NO. COA00-1398

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA,

v. From Dare County
No. 99-CRS-2022 through 2026

MELISSA LYNN MARVIN,

Defendant.

Appeal by defendant from judgment entered 15 January 2000 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 17 October 2001.

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

Cheshire, Parker, Schneider, Wells & Bryan, by Joseph B. Cheshire, V, and John Keating Wiles, for Defendant-Appellant.

BRYANT, Judge.

Defendant appeals from her convictions of second-degree murder and assault with a deadly weapon inflicting serious bodily injury.

At approximately noon on 6 April 1999, defendant Melissa Lynn Marvin went to a bar in Nags Head and consumed two margaritas without eating. At approximately 1:00 p.m., defendant went to a restaurant, where she ordered a Rumple Minze, an alcoholic beverage that is 100-proof alcohol served "straight-up" in a shot glass. She consumed three shots, also without eating. The bartender

warned defendant against trying to drive to Williamsburg, where she was going to a concert. Defendant decided to drive anyway.

At approximately 2:50 p.m., witnesses saw defendant's sport utility vehicle weaving through traffic on Highway 158 North in Kill Devil Hills, traveling between 50-60 mph in a 50 mph zone. Witnesses also observed defendant's left foot on the dash. Defendant ran a red light and collided with a car in which five teenagers were traveling. Four of the teens were killed and one was seriously injured. Defendant sustained minor injuries.

Defendant was arrested and initially charged with three counts of felony death by vehicle based on impaired driving,[1] and one count each of driving while impaired [DWI], running a red light, exceeding a safe speed and reckless driving. Defendant was indicted on four counts of second-degree murder and one count of assault with a deadly weapon inflicting serious injury. At trial, the jury returned verdicts of guilty on all counts. Defendant was sentenced and now appeals.

We note at the outset that defendant raised fifteen assignments of error in the Record on Appeal. Defendant argues only seven assignments of error in her brief. Our Rules of Appellate Procedure provide that assignments of error not discussed in a party's brief are deemed abandoned. N.C. R. App. P. 28(a). Therefore, the additional eight assignments of error defendant failed to raise in her brief are deemed abandoned and will not be

[1] One teenager survived the collision but died shortly thereafter.

considered. Further, defendant abandoned the second argument in her brief at oral argument, which included two assignments of error. We therefore deem these assignments of error abandoned.

Defendant's remaining assignments of error are combined into two issues: 1) whether the defendant was prejudiced by the admission of evidence of defendant's prior convictions and conduct underlying those convictions; and 2) whether the defendant was prejudiced by the prosecutor's arguments based on evidence not in the record or that had been excluded. We hold that defendant was not prejudiced by the admission of this evidence nor by the prosecutor's statements and find no error.

I. Prior Convictions

The determination of the admissibility of evidence under Rule 403 of the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, Rule 403 (1999), is left to the sound discretion of the trial court. *State v. Mickey*, 347 N.C. 508, 518, 495 S.E.2d 669, 676 (1998) (citing *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). The trial court's ruling will not be overturned on appeal for abuse of discretion unless "its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). The standard of reviewing evidence admitted under Rule 404(b), N.C.G.S. § 8C-1, Rule 404(b) (1999), is the same. *See State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000), *review denied*, 353 N.C. 382, 546 S.E.2d 114 (2000).

A. Underlying Conduct

Defendant argues that she was prejudiced by the trial court's admission of evidence of defendant's prior convictions and conduct underlying the convictions. Defendant first complains that the trial court allowed a "mini-trial" of the conduct underlying two prior careless and reckless driving convictions by allowing the State to present evidence of the DWI *charges* to show the malice necessary to prove second-degree murder. Defendant was charged with DWI in 1991 and 1996, but convicted both times of careless and reckless driving. The trial court properly allowed evidence of defendant's conduct at the time of each DWI charge, and the subsequent convictions of careless and reckless driving, to establish malice.

In *State v. Miller*, 142 N.C. App. 435, 439, 543 S.E.2d 201, 204 (2001), this Court allowed evidence of the defendant's two prior convictions of careless and reckless driving, one prior conviction of driving under the influence [DUI], and one prior conviction of driving while impaired[2] to establish malice in a second-degree murder case. Miller was charged with second-degree murder, DWI and careless and reckless driving after the truck he was driving collided with another car, killing the driver. The trial court allowed evidence of the prior convictions to establish

[2]In 1983, the North Carolina General Assembly enacted the Safe Roads Act, thereby changing the offense of driving under the influence to driving while impaired. *See* 1983 N.C. Sess. Laws ch. 435, § 23-24.

malice or knowledge of the dangerousness of one's behavior, even though the convictions were up to sixteen years old.

In *State v. McBride*, 109 N.C. App. 64, 425 S.E.2d 731 (1993), the defendant was convicted of, inter alia, second-degree murder and DWI when he collided with another car and killed an occupant. At trial, the State admitted evidence of two prior DUI convictions to establish malice in the second-degree murder charge. On appeal, this Court affirmed, holding that "[o]ur Court has held that prior conduct such as prior convictions . . . will be admissible under Rule 404(b) of the North Carolina Rules of Evidence as evidence of malice to support a second-degree murder charge." *Id.* at 69, 425 S.E.2d at 734. The evidence must go toward the requisite mental state for a conviction of second-degree murder, not toward the defendant's propensity to commit the crime. *Id.*

In the case sub judice, the trial court properly allowed evidence of defendant's prior conduct involving impaired driving to establish malice. Based on this record and on *Miller* and *McBride*, we find no error.

B. Jury Instruction

Defendant next argues that the court erred in instructing the jury that there was evidence "tending to show that the defendant has previously *committed* two offenses of driving while subject to an impairing substance prior to these charges, and have [sic] been convicted of two charges of reckless driving . . . ." (emphasis added). As we stated above, evidence of defendant's careless and reckless driving record and the underlying conduct was properly

admitted on the issue of malice. *See State v. Miller*, 142 N.C. App. 435, 439, 543 S.E.2d 201, 204 (2001) (holding defendant's prior DUI, DWI and careless and reckless driving convictions admissible to establish malice element of second-degree murder); *State v. McBride*, 109 N.C. App. 64, 425 S.E.2d 731 (1993) (holding that defendant's prior DWI and driving while license revoked convictions admissible to establish malice element of second-degree murder). Further, the trial court instructed the jury:

> This evidence is not evidence of the defendant's character nor is it offered to show that . . . the defendant acted in conformity therewith. Instead, this evidence was received solely for the purpose of showing that there existed in the mind of the defendant a particular mental state, that of malice.
>
> If you believe such evidence, you may consider it but only for the limited purpose for which it was received.

The trial court's limiting instruction to the jury to consider the evidence only to determine the existence of malice was sufficient to instruct the jury on the proper use of the evidence. *See State v. Holden*, 346 N.C. 404, 420, 488 S.E.2d 514, 522 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998).

C. Rule 403 Balancing Test

Defendant next argues that the trial court abused its discretion when performing the balancing test required by Rule 403 of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 403. Defendant argues that, rather than engaging in a factual analysis of probative value and unfair prejudice, the trial court abused its discretion by limiting its balancing to a "conclusory

parroting" of Rule 403. Defendant further argues that the trial court abused its discretion by failing to assess the similarities or differences in the 404(b) evidence and by its conclusory recitation of Rule 403. We disagree.

Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* "[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988); *State v. Beckham*, 145 N.C. App. 119, 550 S.E.2d 231 (2001). When reviewing a trial court's ruling on the admissibility of evidence under Rule 403, this Court will not disturb the trial court's ruling absent abuse of discretion because the balancing test under Rule 403 falls within the sound discretion of the trial court. *Williams v. McCoy*, 145 N.C. App. 111, 117, 550 S.E.2d 796, 801 (2001). For this Court to overrule the trial court's ruling under Rule 403, the trial court's decision must be "'manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* (quoting *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998)).

In the instant case, the trial court found that evidence of the conduct leading to the DWI charges and the convictions of careless and reckless driving were "sufficiently relevant and similar to the charges . . . that are pending . . . to show the requisite mental state of malice, which is an element of the offense charged." The court further found that the conduct leading to the DWI charges was "not too remote to prevent or otherwise limit its relevance."

This Court has held that prior convictions over fifteen years old were admissible to establish the element of malice. *Miller*, 142 N.C. App. at 439, 543 S.E.2d at 204. In the instant case, defendant's convictions were from 1991 and 1996. The accident leading to the second-degree murder charges occurred in 1999. The trial court specifically found that "the prior instances wherein charges were made of driving while subject to impairing substances were not too remote to prevent or otherwise limit its relevance." The court was not required to list specific factors in balancing probative value versus unfair prejudice. However, in conducting its balancing test under Rule 403 the court specifically found that:

> the probative value is not outweighed, substantially or otherwise, by the danger of any unfair prejudice, confusing of issues, misleading the jury, nor is it deemed to be cumulative evidence, nor are there any other considerations under Rule 403 which would prevent its admissibility. Other matters will go to weight as opposed to admissibility.

We do not find the court's balancing to be conclusory, nor was it a mere parroting of the rule as alleged by defendant. The trial court's admission of evidence of defendant's prior convictions and underlying conduct was not "'manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.'" *Williams v. McCoy*, 145 N.C. App. 111, 117, 550 S.E.2d 796, 801 (2001) (quoting *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998)). For the reasons stated herein, this assignment of error is overruled.

II. Evidence not in the Record

Defendant last argues that she was prejudiced by the trial court's overruling of defense counsel's objections to the prosecution's arguments based on evidence not in the record or that had been excluded. In its closing argument, the State argued:

> You know, it's one thing to surf drunk at the First Street Beach Access . . . [t]o surf with alcohol in your system if you want to, to rip the waves and curl where no one is around and no one can get hurt. But [U.S.] 158 is not the Atlantic Ocean and a Montero is not a surfboard. Context, behavior and attitude. That is malice. And that is why she's guilty of murder.

Defendant alleges that the State's closing argument referred to voir dire testimony of reserve Deputy Sheriff Ted Kearns, who encountered defendant surfing with the "odor of alcohol" about a week before the accident. Defendant had objected during voir dire to Kearns's testimony, which the State wanted to use to establish the element of malice. The trial court sustained the objection after finding the proffer to be inadmissible character evidence

under 404(b). However, because the record contains other evidence sufficient to support the State's argument, we find no error.

Trooper Shelton Smith of the North Carolina State Highway Patrol testified before the jury that he stopped defendant at 10:15 p.m. on 28 June 1996 after she cut off another vehicle at a high rate of speed. When Trooper Smith smelled alcohol on her breath and asked if she had anything to drink, defendant responded that she had a couple of beers. The Trooper placed defendant under arrest after observing her bloodshot eyes and red face. Trooper Smith then testified that when defendant realized she was under arrest for DWI, she began crying and voluntarily told Trooper Smith that:

> [s]he and her boyfriend had gotten in a fight. She had left the residence. She was headed to, as I understand it, her place of employment which at the time, I believe, was Black Pelican, to have a few drinks because the boyfriend--is what she told me, was upset because *she had been surfing all day and had started drinking approximately 2 o'clock that afternoon* and she was tired of arguing and fussing so she had to get out of the house.

(emphasis added) Furthermore, Officer Liverman who arrested defendant following the traffic accident on 6 April 1999, testified at trial that he knew defendant because he had seen her surfing at the First Street beach access. The testimony of Trooper Smith and the testimony of Officer Liverman was presented to the jury without objection by defendant.

In addition, witness testimony regarding events on the date of the accident indicate defendant's drinking and her enthusiasm for surfing. The bartender at the Nags Head bar testified that he

bought her a margarita (one of two she consumed at noon without eating) because she was a friend and a regular. The bartender at the next restaurant where she consumed three drinks without eating testified that he warned her against driving. The owner of a surf shop testified that he had known defendant a number of years through her surfing activities, and that just before the accident, defendant stopped by his shop to borrow surfing videos to show to a middle school surf club. It is clear from the record that there was evidence to show that defendant was a surfer, that she surfed after consuming alcohol, and that based on her past driving record, on several occasions she drove recklessly after consuming alcohol.

Our Supreme Court has stated:

> Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom. We further emphasize that 'statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred.'

State v. Guevara, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998) (citation omitted), *cert. denied*, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999). We find that the statements made during closing arguments were reasonably inferred from and properly supported by factual evidence properly before the jury.

NO ERROR.

Judges WYNN and McCULLOUGH concur.

Report per Rule 30(e).