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NO. COA06-1165

NORTH CAROLINA COURT OF APPEALS

Filed: 01 May 2007

STATE OF NORTH CAROLINA

v.

Wake County
No. 04 CRS 76639

ROBERT ROLAND GOODWIN

Appeal by defendant from judgment entered 5 August 2005 by Judge John R. Jolly in Wake County Superior Court. Heard in the Court of Appeals 29 March 2007.

Attorney General Roy Cooper, by Special Counsel Isaac T. Avery III, for the State.

Nora Henry Hargrove for defendant-appellant.

STEELMAN, Judge.

Evidence of defendant's prior conviction for driving while impaired was properly admitted as evidence and together with other evidence was sufficient to support the element of malice for purposes of the charge of second-degree murder.

On 23 September 2004, Robert Roland Goodwin ("defendant") was employed by the State of North Carolina in the landscape department of the Governor Morehead School for the Blind. On that date he was taking garbage in a dump truck to a landfill located off of N.C. Highway 55. Defendant was driving the dump truck and was accompanied by co-worker Gerry Watson ("Watson"). On the way to

the landfill, defendant and Watson stopped at a convenience store and defendant purchased six twelve-ounce cans of beer. Upon unloading the garbage at the landfill, defendant and Watson consumed three beers apiece in about fifteen minutes. On the way back to the school, defendant and Watson stopped at another convenience store and defendant purchased two sixteen-ounce cans of beer. Defendant and Watson each began to consume the beers while driving the dump truck back to the school. Defendant and Watson were traveling eastbound on U.S. Highway 64 when Watson heard a sound coming from the direction of the left rear wheel of the dump truck. Watson looked in the rear view mirror. When Watson looked forward again, the dump truck was crossing the median of U.S. Highway 64, nearly airborne, into the westbound lanes of traffic. The dump truck hit a minivan driven by Haiyun Chen ("Chen") head-on. Chen's two young children were passengers in the minivan. Chen subsequently died from the injuries she sustained in the accident. There was no evidence at the site of the accident that defendant attempted to stop the dump truck or turn prior to hitting Chen's minivan.

Officer William Allen ("Allen") of the Apex Police Department responded to the accident. Allen did not detect the odor of alcohol on defendant's person but did notice that his speech was slurred and his eyes were glassy. Defendant denied having consumed any alcohol on the day of the accident. When shown a beer can that Allen found at the scene, defendant did not respond.

Defendant was taken to a hospital after the accident. Officer Jason Howe ("Howe") of the Apex Police Department interviewed defendant at the hospital. Howe observed that defendant had glassy eyes, an odor of alcohol about his person, and slurred speech when at the hospital shortly after the accident. Defendant told Howe that he had not consumed any alcohol the day of the accident and that he did not know why the dump truck went across the median. A blood sample was taken with consent from defendant at the hospital and his blood alcohol level was determined to be 0.19 grams of alcohol per 100 milliliters of whole blood, more than double the legally permissible limit.

On 12 October 2004, defendant was indicted for second-degree murder and also for the related misdemeanor of driving while impaired. On 25 July 2005, defendant filed a motion *in limine* with the trial court, seeking to prohibit the introduction of a prior conviction for driving while impaired which occurred on 15 September 1997. On 2 August 2005, the trial of defendant began. That same day, the trial court denied defendant's motion *in limine*. On 4 August 2005, a jury found defendant guilty of second-degree murder. On 5 August 2005, Judge John R. Jolly sentenced defendant to 125-159 months imprisonment. On 8 August 2005, the driving while impaired charge was voluntarily dismissed. Defendant appeals.

In his first argument, defendant contends that the trial court erroneously admitted evidence of his seven year old conviction for driving while impaired because it was not probative of malice, it

was not factually similar to the 2004 offense, and it was too remote in time. We disagree.

Evidence of another crime, while not admissible as character evidence, is admissible for limited 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) (2005). This Court has held that evidence of a single prior conviction is admissible to show the malice necessary to support a second-degree murder conviction. See, e.g., *State v. Westbrook*, 175 N.C. App. 128, 135, 623 S.E.2d 73, 78 (2005) (affirming a second-degree murder conviction where the defendant had a blood alcohol level of 0.156 at the time of the accident and had a single nine year old conviction for driving while impaired); *State v. McAllister*, 138 N.C. App. 252, 258, 530 S.E.2d 859, 863 (2000) (finding no error in a second-degree murder conviction where the defendant had a blood alcohol level of 0.126 and a single six year old conviction for driving while impaired).

In the instant case, the trial court admitted, over defendant's objection during trial, testimony concerning defendant's prior impaired driving conviction. Because this Court has ruled that such prior convictions are admissible to show malice under Rule 404(b) in situations where the prior conviction was older than the one in the instant case and for the same offense, we hold that the trial court did not err in allowing the evidence of defendant's seven year old conviction for impaired driving. See *id.* This assignment of error is without merit.

In his second argument, defendant contends that the trial court erroneously denied his motion to dismiss the charge of second-degree murder. Specifically, defendant argues that there was insufficient evidence to show malice. We disagree.

In considering a motion to dismiss, the only issue for the trial court is whether there is substantial evidence of each essential element of the offense charged. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). The trial court must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference. *State v. Jaynes*, 342 N.C. 249, 274, 464 S.E.2d 448, 463 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). Evidentiary contradictions and discrepancies are resolved in favor of the State. *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995).

The essential elements of second-degree murder are an unlawful killing with malice, but without premeditation or deliberation. N.C. Gen. Stat. § 14-17 (2005); *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000). What constitutes proof of malice is based on the facts and circumstances of each individual case. *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733 (1993). However, "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief" are examples of circumstances

which, if proven, would allow a jury to infer malice. *Rich*, at 392-93, 527 S.E.2d at 302-303. "It is necessary for the State to prove only that [the] [d]efendant 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." *Westbrook*, at 135, 623 S.E.2d at 78.

In the instant case, the evidence presented at trial tended to show that defendant was driving while impaired with a blood alcohol level of 0.19, which is over twice the legal limit, that there was no evidence that defendant braked the dump truck before hitting Chen's minivan, and that defendant was on notice as to the consequences of driving while impaired as a result of his prior driving while impaired conviction which had occurred seven years earlier. Taken in the light most favorable to the State, we conclude that there was substantial evidence presented from which the jury could find malice as well as the other elements of second-degree murder. *See, e.g., Westbrook*, at 135, 623 S.E.2d at 78; *McAllister*, at 258-59, 530 S.E.2d at 863-64. Thus, the trial court did not err in denying defendant's motion to dismiss the charge of second-degree murder. This assignment of error is without merit.

In his third argument, defendant contends that the trial court's instructions to the jury regarding malice amounted to plain error. Defendant properly assigned error to this argument in the record. However, defendant failed to make any argument with respect to this assignment of error in his brief. It is therefore deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

Other assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

NO ERROR.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).