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NO. COA09-1487

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v. Edgecombe County
Nos. 08 CRS 3507, 51687, 52046

DERRICK MCCOY

Appeal by Defendant from judgments entered 29 April 2009 by Judge Alma L. Hinton in Superior Court, Edgecombe County. Heard in the Court of Appeals 12 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

Thomas R. Sallenger for Defendant-Appellant.

McGEE, Judge.

Derrick McCoy (Defendant) was convicted of second-degree murder, driving while impaired, driving left of center, driving while license revoked, and aggravated felony serious injury by vehicle. The evidence at trial tended to show that Defendant was driving a Ford Taurus (the Taurus) in the westbound lane of U.S. 64 Alternate, between Rocky Mount and Tarboro, on 10 May 2008. Austin Rogers (Rogers) was driving a Toyota Camry (the Camry) in the eastbound lane of U.S. 64 Alternate. Courtney Dickens (Dickens) was a passenger in the Camry. The vehicles collided head-on.

Paramedics and police officers arrived at the scene of the

accident. Trooper Timothy Pope (Trooper Pope) of the North Carolina Highway Patrol investigated the accident. Rogers and Dickens were in the front seat of the Camry. Rogers was treated by paramedics. Another group of paramedics, along with police officers, attempted to pry open the passenger side of the Camry with a jaws-of-life device to gain access to Dickens. Trooper Pope did not smell alcohol on Rogers' breath nor did he suspect Rogers of drug or alcohol use.

Trooper Pope interviewed Defendant, who advised Trooper Pope that he did not have a driver's license. Trooper Pope noted that Defendant's speech was slurred, his eyes were bloodshot and glassy, and that there was an "extremely strong" odor of alcohol about Defendant.

Rogers, Dickens, and Defendant were transported to Heritage Hospital in Tarboro where Dr. Tonya West (Dr. West) treated all three. Dr. West testified that Rogers sustained numerous injuries, including internal bleeding, amnesia, neck and back pain, collapsed and contused lungs, and fractures in his ribs, hip, and forearm, and was placed on a ventilator. Rogers remained in the hospital for six weeks and, a week after his release, had to return to have a rod placed in his leg.

Dr. West testified that Dickens' left arm and right leg were broken. At the scene of the accident, Dickens' breathing had been strained and, when she arrived at the hospital, her blood pressure dropped and she stopped breathing. Dr. West testified that Dickens suffered massive head trauma, which caused Dickens' death.

Dr. West testified that Defendant's only obvious injury was a "probable fracture of his right leg." Dr. West testified there was a strong odor of alcohol about Defendant and that Defendant appeared to be intoxicated.

Trooper Pope testified he asked Defendant how much he had drunk and Defendant responded, "quite a bit". Trooper Pope testified that he formed the opinion that Defendant was "appreciably impaired" by alcohol and, pursuant to N.C. Gen. Stat. § 20-16.2, advised Defendant of his chemical analysis rights. Trooper Pope asked Defendant if he would submit to a blood test and Defendant replied, "sure." Trooper Pope then told Defendant that he needed a "yes" or "no" answer and Defendant said, "Yes." Because of Defendant's injuries, Trooper Pope did not have Defendant sign the rights form; instead, Trooper Pope wrote "unable to sign" on the signature line. The results of the chemical analysis performed on Defendant's blood sample showed that Defendant had a blood alcohol concentration (BAC) of 0.37.

Trooper Pope interviewed Defendant over the following days. Trooper Pope testified that Defendant stated he began drinking at noon on 10 May 2008 while watching a game on television with a friend. During half-time, Defendant drank "about two 40 ounces of beer" and "a certain amount" of wine. Around 5:00 p.m., Defendant stopped by a store, then went home and fell asleep. At around 9:30 p.m., Defendant left Rocky Mount and headed to Tarboro because he was supposed to "watch [his] daughter that night." When Defendant arrived in Tarboro, his daughter's mother told him that she no

longer needed him to watch their daughter. Defendant then drove west on U.S. 64 Alternate toward Rocky Mount. Defendant approached "the city limits or where the speed changes, [and] looked down to make sure [he] wasn't going too fast, too slow, too fast, too soon." When Defendant looked back up, he saw headlights and "tried to swerve to the right, but it was too late." Defendant then collided with the Camry driven by Rogers.

Trooper Eric Schaberg (Trooper Schaberg), of the State Highway Patrol, testified as an expert in collision investigation. Trooper Schaberg investigated the scene of the accident and reviewed photographs of the roadway. At trial, Trooper Schaberg testified that, in his opinion, the head-on collision occurred in the eastbound lane of U.S. 64 Alternate.

Defendant was indicted for the second-degree murder of Dickens; driving while impaired (DWI); driving left of center (DLC); driving while license revoked (DWLR); and aggravated felony serious injury by vehicle (AFSIV). Defendant was found guilty of the charges of second-degree murder, DWI, DWLR, and AFSIV. Defendant was found responsible for DLC. The trial court sentenced Defendant to 189 to 236 months in prison for second-degree murder. The trial court arrested judgment in Defendant's conviction for DWI. Defendant was also sentenced to 29 months to 44 months in prison for AFSIV, to run consecutively to Defendant's second-degree murder sentence. Defendant was also sentenced to forty-five days for DWLR and DLC, to run consecutively to Defendant's AFSIV sentence. Defendant appeals.

I. Motion to Suppress

Defendant first argues the trial court erred in denying his motion to suppress evidence of Defendant's BAC. Defendant argues that Trooper Pope did not obtain a search warrant to obtain a sample of Defendant's blood, and "any purported consent by . . . Defendant was not a voluntary, knowing and intelligent waiver of his rights under the law[.]" We disagree.

a. Findings of Fact

Defendant contends the trial court erred by failing to make findings of fact and conclusions of law supporting its denial of Defendant's motion to suppress. Defendant cites N.C. Gen. Stat. § 15A-977(f), which provides that, in ruling on a motion to suppress, the trial court "must set forth in the record [its] findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2009). Defendant asserts that the trial court's failure to make findings of fact "leaves this Court with only the ability to guess as to what the [t]rial [c]ourt believed was important and why the [t]rial [c]ourt decided the issue as it did." The State counters that, because the evidence of Defendant's BAC was undisputed, the trial court was not required to make findings of fact. *See State v. Toney*, 187 N.C. App. 465, 469, 653 S.E.2d 187, 189-190 (2007) ("[N.C.G.S.] § 15A-977(f) notwithstanding, our Supreme Court has held that '[i]f there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows.'" *Citing State v. Lovin*, 339 N.C. 695,

706, 454 S.E.2d 229, 235 (1995)).

In the case before us, the transcript reveals no material conflict in the evidence about Defendant's BAC. Rather, the reasoning behind Defendant's motion to suppress, and the State's arguments against it, concern the interpretation and applicability of N.C. Gen. Stat. 20-16.2 concerning Defendant's right to refuse a blood test. Because there is no material conflict in the evidence, we "'can determine the propriety of the ruling on the undisputed facts which the evidence shows.'" *Id.*, 653 S.E.2d at 190 (citation omitted). Therefore, it was not reversible error for the trial court to fail to make findings of fact in denying Defendant's motion to suppress.

b. Consent to Chemical Analysis

Defendant argued in his motion to suppress that, although Defendant was pinned in the car and had suffered "massive and extraordinary physical injuries[,]" he remained conscious. Defendant further contended he had no recollection of consenting to, or submitting to, the taking of a blood sample. Defendant stated in his motion that, though the notice of rights form indicated that Defendant was unable to sign, Defendant believed that he had not been "properly and appropriately advised of his rights pursuant to N.C.G.S. § 20-16.2." Finally, Defendant asserted that Trooper Pope had not obtained a search warrant to take Defendant's blood sample.

N.C. Gen. Stat. § 20-16.2(a) provides:

> Any person who drives a vehicle on a highway or public vehicular area thereby gives consent

> to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.

N.C. Gen. Stat. § 20-16.2(a) (2009). N.C.G.S. § 20-16.2(a) also sets forth certain information which must be provided, in writing, to the person charged before a chemical analysis is obtained. *Id.* However, N.C. Gen. Stat. § 20-16.2 further provides that:

> (b) Unconscious Person May Be Tested. -- If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed. In this instance the notification of rights set out in subsection (a) and the request required by subsection (c) are not necessary.
>
> (c) Request to Submit to Chemical Analysis. -- A law enforcement officer or chemical analyst shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law.

N.C.G.S. § 20-16.2. Thus, N.C.G.S. § 20-16.2 provides that an officer having reasonable grounds to suspect that a person has committed an implied-consent offense may obtain a blood sample for chemical analysis in two ways: (1) if the person is conscious and capable of refusal, the officer may obtain a sample only if the person consents; or (2) if the person is unconscious or incapable

of refusing, the officer may obtain a blood sample without obtaining the consent of the person.

In the case before us, Trooper Pope testified that he read Defendant a form detailing Defendant's rights pursuant to N.C.G.S. § 20-16.2 and requested that Defendant submit to a chemical analysis. Trooper Pope testified that he informed Defendant that he was charged with an implied-consent offense and that Defendant could refuse the test, but that refusal would result in a one-year revocation of Defendant's driver's license. Trooper Pope testified during *voir dire* that he wrote "unable to sign" in the portion of the form left blank for Defendant's signature because Defendant's "injuries were so bad that he was unable to sign the form." After reading these rights to Defendant, Trooper Pope asked Defendant if he consented to a blood sample being taken. Defendant responded, "sure." Trooper Pope told Defendant that he "needed a yes or a no. [Defendant] said, yes."

Defendant contends that "there was no evidence from any medical professionals presented that [Defendant] was capable of understanding his rights under the statute." Defendant also argues that there was "no evidence presented from any medical professionals that [he] was *in*capable of understanding his rights under the statute." (Emphasis added). Defendant's argument is that, because there was no evidence that he was able to understand his rights, his consent to the chemical analysis was ineffective. Defendant further argues that, because he was not unconscious and did not consent, the only appropriate method for Trooper Pope to

have obtained a blood sample was pursuant to a search warrant. We disagree.

Defendant's contention that an officer can obtain a blood sample without a person's consent only if the person is unconscious is unsupported by both the statute and case law. N.C.G.S. § 20-16.2(b) clearly states that an officer may obtain a sample if the person is either "unconscious *or otherwise in a condition that makes the person incapable of refusal.*" N.C.G.S. § 20-16.2(b) (emphasis added); *see also State v. Stewardson*, 32 N.C. App. 344, 349, 232 S.E.2d 308, 311 (1977) (holding that the defendant's argument that "because of his physical injuries and resulting mental condition, '[the] defendant could no more consent understandingly to this test than could an infant[]'" was without merit because N.C.G.S. § 20-16.2(b) "would nevertheless authorize the test to be given.").

Therefore, on the facts before us, Defendant was either: (1) conscious and capable of refusal, but gave his consent when he told Trooper Pope, "yes," or (2) "otherwise in a condition that [made him] incapable of refusal." In either circumstance, Trooper Pope was permitted by statute to obtain Defendant's blood sample. Therefore, Defendant's argument is without merit and we hold that the trial court did not err in denying Defendant's motion to suppress the evidence of his BAC.

II. Jury Instructions on Malice

Defendant next argues that the trial court committed reversible error in its instruction to the jury concerning the

definition of malice as an element of second-degree murder. Defendant contends that the instruction given was not supported by the evidence presented. Defendant's argument on this issue centers on the State's use of Defendant's driving record to show malice.

We review a trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "An instruction about a material matter must be based on sufficient evidence." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). We review jury instructions "'contextually and in [their] entirety'" to determine if the charge "'presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. . . .'" *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citations omitted).

During the charge conference, the trial court stated its intent to give North Carolina Pattern Jury Instruction 206.32, the pattern jury instruction for second-degree murder by vehicle, which contains the following language regarding malice:

> Fifth, that the defendant acted unlawfully and with malice. Malice is a necessary element which distinguishes second degree murder from manslaughter. Malice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

N.C.P.I.-Crim. 206.32.

The State filed a written motion requesting that the trial court give an additional instruction regarding malice, including language the State developed from the opinion of our Supreme Court in *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000). The record on appeal does not contain a copy of this proposed instruction, and the State did not read into the record the wording of the request during the charge conference. Defendant requested that the trial court give only the pattern jury instruction. The trial court stated that it would provide the instruction, as requested by the State, with some modification. Neither Defendant nor the State requested further alteration as to the malice charge.

In its charge to the jury, the trial court gave the following instruction on malice:

> Malice is a necessary element that distinguishes second-degree murder from manslaughter. Malice arises when an act is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief *though there may be no intention to injure a particular person, it is sufficient to supply the malice necessary for second-degree murder*. That is a factual determination that you, the jury, must make.

(emphasis added).

Defendant characterizes his argument as one concerning the sufficiency of the evidence to support the jury charge. We note that Defendant's assignment of error and the argument based thereon are addressed only to the jury instructions. However, the reasoning and analysis contained in Defendant's brief address the

admissibility of Defendant's record. Our Courts have held that a defendant's driving record containing prior convictions for DWI may be admitted to show malice in second-degree murder cases involving impaired driving. *See Rich*, 351 N.C. at 400, 527 S.E.2d at 306-07. The probative value of such evidence admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009), is tempered by the requirements of temporal proximity and similarity. *State v. Maready*, 362 N.C. 614, 624, 669 S.E.2d 564, 570 (2008). However, instead of assigning error to and arguing against the admission of the driving record pursuant to Rule 404(b), Defendant argues that the trial court erred because the evidence at trial failed to support an instruction on malice. Defendant argues:

> Other than being charged for DWI, the facts of the two incidents were so dissimilar that the [t]rial [c]ourt's permissive stance with allowing the State to posture its argument that such prior conviction did support the element of "malice" that the result to the Defendant was tremendously unfair and especially prejudicial.

Defendant appears to be arguing that his prior DWI conviction and the offense in this case are dissimilar and, therefore, the trial court's jury instructions were erroneous. As we have noted, the similarity of a prior conviction and a present offense is a threshold issue in determining the admissibility of evidence under Rule 404(b), and is not relevant to our review of jury instructions. *See State v. Al-Bayyinah*, 356 N.C. 150, 154-55, 567 S.E.2d 120, 122-23 (2002).

Defendant endeavors to support his argument by distinguishing the cases of *State v. Vassey*, 154 N.C. App. 384, 572 S.E.2d 248

(2002) and *State v. Miller*, 142 N.C. App. 435, 543 S.E.2d 201 (2001). However, because the holdings in *Vassey* and *Miller* relate to Rule 404(b) admissibility, Defendant does not demonstrate how they are relevant to his arguments concerning jury instructions. Our Court held in *Vassey* that, assuming *arguendo* it was error to have admitted certain of a defendant's prior convictions, "the exclusion of one additional conviction out of the seven that were before the jury could not have resulted in a different verdict" and therefore was not prejudicial error. *Vassey*, 154 N.C. App. at 392, 572 S.E.2d at 253. Likewise, in *Miller*, our Court found "no error in the trial court's introduction of defendant's prior crimes to establish that defendant acted with the malice necessary to convict him of second-degree murder." *Miller*, 142 N.C. App. at 440, 543 S.E.2d at 205. Defendant fails to demonstrate how *Vassey* and *Miller* are applicable to his case, as those cases turned on the admissibility of evidence regarding prior convictions and not on jury instructions.

We note that the trial court quoted the jury instructions exactly as set forth in the pattern jury instructions. However, to the sentence, "an act is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief[,]" the trial court added the following clause: "though there may be no intention to injure a particular person, it is sufficient to supply the malice necessary for second-degree murder." Defendant does not challenge this

additional language. Viewing the trial court's instruction to the jury contextually and in its entirety, we hold that there is no reasonable cause to believe the jury was misled or misinformed. *Blizzard*, 169 N.C. App. at 296-97, 610 S.E.2d at 253. We therefore find no error in the instruction on malice.

III. Motion to Dismiss

a. Second-Degree Murder

Defendant next argues that the trial court erred by denying his motion to dismiss the charge of second-degree murder. Defendant contends the State failed to present substantial evidence of malice. Specifically, Defendant contends that his having only one DWI conviction in his record was insufficient to demonstrate malice for second-degree murder.

A trial court should grant a motion to dismiss for insufficiency of the evidence only where the State has failed to show "'substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense.'" *State v. Morton*, 166 N.C. App. 477, 481, 601 S.E.2d 873, 876 (2004) (citation omitted). The trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *Id.* Any discrepancies or contradictions in the evidence are for the jury to consider. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). Second-degree murder is "an unlawful killing with malice, but without premeditation and deliberation." *State v. Brewer*, 328 N.C. 515,

522, 402 S.E.2d 380, 385 (1991). Where a second-degree murder charge is based on impaired driving, the requisite malice may arise as a result of "'a mind regardless of social duty and deliberately bent on mischief[.]'" *State v. Locklear*, 159 N.C. App. 588, 591, 583 S.E.2d 726, 729 (2003)(citation omitted), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 394, *aff'd* 359 N.C. 63, 602 S.E.2d 359 (2004) (per curiam). Our Court has held that to survive a motion to dismiss on this issue, "[i]t is necessary for the State to prove only 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." *Locklear*, 159 N.C. App. at 592, 583 S.E.2d at 729. In *Locklear*, we held that there was sufficient evidence of malice based upon the following:

> In the instant case, the State's evidence on the issue of malice tended to show that [the] defendant was driving while impaired with an alcohol concentration of 0.08, which is above the legal limit, and that [the] defendant was on notice as to the serious consequences of driving while impaired as a result of his prior driving while impaired conviction which occurred four years earlier. Examining the evidence in the light most favorable to the State, there was substantial evidence presented from which the jury could find malice and each of the other essential elements of second-degree murder. Thus, the trial court did not err in denying [the] defendant's motion to dismiss the charge of second-degree murder.

Id.

In the present case, the evidence tended to show that: (1) Defendant was driving while impaired with an alcohol concentration of .37, which is well above the legal limit of .08; (2) Defendant

was on notice as to the serious consequences of driving while impaired as a result of his prior DWI conviction that occurred approximately one month before this offense; (3) Defendant was driving without a valid driver's license; and (4) Defendant looked away and drifted into the lane of oncoming traffic. In light of *Locklear*, and the evidence deemed sufficient therein, we hold there was sufficient evidence in the case before us to survive Defendant's motion to dismiss the charge of second-degree murder. *See also State v. Westbrook*, 175 N.C. App. 128, 135, 623 S.E.2d 73, 78 (2005); *State v. McAllister*, 138 N.C. App. 252, 260, 530 S.E.2d 859, 864-65 (2000). We find no error in the trial court's denial of Defendant's motion to dismiss.

b. Aggravated Felony Serious Injury by Vehicle and Driving Left of Center

Defendant next argues that the trial court erred in denying his motions to dismiss the charges of AFSIV and DLC for insufficiency of the evidence. N.C. Gen. Stat. § 20-141.4(a4) provides:

> A person commits the offense of aggravated felony serious injury by vehicle if:
>
> (1) The person unintentionally causes serious injury to another person,
>
> (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2,
>
> (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury, and
>
> (4) The person has a previous conviction involving impaired driving, as defined in G.S.

> 20-4.01(24a), within seven years of the date of the offense.

N.C. Gen. Stat. § 20-141.4(a4)(2009). N.C. Gen. Stat. 20-146 provides in pertinent part, that "[u]pon all highways of sufficient width a vehicle shall be driven upon the right half of the highway[.]" N.C. Gen. Stat. § 20-146(a)(2009). N.C.G.S. § 20-146(a) provides four exceptions not relevant here. Defendant challenges the sufficiency of the evidence for both of these charges, arguing that there was no evidence that he was driving left of the center line. Without evidence that he was driving left of the center line, Defendant contends there was no proof that his driving was a proximate cause of Rogers' injuries.

Defendant bases his contention on the following reasoning: though the State presented the testimony of Trooper Schaberg, an expert in collision investigation, this witness was cross-examined by Defendant. The cross-examination, Defendant urges, "quickly destroyed any notion by the expert as presented by the State" that the accident occurred according to the State's theory of the case. However, as stated above, when ruling on a motion to dismiss, we give the State the benefit of every reasonable inference to be drawn from the evidence. *Morton*, 166 N.C. App. at 481, 601 S.E.2d at 876. Discrepancies and contradictions therein are to be considered by the jury. *Barnes*, 334 N.C. at 75, 430 S.E.2d at 918. Viewing the evidence in the light most favorable to the State, we find that the State presented the expert testimony of Trooper Schaberg, who opined that the collision occurred in the eastbound lane of U.S. 64 Alternate. Defendant had been traveling in the

westbound lane just prior to the collision. Trooper Pope also testified that, in his opinion, Defendant's vehicle had crossed the center line and that the accident occurred in the eastbound lane.

In light of the testimony of Troopers Pope and Schaberg, we find that the State presented sufficient evidence that Defendant was driving left of center. Because Defendant challenges the sufficiency of the evidence of the AFSIV and DLC charges only by arguing there was insufficient evidence of his driving left of center, his argument is without merit. The State therefore presented sufficient evidence to survive Defendant's motions to dismiss the charges of AFSIV and DLC. Any discrepancies or issues of credibility were properly presented to the jury for its consideration. Therefore, the trial court did not err in denying Defendant's motions to dismiss. Defendant does not argue his remaining assignments of error and they are therefore deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).