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NO. COA07-126

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

STATE OF NORTH CAROLINA

v.

Catawba County
No. 04 CRS 15348

DUSTIN O'NEAL HOUSTON

Appeal by Defendant from judgments entered 4 August 2006 by Judge Robert C. Ervin in Catawba County Superior Court. Heard in the Court of Appeals 19 September 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General James A. Wellons, for the State.

Allen W. Boyer for Defendant.

STEPHENS, Judge.

I. PROCEDURE

Defendant Dustin O'Neal Houston was indicted on 1 November 2004 on charges of (1) assault with a deadly weapon inflicting serious injury and (2) assault inflicting serious injury on a law enforcement officer. A superceding indictment dated 7 February 2005 was issued by the Catawba County Grand Jury charging him with those two offenses as well as (3) reckless driving, (4) speeding, and (5) willful failure to obey a law enforcement officer. Defense counsel filed a Motion for Change of Venue in Catawba County Superior Court on 4 April 2005.

The case was called for trial during the 31 July 2006 Criminal Session of Catawba County Superior Court before the Honorable Robert C. Ervin. At that time, defense counsel withdrew his motion for a change of venue and announced he was ready to proceed with the trial.

After the State rested, Defendant moved to dismiss all the charges. The trial court ruled that the felony charge of assault inflicting serious injury on a law enforcement officer could not be submitted to the jury because the indictment failed to allege that Defendant had inflicted serious bodily injury on a law enforcement officer. The trial court concluded, however, that the lesser included misdemeanor offense of assault on a law enforcement officer could be submitted to the jury. The trial court denied Defendant's motion to dismiss the other charges.

After Defendant rested, he renewed his motion to dismiss. The trial court again denied the motion. On 3 August 2006, the jury returned verdicts finding Defendant guilty of (1) assault with a deadly weapon inflicting serious injury, a Class E felony assault; (2) assault on a law enforcement officer, a Class A-1 misdemeanor; and (3) reckless driving, (4) speeding, and (5) failure to obey an order of a law enforcement officer, all misdemeanors.

Upon these verdicts, Judge Ervin entered sentences as follows: on the Class E felony assault, Defendant was sentenced to an active prison term of 24 to 38 months; on the Class A-1 misdemeanor assault, Defendant received a suspended sentence of 150 days, and was placed on 24 months supervised probation; on the speeding,

reckless driving, and failure to obey an order of a law enforcement officer misdemeanors, Defendant received one consolidated suspended sentence of 60 days, and was placed on 24 months probation. The trial court ordered that the sentences run consecutively. Defendant gave notice of appeal in open court immediately following sentencing.

II. FACTS

After apprehending a suspect in a case unrelated to this case, three officers with the Town of Maiden Police Department, Officer Michael Wooten, Sergeant Michael Eaker, and Officer Cory Reid, were on East Maiden Road at around 10:30 p.m. on 4 October 2004. They were standing in a driveway when they heard motorcycles approaching. The officers walked over to the roadway to see what was happening. Sergeant Eaker and Officer Wooten stayed on the side of the road while Officer Reid walked into the middle of the eastbound lane. All three looked in the direction of the motorcycles and waved their flashlights. Two of the officers' police cruisers, parked off the road, had their blue lights flashing; one of the cruisers had its headlights on, and the other had its four-way flashers on. None of the officers wore any reflective clothing.

Two motorcycles came over the crest of the hill, about 500 to 600 feet to the west from where the officers were standing. The first motorcycle was in the eastbound lane near the center line. The second motorcycle, driven by Defendant, was in the same lane but closer to the center line. After the motorcycles crested the

hill, they slowed down but then sped back up. The posted speed limit was 35 miles per hour. It was estimated that the motorcycles were going between 80 and 100 miles per hour when they crested the hill, slowing down to approximately 55 to 65 miles per hour. The first motorcycle swerved over the center line, passed Officer Reid on the left, and kept going down the road. The second motorcycle ran into Officer Reid. About five seconds elapsed between the time the officers first saw the motorcycles and the time Defendant collided with Officer Reid.

The impact pinned Officer Reid to the front of the motorcycle as it continued down the road. Officer Reid then fell face-first onto the roadway as the motorcycle went off the road to the right. He slid down the roadway face-first for about 15 to 20 feet.

As a result of the accident, most of Officer Reid's teeth were either broken or knocked out, and the right side of his face was crushed. He had a compound fracture in his left leg and a broken tibia in his right leg. Surgeons inserted a plate in the right side of his face to reconnect his jaw to his head, and inserted rods and screws in both legs. His jaw was wired shut for two to three weeks following his surgery. At the time of Defendant's trial, Officer Reid's left knee still could not bear any weight and the rods in his legs continued to cause him great pain. Officer Reid was experiencing partial complex seizures and post-concussive syndrome.

III. DISCUSSION

On appeal, Defendant argues eight assignments of error. We find no merit to any of Defendant's contentions.

1. Insulating Negligence

By his first assignment of error, Defendant argues that, in light of evidence that Officer Reid walked into the middle of East Maiden Road at night without wearing any reflective clothing over his dark uniform, the trial court erred in denying Defendant's request for an instruction on insulating negligence. We disagree.

"In order for negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains a proximate cause, sufficient to find him criminally liable." *State v. Hollingsworth*, 77 N.C. App. 36, 39, 334 S.E.2d 463, 465 (1985). In *Hollingsworth*, the defendant was drunk when he gave two passengers a ride in his car. During the ride, another car collided with the defendant's car, killing the two passengers. At trial, the defendant, charged with manslaughter, contended that the victims' own negligence in voluntarily entering into his car when he was visibly intoxicated insulated him from criminal negligence. This Court held that the victims' "negligence would be, at most, a *concurring* proximate cause of the deaths of [the victims], and would not insulate [the] defendant from criminal liability." *Id.* at 39, 334 S.E.2d at 466. Accordingly, this Court held the trial court did not err in not instructing the jury on insulating negligence. *Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463.

Here, Defendant asserts that Officer Reid was negligent in walking into the dark roadway at night, dressed in a dark uniform without reflective clothing, and that such negligence broke the causal chain between Defendant's negligence and Officer Reid's injuries. However, it was estimated that it took Defendant approximately five seconds to travel the 500 to 600 feet between the crest of the hill and Officer Reid. Had Defendant been driving at the posted speed limit of 35 miles per hour, it would have taken him more than double that time to travel that distance, giving Defendant the opportunity to take note of the flashlights the officers were waving and the flashing blue police cruiser lights, and more time to avoid the accident. Therefore, even assuming *arguendo* that Officer Reid's conduct was negligent, it was at most a concurring proximate cause of his injuries, and Defendant's driving remained a proximate cause of Officer Reid's serious bodily injury. Thus, the trial court did not err in denying Defendant's request for an instruction on insulating negligence. This assignment of error is overruled.

2. Evidence of Prior Violations

In his second assignment of error, Defendant alleges the trial court erred in allowing two officers to testify about two prior traffic violations committed by Defendant because the evidence was offered only to show Defendant had a propensity to engage in the behavior with which he was charged. We disagree.

"A trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate

that the particular ruling was in fact incorrect." *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988). Furthermore, even if the complaining party can show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice. N.C. Gen. Stat. § 15A-1443(a) (2005).

"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 . . ." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005). Rule 404(b) is "a 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). The rule stated in *Coffey*, however, is "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). "When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Additionally, "[w]hen otherwise similar offenses are distanced by significant

stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor." *Id.*

In this case, North Carolina State Highway Patrol Trooper Brian Perkins testified that on 10 June 2003, he was on duty at 9:40 a.m. on Highway I-40 in Catawba County when he clocked Defendant on his 2001 Suzuki motorcycle at 90 miles per hour in a 65-mile-per-hour zone. When Trooper Perkins asked Defendant whether there was any reason for him to be traveling 90 miles per hour in a 65-mile-per-hour zone, Defendant responded that he was sorry, that he thought he was running 85 miles per hour or so.

Sergeant Steve Boyd of the City of Newton Police Department testified that on 16 July 2003 at 9:45 a.m., he was on duty on Highway 75 in the city of Newton, at the corner of Fairgrove Church Road waiting for a westbound traffic light to change. He observed a 2001 Suzuki motorcycle approach the intersection at a high rate of speed, lift its front wheel, and continue through the intersection at a high rate of speed. He made a visual estimate that the motorcycle went through the intersection at 70 miles per hour. The speed limit at the intersection was 50 miles per hour. He apprehended the driver, who was Defendant. When Sergeant Boyd asked Defendant why he had driven his motorcycle in that manner, Defendant responded that his girlfriend was following behind him and he was showing off for her.

Defense counsel objected to the evidence. The trial court overruled the objection, admitting the evidence "for the purpose of

showing that [Defendant] had the intent that is a necessary element of . . . two of the crimes charged in this case." Specifically, the evidence was introduced to establish the element of intent for the purpose of proving assault with a deadly weapon inflicting serious injury and assault on a law enforcement officer. Thus, the evidence was relevant to establish Defendant's "thoughtless disregard of consequences and heedless indifference to the safety and rights of others." See *State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000) (stating that evidence of the defendant's prior traffic violations was relevant to establish defendant's "totally depraved mind" for purposes of his second-degree murder charges).

Furthermore, the admission of the evidence of Defendant's two prior traffic violations satisfied both the similarity and temporal proximity requirements of Rule 404(b). With respect to the similarity requirement, the accident at issue and the two prior incidents involved Defendant's traveling at an excessive rate of speed, on urban roads, in Catawba County, on his Suzuki motorcycle. Thus, the prior incidents are sufficiently similar for purposes of Rule 404(b). The temporal proximity requirement was satisfied as well, as the previous speeding violations occurred only 15 and 16 months before the incident at issue. Accordingly, the trial court did not err in admitting the testimony of the police officers regarding Defendant's prior traffic violations.

Defendant further argues, however, that even if the evidence was admissible under Rule 404(b), the trial court should have

excluded it under N.C. Gen. Stat. § 8C-1, Rule 403. Under Rule 403, "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[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2005). The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court, *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986), which is left undisturbed unless the trial court's ruling "is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993).

Here, on each occasion in which evidence of the prior violations was offered, the trial court guarded against the possibility of unfair prejudice by instructing the jury to consider such evidence for the limited purposes allowed by Rule 404(b). See, e.g., *State v. Hyatt*, 355 N.C. 642, 566 S.E.2d 61 (2002) (holding admission of prior bad acts not unfairly prejudicial under Rule 403 when the trial court gave extensive limiting instruction regarding permissible uses of the 404(b) evidence). These limiting instructions also specifically admonished the jury not to consider the challenged evidence in determining the speed at which Defendant operated the motorcycle at the time of the incident at issue. Therefore, the trial court did not abuse its discretion by allowing the admission of this evidence. Defendant's argument is overruled.

3. Motion to Dismiss

Defendant's next five assignments of error are based on his contention that the trial court erred in denying his motion to dismiss all five charges for insufficiency of the evidence. For the following reasons, we overrule these assignments of error.

"Our standard of review of a trial court's ruling on a motion to dismiss for insufficient evidence is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense." *State v. Prush*, __ N.C. App. __, __, 648 S.E.2d 556, 558 (2007) (quotation marks and citations omitted). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Blake*, 319 N.C. 599, 356 S.E.2d 352 (1987). The trial court must review the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978). The trial court is concerned only with the sufficiency of the evidence to carry the case to the jury, and not with its weight. *State v. McNeil*, 280 N.C. 159, 185 S.E.2d 156 (1971).

A. Assault With a Deadly Weapon Inflicting Serious Injury

Defendant first argues the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury for insufficiency of the evidence. The elements of this offense are (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, and (4) not resulting in death. N.C. Gen. Stat. § 14-32(b) (2005); *State v. Aytche*, 98 N.C.

App. 358, 391 S.E.2d 43 (1990). Specific intent is not an element of the offense. *State v. Curie*, 19 N.C. App. 17, 198 S.E.2d 28 (1973). Defendant argues there was insufficient evidence of an intentional assault. However, criminal intent may be implied from culpable negligence. *State v. Eason*, 242 N.C. 59, 86 S.E.2d 774 (1955). "Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933).

Here, the excessive speed at which Defendant was traveling, around 80 miles per hour when he crested the hill and around 55 miles per hour when he hit the officer, in a 35-mile-per-hour zone, the apparent disregard for the patrol car lights and flashlights held by the troopers, and the evidence of two prior speeding violations under similar circumstances and within the past sixteen months, was sufficient to support a finding that Defendant acted with a thoughtless disregard of the consequences and a heedless indifference to the safety of others. Thus, the trial court properly denied Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

B. Assault on a Law Enforcement Officer

Defendant next argues the trial court erred in denying his motion to dismiss the charge of assault on a law enforcement officer, also contending that the State presented insufficient evidence of an intentional assault. For the reasons stated in the

preceding discussion, we disagree and hold that the trial court properly denied Defendant's motion to dismiss the charge of assault on a law enforcement officer.

C. Reckless Driving

Defendant next argues the trial court erred in denying his motion to dismiss the charge of reckless driving for insufficiency of the evidence. "Any person who drives any vehicle upon a highway . . . without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." N.C. Gen. Stat. § 20-140(b) (2005).

Defendant argues that he slowed down when he crested the hill, there were no radar readings taken to determine his speed, and there was no person or car visible in the highway to either biker. Furthermore, Defendant argues there was no evidence that the first biker was ever charged with speeding. However, this Court has held that a motion to dismiss a charge of reckless driving was properly denied where the State introduced evidence that the defendant drove well over the 35-mile-per-hour speed limit; swerved at least once into the opposing lane of traffic; and slid for approximately 20 feet after braking. *State v. Davis*, 163 N.C. App. 587, 594 S.E.2d 57, *disc. review denied*, 358 N.C. 547, 599 S.E.2d 564 (2004).

Similarly, in this case, the State introduced substantial evidence from eyewitness police officers showing that Defendant drove as fast as 80 to 100 miles per hour in a 35-mile-per-hour zone; that Defendant applied his brakes only three feet before he

collided with Officer Reid; that after he applied his brakes, Defendant left a skid mark that was nine and a half feet long; and that after impact, Defendant's motorcycle slid 96 feet down the road. Furthermore, whether the first biker was charged with speeding is irrelevant to the sufficiency of the evidence regarding the charges against Defendant. The evidence was plainly sufficient to take the charge of reckless driving to the jury, and the trial court properly denied Defendant's motion to dismiss this charge.

D. Speeding

Defendant next argues the trial court erred in denying his motion to dismiss the charge of speeding in excess of 15 miles per hour over the speed limit. Defendant argues that no radar was used to establish his speed, and the estimate of his speed near the impact area where the eyewitness officers were standing varied from 45 to 55 miles per hour.

First, although Defendant correctly notes that his speed was not determined by radar, "[i]t is a general rule of law, adopted in this State, that any person of ordinary intelligence, who has had an opportunity for observation, is competent to testify as to the rate of speed of a moving object, such as an automobile." *Lookabill v. Regan*, 247 N.C. 199, 201, 100 S.E.2d 521, 522 (1957). "The question as to the opportunity of the witness to judge, under the particular circumstances, the speed of an automobile, has been held, as a general rule, to go to the weight of his testimony rather than to its admissibility." *State v. Becker*, 241 N.C. 321, 327, 85 S.E.2d 327, 331 (1955) (citation omitted). Furthermore, on

a motion to dismiss, the evidence must be taken in the light most favorable to the State. *Thomas*, 296 N.C. 236, 250 S.E.2d 204.

Here, the officers standing on the side of the road on which Defendant was driving testified that Defendant was going between 80 and 100 miles per hour when he crested the hill, and then slowed to 55, 60, or 65 miles per hour. Given their reasonable opportunity for observation of Defendant's speed, their testimony was admissible, and the weight of their testimony was then a matter for the jury. Additionally, while arguing his motion to dismiss to the trial court, Defendant conceded that the State had presented sufficient evidence to take the speeding charge to the jury. Therefore, the trial court properly denied Defendant's motion to dismiss the charge of speeding in excess of 15 miles per hour over the speed limit.

E. Failure to Obey a Law Enforcement Officer

Defendant next argues the trial court erred in denying his motion to dismiss the charge of failure to obey a law enforcement officer for insufficiency of the evidence. "No person shall willfully fail or refuse to comply with any lawful order or direction of any law-enforcement officer or traffic-control officer invested by law with authority to direct, control or regulate traffic, which order or direction related to the control of traffic." N.C. Gen. Stat. § 20-114.1 (2005). Defendant argues that he did not see the flashlights that the officers were waving and that there was no order given by any of the police officers.

The State offered testimony from Sergeant Eaker that the three officers "were in an attempt to get the violators to stop what they were doing. We had our blue lights activated. We had our flashlights. We were trying to give signals and command to these subjects to stop, and it was apparent they were not going to." Even though Defendant claimed he did not see the flashlights, on a motion to dismiss "[c]ontradictions and discrepancies in the testimony or evidence are for the jury to resolve and will not warrant dismissal. Moreover, determinations of the credibility of witnesses are issues for the jury to resolve[.]" *State v. Brown*, __ N.C. App. __, __, 641 S.E.2d 850, 852-53 (2007) (citation omitted). Therefore, the trial court properly denied Defendant's motion to dismiss the charge of failure to obey a law enforcement officer.

4. Ineffective Assistance of Counsel

By his eighth and final assignment of error, Defendant alleges he did not receive effective assistance of counsel because, when his case was called for trial, defense counsel withdrew Defendant's 15-month-old motion for change of venue and announced that Defendant was ready for trial.

In his motion for change of venue, Defendant asked the trial court to move the action from Catawba County to Iredell County. In support of his motion, Defendant alleged that since Officer Reid and his family had strong ties to and were well-known throughout Catawba County, in that Officer Reid and many of his family members had been involved in law enforcement in Catawba County for a

significant number of years, and given the significant pretrial publicity in Catawba County regarding Defendant's charges, Defendant believed he would not receive a fair trial in Catawba County.

To obtain relief for ineffective assistance of counsel, a defendant must demonstrate that his counsel's conduct fell below the objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). This requires a showing that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced his defense. *Id.* "However, when this Court is able to determine that defendant has not been prejudiced by any alleged ineffectiveness of counsel, we need not consider whether counsel's performance was deficient." *State v. Augustine*, 359 N.C. 709, 719, 616 S.E.2d 515, 524 (2005), *cert. denied*, __ U.S. __, 165 L. Ed. 2d 988 (2006).

Defendant makes the bald assertion that "[t]he outcome of his trial probably would have been different if it had a different county venue." This assertion first assumes, with no argument advanced, much less a persuasive one, that the motion for change of venue would have been granted. Furthermore, Defendant makes no argument as to why or how the outcome of his trial would have been different had the motion been granted. Regardless, upon a thorough review of the record and in light of the compelling evidence of Defendant's guilt discussed above, we perceive no reasonable probability that defense counsel's withdrawal of Defendant's motion

for change of venue deprived Defendant of a fair trial whose result is reliable. Accordingly, this assignment of error is overruled.

For the above stated reasons, we hold Defendant received a fair trial, free of error.

NO ERROR.

Judges McCULLOUGH and CALABRIA concur.

Report per Rule 30(e).