factors if a defendant is sentenced

within the presumptive range. N.C. Gen. Stat. § 15A-1340.16(c); *State v. Brooks*, 136 N.C. App. 124, 523 S.E.2d 704 (1999), *disc. rev. denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). "The need for findings [of aggravating or mitigating factors] is triggered when a court moves outside the presumptive range." *State v. Streeter*, 146 N.C. App. 594, 598, 553 S.E.2d 240, 242 (2001). Here, the trial court sentenced defendant to the maximum allowed within the presumptive range, a minimum term of 116 months, which is also the minimum allowed within the aggravated range. It was not required to make further findings or conclusions. *Id.* at 598-99, 553 S.E.2d at 242-43.

The trial court did not err in failing to find that aggravating factors outweighed mitigating factors to correctly impose defendant's sentence. This assignment of error is overruled.

VI. Conclusion

We have carefully reviewed the record and defendant's assignments of error and hold that defendant's trial and sentencing were free of prejudicial error.

No Error.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).