

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-595
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.

Burke County
Nos. 11 CRS 53194, 53262-63

AMIE JO SKEENS

Appeal by defendant from judgments entered 19 November 2012 by Judge Michael O'Foghludha in Burke County Superior Court. Heard in the Court of Appeals 23 October 2013.

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

Russell J. Hollers, III, for defendant-appellant.

CALABRIA, Judge.

Amie Jo Skeens ("defendant") appeals from judgments entered upon jury verdicts finding her guilty of two counts of second degree murder and driving while impaired. We find no error.

On 25 October 2011, Stephen Brent Moody ("Moody") and his son Kevin ("Kevin") (collectively, "the Moodys") were riding a motorcycle on Airport Rhodhiss Road in Burke County. The Moodys were following another motorcycle operated by family friends

Brett Cole ("Cole") and his son Dylan (collectively "the Coles"). The Coles were the lead motorcycle as they approached a curve. While the speed limit on Airport Rhodhiss Road is 45 miles per hour, the speed limit on the curve is marked as 25 miles per hour. The Moodys were approximately two car lengths behind the Coles. As they approached the curve, a van sped around the curve from the opposite direction and entered the motorcycles' lane of travel. The van sideswiped the Coles' motorcycle, struck the Moodys, and did not stop.

The Coles parked their motorcycle and ran back to the scene of the collision. Both Moody and Kevin were lying beside the road, several feet away from the impact site. They were both still wearing their helmets, but the face shields on both helmets had shattered. They both sustained serious injuries. Kevin had a large amount of blood in his airway. Moody had severe spinal injuries, and his lower extremities were crushed. The Moodys were deceased before paramedics arrived on scene.

Witnesses reported seeing defendant driving a severely damaged purple minivan on Airport Rhodhiss Road that turned and parked at the Simmons Iron Works ("Iron Works"). The front of the van was crushed and the windshield was "smashed," the van was leaking fluid, and the airbag had deployed. When Detective Jared Ball ("Detective Ball") of the Burke County Sheriff's

Department responded to investigate the parked vehicle at the Iron Works, he observed defendant running into the nearby wood line. Detective Ball and another responding officer followed defendant into the woods and found her crouched behind a tree. Detective Ball detected the odor of alcohol coming from defendant and noted her slurred speech. Detective Ball detained defendant for her safety in his patrol vehicle until Trooper Cody Smith ("Trooper Smith") of the North Carolina Highway Patrol arrived. When defendant was placed in the patrol vehicle, she became irate, kicked the door, screamed, and licked the window of the patrol vehicle.

Upon arriving at the Iron Works, Trooper Smith attempted to speak with defendant. Defendant denied driving by telling Trooper Smith "[i]t was zombies." When Trooper Smith indicated he was investigating a collision involving two fatalities, defendant shrugged her shoulders, grinned, and laughed. She also said she did not know what happened. Trooper Smith placed defendant under arrest. Toxicology tests indicated defendant's blood alcohol concentration was .10, and defendant also tested positive for cocaine and metabolites of cocaine.

Defendant was subsequently indicted for two counts of second degree murder, two counts of felony death by vehicle, and one count of driving while impaired. At trial, defendant moved

to dismiss all charges at the close of the State's evidence and the trial court denied the motion. Defendant did not present evidence and renewed the motion to dismiss. At the close of all evidence, the trial court again denied the motion.

On 19 November 2012, the jury returned verdicts finding defendant guilty of all charges. Defendant was sentenced to 12 months in the custody of the North Carolina Division of Adult Correction for the impaired driving charge, but was given credit for already serving 365 days prior to the date of judgment. The trial court arrested judgment on the felony death by vehicle offenses. Defendant was sentenced to two consecutive sentences of a minimum of 170 months and a maximum of 213 months in the custody of the North Carolina Division of Adult Correction for the two counts of second degree murder. Defendant appeals.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150

(2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The trial court considers the evidence in the light most favorable to the State, drawing all reasonable inferences and resolving any conflicts in the evidence in the State's favor. *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

Defendant's sole argument on appeal is that the trial court erred in denying defendant's motion to dismiss the second degree murder charges. We disagree.

"The essential elements of second degree murder are the (1) unlawful killing (2) of a human being (3) with malice, but without premeditation and deliberation." *State v. Mack*, 206 N.C. App. 512, 516, 697 S.E.2d 490, 493 (2010) (internal quotations and citation omitted). "Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991). "In the context of an automobile accident, this requirement means that the State must 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." *Mack*, 206 N.C. App. at 517, 697 S.E.2d at 493-94 (citation omitted).

Defendant argues that although she was intoxicated, she did not kill the Moodys with malice, thus the trial court erred in denying her motions to dismiss the murder charges. Defendant compares her conduct to defendants in several cases in which our Courts have upheld second degree murder charges. Specifically, defendant argues that her conduct, especially her speed at the time of the collision, does not rise to the same level of recklessness as those in the cases she cites. However, speed is not the sole factor for determining whether a defendant acts with malice, as there must be *substantial* evidence in order to overcome a motion to dismiss. *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

Our Courts have found that while speed is a factor, other factors in addition to speed rise to a level of recklessness as substantial evidence of malice that is sufficient to defeat a motion to dismiss. *See State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (evidence to support malice when the State showed a pattern of reckless behavior in which the defendant drove impaired left of center in a no-passing zone in violation of right-of-way rules and entered a sharp curve at a high rate of speed); *State v. Snyder*, 311 N.C. 391, 394, 317

S.E.2d 394, 396 (1984) (evidence to support a finding that the defendant's acts "evidenced recklessness of consequences and total disregard for human life" when defendant ran a red light at a high rate of speed, passed cars in a no-passing zone, and ran a motorcycle off the road while intoxicated); *State v. Grooms*, ___ N.C. App. ___, 748 S.E.2d 162, 170-71 (2013) (substantial evidence of malice when defendant was not speeding but his blood alcohol level was twice the legal limit, he knowingly consumed an impairing illegal controlled substance, swerved off road prior to collision, failed to brake, failed to call 911, and did not aid victims); *State v. Davis*, 197 N.C. App. 738, 678 S.E.2d 385 (2009) (evidence of malice sufficient for trial court to deny motion to dismiss when a defendant with a blood alcohol concentration of .13 ran over a street sign and continued driving before he collided with the victims' truck at approximately 48 miles per hour without braking), *aff'd in part, rev'd in part on other grounds*, 364 N.C. 297, 698 S.E.2d 65 (2010).

In the instant case, the trial court specifically found that Cole's lay opinion estimating defendant's speed at 60 to 65 miles per hour was similar to an accident reconstruction expert's testimony that the maximum speed at which a vehicle could round the curve was 59 miles per hour. Defendant argues

that the posted caution sign suggesting a 25 mile per hour safe speed for the curve on Airport Rhodhiss Road should not be considered to determine whether her conduct rises to the level of malice. However, even assuming the general 45 mile per hour speed limit on the road before and after the curve, the trial court found defendant was travelling approximately 15-20 miles per hour over the speed limit as she rounded the curve. Moreover, the expert witness testified that defendant exceeded the posted speed limits just prior to impact with the Moodys' motorcycle. According to the toxicology tests, defendant's blood alcohol concentration was .10 and there was evidence of cocaine in her system when she took a sharp curve, crossed into the opposite lane of traffic, and sideswiped the Coles' motorcycle. After colliding with the Moodys' motorcycle, defendant did not stop or call emergency services, but left the Moodys and continued to drive away. As a result of defendant's acts, the Moodys were deceased before paramedics arrived on scene.

A witness on Airport Rhodhiss Road that day testified he had to slow down and pull over to the side of the road to avoid defendant's van as she drove past him after the collision. When questioned by Trooper Smith, defendant denied driving and stated that she was "too high to drive," indicating she was aware of

the consequences of driving while impaired. When Trooper Smith informed defendant that two people were killed in the collision, defendant shrugged her shoulders, grinned, and laughed. This evidence is both substantial and sufficient to support a jury finding that malice existed in support of the second degree murder charges.

Taken in the light most favorable to the State, the facts in the instant case establish a pattern of reckless behavior, and defendant's conduct evidences a "total disregard for human life." *Snyder*, 311 N.C. at 394, 317 S.E.2d at 396. Accordingly, the trial court properly denied defendant's motion to dismiss the second degree murder charges. We find no error.

No error.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).