NO. COA13-6
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v.

DONALD OLIVER-RAY JONES,
Defendant.

Edgecombe County
Nos. 10 CRS 3237
10 CRS 51615
10 CRS 52242
10 CRS 52243

Appeal by defendant from judgments entered 1 May 2012 by Judge Milton F. Fitch, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 23 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Tamara S. Zmuda, for the State.

Russell J. Hollers III for defendant-appellant.

GEER, Judge.

Defendant Donald Oliver-Ray Jones appeals from the judgments entered on his convictions of second degree murder, felony hit and run injury, reckless driving to endanger, felony serious injury by vehicle, driving while license revoked, and failure to stop at a stop sign. On appeal, defendant primarily argues that the trial court erred in its instructions on second degree murder. The trial court instructed the jury that it

could find defendant guilty of second degree murder based on several theories, including that he was driving while impaired. Defendant contends that the trial court's further instruction that marijuana, as well as alcohol, is an impairing substance was in error because the State presented no evidence that defendant was impaired by marijuana.

Based on our review of the record, we hold that defendant's statement, when viewed in the light most favorable to the State, would allow a jury to find that he had smoked marijuana at approximately the time of the accident, thereby supporting the instruction. Regardless, even if the instruction were in error, we are able to determine from the jury's verdict with respect to another offense that the jury did not rely upon the claimed improper theory of guilt when finding defendant guilty of second degree murder. Defendant was not, therefore, prejudiced by the instruction.

Facts

The State's evidence tended to show the following facts. On 9 May 2010, 23-year-old Antoine Felder and his girlfriend, Teresa Walker, were staying in a room at the Gold Rock Inn in Rocky Mount, North Carolina. Defendant, who was good friends with Mr. Felder, visited the room sometime that morning. After defendant indicated that he needed to buy a Mother's Day gift

for his girlfriend, Jackie Langley, defendant and Mr. Felder left in Ms. Langley's car.

Defendant and Mr. Felder returned in 30 minutes to an hour and told Ms. Walker that there was a cookout at the Comfort Inn down the street, where Ms. Langley worked. Defendant, Mr. Felder, Ms. Walker, and Ms. Langley all went to the cookout. After a few minutes, defendant and Mr. Felder went to the store and returned with a 40-ounce bottle of beer each. Defendant drank his entire 40-ounce bottle and then drank over half of Mr. Felder's 40-ounce bottle.

After the cookout, at roughly 1:30 p.m., defendant, Mr. Felder, Ms. Langley, and Ms. Walker left together in Ms. Langley's car with defendant driving. Nobody in the car, including defendant, had a driver's license. Defendant first drove the group back to the Gold Rock Inn. He drove fast, disregarding warnings by two men on the street to slow down. Defendant next drove the group in Ms. Langley's car to Battle Park in Rocky Mount, arriving between 2:30 and 3:00 p.m.

Once at Battle Park, defendant got in the water with all his clothes and shoes on, and fell in the water three or four times. Some children were attempting to spear fish, and defendant played with them and tried to take their spear away and spear fish himself. Defendant began "cussing people out" in

the park, some of whom were talking and some of whom were not, telling them all to "shut the fuck up." None of these people were doing anything to defendant.

After about 45 minutes to an hour at Battle Park, defendant drove the group roughly 17 miles to his mother's house in Battleboro where defendant chased a dog on the porch and then fell headfirst over the railing off of the porch. Defendant asked someone at the house for three dollars for gas, and was told nobody had any money, making defendant mad. Defendant then left the porch and returned to the car while cursing at people on the porch. Defendant, Mr. Felder, Ms. Walker, and Ms. Langley then all got back into the car to leave. While defendant was backing out, he jumped out of the car, without taking it out of reverse, got on the hood of the car, and continued cursing at a man on the porch. Ms. Langley had to put the car in park.

Defendant then drove the group north on Old Battleboro Road. The speed limit on that stretch of Old Battleboro Road is 45 miles per hour on the straight sections and 35 miles per hour around the curves. Defendant began to drive faster and faster, announcing out loud how fast he was going: "I'm going 70. I'm going 80. I'm going 85." Defendant rounded a curve while driving 70 or 75 miles per hour and the car went up on two

wheels. Mr. Felder, Ms. Walker, and Ms. Langley each yelled at defendant to slow down. Defendant told them all to "shut the fuck up" twice, but Ms. Langley kept trying to make him slow down. Defendant then sped up to almost 100 miles per hour, slowing down a little bit for curves.

Ms. Walker, riding in the rear passenger's side seat, and Ms. Langley, riding in the front passenger's side seat, both put their seatbelts on. Mr. Felder, riding in the rear driver's side seat, was mad and did not put his seat belt on.

After driving almost three miles on Old Battleboro Road, defendant approached Old Battleboro Road's intersection with Morning Star Church Road. There are two stop signs for northbound traffic on Old Battleboro Road, one on each side of the road, that required defendant to stop at the intersection. Defendant ignored the stop signs and entered the intersection. Ms. Langley saw an oncoming car on Morning Star Church Road, which had no stop sign, and Mr. Felder and Ms. Langley yelled "hold on or stop sign or something."

Hashem Selah was driving the oncoming car with his cousin, Nadham Alkhanshali, and Mr. Selah's nine-year-old daughter in his car. Mr. Selah's car crashed into the car defendant was driving, causing defendant's car to flip over into a field, land upside down, and catch on fire. During the crash, Mr.

Alkhanshali was thrown from Mr. Selah's car and came to rest face down in the street. Mr. Alkhanshali sustained injuries to the head, face, pelvis, back, and leg.

After the wreck, defendant crawled out of the car and ran away from the scene of the wreck before emergency responders arrived. Ms. Walker and Ms. Langley were able to get out of the car after the wreck, and they called for help and tried to pull Mr. Felder out of the car, but they were unable to do so. A firefighter and a Rocky Mount police officer, who responded to the scene, pulled Mr. Felder from the overturned, burning car as flames were entering the passenger compartment and it was filling with smoke. Mr. Felder was transported to a local hospital, where he died that evening from multiple blunt trauma including a broken neck, chest wounds, and lung contusions.

Defendant was located by officers in Battleboro roughly three hours after the accident. Defendant ran from officers when they attempted to handcuff him, forcing them to chase him a block before they were able to apprehend him. When defendant was arrested, he had an odor of alcohol on his breath and person.

Defendant was taken to a local hospital and, while there, first told an officer that he was not involved in any wreck. Defendant then told the officer that he was in the wreck, but

that his cousin was driving, and defendant was sitting in the back seat. Defendant claimed that after the wreck he fled because he had outstanding warrants. When the officer told defendant that one person was killed and another person was seriously injured, defendant showed no emotion and again stated his cousin was driving.

Still at the hospital, at about 9:00 p.m., defendant told another officer, "I ran from the wreck because I had warrants. . . . I'm not waiting around for nobody. I had an Old English 800. I'm about to go away for twenty-five years. Can you please give me some water. . . . I have not smoked any weed since I got off work at six p.m."

On 6 December 2010, defendant was indicted for second degree murder, felony hit and run injury, reckless driving to endanger, failure to stop at a stop sign, felony death by vehicle, felony serious injury by vehicle, driving while impaired ("DWI"), and driving while license revoked. The jury found defendant guilty of second degree murder, felony hit and run injury, reckless driving to endanger, felony serious injury by vehicle, DWI, driving while license revoked, and failing to stop at a stop sign.[1]

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[1]It appears from the record that the felony death by vehicle charge was not heard by the trial court, although there is no indication of how that charge was disposed of below. While

The trial court arrested judgment on the DWI conviction and then sentenced defendant to a presumptive-range term of 207 to 258 months imprisonment for second degree murder followed by a consecutive, presumptive-range term of 21 to 26 months imprisonment for felony serious injury by vehicle to begin at the expiration of defendant's term of imprisonment for second degree murder. The trial court sentenced defendant to a presumptive-range term of 10 to 12 months imprisonment for felony hit and run injury, but suspended that sentence and placed defendant on 18 months supervised probation to begin at the expiration of defendant's term of imprisonment for felony serious injury by vehicle. The court further sentenced defendant to 120 days imprisonment for driving while license revoked and to 60 days imprisonment for reckless driving to endanger, but the court suspended those sentences and placed defendant on 18 months supervised probation for each offense with both probation periods beginning at the expiration of defendant's term of imprisonment for felony serious injury by vehicle. Finally, the court ordered defendant to pay a $550.00 penalty for failing to stop at a stop sign. Defendant timely appealed to this Court.

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discussing jury instructions, the trial court noted that the felony death by vehicle charge "was not heard," and the prosecutor stated, "That's correct."

I

Defendant first argues that the trial court's jury instruction, in connection with second degree murder, that marijuana is an impairing substance was not supported by evidence at trial. Defendant contends further that since the trial court instructed the jury that it could find defendant guilty of second degree murder based on several theories, including the allegedly defective impaired driving based on marijuana theory, we cannot discern whether the jury based its verdict on the improper instruction and must, therefore, grant him a new trial on the second degree murder charge.[2]

Jury instructions are meant to "clarify issues so that the jury can apply the law to the facts of the case." *State v. Williams*, 136 N.C. App. 218, 222, 523 S.E.2d 428, 432 (1999). Accordingly, a trial court must not "give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). The question whether the evidence presented at trial was sufficient to support a jury instruction is reviewed de novo by this Court. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

[2]Although the trial court gave the same instruction in connection with the DWI charge, defendant states in his brief that the "trial court arrested judgment on the DWI verdict, so it is not a subject of this appeal."

The trial court charged the jury on second degree murder, in relevant part, as follows:

> For you to find the defendant guilty of second-degree murder by vehicle, the state must prove seven things beyond a reasonable doubt. . . .
>
> . . . .
>
> Fifth, that the defendant was driving while impaired or that the defendant violated the following law or laws of this state governing the operation of a motor vehicle.
>
> The laws of this state make it unlawful to drive recklessly or to fail to stop at a duly erected stop sign.
>
> For you to find the defendant guilty of driving while impaired, the state must prove these things beyond a reasonable doubt. That . . . the defendant was under the influence of an impairing substance.
>
> *Alcohol and marijuana are impairing substances*. . . .
>
> . . . .
>
> And, sixth, (sic) that the death of the victim was proximately caused by the unlawful acts of the defendant done in a malicious manner. . . .

(Emphasis added.)

The State acknowledges that the only possible evidence of marijuana use was defendant's statement at 9:00 p.m. in which defendant told an officer: "I ran from the wreck because I had warrants. . . . I'm not waiting around for nobody. I had an

Old English 800. I'm about to go away for twenty-five years. Can you please give me some water. . . . *I have not smoked any weed since I got off work at six p.m.*" (Emphasis added.) We agree with the State that this statement would allow a jury to find that defendant had smoked marijuana shortly before 6:00 p.m. Since the State also presented evidence that the accident occurred approximately three hours before defendant made this statement at 9:00 p.m., a reasonable jury could find that defendant admitted smoking marijuana just before the accident occurred.

Even assuming, however, that the trial court erred in instructing that marijuana is an impairing substance, the issue remains whether the error prejudiced defendant. Our Supreme Court has held that "[w]here the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence and the other which is, *and* . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (emphasis added).

Here, the verdict sheets did not specify upon which, of several, theories of second degree murder the jury relied when finding defendant guilty. Based on the court's instruction, the

jury could have found that defendant's malicious act which proximately caused the death was: (1) impaired driving, (2) reckless driving, (3) failing to stop at a stop sign, or (4) two or more of those acts combined. However, by comparing the court's charge for second degree murder with the court's charges of reckless driving to endanger, failing to stop at a stop sign, and impaired driving, it is apparent from the jury's guilty verdicts for *all* of those offenses that the jury found the fifth element of second degree murder -- "that the defendant was driving while impaired or that the defendant violated the following law or laws of this state governing the operation of a motor vehicle . . . mak[ing] it unlawful to drive recklessly or to fail to stop at a duly erected stop sign" -- satisfied in all three possible ways.

Nevertheless, the jury was also required to determine that "that the death of the victim was proximately caused by the unlawful acts of the defendant done in a malicious manner." The possibility therefore remains that the jury could have found that defendant's being impaired by marijuana caused the death rather than one of the other malicious acts.

However, the jury's verdict on the felony serious injury by vehicle charge shows that the jury found that defendant's impairment based solely on alcohol proximately caused the crash.

The trial court charged the jury on felony serious injury by vehicle as follows:

> The defendant has been charged with felony serious injury by vehicle. For you to find the defendant guilty of this offense, the state must prove five things beyond a reasonable doubt:
>
> . . . .
>
> Third, *that at the time the defendant was driving the vehicle the defendant was under the influence of an impairing substance. Alcohol is an impairing substance.*
>
> . . . .
>
> And, fifth, that *the impaired driving by the defendant proximately, but unintentionally, caused the victim's serious injury*. . . .

(Emphasis added.) The trial court did not mention marijuana in this instruction.

Since the jury found defendant guilty of felony serious injury by vehicle, it necessarily found that defendant's impaired driving, based on alcohol, proximately caused injury to Mr. Alkhanshali. There is no dispute that Mr. Alkhanshali's injuries and Mr. Felder's death were caused by the same crash. Thus, we can determine from the guilty verdict for felony serious injury by vehicle that if the jury determined, for the purposes of second degree murder, that impaired driving was a malicious act that proximately caused Mr. Felder's death, the

jury must have based that determination on impairment by alcohol.

Defendant nonetheless cites *Lynch* and *State v. Hughes*, 114 N.C. App. 742, 443 S.E.2d 76 (1994), in support of his argument. However, in both of those cases there was no way to determine which of multiple theories the jury relied upon in reaching its verdict. *See Lynch*, 327 N.C. at 219, 393 S.E.2d at 816 (granting new trial on first degree murder since there was insufficient evidence supporting one of two theories of guilt presented in jury instructions, jury returned only a general verdict, and it could not "be discerned from the record upon which theory or theories the jury relied in arriving at its verdict"); *Hughes*, 114 N.C. App. at 746, 443 S.E.2d at 79 (granting new trial on first degree sexual offense since there was insufficient evidence supporting one of two theories of guilt presented in jury instructions and it could not "be discerned from the record upon which theory or theories the jury relied in arriving at its verdict").

Because the record in this case demonstrates that the jury did not rely upon an improper theory of guilt, *Lynch* and *Hughes* are distinguishable. Consequently, although defendant's admission regarding marijuana use was sufficient to support the challenged instruction, even if we were to assume it was not,

defendant has failed to show that he was prejudiced by any error.

II

Defendant next argues that the trial court erred in sentencing him as a prior record level III because the State failed to present sufficient evidence of his prior convictions. "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2011).

It is well established that "[s]tanding alone, a sentencing worksheet prepared by the State listing a defendant's prior convictions is insufficient proof of prior convictions." *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007). However, prior convictions may be proven by, among other things, a "[s]tipulation of the parties." N.C. Gen. Stat. § 15A-1340.14(f)(1). "A stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object and failed to do so." *Wade*, 181 N.C. App. at 298, 639 S.E.2d at 85.

During the sentencing hearing in this case, the following exchange occurred:

> THE COURT: All of the verdicts in file number 10-CRS-3237 recorded, 10-CRS-52242 recorded, 10-CRS-51615 recorded, 10-CRS-52243 recorded. State ready to pray judgment?
>
> THE STATE: Yes, sir. May I approach, your Honor.
>
> THE COURT: Come forward. Second-degree is what?
>
> THE STATE: Your Honor, he is going to be -- it's B2 and he's *going to be a Level III*.
>
> THE COURT: B2. All right. Felony serious injury.
>
> THE STATE: Would be Class F, *Level III*.
>
> THE COURT: F. Felony hit and run.
>
> THE STATE: That's going to be a Class H, *Level III*.
>
> THE COURT: H, *Level III*. Reckless driving.
>
> THE STATE: Your Honor, he is going to be a *Level III for misdemeanor purposes* o[n] any misdemeanors.
>
> THE COURT: But that is a Class I.
>
> THE STATE: Yes, sir.
>
> THE COURT: Stop sign.
>
> [DEFENSE COUNSEL]: I think that's a II, Judge. It's either a II or III.

> THE COURT: Driving while license [is] revoked.
>
> THE STATE: That's going to be a Class I, your Honor.
>
> THE COURT: Level I [sic]. All right, defendant.
>
> [DEFENSE COUNSEL]: Yes, your Honor, would ask that his mother and his aunt be allowed to speak. I'd be glad to do it from the witness stand if you prefer.

(Emphasis added.)

Defendant then offered statements by his mother and aunt regarding sentencing. After completing the sentencing presentation, defense counsel informed the court that defendant was 24 years old and had been in jail roughly two years awaiting trial in this case and that defendant had a good work history. Defense counsel further stated, "We would ask of your Honor I know, Judge, what you got to do on active time on a second-degree murder. We would ask that you would consolidate the other matters into that. You can't do that with DWI, I suppose. But everything else we would ask that you consolidate in. It's a long time. And we're asking you to give him the low end of the presumptive range in this matter."

The trial court then called the attorneys to the bench for an off-the-record discussion, and the court then asked defense counsel whether he was through with his sentencing argument, to

which counsel replied, "Yes, sir." The court proceeded to sentence defendant as a prior record level III for the felonies and prior conviction level III for the misdemeanors.

Although there was never any express mention of defendant's prior record level worksheet at the sentencing hearing, the worksheet was prepared by the prosecutor on 27 April 2012 and was signed by the judge and the prosecutor on the date of the sentencing hearing, 1 May 2012. According to the worksheet, defendant had a prior record level III for felonies and a prior conviction level III for misdemeanors.

In *Wade*, the defendant argued on appeal that the trial court erred in determining his prior convictions and prior record level. *Id.* at 297, 639 S.E.2d at 85. There, the following exchange had occurred during the defendant's sentencing hearing:

> "THE COURT: Are you ready to proceed with sentencing, Mr. D. A.?
>
> [PROSECUTOR]: Yes, Your Honor, the State is ready.
>
> THE COURT: All right. Are you ready to proceed with sentencing, Mr. Donadio [defense counsel]?
>
> MR. DONADIO: Yes, Your Honor.
>
> THE COURT: All right.
>
> [PROSECUTOR]: May I approach, Your Honor?

> THE COURT: Yes, sir.
>
> So the State contends his prior record level will be II?
>
> [PROSECUTOR]: That's correct, Your Honor.
>
> THE COURT: All right. Mr. Donadio, I'll hear from you on sentencing, sir.
>
> MR. DONADIO: Your Honor, Courtney is here this week supported by various members of his extended family. He has no prior conviction approaching this type of incident. He is a young man. He still has a lot maybe to learn and a lot that he can accomplish, and I would ask you to consolidate where appropriate and give him the benefit of a second chance at some point.
>
> THE COURT: All right. So you would contend at least one mitigating factor; he has a support system in the community?"

Id. at 298, 639 S.E.2d at 85-86.

The Court in *Wade* explained, "[b]ecause a sentencing worksheet was the only proof submitted to the trial court, we look to the dialogue between counsel and the trial court to determine whether defendant stipulated to the prior convictions which raised his prior record level to II." *Id.*, 639 S.E.2d at 86. Analyzing the relevant exchange, the Court reasoned that the "defendant had an opportunity to object and instead of doing so, began describing mitigating factors to the trial court. At no time did defendant object to any of the convictions on the worksheet." *Id.* at 299, 639 S.E.2d at 86. The Court held that,

under those circumstances, the defendant had stipulated to the prior convictions. *Id.*

Here, as in *Wade*, the colloquy between the court and the prosecutor makes plain that both were working off the premise that defendant was to be sentenced as a prior record level III. During the relevant exchange, defendant's prior record level III was mentioned three different times and his prior conviction level III for misdemeanors was also specifically mentioned. Defendant, however, did not object when given the opportunity to be heard on sentencing and instead offered statements by family members and asked the court to consider his age and his work history. Under *Wade*, "this constituted stipulation to defendant's prior convictions." *Id.*

Defendant nonetheless cites *State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004), in support of his argument. There, this court found that the State failed to sufficiently prove the defendant's prior record level when the State submitted only a prior record level worksheet listing the purported convictions of the defendant, which established his prior record at level III. *Id.* at 579-80, 605 S.E.2d at 675. Although acknowledging that this Court has "held that a defendant can stipulate to a prior record level through a colloquy between defense counsel and the trial court," the Court found such a colloquy lacking in

Jeffery since "[d]efense counsel makes no reference to the worksheet in his discussion with the trial court," and "the only mention of defendant's prior record level is the trial court's statement that defendant has 'seven prior record points' and has a 'prior record level three.'" *Id.* at 580, 581, 605 S.E.2d at 675, 676.

However, there is no indication in this Court's opinion in *Jeffery* that the defendant there was given an opportunity to object to his prior record level as calculated by the prosecutor and the court and, instead, chose to address other matters and not object to the prior record level determination. This case is, therefore, controlled by *Wade* and not by *Jeffery*.

Defendant further contends that there was no stipulation here because, in this case, "no one ever referred to a worksheet on the record" and, accordingly, "[w]e do not know whether the trial court had a worksheet in front of it when he asked to hear from Mr [sic] Jones's lawyer before sentencing." Because the trial court signed the worksheet on the day of the sentencing hearing, the record establishes that the trial court had the worksheet before him. Moreover, defendant's argument fails to recognize that *Wade* presented a similar situation in which there was no express indication in the sentencing hearing exchange between the court and attorneys that the court had the worksheet

before it. *See Wade*, 181 N.C. App. at 299, 639 S.E.2d at 86. We, accordingly, find defendant's argument unpersuasive.

We hold, under *Wade*, that defendant stipulated to his prior record level. Consequently, the trial court did not err in sentencing defendant as a level III felony and misdemeanor offender.

III

Finally, defendant contends that the trial court erred in ordering him to pay a $550.00 fee for committing the infraction of failing to stop at a stop sign. The State agrees.

Failing to stop at a stop sign is made unlawful by N.C. Gen. Stat. § 20-158(b)(1) (2011). That statute is located in Part 10 of Article 3 of Chapter 20 of the North Carolina General Statutes. Violation of a provision of Part 10 of Article 3 "is an infraction unless the violation is specifically declared by law to be a misdemeanor or felony." N.C. Gen. Stat. § 20-176(a) (2011). "Unless a specific penalty is otherwise provided by law, a person found responsible for an infraction contained in [Article 3] may be ordered to pay a penalty of not more than one hundred dollars ($100.00)." N.C. Gen. Stat. § 20-176(b).

Since it is not excepted from these general provisions, failure to stop at a stop sign is an infraction for which a court may not order a penalty of more than $100.00. *See* N.C.

Gen. Stat. § 20-158. Here, the trial court's order that defendant pay a penalty of $550.00 for failing to stop at a stop sign exceeded the penalty allowed under N.C. Gen. Stat. § 20-176. Accordingly, we reverse the judgment imposing the $550.00 penalty and remand to the trial court for entry of a judgment that complies with N.C. Gen. Stat. § 20-176.

No error in part and reversed in part.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).