NO. COA02-6

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2002

STATE OF NORTH CAROLINA

v. Brunswick County
No. 99 CRS 56827

THOMAS EDWARD SWAIN

Appeal by defendant from judgment entered 9 April 2001 by Judge Steven Balog in Brunswick County Superior Court. Heard in the Court of Appeals 28 October 2002.

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

Frink, Foy & Yount, P.A., by Stephen B. Yount, for defendant.

TYSON, Judge.

I. Facts

On 17 November 1999, Thomas Edward Swain ("defendant") was assisting Robert Edwards and John Alan Maggard in cleaning up after a roofing job performed by Edwards' roofing business. After finishing at the job site, the three men hauled a load of shingles to the dump. Defendant left his vehicle at Antioch Baptist Church so that the men could ride together. After dumping the shingles, the men traveled together to leave the trailer at the next job site. On the way to defendant's vehicle, defendant and Maggard purchased beer at a gas station while Edwards waited in his

vehicle. Defendant purchased a twelve-pack of Natural Ice and gave two beers away to other friends at the gas station. Edwards then drove defendant and Maggard back to Antioch Baptist Church, approximately forty-five minutes to an hour away. During the drive defendant was drinking beer from the twelve-pack and Maggard and Edwards were drinking Crown Royal liquor mixed with Mountain Dew. Only defendant drank beer.

After dropping defendant off at his car, Edwards and Maggard drove away. While they were traveling on Green-Lewis Road, defendant drove his vehicle up behind them and began to pass. Maggard testified that defendant "was at least running about 80, 85" miles per hour when he passed them.

About that time, Jesse Alan Lockamy ("Jesse"), sixteen years old, decided to ride his bicycle to Antioch Baptist Church for Wednesday night services. Jesse's father testified that after Jesse had left the house, he heard what sounded like two cars racing at full throttle on the road. He looked out his window and saw one set of headlights and then a second set of headlights pull up next to the first set. He testified that the vehicles were going "[a]t least a hundred miles an hour."

As defendant was passing Edwards' vehicle, his vehicle went off the road and struck and killed Jesse at about 6:00 p.m. Defendant's vehicle flipped twice and landed upside down. Defendant was taken to the hospital. At approximately 7:41 p.m., defendant's blood alcohol level was tested at 0.083. At approximately 10:17 p.m., a blood alcohol concentration test,

performed pursuant to a search warrant, showed defendant's blood alcohol level was 0.053. By extrapolating backwards, Paul Glover, an expert in blood alcohol physiology, testified that defendant's blood alcohol level was 0.101 at about 6:00 p.m., the time of the collision. On 13 March 2000, defendant was indicted for the murder of Jesse.

Edwards, on behalf of defendant, testified that he had been driving approximately 45 to 55 miles per hour when defendant passed him. He testified that the rate of speed of defendant's vehicle "could have been more than 55 or 60 at the very, very most. I don't think it was quite that fast. ... It was probably more closer [sic] to in between 50 and 55." Steven Howard Farlowe, an accident reconstruction expert, testified for defendant that defendant's vehicle was going approximately 69.25 miles per hour at the time that the vehicle flipped.

The trial court submitted second degree murder, involuntary manslaughter, and misdemeanor death by vehicle to the jury, who returned a verdict of guilty of second degree murder. Defendant was sentenced to an active sentence of 180 to 225 months. Defendant appeals. We find no error.

II. Issues

Defendant contends the trial court erred in (1) admitting defendant's prior driving convictions to prove malice; (2) admitting prior charges resulting from a 1993 automobile accident which were dismissed; and (3) denying defendant's motion to dismiss for insufficient evidence.

III. Rule 404(b) Evidence

Defendant contends the trial court erred in admitting his prior driving convictions which were not based on reckless driving or driving while impaired to prove the issue of malice. Defendant concedes that "prior driving while impaired convictions are admissible to find the element of malice sufficient to support a finding of second-degree murder and that these crimes are admissible under Rule 404."

Rule 404(b) of the North Carolina Rules of Evidence states:

> 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). Our Supreme Court has expressed that Rule 404(b) is a "clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "Such evidence is relevant and admissible under Rule 404(b) against a defendant 'if the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the Rule 403 balancing test.'" *State v. Cotton*, 318 N.C. 663, 665, 351 S.E.2d 277, 278-79 (1987) (quoting *State v. Scott*, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986)).

A. Full Driving Record

The State submitted defendant's prior driving record into evidence to show intent, knowledge, and absence of mistake for the element of malice. Our Courts have repeatedly held that evidence of prior driving records is relevant to show that "defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life." *State v. Jones*, 353 N.C. 159, 173, 538 S.E.2d 917, 928 (2000). *See, e.g. State v. Rich,* 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000); *State v. Miller*, 142 N.C. App. 435, 440, 543 S.E.2d 201, 205 (2001); *State v. McAllister*, 138 N.C. App. 252, 530 S.E.2d 859, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000); *State v. Grice*, 131 N.C. App. 48, 505 S.E.2d 166 (1998), *disc. rev. denied*, 350 N.C. 102, 533 S.E.2d 473 (1999). This Court determined that driving records from sixteen years prior to the alleged offense were not "too remote" to be relevant on the issue of malice. *Miller*, 142 N.C. App. at 440, 543 S.E.2d at 205.

Here, defendant's driving record included an accident in 1997, an accident in 1993, and convictions for driving without liability insurance and speeding in 1993, speeding in 1992, exceeding safe speed in 1990, and failing to stop for siren or red light in 1989. The most remote of these convictions occurred ten years prior to the present collision. Although these convictions are non-alcohol related, they are relevant to the issue of defendant's knowledge, intent to speed, and malice. "'[B]ecause the State offered the evidence to show that defendant knew and acted with a total

disregard of the consequences, which is relevant to show malice, the provisions of Rule 404(b) were not violated.'" *Id.* (quoting *Rich*, 351 N.C. at 400, 527 S.E.2d at 307). The trial court did not err in admitting defendant's full driving record under Rule 404(b).

B. Prior Charged But Dismissed Driving Violations

After the 1993 automobile accident, defendant was charged with driving while impaired and failing to have proper insurance. Defendant pled guilty to the insurance charge. The State dismissed the driving while impaired charge. The State offered evidence of facts surrounding the 1993 automobile accident and the violations charged under Rule 404(b) to show further evidence of defendant's malice and knowledge. Defendant contends the trial court erred by admitting this evidence under Rules 404(b) and 403.

Assuming *arguendo* that the dismissed charges were improperly admitted, we do not find that the admission of this evidence was prejudicial. A defendant is entitled to relief "only if he can show a reasonable possibility that the outcome of the trial would have been different had the evidence been excluded." *State v. King*, 342 N.C. 357, 362, 464 S.E.2d 288, 292 (1995) (citing N.C. Gen. Stat. § 15A-1443(a)); *State v. Hardy*, 104 N.C. App. 226, 238, 409 S.E.2d 96, 102 (1991) ("An error is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed"). To prove malice, "the State need only show '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.'"

Miller, 142 N.C. App. at 441, 543 S.E.2d at 205 (citing *Rich*, 351 N.C. at 395, 527 S.E.2d at 304).

Here, there is substantial other evidence of malice. The State introduced defendant's past driving record which goes to show defendant's awareness. Testimony also showed that defendant was driving while impaired at the time of the present collision. Testimony showed that defendant was speeding between 80 and 100 miles per hour and was racing another vehicle. When he passed Edwards' vehicle, defendant drove off the road and struck and killed the victim. Without evidence of defendant's prior driving while impaired arrest, this evidence is sufficient for the jury to find that defendant's reckless manner of driving proved malice. *Id.*

In light of the overwhelming other evidence of malice, we do not find there was a reasonable possibility that, without the evidence of the dismissed charge of driving while impaired, the result of the trial would have been different. N.C. Gen. Stat. § 15A-1443(a); *King*, 342 N.C. at 363, 464 S.E.2d at 292. This assignment of error is overruled.

IV. Motion to dismiss

A motion to dismiss should be denied when there is substantial evidence of (1) each element of the offense charged and (2) that the defendant is the perpetrator of the crime. *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998). "Substantial evidence is evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt." *Id.* (citing

State v. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *Id.* at 679, 505 S.E.2d at 141 (citing *State v. Mitchell*, 109 N.C. App. 222, 224, 426 S.E.2d 443, 444 (1993)).

Defendant was indicted for second degree murder. Second degree murder is the "unlawful killing of a human being with malice, but without premeditation and deliberation." *Miller*, 142 N.C. App. at 441, 543 S.E.2d at 205 (citing *Rich*, 351 N.C. at 395, 527 S.E.2d at 304). To prove malice, "the State need only show '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.'" *Id.* (quoting *Rich*, 351 N.C. at 395, 527 S.E.2d at 304).

The State presented substantial evidence that defendant was driving under the influence and speeding excessively at the time of the collision. Expert testimony was offered to show that defendant's blood alcohol level was 0.101 at the time of the collision and was 0.083 over an hour and a half later. N.C. Gen. Stat. § 20-138.1 (2001). There was also evidence of defendant's impairment through Officer Murray who testified to an odor of alcohol about defendant's person and that his speech was slurred. Defendant consumed multiple beers in the forty-five minute drive from the gas station to his vehicle. Maggard testified that defendant was driving at 80 or 85 miles per hour at the time of the

collision. Jesse's father testified that defendant's vehicle was traveling at 100 miles per hour and racing with Edwards at the time of the collision.

The evidence of past moving vehicle convictions is also admissible to show that "defendant was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life." *Jones*, 353 N.C. at 173, 538 S.E.2d at 928.

The State presented sufficient evidence of defendant's malice to submit the charge of second degree murder to the jury. This assignment of error is overruled.

V. Conclusion

We find no prejudicial error in the trial and conviction of defendant for second degree murder.

No Prejudicial Error.

Chief Judge EAGLES and Judge THOMAS concur.

Report per Rule 30(e).