NO. COA13-887

NORTH CAROLINA COURT OF APPEALS

Filed: 4 February 2014

STATE OF NORTH CAROLINA

v. Yancey County
No. 10-CRS-304

ROMY VERDAE GEISSLERCRAIN

Appeal by Defendant from judgments entered 10 April 2013 by Judge Marvin P. Pope, Jr., in Yancey County Superior Court. Heard in the Court of Appeals 12 December 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Charlotte Gail Blake, for Defendant.

DILLON, Judge.

Romy Verdae Geisslercrain ("Defendant") appeals from judgments convicting her of impaired driving and reckless driving to endanger, alleging errors in her sentencing and challenging the trial court's denial of her motion to dismiss for insufficiency of the evidence. We find no error, in part, and we vacate and remand, in part.

I. Background

The evidence of record tends to show the following: On the evening of 16 July 2010, Defendant was involved in a single vehicle accident on Highway 19 near Burnsville which required her to seek medical attention at a nearby hospital. Shortly after the accident, but after Defendant had been transported to the hospital, State Trooper Jeremy Carver arrived at the scene where he found Defendant's damaged Ford Ranger truck in the middle of the highway. No other vehicles were damaged or people injured in the incident. Trooper Carver believed that Defendant had likely driven off the right side of the road, after which she tried to jerk her truck back onto the road too quickly, which had resulted in the truck rolling several times and sustaining approximately $7,000.00 in damage. Trooper Carver thought the truck may have been going too fast for a curve in the road.

Trooper Carver went to the hospital to speak with Defendant, who told him she had taken medications either the day of the incident or the day before – including Methadone, Clonazepam, and Adderall. She also admitted to Trooper Carver that she had been drinking alcohol. Trooper Carver believed that Defendant had consumed a sufficient quantity of impairing

substances to appreciably impair her mental and physical faculties.

Defendant was indicted on charges of impaired driving and reckless driving to endanger. After being convicted in District Court, Defendant appealed to Superior Court, where a jury found her guilty of impaired driving and reckless driving to endanger. The trial court determined, without submitting the question to a jury, that an aggravating factor existed, specifically, that "[t]he negligent driving of [D]efendant led to an accident causing property damage of $1,000.00 or more[.]" The trial court further determined that a mitigating factor existed, specifically, that "[D]efendant has a safe driving record, having no convictions of any motor vehicle offense for which at least four points are assigned[.]" The trial court determined that the aggravating factor was substantially counterbalanced by the mitigating factor, and, therefore, "a Level Four punishment shall be imposed." Accordingly, the trial court entered judgments consistent with the jury's verdicts. With respect to the impaired driving conviction, the written judgment reflects that the trial court intended to sentence Defendant, as a level four offender, but actually sentenced her to a minimum and maximum sentence of twelve months incarceration, which the trial

court suspended on the condition that she be placed on twelve months supervised probation. The trial court also entered a written judgment on Defendant's reckless driving to endanger conviction, sentencing her to ten days incarceration, which the trial court suspended on the condition that she be placed on twelve months supervised probation, to be served concurrently with the sentence for her impaired driving conviction. From these judgments, Defendant appeals.

II. Analysis

Defendant argues on appeal that the trial court erred in denying her motion to dismiss and also committed errors with regard to her sentence. We address each argument, in turn, below.

A: Motion to Dismiss

Defendant argues that the trial court erred by denying her motion to dismiss the charge of reckless driving. We disagree.

"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 and quotation marks 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). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

N.C. Gen. Stat. § 20-140(a) and (b) provide two definitions of reckless driving. A person may violate N.C. Gen. Stat. § 20-140 by either of the courses of conduct defined in subsection (a) and (b), or in both respects. *State v. Dupree*, 264 N.C. 463, 142 S.E.2d 5 (1965). Most pertinent to this case, N.C. Gen. Stat. § 20-140(b), provides the following: "Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a

manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." *Id.*

On appeal, Defendant specifically argues the trial court erroneously denied her motion to dismiss because the evidence shows that she merely failed to keep a reasonable lookout. "Mere failure to keep a reasonable lookout does not constitute reckless driving[;] [t]o this must be added dangerous speed or perilous operation." *State v. Dupree*, 264 N.C. 463, 466, 142 S.E.2d 5, 7 (1965). We believe the evidence in this case was substantial evidence supporting the elements of reckless driving, and, when viewed in the light most favorable to the State, was more than evidence of a mere failure to keep a reasonable lookout. Specifically, the State presented evidence that Defendant was intoxicated; that all four tires of Defendant's vehicle had gone off the road; that distinctive "yaw" marks were left on the road indicating that Defendant had lost control of the vehicle; that Defendant's vehicle overturned twice; and that the vehicle traveled 131 feet from the point it went off the road before it flipped, and another 108 feet after it flipped. Accordingly, the trial court did not err by Defendant's motion. *See, e.g., State v. Floyd*, 15 N.C. App. 438, 440, 190 S.E.2d 353, 354, *cert. denied*, 281 N.C. 760, 191

S.E.2d 363 (1972); *State v. Coffey*, 189 N.C. App. 382, 387, 658 S.E.2d 73, 77 (2008); *see generally Bank v. Lindsey*, 264 N.C. 585, 587, 142 S.E.2d 357, 360 (1965) (stating that "operation of [a vehicle] in a drunken condition constituted a driving of it upon the public highway without due caution and circumspection and in a manner so as to endanger persons or property, and was reckless driving within the intent and meaning of G.S. § 20-140(b)"). Accordingly, Defendant's argument is overruled.

B: Sentencing

Defendant next contends the trial court erred by sentencing her to twelve months incarceration on the impaired driving conviction, because the maximum sentence allowed on a level four punishment is 120 days. We agree.

N.C. Gen. Stat. § 20-179(j) provides the following sentencing guidelines for level four punishment: "A defendant subject to Level Four punishment . . . shall be sentenced to a term of imprisonment that includes a minimum term of not less than 48 hours and a maximum term of not more than 120 days. The term of imprisonment may be suspended." *Id.*

In this case, the transcript makes clear that the trial court intended to sentence Defendant in accordance with N.C. Gen. Stat. § 20-179(j), at level four, within the presumptive

range. However, the trial court initially erroneously recited a sentence within the range for a level five offender by stating that it was sentencing Defendant to a minimum term of 24 hours, which it would suspend if Defendant chose to "perform 24 hours of community service within 30 days of today's date." The trial court quickly realized its mistake, stating as follows: "Excuse me, it's Level Four, I was looking at Level Five. She is to do 48 hours of community service within 60 days." The trial court, however, never recited the minimum and maximum active sentence it was suspending. It could be assumed that the trial court at least intended the *minimum* sentence to be 48 hours – which is the minimum sentence for a level four offender – since it had initially stated the minimum sentence for a level five offender. However, though the trial court never actually stated the minimum and maximum sentences it was imposing, the written judgment states that the range was for a minimum of 12 months and a maximum of 12 months. Based on our review of the transcript, we believe that the trial court erred by failing to articulate the minimum and maximum sentence it was imposing and that the range indicated on the written judgment was the result of a clerical error due to a miscommunication during the proceeding. Specifically, in responding to a question as to the

sentence it was imposing for the impaired driving conviction, the trial court stated the length of time during which Defendant's *probation* would be supervised, namely 12 months. In other words, the transcript clearly shows that the trial court never responded to the question as to the sentencing range, but its answer was misinterpreted by the person who prepared the written judgment sheet.

"When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)). Accordingly, we remand this matter to the trial court, directing it to correct the clerical error on the judgment form by removing the minimum and maximum sentence shown on the written judgment for the impaired driving conviction and to enter a minimum and maximum sentence within the presumptive range for a level four offender as it intended.

C. Aggravating Factor

Defendant's next argues the trial court committed reversible error by determining, *itself*, that an aggravating

factor existed, rather than submitting the aggravating factor to the jury for determination, citing the United States Supreme Court decision *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) in which that Court applied the rule it stated in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435 (2000) – that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to the jury and proved beyond a reasonable doubt" – to aggravating factors. *Id.* at 301, 159 L. Ed. 2d at 412. However, our Supreme Court has held that *Blakely* is not implicated where a defendant is sentenced within the presumptive range, notwithstanding that the trial judge – and not the jury – finds aggravating or mitigating factors. *State v. Norris*, 360 N.C. 507, 514, 630 S.E.2d 915, 919, *cert. denied*, __ U.S. __, 166 L. Ed. 2d 535 (2006). Specifically, our Supreme Court held that a trial judge "does not exceed his proper authority until he inflicts [enhanced] punishment . . . the jury's verdict alone does not allow." *Id.* (citations and quotation marks omitted). Following the rationale in *Norris*, our Court rejected this same argument in a prosecution for impaired driving where the trial court – and not the jury – found two aggravating factors as well as two

mitigating factors. *State v. Green*, 209 N.C. App. 669, 707 S.E.2d 715 (2011). Our Court stated that since the defendant was sentenced within the presumptive range, *Blakely* "was not implicated" and the trial court otherwise "acted within the sentencing authority conferred to it under N.C. Gen. Stat. § 20-179." *Id.*

In this case, the trial court intended to sentence Defendant within the presumptive range for a level four offender; and we are remanding this matter to the trial court to enter a sentence within the presumptive range as it had intended. Therefore, we conclude Defendant's argument pertaining to the trial court's finding of an aggravating factor must necessarily fail.

D: Notice

Defendant contends the State failed to provide notice that it intended to seek aggravating factors as required by N.C. Gen. Stat. § 20-179(a1)(1). We agree that the State's failure to provide the required notice was error. However, we conclude that because the trial court intended to sentence Defendant within the presumptive range and because we are remanding this matter to the trial court to enter a sentence within the

presumptive range as it intended, the error regarding proper notice was harmless.

N.C. Gen. Stat. § 20-179(a1)(1) provides the following with regard to notice of aggravating factors:

> If the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

Id. In the case *sub judice*, the record reveals that the State failed to provide notice to Defendant of its intent to pursue any aggravating factors. On appeal, the State does not argue there was proper notice; rather, the State contends that because the trial court determined that the aggravating factor was substantially counterbalanced by the mitigating factor in this case, and because Defendant was accordingly sentenced in the presumptive range, the State's failure to provide notice was harmless error.

Generally, when the State has failed to provide proper notice pursuant to N.C. Gen. Stat. § 20-179(a1)(1), this Court

has vacated Defendant's sentence and remanded for resentencing. *See State v. Mackey*, 209 N.C. App. 116, 708 S.E.2d 719, *disc. review denied*, 365 N.C. 193, 707 S.E.2d 246 (2011); *State v. Reeves*, __ N.C. __, 721 S.E.2d 317 (2012). In *Mackey*, this Court held that because "the State did not provide proper notice of its intent to present evidence of aggravating factors as required by N.C. Gen. Stat. § 15A-1340.16(a6)[,]" and because the defendant did not waive the statutory notice requirement, "the trial court erred by sentencing defendant in the aggravated range based upon the State's failure to provide proper written notice to defendant." *Id.* at 120-22, 708 S.E.2d at 721-23. Similarly, this Court vacated the defendant's sentence in *Reeves*, stating, "[i]t is evident that the State failed to provide Defendant with the statutorily required notice of its intention to use an aggravating factor under N.C. Gen. Stat. § 20-179(d). We must therefore vacate Defendant's sentence as to the DWI charge and remand to the trial court for resentencing." *Id.* at __, 721 S.E.2d at 322. In *Reeves*, as in *Mackey*, the trial court imposed punishment in the aggravated range, after a determination that the "aggravating factor[] . . . substantially outweigh[ed] any mitigating factor[.]" *Reeves*, __ N.C. at __, 721 S.E.2d at 319.

We believe both of the foregoing decisions are distinguishable from the case *sub judice*, because, in this case, the trial court sentenced Defendant in the presumptive range.[1] Because Defendant was sentenced in the presumptive range in this case, we conclude any error in failure to provide notice pursuant to N.C. Gen. Stat. § 20-179(a1)(1), was harmless. *See generally Norris*, 360 N.C. at 514, 630 S.E.2d at 919 (stating that a trial judge "does not exceed his proper authority until he inflicts [enhanced] punishment . . . the jury's verdict alone does not allow").

III. Conclusion

Based on the foregoing, we find no error in the trial court's denial of Defendant's motion to dismiss; however, we vacate and remand the matter to the trial court to enter a

[1] We note that in an unpublished opinion, *State v. Culross*, __ N.C. App. __, 720 S.E.2d 30 (2011), this Court vacated the defendant's sentence and remanded the case to the trial court for resentencing based on the State's failure to provide proper notice of its intent to present evidence of aggravating factors as required by N.C. Gen. Stat. § 15A-1340.16(a6), even though "the trial court concluded that the one aggravating factor was substantially counterbalanced by the two mitigating factors and imposed level four punishment[,]" which was in the presumptive range. However, in *Culross*, the State did not argue that any failure to provide the statutorily required notice to the defendant was harmless in light of the defendant's presumptive sentence; rather, the State argued the defendant failed to preserve the issue for appellate review.

sentence within the presumptive range for a level four offender on the impaired driving conviction.

NO ERROR, in part; VACATED and REMANDED, in part.

Judge STROUD and Judge HUNTER, JR., concur.