NO. COA11-411
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Gaston County
No. 09 CRS 20351

JULIAN MARTINEZ GUTIERREZ

Appeal by Defendant from judgment entered 12 August 2010 by Judge W. Robert Bell in Superior Court, Gaston County. Heard in the Court of Appeals 11 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill, for the State.

Mary March Exum for Defendant-Appellant.

McGEE, Judge.

Julian Gutierrez (Defendant) was driving a vehicle at approximately 3:30 a.m. on 31 October 2009 when the vehicle crashed, killing Defendant's girlfriend, Francy Lorena Toro (Ms. Toro), who was a passenger in the vehicle. According to the State's evidence, Defendant had a blood alcohol level of 0.12 at the time of the crash. Defendant was indicted for second-degree murder for the death of Ms. Toro.

The State presented evidence, over Defendant's objection, showing that at the time of the crash, Defendant had a driving while impaired (DWI) charge pending in Iredell County. When Defendant was arrested for the DWI in Iredell County, he had a blood alcohol content of 0.11. Defendant pled guilty to the Iredell County DWI prior to the trial in this matter. The jury found Defendant guilty of second-degree murder on 12 August 2010, and Defendant was sentenced to 120 months to 153 months in prison. Defendant appeals.

I. *Motion for Appropriate Relief*

Defendant filed a motion for appropriate relief (MAR) with this Court on 14 July 2011, requesting relief not sought in Defendant's appeal. The MAR was referred to a panel consisting of the undersigned judges on 22 July 2011. By separate order, this Court grants Defendant's motion for appropriate relief, and remands to the trial court for further action. The outcome of the hearing on remand will determine whether Defendant receives a new trial. Because Defendant's second and third arguments on appeal might recur even if Defendant is granted a new trial, we address them below. In the interest of judicial economy, because Defendant might not receive any relief upon remand, we also address Defendant's first argument on appeal.

II. *404(b) Evidence*

In Defendant's second argument, he contends that the trial court erred by "admitting unfairly prejudicial 404(b) evidence regarding a prior DWI conviction." We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Our Courts have "'repeatedly held that evidence of prior convictions is admissible under Rule 404(b) to show the malice necessary to support a second-degree murder conviction.'" *State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 306 (2000) (citations omitted). However, "[t]he admissibility of evidence under this rule is guided by two further constraints – similarity and temporal proximity." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) (citations omitted).

Defendant argues that our opinion in *State v. Davis*, __ N.C. App. __, 702 S.E.2d 507 (2010), supports his argument that evidence of his prior DWI should not have been admitted at trial. However, *Davis* does not support Defendant's argument. In fact, *Davis* undercuts Defendant's position. In *Davis*, this

Court held that three of four prior DWIs were erroneously admitted at the defendant's trial because they were too remote in time. However, the fourth DWI occurred two years prior to the offense for which the defendant was on trial, was not too remote in time, and therefore was properly admitted to show malice. "We therefore hold that the admission of evidence concerning [d]efendant's 1989 and 1990 convictions for DWI was error; however, the admission of [d]efendant's DWI conviction from 2006 was not error because it was within the general time frame set forth in [prior opinions of our appellate courts]." *Davis*, __ N.C. App. at __, 702 S.E.2d at 520. In the present case, Defendant's prior DWI was still pending at the time of the crash. Defendant was convicted of the DWI between the time of the crash and his trial. Defendant's prior DWI conviction was clearly not too remote in time, and it was relevant to show malice. *Rich*, 351 N.C. at 399-400, 527 S.E.2d at 306-07. We hold the trial court did not err by admitting evidence of Defendant's prior DWI. Defendant's second argument is without merit.

III. *Jury Instruction*

In Defendant's third argument, he contends the trial court erred by denying his requested jury instruction on malice, and

by giving an instruction concerning malice requested by the State. We disagree.

"This Court reviews jury instructions only for abuse of discretion. Abuse of discretion means 'manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Bagley*, 183 N.C. App. 514, 524, 644 S.E.2d 615, 622 (2007) (citations omitted).

Specifically, Defendant argues that the instruction on malice given by the trial court "lessened the State's burden of proof and thereby unfairly prejudiced" Defendant. The trial court instructed the jury on malice as follows:

> [T]hat [Defendant] acted unlawfully and with malice. Malice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and is deliberately bent on mischief. Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice. Malice comprehends not only particular animosity, but also wickedness of disposition, hardness of heart, cruelty, and recklessness of consequences, though there be no intention to injure a particular person[.]

At the charge conference, Defendant's attorney objected to the addition requested by the State, specifically the portion stating "though there be no intention to injure a particular person." Defendant objected on the basis that "it's repetitive.

If the [c]ourt included 'though there be no intention to injure a particular person,' that, I would argue, is the same thing as 'comprehends not only particular animosity.'" Defendant did not argue at trial that the addition to the instruction "lessened the State's burden of proof" for the element of malice. Because Defendant did not make this argument at trial, and because Defendant does not contend on appeal that any error in the instruction amounted to plain error, Defendant has abandoned this argument. N.C.R. App. P. Rule 10(a)(2) & (4); *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002).

Even assuming, *arguendo*, that Defendant had preserved this argument, we would hold that the trial court did not abuse its discretion by giving the disputed instruction. Defendant directs this Court to no law in support of his contention that the instruction constituted error, and we can find none. *See Rich*, 351 N.C. at 393-94, 527 S.E.2d at 302-03; *State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978). Defendant's third argument is without merit.

IV. *Motion to Dismiss*

In Defendant's first argument, he contends that the trial court erred by denying his motion to dismiss. We disagree.

Defendant argues that his motion to dismiss was improperly denied because there was insufficient evidence of the necessary

element of malice produced at trial. In reviewing the denial of a motion to dismiss, we must take the evidence in the light most favorable to the State. *State v. Andujar*, 180 N.C. App. 305, 309, 636 S.E.2d 584, 588 (2006). In the present case, the State's evidence tended to show that, at the time Defendant was driving an automobile, he had a blood alcohol concentration of 0.12 and at the same time, had another DWI charge pending in Iredell County.

> [I]t was 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. The State was not required to show that defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill.

Rich, 351 N.C. at 395, 527 S.E.2d at 304. Properly admitted prior convictions for DWI may be used by the State as evidence of malice. *State v. Gray*, 137 N.C. App. 345, 349, 528 S.E.2d 46, 49 (2000). We hold that, when the evidence is viewed in the light most favorable to the State, the trial court did not err in denying Defendant's motion to dismiss. Defendant's first argument is without merit.

V. *Conclusion*

We find no error brought forward by Defendant on direct appeal. Our holdings in this opinion do not affect our ruling on Defendant's MAR.

No error.

Judges HUNTER, Robert C. and CALABRIA concur.

Report per Rule 30(e).