IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-628

Filed:15 September 2020

Brunswick County, Nos. 17CRS707, 17CRS050667, 17CRS050718

STATE OF NORTH CAROLINA

v.

WILLIAM CHANDLER MCHENRY, Defendant.

Appeal by Defendant from judgments entered 3 December 2018 by Judge D. Jack Hooks in Superior Court, Brunswick County. Heard in the Court of Appeals 21 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

McGEE, Chief Judge.

William Chandler McHenry ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of two counts of second-degree murder and one count of driving while license revoked. On appeal, Defendant argues that the trial court committed plain error by admitting the investigating officer's testimony that

the decision to charge Defendant with second-degree murder came "after reviewing all of the records[,] . . . the prior conviction, pending charge, the prior red lights, [and] all the medical records[.]" We hold the trial court did not err.

I. Factual and Procedural History

Kathleen Peterson ("Ms. Peterson") testified that she and her husband, Dwight Peterson ("Mr. Peterson") (collectively, the "Petersons"), hosted a birthday dinner for their friend, Colonel John Howard ("Colonel Howard"), at their home in Supply, North Carolina on 2 February 2017. Colonel Howard and his girlfriend, Betty Lou Erdman ("Ms. Erdman"), arrived at the Peterson's home at approximately 5:00 p.m. in Colonel Howard's Chevrolet Equinox. The Petersons had introduced Ms. Erdman and Colonel Howard in 2015; Ms. Peterson explained that her friendship with Ms. Erdman had spanned the course of 60 years and Colonel Howard had been a close friend for approximately 20 years.

Ms. Peterson testified that, upon finishing dinner at approximately 6:30 p.m., the friends spoke for a short time on the front porch. Then, as the Petersons waved goodbye from their porch, Colonel Howard drove forward around the Peterson's circular driveway and took a right hand turn onto Kilby Road. Ms. Peterson turned to walk inside but, upon hearing a noise "like somebody . . . stomped on the gas," she promptly turned back around in time to observe an SUV "coming right toward" Colonel Howard's car. Ms. Peterson testified that the SUV was traveling in the

"right-hand lane" before it "came into the left-hand lane and crossed the center line[,]" explaining that the SUV "smashed into [Colonel Howard's] car and turned it around in a circle[.]" Mr. Peterson also testified, and explained that the SUV, later identified as a Ford Explorer, "was in the middle of the road laying on the driver's side" and "there was just one person laying in the street outside of that car." Ms. Peterson instructed Mr. Peterson to call 911 and then ran out to Colonel Howard's car.

The Peterson's neighbor, Kate Gentle ("Ms. Gentle") testified that on the night of 2 February 2017, she was eating dinner with her ex-husband and five children when she "heard a huge explosion" and felt her house shake. Ms. Gentle went outside and saw "a white SUV or little minivan on its side" and heard the driver "screaming in pain" because the vehicle "was on top of the gentleman[.]" As other neighbors attempted to lift the Explorer off the driver, the Petersons and Ms. Gentle tried to get inside Colonel Howard's car, which "had been hit on the front driver's side" and "was all caved in." Although the car doors would not open, Ms. Peterson testified that she was able to hear moaning and see Ms. Erdman's "hand pressed down on the seat[.]" Ms. Gentle testified that Colonel Howard "was slumped over the steering wheel[;]" she observed that "the dashboard was pushed into [Colonel Howard's] midsection" and he "had blood coming down" and "had glass everywhere[.]" Explaining that "I just wanted him to be comforted because I knew it was really bad," Ms. Gentle

testified that she "started gently rubbing [Colonel Howard's] head and just telling him he was going to be fine[.]"

First responders arrived on the scene and tended to the driver of the Explorer, who was later identified as Defendant. Ms. Gentle testified that the paramedics "had to cut [Defendant's] pants to get him" fully out of the car and into the ambulance. The responders then turned to Ms. Erdman and, after breaking the passenger side window of Colonel Howard's car, they managed to cut open the car door and extricate Ms. Erdman. Ms. Peterson testified that once Ms. Erdman had been removed from the car, "she opened her eyes once and looked directly at" Ms. Peterson before being transported by ambulance to New Hanover Regional Medical Center. The Petersons then observed as authorities extricated Colonel Howard from his car using the "jaws of life." Colonel Howard was placed in the ambulance and driven a short distance to a helicopter landing zone. However, the paramedic treating Colonel Howard testified that, "as soon as we pulled up into the landing zone, we lost the heartbeat" and, because cardiac arrest cannot be adequately treated in the small confines of a helicopter, the paramedics "diverted from the landing zone," began administering CPR, and drove to Brunswick Medical Center.

Paramedic Brandon Tysinger ("Paramedic Tysinger"), a paramedic for Brunswick County, testified that, upon arriving at the accident scene—which he described as "[a]bsolute carnage"—he began providing medical treatment to

Defendant. Paramedic Tysinger observed that Defendant "was crying" and had sustained injuries to his face; notably, Defendant had two lacerations on his face and a "mangled" left ear. Defendant was transported to New Hanover Regional Hospital, as Paramedic Tysinger provided care in the back of the ambulance. Paramedic Tysinger testified that when he spoke to Defendant "just to keep [him] alert," Defendant responded, "shut up and I'm cold" and, when he asked Defendant whether he had been drinking or doing drugs, Defendant "very forcefully and angrily" said, "yes, I've been drinking and done some drugs." Paramedic Tysinger testified that he did not smell alcohol on Defendant.

Once their driveway was cleared, the Petersons drove straight to Brunswick Medical Center, where they learned that Colonel Howard had passed away. The medical examiner testified that Colonel Howard's cause of death was "multiple blunt force trauma due to a motor vehicle collision[.]" After collecting Colonel Howard's belongings, the Petersons drove to New Hanover Regional Hospital to check on Ms. Erdman, arriving at approximately midnight. Mr. Peterson testified that Ms. Erdman was in surgery for torn intestines when they arrived at the hospital. Ms. Erdman awoke after surgery and asked the Petersons, "what happened to John[;]" the Petersons explained that he was receiving treatment at Brunswick Medical Center. Ms. Peterson testified that she told Ms. Erdman several days later that Colonel Howard had passed away. Subsequently, on 12 February 2017—Ms.

Peterson's birthday—Ms. Erdman was removed from life support and succumbed to her injuries.

Trooper Matthew Strangman ("Trooper Strangman") of the North Carolina State Highway Patrol testified that he responded to the collision site on 2 February 2017 at approximately 8:00 p.m. and surveyed the scene. Upon learning that Colonel Howard had passed away, Trooper Strangman contacted Paramedic Tysinger "to get information on [Defendant's] condition" and "to obtain some answers or clarify maybe what happened[.]" Trooper Strangman testified that, after being informed of Defendant's admission to drug and alcohol use, he obtained a search warrant to test Defendant's blood. Trooper Strangman met Defendant at New Hanover Regional Hospital's Emergency Department and proceeded to read him his Miranda Rights and Implied Consent Rights; Defendant agreed to submit blood samples for chemical analysis.

Defendant submitted to a urine sample at 11:10 p.m. and a blood sample at 11:28 p.m. Trooper Strangman testified that one vial of blood was sent to the Wilmington Police Department Crime Lab to test for alcohol and a second vial was sent to the North Carolina State Bureau of Investigation Crime Lab to test for drugs. The lab director at the Wilmington Police Department Crime Lab testified that pursuant to her 13 June 2017 report, an analysis of Defendant's blood sample revealed a .15 alcohol concentration; a forensic scientist at the North Carolina State

Bureau of Investigation Crime Lab testified that pursuant to his 16 March 2017 report, an analysis of Defendant's blood sample revealed cocaine and cocaine metabolites.

Trooper Strangman also obtained a search warrant to obtain Defendant's medical records and, accordingly, New Hanover Regional Hospital turned over the records to the North Carolina Highway Patrol. Trooper Strangman testified as to certain documents contained within Defendant's medical records, including one report dated 6 February 2017, wherein hospital personnel documented Defendant's history of substance abuse as: "alcohol use moderate, had first consumed alcohol at age 8; illicit drug use heroin IV one bag twice a week; opium moderate amounts; and THC . . . started at age 13." Trooper Strangman also testified about the results of the blood and urine samples collected from Defendant by New Hanover Regional Medical Center personnel on 2 February 2017, explaining that Defendant's blood test revealed a converted alcohol concentration of .25 and Defendant's urine tested "[p]ositive for THC, positive for cocaine, and positive for opiates.[1]" Trooper Strangman explained that he used Defendant's medical records, "in addition to some other facts, to determine appropriate charges."

In regard to the "other facts" Trooper Strangman considered, he testified that he ran Defendant's criminal history. Trooper Strangman testified that Defendant

[1] Trooper Strangman testified that heroin is considered an opiate.

had been convicted of driving while impaired ("DWI") on 10 November 2011 in New Hanover County and had been issued a citation in Brunswick County for DWI on 14 January 2017 – just 19 days before the collision that killed Ms. Erdman and Colonel Howard. Moreover, the State introduced into evidence Defendant's driving record, issued by the North Carolina Division of Motor Vehicles, and Trooper Strangman testified that Defendant was convicted of running a red light on 18 November 2016. Trooper Strangman further testified that on 2 February 2017, Defendant was on notice that he was driving with a revoked license resulting from his pending January 2017 DWI charge. Trooper Strangman explained that, in the course of the investigation, Defendant was charged with second-degree murder:

> [THE STATE:] Trooper Strangman, after reviewing all of the records that we just talked about, the prior conviction, pending charge, the prior red lights, all the medical records, at that point, after conferencing with your superiors and everything, is that when you decided to charge the defendant?
>
> [TROOPER STRANGMAN:] That's when we came to the conclusion.
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> [THE STATE:] Okay.
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> [TROOPER STRANGMAN:] For the resulting charges.
>
> [THE STATE:] And, Trooper, at that point you charged him with second degree murder, correct?
>
> [TROOPER STRANGMAN:] Correct.

In addition to Trooper Strangman's testimony regarding the bare facts of Defendant's two prior DWI charges, the State also introduced evidence regarding the specific facts and circumstances surrounding each charge. As to Defendant's 10 November 2011 DWI conviction, Trooper Calvin Lewis ("Trooper Lewis") of the North Carolina State Highway Patrol testified that while investigating a vehicle collision involving Defendant on 2 January 2011, Defendant admitted that he had been at his friend's house and "had had Bud Lights and Grey Goose and vodka." Trooper Lewis testified that Defendant had "a strong odor of alcohol" and "thought that he was still in the driveway of his friend's house[.]" Defendant consented to a blood draw and was subsequently convicted of DWI on 10 November 2011.

As to the other DWI charge, Officer Heather Mahler-Newman ("Officer Mahler-Newman") of the Shallotte Police Department testified that on 14 January 2017 at approximately 4:00 a.m., she and her partner, Sergeant Donald Koontz, were sitting in their respective patrol cars in a parking lot in Shallotte when she heard "[t]he sound of accelerating quickly from a vehicle coming towards [her] and then the sudden sound of braking" and observed Defendant drive by her in a white Ford Explorer with no license plate. Officer Mahler-Newman testified that Defendant turned into the parking lot of a closed McDonalds, pulled up to the drive-through window, waited approximately two minutes, and then pulled out of the parking lot and took a left turn onto Main Street. Sergeant Koontz pulled out of the parking lot

and followed the Explorer and Officer Mahler-Newman followed Sergeant Koontz's patrol car. Officer Mahler-Newman testified that Defendant "was all over the roadway, had a hard time maintaining lane control" and, after Defendant ran a red light, Sergeant Koontz activated his lights and siren.

Although Defendant initially continued speeding, he eventually pulled over and was directed by Sergeant Koontz to put his hands out the window and step outside his car. Officer Mahler-Newman observed that Defendant had red and glassy eyes, was slurring, and was swaying while standing; Defendant told the officers that he had consumed one beer. Officer Mahler-Newman testified that, after performing poorly on the standardized field sobriety tests and displaying signs of impairment, Defendant was arrested. Defendant signed an implied consent form and blew .18 on the Intoximeter.

In this case, Defendant was indicted for two counts of murder and one count of driving while license revoked. The case was heard in Superior Court, Brunswick County on 29 November 2018. The jury convicted Defendant of two counts of second-degree murder and one count of driving while license revoked on 3 December 2018. The trial court arrested judgment on the verdict for driving while license revoked and

sentenced Defendant to two consecutive terms of 186 months' minimum to 236[2] months' maximum imprisonment. Defendant appeals.

II. Analysis

Defendant argues that the trial court committed plain error by admitting Trooper Strangman's testimony that, after reviewing the evidence and conferring with his supervisors, Defendant was charged with second-degree murder. We disagree.

Acknowledging that the portion of Trooper Strangman's testimony challenged on appeal was not objected to at trial, Defendant distinctly requests plain error review. "We may review unpreserved evidentiary errors in criminal cases for plain error." *State v. Dawkins*, ___ N.C. App. ___, ___, 827 S.E.2d 551, 555 (2019) (citation omitted). "The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something 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) (citation omitted). "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result."

[2] We note that the judgment in 17 CRS 050718 reads "for a minimum term of 186 months and a maximum term of 186 months." However, when announcing Defendant's sentence in 17 CRS 050718 in open court, the trial court explained, "[t]his 186 to 236 sentence runs at the expiration of that 186 to 236 imposed in 17 CRS 50667." Moreover, this issue is not before us on appeal.

State v. Perkins, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citation omitted). "Moreover, because plain error is to be 'applied cautiously and only in the exceptional case,' the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

The trial court submitted second-degree murder, involuntary manslaughter, and not guilty to the jury, who returned a verdict of second-degree murder. "The difference between second-degree murder and manslaughter is the presence of malice in the former and its absence in the later." *State v. McCollum*, 157 N.C. App. 408, 412, 579 S.E.2d 467, 470 (2003) (citation omitted); *see also State v. Wrenn*, 279 N.C. 676, 681–82, 185 S.E.2d 129, 132 (1971) (explaining that "[m]urder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation" and "[i]nvoluntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury" (citations omitted)). Malice can be implied from the circumstances "'when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.'" *Wrenn*, 279 N.C. at 682, 185 S.E.2d at 132 (quoting *State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629 (1925)).

Defendant argues that, by admitting Trooper Strangman's testimony that the decision to charge Defendant with second-degree murder came "after reviewing all of the records . . . the prior conviction, pending charge, the prior red lights, [and] all the medical records," the trial court improperly allowed Trooper Strangman "to communicate to the jury that the police thought the State's evidence supported a finding of malice." Specifically, Defendant asserts that "the trial court effectively allowed Trooper Strangman to express he and his superiors' opinion on the ultimate question for the jury"—i.e., "whether the evidence showed beyond a reasonable doubt that [Defendant] acted with malice." N.C. Gen. Stat. § 8C-1, Rule 701 limits lay opinion testimony "to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). This Court has explained, however, that "while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness." *State v. Najewicz*, 112 N.C. App. 280, 293, 436 S.E.2d 132, 140 (1993) (citation omitted). Thus, we must determine whether Trooper Strangman's testimony expressed an improper opinion or legal conclusion or, as argued by the State, "was consistent with accepted testimony about police procedure in that it was introduced solely to explain the basis for the charge."

Our Supreme Court has explained that "where the witness uses a term as a shorthand statement of fact rather than as a legal term of art or an opinion as to the legal standard the jury should apply, the testimony is admissible." *State v. Anthony*, 354 N.C. 372, 408, 555 S.E.2d 557, 581 (2001) (citation omitted). In *Anthony*, the Supreme Court held that the trial court did not err in admitting a police officer's testimony explaining that he was authorized to arrest the defendant because the defendant violated a domestic violence protective order. *Id.* The Supreme Court explained when a police officer's testimony "described the evidence available to him at the time; paraphrased the statute in neutral terms; then gave the opinion that under the statute, the facts described to him by [the victim's father] provided probable cause to arrest defendant[,]" *id.*, the officer "was not providing an interpretation of the law" but, "[i]nstead, he was offering an explanation of his actions[,]" *id.* at 408, 555 S.E.2d at 581–82.

In the present case, we note that Trooper Strangman made no reference to the legal term "malice" in his testimony. Thus, Defendant's argument that Trooper Strangman's testimony communicated his opinion that the State's evidence supported a finding of malice is, at best, attenuated. Regardless, as in *Anthony*, Trooper Strangman did not offer an opinion regarding malice or Defendant's guilt; Trooper Strangman's testimony merely "offer[ed] an explanation of his actions." *Id.* Specifically, Trooper Strangman's testimony explained the investigative process and

provided the basis of his charging decision. Thus, we hold the trial court did not err in admitting Trooper Strangman's testimony.

Even assuming, *arguendo*, that the trial court erred in admitting Trooper Strangman's testimony, the error did not amount to plain error. At trial, the State introduced evidence tending to demonstrate malice, including Trooper Lewis' testimony about Defendant's 2011 DWI conviction and Officer Mahler-Newman's testimony about Defendant's pending DWI charge. Officer Mahler-Newman testified that Defendant was arrested for DWI just 19 days prior to the collision that killed Colonel Howard and Ms. Erdman. The State also presented evidence detailing Defendant's history of drug and alcohol use and establishing that, on the night of 2 February 2017, Defendant's blood sample revealed the presence of alcohol and his urine sample revealed traces of THC, cocaine, and opiates. Moreover, the jury was presented with evidence that on the night of the collision, Defendant was driving with a revoked license. Thus, considering the evidence offered by the State tending to show malice, we cannot say that absent Trooper Strangman's testimony, "the jury probably would have reached a different result." *Perkins*, 154 N.C. App. at 152, 571 S.E.2d at 648.

III. Conclusion

As discussed above, we hold that the trial court did not err in admitting Trooper Strangman's testimony regarding his decision to charge Defendant with second-degree murder.

NO ERROR.

Judges STROUD and BROOK concur.

Report per Rule 30(e).