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NO. COA06-114

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2007

STATE OF NORTH CAROLINA

v.

MARCUS JERMAINE WALTERS

Rockingham County
Nos. 04 CRS 6927
04 CRS 6929
04 CRS 6930

Appeal by defendant from judgments entered 25 July 2005 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 18 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Patricia A. Duffy, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

CALABRIA, Judge.

Marcus Jermaine Walters ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of involuntary manslaughter, felony fleeing to elude arrest, and felony hit and run. We find no error.

Tina Marie Harris ("Harris") testified that on 25 May 2004, she was standing in the parking lot of the Womack Apartments in Reidsville talking to Kenneth Heckstall ("Lieutenant Heckstall"), a lieutenant with the Triton Special Police Department. Harris, who was accompanied by her one-year-old son, left Lieutenant

Heckstall and walked across the street to check her mailbox. When she reached the street, she saw a silver car drive by her at a high rate of speed. "[I]t almost hit me and my son," she stated. "And I picked me and my son up and I ran across to the neighbor's house. And I was standing over there with her, and Kenny put on his blue lights and went up to the stop sign and then he went after the car."

Lieutenant Heckstall identified the vehicle described by Harris as a silver Ford Escort. He testified that after witnessing the vehicle driving at an unsafe speed and making unsafe movements, including almost striking a child on a bicycle, he pulled in behind the Ford, activating his blue lights and sounding his siren. The vehicle stopped, but again fled when Lieutenant Heckstall got out of his car to approach it. During the stop, Lieutenant Heckstall reported the Ford's license plate tag to his dispatcher. He identified it as a Virginia tag which read ZKH-6843, and testified that the defendant was driving the vehicle. Lieutenant Heckstall stated that when the Ford Escort fled the stop, he lost sight of the vehicle and did not pursue it since the department has a "no-chase" policy. "A few minutes later, there was a call went out in reference to a vehicle. The call went out as a rollover, and it was on Lawsonville Avenue," he stated.

William L. Robinson ("Robinson") testified that he was driving a small truck traveling east on Lawsonville Avenue. When he attempted to make a left turn, his truck was suddenly struck by a silver Ford Escort on the left-front portion of the driver's side.

After striking Robinson's truck, the Ford Escort crashed into a brick wall and flipped over. Its driver crawled out of the wreckage and ran away. When Lieutenant Heckstall arrived at the scene of the rollover, he checked the wrecked Ford Escort's tag number and determined that the vehicle was the same vehicle that previously fled during the stop.

At the time of the accident, Patricia Danielle Womack ("Womack") was walking to a friend's house on Lawsonville Avenue, accompanied by her cousins LaPria Winchester, then six years old, and LaKenya Winchester, then four years old. Womack testified that she was walking up a hill facing traffic and was holding LaKenya's hand.

> Next thing you know, I just like — I heard it, because the fact that it happened so fast, I just heard something loud, and I just turned around like that, and I just saw, just like something coming at me, just like flipped up or something. That's when I noticed I was hit and I was in somebody's yard. LaKenya was under my foot or my leg, but I wasn't touching her. She was just like under my leg. She was like laying on the curb. Her head was like towards the curb. And I laid there for a minute and I turned my head this way, and that's when I saw the gray car flipping. Or when I woke up or whatever I was, I just saw a gray car flipping down the road.

Womack stated that it was clear LaKenya was severely injured. "She had a gash on her head, and like something on her head that I had thought the lady had told me was glass from the car, but it wasn't. I found out it was . . . her skull." The child died as a result of the injuries.

Witnesses testified that they saw the driver of the Ford Escort exit the vehicle and run away immediately following the crash. One witness identified the defendant as the driver. Lieutenant Ken Hanks ("Lieutenant Hanks") of the Reidsville Police Department testified that he arrived at the scene and ran the Ford Escort's tag, tracing it to Kathy Hutchens ("Hutchens") of Danville, Virginia. Hutchens told Lieutenant Hanks that she had loaned the vehicle to her boyfriend, the defendant. With Hutchens' help, Lieutenant Hanks tracked the defendant to a local address. The defendant initially refused to identify himself, then told officers he was "Kevin Johnson." Officers found a wallet on the defendant, which included an identification card identifying him as Marcus Jermaine Walters. Shortly thereafter, defendant was arrested and taken into police custody.

Defendant was indicted for second degree murder, felony speeding to elude arrest, felony hit and run, and for attaining the status of an habitual felon. After a trial in Rockingham County Superior Court, the jury returned a verdict finding him guilty of involuntary manslaughter, felony speeding to elude arrest, and felony hit and run. Subsequently, defendant pled guilty to attaining the status of an habitual felon. Judge Edwin G. Wilson, Jr., entered judgments, sentencing defendant to a minimum of 60 months and a maximum of 81 months in the North Carolina Department of Correction on each of the three convictions. The sentences were ordered to run consecutively. From those judgments, defendant appeals.

Defendant initially argues that the trial court erred by allowing into evidence a confession defendant made to police after he was arrested and read his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The defendant brought a pre-trial motion to suppress, which was denied by Judge Thomas W. Seay, Jr. However, no written order denying the motion was ever filed. In denying the defendant's motion, Judge Seay stated:

> The decision of the Court is that the motion to suppress is denied. I'll need an order, written order prepared, making findings of facts based entirely on the evidence that's presented here in court and, considering the totality of the circumstances, the fact that the second series of contacts between the defendant and the law enforcement officer were initiated by the defendant, that there was no improper inducement offered to the defendant by anyone to do anything, and that the defendant was not deprived of his right to contact family members or an attorney.

The defendant again moved to suppress the statement prior to trial before Judge Edwin G. Wilson, Jr., who also denied the motion. In denying the defendant's motion, Judge Wilson relied on the transcript of the motion to suppress hearing. However, at least three times he indicated his concern that there was no written order from Judge Seay, and stated, "I guess we just need to make sure that an order is in the file from Judge Seay." Despite these concerns, no written order was ever entered.

North Carolina General Statute § 15A-977 (2005) states that "the [trial] judge must set forth in the record his findings of fact and conclusions of law." *Id.*

> Where the trial judge makes the determination [on a motion to suppress] after a hearing, as

> in this case, he must set forth in the record his findings of fact and conclusions of law. Findings and conclusions are required in order that there may be a meaningful appellate review of the decision. The statute does not require that the findings be made in writing at the time of the ruling. Effective appellate review is not thwarted by the subsequent order.

State v. Horner, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984) (internal citation omitted). While *Horner* makes clear that a delay in entering written findings of fact and conclusions of law does not prejudice a defendant, it assumes that a written order *eventually* must be entered. Otherwise the defendant suffers prejudice on appeal, as this Court is prevented from effective appellate review. However, this rule applies only where there is a "material" conflict in the evidence presented at the hearing.

> When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the basis of his ruling. If there is a material conflict in the evidence on voir dire, he must do so in order to resolve the conflict. If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. In that event, the necessary findings are implied from the admission of the challenged evidence.

State v. Vick, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995) (citations omitted).

Here, there was no material conflict in the evidence. The transcript from the hearing on the motion to suppress indicates that the defendant and the police testified to essentially the same

facts. Specifically, they testified that defendant was initially questioned and invoked his right to counsel, at which point interrogation ceased. Defendant was then taken for routine booking procedures, where he asked a detective what charges he was facing. When a detective read the elements of vehicular homicide crimes to defendant and told defendant a story about a similarly situated defendant who received a light sentence because he had committed the crime while intoxicated, defendant re-initiated conversation about his case and eventually signed a form waiving his *Miranda* rights. Because there was no material conflict in the evidence, it was not error for the court to fail to enter an order stating findings of fact and conclusions of law. We must therefore determine whether the trial court's legal conclusion was correct.

Under *Miranda* and its progeny, police must advise a defendant that he has the right to counsel before engaging in custodial interrogation, and if defendant asks for an attorney, police must cease all interrogation until an attorney is present. *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000). "Interrogation" has been held to mean express questioning or its "functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). This includes "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301. However, routine booking questions have been held to fall outside of *Innis*' scope. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

Here, defendant invoked his right to counsel after Lieutenant Hanks indicated disbelief in the defendant's version of events. All questioning ceased, and defendant was taken to be processed for booking. During the time he was asked routine booking questions, defendant asked Detective James Austin, Jr. ("Detective Austin"), what charges he could face. Detective Austin retrieved a book containing the elements of North Carolina crimes and started reading it to defendant. Detective Austin testified that he told the defendant that if he could show that he was intoxicated during the time of the accident, he might fall under the misdemeanor death by motor vehicle statute. Detective Austin further testified he told defendant that he knew of a case where an intoxicated driver committed vehicular homicide and "received a slap on the wrist."

In addition, Detective Greg Harris ("Detective Harris") retrieved a photograph of the victim from her family and placed it where the defendant could see it. Detective Harris testified that the sight of the photograph prompted the defendant to ask about the victim, including inquiries about her name and age. Defendant contends that the police, by reciting the elements of vehicular homicide crimes, telling him of a similar offender who received a "slap on the wrist" because he was intoxicated, and placing the photo of the victim before defendant, engaged in words and conduct reasonably likely to elicit an incriminating response and thus violated defendant's right to counsel. We disagree.

"[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that

right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). "[B]efore a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'" *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). Thus, we must determine whether the statements of Detective Austin and the actions of Detective Harris amount to a resumption of interrogation after defendant asked for a lawyer and, if so, whether defendant invited the resumption of interrogation by re-initiating contact with police.

There is insufficient evidence to conclude that Detective Harris intended to coerce the defendant into incriminating himself by placing the picture where defendant could see it, and the evidence, as presented, does not support a conclusion that the placing of the photograph in a place visible to defendant made it reasonably likely that defendant would incriminate himself.

In contrast, Detective Austin's apparent subjective purpose in reading defendant elements of North Carolina vehicular homicide crimes and telling him about an offender who received a "slap on the wrist" for vehicular homicide was to elicit incriminating information from defendant. Notwithstanding Detective Austin's intended purpose, such actions are reasonably likely to elicit an incriminating response from the defendant. This amounts to interrogation.

However, defendant admitted that he re-initiated contact with Detective Austin. At his motion to suppress hearing, the defendant was asked by the prosecutor, "Well, you were the one who initiated contact, asking him what could happen to you and what charges could be made and that kind of thing; isn't that right?" He answered, "Yes. While we was right there, I asked him again to give me some more information on those charges. He opened another book and started explaining to me death by motor vehicle and involuntary manslaughter."

In *Bradshaw*, the United States Supreme Court considered a situation similar to the case *sub judice*. In that case, the defendant was charged with furnishing liquor to a minor and was suspected of causing the minor's death. After he was advised of his *Miranda* rights on the furnishing liquor charge, the defendant invoked his right to counsel. While being transferred to jail, the defendant asked a police officer, "Well, what's going to happen to me now?" The officer advised the defendant that he did not have to talk to police, and the defendant said he understood. A discussion of the case ensued, and the officer suggested that defendant submit to a polygraph examination. Defendant agreed, and submitted to the polygraph after signing a written waiver of his *Miranda* rights. After completing the polygraph, the examiner told the defendant that he did not believe defendant was being truthful. Defendant then recanted his original story and admitted his culpability. The Supreme Court determined that the defendant re-initiated contact with police and subsequently waived his *Miranda* rights. *Id.* In

the instant case, defendant also invited a resumption of dialogue and subsequently signed a form waiving his *Miranda* rights. A waiver of *Miranda* rights is effective "provided the waiver is made voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444.

> The test for determining the voluntariness of a waiver of counsel is similar to that for determining the voluntariness of a consent to search. Prior to any questioning, the suspect must be warned of his constitutional rights, including his right to remain silent and his right to have an attorney present during questioning. . . . The voluntariness of a waiver must be based on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.

State v. Williams, 314 N.C. 337, 347-48, 333 S.E.2d 708, 716 (1985) (citations omitted).

Here, the defendant's background and experience bolster the State's argument supporting waiver. Defendant was experienced enough with the criminal justice system that he pled guilty to attaining the status of an habitual felon after being convicted of the crimes on review here. Likewise, defendant's conduct weakens his argument, as he admits to having lied to detectives in hope of manipulating his way into a misdemeanor charge. Since we have determined that defendant re-initiated contact with police and waived his *Miranda* rights, we conclude that it was not error for the trial court to deny defendant's motion to suppress. This assignment of error is overruled.

Defendant next argues that the trial court erred by denying him a jury instruction on the issue of an intervening act of

negligence. Defendant contends that William L. Robinson was driving with a revoked license and may have failed to keep a proper lookout, and that the jury might have determined these to be insulating acts of negligence.

A trial court is required to give a jury instruction where "the request is correct in law and supported by the evidence in the case," although the court is not required to state the instruction in precisely the language requested by the party requesting the instruction. *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). A defendant is prejudiced by errors of the court when there is a reasonable probability that there would have been a different result absent the error. N.C. Gen. Stat. § 15A-1443(a).

Here, there is no evidence in the record supporting a causal link between Robinson's driving with a revoked license and the fatal crash at issue. Likewise, there is insufficient evidence that Robinson committed any negligent act that could have broken the causal chain between defendant's negligent act and the death of LaKenya Winchester. But assuming, *arguendo*, that it was error for the court to deny the defendant's proposed instruction, there is no reasonable probability, in light of the evidence, that the jury's verdict would have been different. As such, this assignment of error is overruled.

Defendant next argues that the trial court erred by failing to dismiss the charge of felonious hit and run due to an insufficiency of the evidence. Our Courts have established the following

practice in reviewing a trial court's denial of a motion to dismiss:

> In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence. The court must determine whether substantial evidence supports each essential element of the offense and the defendant's perpetration of that offense. If so, the motion must be denied and the case submitted to the jury. 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion."

State v. Hairston, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000) (citations omitted). North Carolina General Statute § 20-166 (2005) states in relevant part:

> (a) The driver of any vehicle who knows or reasonably should know:
>
> (1) That the vehicle which he or she is operating is involved in an accident or collision; and
>
> (2) That the accident or collision has resulted in injury or death to any person;
>
> shall immediately stop his or her vehicle at the scene of the accident or collision. The driver shall remain with the vehicle at the scene of the accident until a law-enforcement officer completes the investigation of the accident or collision or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.
>
> Prior to completion of the investigation of the accident by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment as set forth

> in subsection (b) of this section, or to remove oneself or others from significant risk of injury. If the driver does leave for a reason permitted by this subsection, then the driver must return with the vehicle to the accident scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer. A willful violation of this subsection shall be punished as a Class H felony.

Id. A defendant's knowledge, under the statute, may be actual or implied from the circumstances. *State v. Fearing*, 304 N.C. 471, 477-78, 284 S.E.2d 487, 491 (1981). "Implied knowledge can be inferred when the circumstances of an accident are such as would lead a driver to believe that he had been in an accident which killed or caused physical injury to a person." *Id.*

Here, the evidence shows that defendant was involved in a serious accident, resulting in his flipping his vehicle after crashing into another vehicle. The accident occurred at a location where there were numerous bystanders and vehicles. It was obvious from the circumstances that someone may have been seriously injured or killed in the crash. Defendant cannot reasonably claim that because he fled the scene, he had no knowledge, actual or implied, that someone might have been injured or killed. This assignment of error is without merit.

Defendant next argues that the trial court committed plain error by instructing the jury that evidence tended to show that the defendant confessed that he committed the crime charged, when the facts did not support such an instruction. The North Carolina Supreme Court has stated the "plain error" rule as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)).

Pursuant to *Odom*, we must reject the defendant's plain error argument unless we determine that the jury probably would have acquitted defendant absent the instruction. Here, there was abundant evidence to support the jury's finding of guilt absent the instruction regarding defendant's confession. This included evidence that the defendant was driving dangerously, fled the stop initiated by Lieutenant Heckstall, was involved in the fatal crash, and fled the scene of the crash. From this, we cannot say the jury probably would not have convicted defendant if the judge had not instructed that evidence tended to show defendant confessed. Accordingly, this assignment of error is overruled.

Defendant has failed to argue his remaining assignments of error on appeal and they are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6)(2006).

No error.

Judges HUNTER and HUDSON concur.

The Judges participated and submitted this opinion for filing prior to 1 January 2007.

Report per Rule 30(e).