NO. COA13-334
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Rockingham County
No. 11 CRS 125-6

DOMINIC EUGENE FOOTE

Appeal by defendant from judgments entered 26 September 2012 by Judge Richard W. Stone in Rockingham County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

James N. Freeman, Jr. for defendant.

ELMORE, Judge.

On 19 September 2012, Dominic Eugene Foote (defendant) was convicted of second degree murder and felony death by vehicle. He was sentenced to a concurrent term of 200 to 249 months imprisonment for the second degree murder conviction and 35 to 51 months for the felony death by vehicle conviction. Defendant now appeals. After careful consideration, we find no trial

error. However, we remand for resentencing consistent with this opinion.

I. Background

The State's evidence tended to show that about midnight on 24 October 2010, defendant picked up Douglas Rontay Clark (the victim), Jamal Stewart (Stewart), and Timothy Lee Dalton (Dalton) in a Dodge Durango. Three female passengers were already in the vehicle. Stewart testified that defendant was "driving crazy," and "everybody in the car was like, slow down, and [defendant] was like, all right, I got this. So he kept speeding." At one point there was an "18-wheeler on the right and a 18-wheeler on the left, and he went through them speeding[.]" Dalton also testified that defendant was "driving fast" and "un-regular," even playing "chicken" with a tractor trailer. Dalton said, "I'm a grown man, and I said stop." Additionally, Deana Meeks, the front-seat passenger, testified that defendant was speeding.

Ultimately, defendant lost control of the vehicle, flipped it, and crashed on the side of the road. Defendant and the victim were thrown from the vehicle, and the victim died as a result of complications from blunt force trauma to the head and chest.

Following the collision, defendant was transported to Morehead Memorial Hospital, where he was treated by emergency room physician Dr. Paul McGuire. At trial, Dr. McGuire was tendered as an expert in emergency medicine. Dr. McGuire testified that he ordered a blood panel and a urinalysis to aid in his treatment of defendant. The results indicated that defendant had a blood alcohol level of 175 milligrams per deciliter and he tested positive for benzodiazepines and cannabinoids. Dr. McGuire concluded that the presence of alcohol, benzodiazepines, and cannabinoids would likely impair a person.

The State tendered Paul Glover, research scientist for the Department of Health and Human Services, as an expert witness in the fields of blood alcohol testing, blood alcohol physiology, pharmacology and the effects of drugs on humans. Mr. Glover testified that defendant's blood alcohol level was .14 grams per 100 milliliters, the measure required by North Carolina Statute. Additionally, he also concluded that the combination of alcohol, cannabinoids, and benzodiazepines would likely impair a person.

Trooper Darren Yoder of the North Carolina Highway Patrol was tendered as an expert witness in the field of automobile crash collision reconstruction. Trooper Yoder responded to the

collision at approximately 2:53 AM. Trooper Yoder did not perform an accident reconstruction but did complete an accident investigation report. He estimated that the vehicle was traveling at approximately 80 m.p.h. immediately preceding the collision. The State also called Officer Elizabeth Tilley and Trooper Mark Rakestraw to testify to the circumstances of defendant's prior arrests for driving while impaired, which resulted in two separate convictions.

II. Analysis

A. Testimonial Evidence

Defendant argues that the trial court erred in allowing testimony based upon hospital records in violation of the Confrontation Clause of the United States Constitution because those who had performed the tests were not available for cross-examination. We disagree.

Defendant did not object to the testimony of Dr. McGuire or Mr. Glover at trial and has therefore waived his right to argue this issue on appeal. However, the North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *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), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). Accordingly, we will review this issue for plain error.

Under *Crawford v. Washington*, our Supreme Court held that "[w]here testimonial evidence is at issue, [] the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). Conversely, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Id.*

In *Crawford*, the Supreme Court specifically found that most of the hearsay exceptions cover statements that are not

testimonial and therefore do not present a Confrontation Clause problem. *Id.* at 56, 158 L. Ed. 2d at 196. Business records are specifically listed as an example of such an exception. *Id.* "Business records are defined to include the records of hospitals." *State v. Miller*, 80 N.C. App. 425, 428, 342 S.E.2d 553, 555 (1986). In *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 35, 125 S.E.2d 326, 328-29 (1962), our Supreme Court specifically applied the business records exception to hospital records.

Here, defendant challenges the expert testimony pertaining to the results of his blood test and urinalysis. However, defendant's test results, although hearsay, are admissible under the business records exception to the hearsay rule upon authentication by the proponent. *Miller*, 80 N.C. App. at 428, 342 S.E.2d at 555. Authentication may occur "by the testimony of the custodian or *other qualified witness*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *Id.* at 429, 342 S.E.2d at 556 (citation omitted) (alteration in original).

The record reflects that Dr. McGuire ordered the tests to help him assess defendant's condition, and the results were recorded in defendant's hospital records. As such, we hold that

defendant's hospital records constitute a record made in the usual course of business and are therefore exempted from the rule against hearsay. Moreover, the records were properly identified and authenticated by Dr. McGuire, a qualified witness, who testified that he ordered the tests pursuant to standard hospital procedure.

Although the hospital records were used in defendant's criminal prosecution, they were not prepared for that purpose. Instead, they were prepared for purposes of treating the patient, not for evidentiary purposes in preparation for trial. While the experts may have referenced the test results in their testimony, such testimony poses no *per se* Confrontation Clause problem. *Crawford* distinctly recognizes that business records are not testimonial. *Crawford*, 541 U.S. at 56, 158 L. Ed. 2d at 196.

Additionally, because the test results were an inherently reliable source of information and because defendant had the opportunity to cross-examine the experts at trial, the trial court did not err in admitting the testimony of either expert. *See State v. Huffstetler*, 312 N.C. 92, 107-09, 322 S.E.2d 110, 120-21 (1984) (holding that the defendant was not deprived of his Sixth Amendment right to confront his accusers when the

trial court allowed an expert witness to testify to the results of blood tests that he did not perform because (1) the test results were inherently reliable, and (2) the defendant had the opportunity to cross-examine the witness). Accordingly, we hold that defendant's right to confront his accuser guaranteed by the Sixth Amendment was not denied.

B. Speed of Vehicle

Defendant next avers that the trial court erred in allowing Trooper Yoder to testify to the purported speed of defendant's vehicle. We disagree. Again, we will review this issue for plain error.

For offenses committed on or after 1 December 2006, Rule 702 provides:

> A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

N.C. Gen. Stat. § 8C-1, Rule 702(i) (2011).

At trial, Trooper Yoder was tendered, without objection, as an expert witness in the field of automobile collision reconstruction. The record indicates that he successfully completed a collision reconstruction course and was certified in

advanced traffic crash investigation. Here, Trooper Yoder did more than review the accident investigation report prior to testifying, because he in fact wrote the report. As such, defendant has failed to convince us that Trooper Yoder's testimony as to the speed of the vehicle failed to surpass the threshold of admissibility under N.C. Gen. Stat. § 8C-1, Rule 702(i). We conclude that the trial court did not err.

C. Testimony Of Prior Arrests

Defendant argues that the trial court erred in allowing testimony regarding the facts and circumstances surrounding his prior arrests and convictions for driving while impaired. Defendant specifically avers that the circumstances of his prior arrests were not probative as to the issue of malice and thus should have been excluded. We disagree.

To prove malice, the State must show 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[.]" *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000). To do so, the State may enter evidence of prior convictions provided they have probative value, meaning the "incidents are relevant to any fact or issue other than to show character of the accused." *State v. Locklear*, 159 N.C. App.

588, 595, 583 S.E.2d 726, 731 (2003) *aff'd*, 359 N.C. 63, 602 S.E.2d 359 (2004).

> Rule 404(b) of the North Carolina Rules of Evidence does not require that these prior incidents be exactly the same in order to have probative value. Further, the similarities between the circumstances need not rise to the level of the unique and bizarre but simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.

Id. (quotations and citations omitted).

Defendant concedes that evidence of a prior conviction for driving while impaired is admissible for the purpose of showing malice. He also acknowledges that the circumstances of a prior arrest may also be admitted if the circumstances are sufficiently similar to the circumstances at issue. *See id.* However, he argues that the circumstances of his prior driving while impaired arrests "simply were not similar in any way" to the present case.

We are not persuaded. On 6 September 2008, Trooper Rakestraw found defendant "passed out" in the driver's seat of his vehicle at approximately 4:00 AM after crashing into a nearby yard. Trooper Rakestraw testified that defendant appeared appreciably impaired; he detected the odor of alcohol, had glassy eyes, slurred speech, and was unsteady on his feet.

Officer Tilley testified that she stopped defendant on 11 October 2008, after observing his vehicle swerve into her lane of travel before running a red light. Upon stopping defendant, she detected the odor of alcohol on his breath. She also noted his red, glassy eyes, nervous demeanor, and saw that he was unsteady on his feet. She also concluded that defendant was appreciably impaired.

As discussed above, the circumstances of a prior arrest and the current offense need only support a reasonable inference that the same person committed the offenses. *See Id.* Such inference is plausible. Here, passengers testified that defendant was speeding, played chicken with an eighteen-wheeler, and drove recklessly. At the hospital, Dr. McGuire detected the odor of alcohol on defendant. Thus, the circumstances of each arrest show that defendant 1) failed to maintain control of his vehicle, 2) drove recklessly, 3) smelled of alcohol, and 4) endangered those traveling on our roadways. We conclude that the trial court did not err; the circumstances of defendant's prior arrests are sufficiently similar to the instant case so as to have probative value.

D. Sentencing

Lastly, defendant argues, and the State concedes, that the trial court acted contrary to N.C. Gen. Stat. § 20-141.4 (2011) in sentencing defendant on second degree murder *and* felony death by vehicle. We agree.

Although defendant did not object at trial, he has not waived his right to appeal this issue. "[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

Our Supreme Court has previously held that under the plain language of N.C. Gen. Stat. § 20-141.4(b), "the classifications and corresponding ranges of punishment authorized in subsection (b) apply only when the conduct is not punished by a higher class offense. In turn, when a trial court imposes punishment for a greater offense covering the same conduct, it is not authorized to impose punishment for the offenses enumerated in subsection (b)." *State v. Davis*, 364 N.C. 297, 303, 698 S.E.2d 65, 68 (2010).

Here, the trial court entered judgments on both second degree murder and felony death by vehicle and imposed two

sentences to run concurrently. However, per N.C. Gen. Stat. § 20-141.4(b), a defendant may not be punished for both second degree murder, a Class B2 felony, and felony death by vehicle, a Class E felony, based on the same conduct. Punishment must "*either* [be] imposed for the more heavily punishable offense *or* for the section 20–141.4 offense, but not both." *Id.* at 304, 698 S.E.2d at 69 (alteration in original). Accordingly, we vacate the felony death by vehicle judgment and remand for resentencing consistent with this opinion.

No error; remanded for resentencing.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).