IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-391

Filed: 7 November 2017

Jackson County, No. 14 CRS 050582-83; 701477

STATE OF NORTH CAROLINA

v.

MARK RICHARD FRANKS

Appeal by defendant from judgment entered 14 August 2015 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 18 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Rick Brown, and Special Deputy Attorney General J. Joy Strickland, for the State.

Mark L. Hayes for defendant-appellant.

TYSON, Judge.

Mark Richard Franks ("Defendant") appeals from the jury's conviction of felony death by vehicle and felony serious injury by vehicle. We find no error in Defendant's convictions or the trial court's sentence thereon. Insufficient evidence was presented to support the trial court's order for restitution. We vacate that portion of the trial court's order and remand for a new hearing on restitution.

I. Background

The State's evidence tended to show Defendant was driving a Ford pickup truck southbound on Cane Creek Road, a curvy, two-lane road in Jackson County on 12 May 2014. Defendant's wife, Steffee Wallis, and his brother-in-law, Jon Wallis, were inside the truck with him.

Defendant's vehicle was travelling approximately 45-50 MPH in an area with a posted speed limit of 25 MPH. As Defendant approached a curve, his vehicle went into a "yaw," with the rear of the truck skidding around towards the front. Defendant lost control of the truck, crossed the center lane, ran off the road, and struck an embankment on the left side of the road. After the truck hit the embankment, it began to roll and vault, travelling almost nineteen feet before landing on its roof, facing northbound.

Defendant was not wearing a seatbelt, and it does not appear either of the two passengers were belted. Mr. Wallis was partially ejected through the windshield, but became trapped underneath the cab. Defendant and Ms. Wallis were able to exit the truck. Ms. Wallis suffered a fractured skull and was bleeding profusely. At the hospital, Defendant did not present with serious injuries, but did have scrapes and cuts on his body. Mr. Wallis was alive after the crash; Defendant spoke with him before leaving the scene. While still trapped under the truck, Mr. Wallis died of compression asphyxia.

A witness at the scene tried to assist Defendant and Ms. Wallis, but they ignored him and walked away from the scene, leaving Mr. Wallis pinned under the truck. Defendant and his wife were picked up by a couple driving by and were taken to the hospital. At the hospital, Defendant spoke with Highway Patrol Trooper Denny Wood. Defendant told Trooper Wood he was the driver of the truck and was travelling about 25 MPH when he lost control of the truck. Trooper Wood instructed Defendant to complete a witness statement form, but Defendant only partially completed it.

Trooper Wood testified he detected a strong smell of alcohol around Defendant. Defendant also had glassy, bloodshot eyes and a red, flushed face. Trooper Wood and hospital personnel testified that Defendant was agitated, "twitchy," and very talkative. Defendant told Trooper Wood he had only consumed one beer, but also told hospital staff he had been drinking that day.

Trooper Wood conducted a gaze and nystagmus test to determine whether Defendant was impaired. All six indicators of that test indicated Defendant was impaired. Trooper Wood formed an opinion that Defendant had consumed sufficient alcohol to impair his mental and physical faculties. With Defendant's permission, Trooper Wood requested a nurse to draw blood for an alcohol analysis. Analysis of Defendant's blood indicated his blood alcohol content was .11 grams per 100 milliliters.

Defendant was arrested that evening for driving while impaired. On 6 October 2014, Defendant was indicted for felony death by vehicle, felony serious injury by vehicle, reckless driving to endanger, and failure to wear a seatbelt. The trial court denied Defendant's motion to dismiss for insufficient evidence at the close of the State's evidence. Defendant renewed his motion at the close of all evidence, which the trial court again denied. On 14 August 2015, after a four-day trial, the jury returned a verdict finding Defendant guilty on all charges. Defendant was sentenced to an active minimum term of 80 months. Defendant appeals.

II. Jurisdiction

The trial transcript reveals no oral notice of appeal, and the record does not indicate any written notice of appeal. On 21 and 23 March 2016, Defendant filed petitions for writ of certiorari. North Carolina Rule of Appellate Procedure 21 governs procedure for review by certiorari: "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1).

This Court granted Defendant's petition for certiorari in an order entered 8 April 2016.

III. Issues

Defendant argues two issues on appeal: (1) the trial court erred by denying his motion to dismiss for insufficient evidence; and, (2) the amount of restitution was not supported by competent evidence.

IV. Defendant's Motion to Dismiss

A. Standard of Review

We review the trial court's denial of Defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A motion to dismiss requires the court to determine whether there is substantial evidence to support each element of the charged offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652 (citation and quotation marks omitted).

All evidence is to be viewed "in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975). Any discrepancies in the evidence are for the jury to resolve. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

B. Analysis

Defendant argues insufficient evidence supports his convictions of felony death by vehicle and felony serious injury by vehicle. The elements of felony death by

vehicle are: "(1) [t]he person unintentionally causes the death of another person, (2) [t]he person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and (3) [t]he commission of the offense in subdivision (2) of this subsection is the proximate cause of the death." N.C. Gen. Stat. § 20-141.4(a1) (2015). The elements of felony serious injury by vehicle are almost identical: "(1) [t]he person unintentionally causes serious injury to another person, (2) [t]he person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2, and (3) [t]he commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury." N.C. Gen. Stat. § 20-141.4 (a3).

Defendant asserts the State failed to present sufficient evidence of proximate cause. Defendant contends no evidence shows his impaired driving proximately caused the death of his brother-in-law and the injuries to his wife. He argues that perhaps it was his reckless driving, unaffected by his alcohol consumption, that led to the accident and resulting injuries and death. We disagree.

This Court has held "[t]here may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death." *State v. Cummings*, 301 N.C. 374, 377, 271 S.E.2d 277, 279 (1980) (citation omitted). While the excessive speed of Defendant's truck was a proximate cause of the accident, there can be more than one proximate cause. Defendant argues many sober drivers speed excessively and recklessly and are

involved in accidents. Defendant asserts there is insufficient evidence to support his convictions without a direct showing of how his intoxication affected the outcome, and without a clear expression of his mental or physical impairment.

The State presented evidence of Defendant's appearance the night of the accident, including his glassy, bloodshot eyes and the strong smell of alcohol emanating from him. The State's evidence of Defendant's behavior the night of the accident included: (1) losing control of the vehicle; (2) leaving the scene; (3) while his brother-in-law was alive and still pinned under the wreck; (4) ignoring offers of help by others at the scene; (5) his unsettled behavior in the emergency room; and, (6) his inability to complete a witness form as requested by Trooper Wood.

The State also presented physical evidence of the results of the gaze and nystagmus test; the blood alcohol level of Defendant, well above the legal limit; and the yaw marks on the road, indicating Defendant's inability to maintain the vehicle within his lane or to brake or slow down as his vehicle began to yaw. The State's evidence also included details of the crash itself, which tended to show Defendant was driving at approximately double the posted speed limit when the truck lost traction as he rounded a curve. Finally, evidence included Defendant's statements, acknowledging that he had consumed alcohol that evening and that he was the driver of the vehicle. Defendant presented no evidence.

Viewing all the evidence in the light most favorable to the State, substantial evidence was presented to allow a reasonable jury to find Defendant's intoxication proximately caused the accident, and that accident resulted in the death of Mr. Wallis and the severe injuries to his wife. *See State v. Hough*, 227 N.C. 596, 597, 42 S.E.2d 659, 660 (1947). A reasonable jury weighed the credibility and any discrepancies in the evidence, resolved them in favor of the State, and convicted Defendant of felony death by vehicle of Jon Wallis and felony serious injury by vehicle of Steffee Wallis.

The State presented competent evidence of Defendant's intoxication as a proximate cause of the accident resulting in the death of his brother-in-law and the serious injury to his wife. Defendant's arguments are overruled.

V. Restitution

Defendant also argues the trial court erred in entering an order for restitution, which was unsupported by any competent evidence. Defendant made no objection at sentencing. Even absent an objection at trial, issues concerning restitution are "deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18)." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004). Defendant's silence on value or amount does not equate to a stipulation to the amount of restitution. *See State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010).

The State argues counsel for Defendant did not remain silent, and the discussion between counsel and the trial court would allow this Court to conclude

Defendant stipulated to the amount of restitution. *See State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005). We disagree.

The evidence in this case does not support the State's argument. Defense counsel's request to investigate the amount of insurance available to offset Mr. Wallis' funeral costs does not rise to the level of "active collaborat[ion]" with the trial court, which may support a finding of defense counsel stipulating to the amount of restitution requested. Further, "a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *Mauer*, 202 N.C. App. at 552, 688 S.E.2d at 778. No evidence was offered at trial or sentencing to support the awarded restitution amount of $4,429.86. We vacate that portion of the trial court's order and remand for a new restitution hearing.

VI. Conclusion

After reviewing all evidence presented in the light most favorable to the State, we hold that a reasonable jury could have found Defendant's intoxication was a proximate cause of the death of Mr. Wallis and the serious injury of Defendant's wife. The trial court properly denied Defendant's motions to dismiss.

As no evidence supports the trial court's order for restitution, we vacate that portion of the order and remand for a new hearing on the issue of restitution. *It is so ordered.*

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges STROUD and HUNTER concur.

Report per Rule 30(e).