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NO. COA08-74

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 05 CRS 22040
05 CRS 218404
05 CRS 218408

RAYMUNDO ESPINOZA PINEDA,

Defendant.

Court of Appeals

Appeal by defendant from judgment entered 7 March 2007 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court.

Heard in the Court of Appeals 20 August 2008.

Slip Opinion

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

Reita P. Pendry for the defendant.

ELMORE, Judge.

On 23 April 2005, Raymundo Espinoza Pineda (defendant) was seen driving a white truck on Independence Boulevard in Charlotte, moving erratically through several lanes of traffic and traveling at approximately seventy to seventy-five miles per hour. Defendant's white truck struck the vehicle driven by Jasmine Lawrence, which sent Ms. Lawrence's vehicle across the grass median into oncoming traffic. Ms. Lawrence's vehicle was then struck on the passenger side by a large truck traveling in the opposite

direction, which caused her car to spin and ultimately led to her death. After defendant left the scene of the accident, Officer Michael Smith was alerted to defendant's location and found that defendant's mental and physical faculties were appreciably impaired by alcohol. At the time of the arrest, defendant had a pending driving while impaired (DWI) charge and was driving on a revoked license.

On 16 May 2005, defendant was indicted for DWI, felony hit and run, and second degree murder of Jasmine Lawrence. On 2 March 2007, defendant was convicted on all three counts. Judgment was arrested on the DWI conviction. Defendant appeals.

At trial, Officer Russell Martin testified that, on 28 May 2004, he stopped defendant after witnessing defendant's vehicle make an illegal maneuver, cross the concrete median, and strike a stop sign. Defendant was arrested for DWI and subsequently agreed to the administration of a chemical analysis of his breath, which resulted in the reading of an alcohol concentration of 0.14. Defense counsel objected. The trial court overruled defendant's objection and admitted evidence of defendant's May 2004 DWI arrest only for the purposes of showing (1) defendant's knowledge that his license was revoked and (2) malice, one of the elements of the charge of second degree murder that was submitted. The trial court issued the following limiting instructions to the jury:

The testimony that you have just heard has been offered for a limited purpose.

The evidence tends to show that at an earlier occasion, the Defendant drove a motor vehicle on the street or highway while subject

to an impairing substance within Mecklenburg County, again, on a previous occasion.

It's offered and admitted for one purpose only, and that is to show that, if you find from the evidence, that the Defendant acted with malice in the operation of the motor vehicle, which is an element of second degree murder.

If you believe this evidence once the trial is completed, then you may consider [sic] for the limited purpose for which it was received.

However, you may not consider this evidence to prove the character of the Defendant, or that he acted in conformity therewith on the date of the offenses for which he is being tried for today.

In other words, you may not consider this as evidence to show the propensity of the Defendant to commit any other criminal offense.

Defendant first argues that the trial court erred by improperly admitting evidence regarding defendant's prior traffic arrest for DWI because it was not sufficiently similar to the charged offense to be relevant. We disagree.

Defendant first argues that his prior bad conduct of the DWI charge was not similar enough to the present charged conduct to justify the admission of the testimony and is therefore irrelevant, in violation of Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404 (2005). Rule 404(b) provides:

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.

Id. It is settled law that this "list of permissible purposes for admission of 'other crimes' evidence is not exclusive, and such

evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. Hipps*, 348 N.C. 377, 404, 501 S.E.2d 625, 641 (1998) (citation and quotation omitted). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Sloan*, 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986). The similarities between the circumstances need not rise to the level of unique, but simply "must tend to support a reasonable inference that the same person committed both the earlier and later acts." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). Whether defendant realized that he was driving with a revoked license tends to show that he was acting recklessly, which in turn tends to show malice. *State v. Jones*, 353 N.C. 159, 173, 538 S.E.2d 917, 928 (2000). Malice is an essential element of second degree murder. See *State v. Bethea*, 167 N.C. App. 215, 218, 605 S.E.2d 173, 176-77 (2004) (listing the elements of second degree murder). The State's evidence demonstrated that defendant was aware that his conduct under the present facts was reckless and dangerous to human life. Such evidence tended to show malice on the part of defendant and that defendant knowingly operated a motor vehicle while his license was revoked. Thus, the evidence was relevant to the crime defendant was tried for and was properly admitted under Rule 404.

Defendant also contends that even if the evidence were relevant, it should have been excluded under Rule 404(b) as evidence which had no purpose other than to show that defendant was

a person of bad character with a propensity for driving with over-the-limit blood alcohol levels. However, the record reveals that the evidence showing that defendant was knowingly driving with a revoked license subsequent to a DWI charge was offered for the purpose of establishing intent or knowledge, permissible purposes under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

Defendant next argues that even if the evidence were relevant and offered for a permissible purpose under Rule 404(b), the prejudicial impact of the evidence substantially outweighed its probative value under Rule 403 and should have been excluded. N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Given that the evidence of the prior DWI charge was fundamental to proving that defendant acted with malice, it was certainly highly probative. The potential danger of unfair prejudice was also substantially mitigated by the trial court's limiting instruction to the jury on the permissible use of the evidence, which specifically stated that the evidence could not be used to prove defendant's character. Therefore, on the record before us, we conclude that the trial court did not abuse its discretion by admitting evidence that defendant's license was revoked.

Defendant next claims that the trial court erred in denying his motion to dismiss the second degree murder charges for insufficiency of the evidence. Specifically, defendant argues that there was insufficient evidence of malice. We are not persuaded.

In considering a motion to dismiss, the trial court must examine all of the evidence in the light most favorable to the

State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The legal standard for a "motion to dismiss based on insufficiency of the evidence is the substantial evidence test." *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993). "The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.*

"The elements of second-degree murder . . . are: (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Fowler*, 159 N.C. App. 504, 511, 583 S.E.2d 637, 642 (2003). Whether the State has carried its burden of proof of malice depends on the factual circumstances of each case. *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733 (1993).

Defendant attempts to base his argument on *United States v. Fleming* from the United States Court of Appeals for the Fourth Circuit, in which the court drew a distinction between murder and vehicular homicides in which the defendants were driving while intoxicated. 739 F.2d 945 (4th Cir. 1984). The court in *Fleming* stated that, "[i]n the vast majority of vehicular homicides, the accused has not exhibited such wanton and reckless disregard for human life as to indicate the presence of malice on his part." *Id.* at 948. The court found, however, that "the facts show a deviation from established standards of regard for life and the safety of

others that is markedly different in degree from that found in most vehicular homicides." *Id.* The Fourth Circuit noted that the defendant's "driving abilities were so impaired that he recklessly put others in danger simply by being on the road and attempting to do the things that any driver would do." *Id.* Defendant in the present case cites *Fleming* for the proposition that his conduct did not rise to the level of "egregious" as compared to the defendant in that case, who had a blood alcohol level of .315. While defendant encourages us to engage in a sliding scale determination of what vehicular homicide conduct is so egregious that it ought to be deemed murder, the present facts undoubtedly serve to provide sufficient evidence of malice and no such determination is warranted.

It is only necessary that the State prove 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." *State v. Locklear*, 159 N.C. App. 588, 592, 583 S.E.2d 726, 729 (2003). In the present case, the State's evidence on the issue of malice tended to show that defendant's license was revoked and he had a pending DWI charge under which he had consumed sufficient alcohol to have an alcohol concentration well over the prescribed limit. Despite having been previously arrested for this conduct and being on notice of the serious consequences, defendant consumed an amount of alcohol sufficient to obtain almost exactly the same blood alcohol concentration level as in his previous DWI charge and again

operated a motor vehicle. After examining the evidence in the light most favorable to the State, we find substantial evidence to support the malice element of second degree murder. Thus, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of second degree murder.

Defendant received a trial free from error.

No error.

Judges TYSON and CALABRIA concur.

Report per Rule 30(e).