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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-111

Filed 20 February 2024

Forsyth County, Nos. 20 CRS 57269-72, 57330

STATE OF NORTH CAROLINA

v.

RAFAEL MARROQUIN, Defendant.

Appeal by Defendant from judgments entered 27 May 2022 by Judge Martin B. McGee in Forsyth County Superior Court. Heard in the Court of Appeals 3 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Christopher W. Brooks and Kathryne E. Hathcock, for the State.

Caryn Strickland for Defendant.

GRIFFIN, Judge.

Defendant Rafael Marroquin appeals from the trial court's judgment entered on jury verdicts finding him guilty of four crimes arising from a motor vehicle accident. Defendant contends the trial court (1) plainly erred by admitting lay opinion testimony regarding the cause of the accident, and (2) erred by admitting

evidence of a prior, dismissed traffic infraction. We hold Defendant received a fair trial, free from prejudicial error.

I. Factual and Procedural Background

This case arises out of a vehicle collision between Defendant and another driver, Lopez, who died as a result of the accident. Around 11:20 p.m. on 19 July 2020, Defendant and Lopez collided head-on when one of their vehicles crossed the center line.

Felder, another driver on the road that night, observed the incident from about four car-lengths behind Lopez's vehicle, a Honda Civic. Felder testified that he saw a white Ford Explorer traveling in the northbound lane enter a curve at high speed, cross the center line into the southbound lane, and collide with Lopez's Civic head-on.

When police arrived at the scene of the accident, they found both vehicles sitting in the southbound lane of travel. Lopez was deceased in her Civic when police arrived. Defendant was not in his vehicle, the white Ford Explorer, at that time. Police later found Defendant lying among brush and trees near a roadside ditch approximately one-half of a mile from the scene of the accident. Defendant's shirt was partially off, he slurred his words, and his eyes appeared "glassy." Defendant "was not overly cooperative" with police, gave inconsistent answers "in a laughing manner," did not ask about the safety of the other driver, and appeared "not very caring for what had just transpired." Defendant initially provided police with a fake

name, but admitted that he was driving the Ford Explorer and had been drinking earlier that night. Defendant's driving record showed that his license had been revoked for twenty years. Three hours after the incident, Defendant's breath test showed a blood alcohol content of 0.11.

The State presented surveillance video footage obtained from two businesses near the scene of the accident, as well as the testimony of a paramedic and police officers who responded to the scene. The video footage provided a view of the accident from a distance of 100 to 200 yards away. Officer Cox explained to the jury how the scene of the accident appeared when he arrived, how the location was depicted in photos taken at the crash site, how he obtained the surveillance video footage, and how the contents of each video corresponded to what he had observed at the setting.

Corporal Dime also led the jury through the scene of the accident, including explaining the technical details of how a crash causes a "debris field" around the vehicles, how vehicles crumple upon impact, how "yaw marks" are left when a vehicle slides sideways against the tire tread, and how vehicles move after an impact occurs. He applied each of these principles to the evidence at the accident scene. He testified that an accident can be reconstructed by scanning the scene with a 3D image-scanning system that he was trained to use and explained the generated images to the jury. Corporal Dime opined that, based on his consideration of the evidence obtained from the scene, the accident occurred in Lopez's lane of travel.

Defendant was indicted for six crimes arising from the incident, including second-degree murder. Following trial, the jury found Defendant not guilty of second-degree murder, but convicted Defendant of felony death by motor vehicle; resisting arrest; driving while impaired; and driving while license revoked. The jury also found the State failed to prove, as an aggravating factor, that Defendant knowingly created a great risk of death to more than one person by means of a hazardous weapon. The trial court entered judgment and sentenced Defendant to a consolidated term of 73 to 100 months' imprisonment.

Defendant timely appeals.

II. Analysis

Defendant contends the trial court erred in two ways: (1) failing to intervene on its own when an officer presented lay opinion testimony regarding the cause of the accident, and (2) admitting evidence of a prior, dismissed motor vehicle incident involving Defendant, in violation of Rule 404(b) of the North Carolina Rules of Evidence.

A. Lay and Expert Witness Opinion Testimony

Defendant argues, even though he failed to object to the testimony during trial, "[t]he trial court plainly erred by admitting lay opinion officer testimony regarding the cause of the accident with which [Defendant] was charged." We disagree.

With respect to the trial court's admission of evidence and jury instructions, "[u]npreserved error in criminal cases . . . is reviewed only for plain error." *State v.*

Lawrence, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial," where, upon examination of the whole record, such error "'had a probable impact on the jury's finding that the defendant was guilty.'" *Id.* at 518, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

Rule 701 of the North Carolina Rules of Evidence allows lay witnesses to testify "in the form of opinions or inferences" only where that testimony is "(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. R. Evid. 701. "Although a lay witness is usually restricted to facts within his knowledge, 'if by reason of opportunities for observation he is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion.'" *State v. Lindley*, 286 N.C. 255, 257–58, 210 S.E.2d 207, 209 (1974) (citations omitted). Our courts have routinely held that an officer is permitted to provide lay opinion testimony regarding his own personal observations of a crime scene. *See State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997); *State v. Buie*, 194 N.C. App. 725, 731–32, 671 S.E.2d 351, 355 (2009).

Under Rule 702, if a witness's testimony would present opinions or inferences that arise from "scientific, technical or other specialized knowledge," the witness must first be "qualified as an expert by knowledge, skill, experience, training, or

education" before testifying. N.C. R. Evid. 702(a). "The essential question in determining the admissibility of opinion evidence is whether the witness, through study or experience, has acquired such skill that he is better qualified than the jury to form an opinion on the subject matter to which his testimony applies." *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973) (citations omitted). The party proposing the expert witness has the burden of tendering that witness's qualifications as an expert. *State v. Ward*, 364 N.C. 133, 140, 694 S.E.2d 738, 742 (2010). It is the "best practice" of a party to formally tender an expert as a witness to obtain the trial court's explicit ruling on their qualifications; an explicit ruling is not required, though, as the trial court implicitly rules that an expert is qualified by accepting their testimony:

> While the better practice may be to make a formal tender of a witness as an expert, such a tender is not required. [*Mitchell*, 283 N.C. at 467, 196 S.E.2d at 739.] Further, absent a request by a party, the trial court is not required to make a formal finding as to a witness'[s] qualification to testify as an expert witness. *Id.* Such a finding has been held to be implicit in the court's admission of the testimony in question. *Id.*; *see also State v. Perry*, 275 N.C. 565, 169 S.E.2d 839 (1969) (implicit finding of medical witness'[s] qualification as an expert by admission of his testimony). Defendant must specifically object to the qualifications of an expert witness in order to preserve the objection. *State v. Riddick*, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986). In this case, by overruling [the] defendant's objections, the trial court implicitly accepted [the witnesses] as expert witnesses.

State v. White, 340 N.C. 264, 293–94, 457 S.E.2d 841, 858 (1995).

Defendant asserts "[t]his issue is controlled by this Court's decision in *State v. Denton*" because there this Court held "[a]ccident reconstruction analysis requires expert opinion testimony." *State v. Denton*, 265 N.C. App. 632, 636, 829 S.E.2d 674, 678 (2019). In *Denton*, this Court did conclude, after a survey of our case law, that a lay witness may not testify as to their opinion of the cause of an accident:

> Accident reconstruction analysis requires expert opinion testimony; we can find no instance of lay accident reconstruction analysis testimony in North Carolina. *See State v. Maready*, 205 N.C. App. 1, 17, 695 S.E.2d 771, 782 (2010) ("Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury."). Accident reconstruction by its very nature requires expert analysis of the information collected from the scene of the accident and falls under Rule of Evidence 702, [in which Rule 702(a)(1)] calls for a quantitative rather than qualitative analysis. That is, the requirement that expert opinions be supported by sufficient facts or data means that the expert considered sufficient data to employ the methodology. [*Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (2015).]

Id.

However, Defendant fails to show that the State impermissibly offered lay witness testimony as to the cause of the accident. Prior to trial, the State listed Corporal Dime as an expert witness it intended to call at trial. During trial, the State did not explicitly tender Corporal Dime as an expert in accident reconstruction, but his testimony was nonetheless sufficient to show his expertise. Corporal Dime

testified to his experience in accident reconstruction; his personal observations of the road, debris, and placement of the vehicles at the scene; the methods and equipment he used to examine and reconstruct the accident scene; and, ultimately, his opinion on which vehicle must have caused the accident. Defendant did not object to this testimony or request a formal finding as to Corporal Dime's qualifications, and then asked Corporal Dime additional questions regarding his methods and opinions on cross-examination. The trial court accepted Corporal Dime's testimony despite its technical, specialized nature. The record shows that Corporal Dime was implicitly admitted as an expert witness and appropriately testified as such.

Officer Cox's testimony concerned his perceptions of the accident scene and his viewing of the surveillance footage. He testified, primarily, to the factual circumstances which he personally perceived at the scene of the accident, his perception of the video footage, and how the accident scene reflected the video footage. *Cf. Buie*, 194 N.C. App. at 733, 671 S.E.2d at 356 (finding error where the witness "was not offering his interpretation of the similarities between evidence he had the opportunity to examine firsthand and a videotape, but rather offering his opinion that the actions depicted in the surveillance video were similar to [another witness's] recollection"). Only on cross-examination did Officer Cox expound that, "[b]ased on what [he] saw at the scene" and based on the video footage, he had come to the conclusion that Defendant caused the accident. *State v. Chatman*, 308 N.C. 169, 177, 301 S.E.2d 71, 76 (1983) ("'Defendant cannot invalidate a trial by . . . eliciting

evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State.'" (citations omitted)).

Further, if we were to hold that part of Officer Cox's testimony was admitted in error, we cannot say that admission of this testimony constituted plain error. Officer Cox first testified to his own perception of the accident scene and how he came to possess the surveillance video footage. Felder and Corporal Dime each also testified, and were admitted without error by the court, as to their observations of where and how the accident occurred. We cannot say Officer Cox's additional testimony regarding the content of the video footage had a probable impact on the jury's verdict.[1]

B. Prior Acts to Show Malice

Defendant next contends "[t]he trial court erred by admitting evidence that six years [prior], Defendant sideswiped his neighbor's vehicle without reporting it, because such evidence failed to meet the requirements of Rule 404(b) and was unduly prejudicial."

"Rule 404(a) is a general rule of exclusion, stating that '[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that

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[1] Defendant also contends, alternatively, that his trial counsel gave ineffective assistance by failing to object to the testimony of Officer Cox and Corporal Dime. We disagree.

In order to show ineffective assistance of counsel, a defendant must show both that (1) defense "counsel's performance was deficient" and (2) that "the deficient performance prejudiced the defense." *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). For the reasons discussed, Defendant cannot show that he was prejudiced by the admission of Officer Cox and Corporal Dime's testimony.

he acted in conformity therewith on a particular occasion.'" *State v. Walston*, 367 N.C. 721, 725, 766 S.E.2d 312, 315 (2014) (quoting N.C. R. Evid. 404(a)). However, Rule 404(b) allows evidence, otherwise excluded by Rule 404(a), to be admitted "as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852–53 (1995). Rule 404(b) works to include evidence of prior acts when that evidence is sufficiently similar to the circumstances at issue in the present trial, and those prior acts were committed within a reasonable temporal proximity. *State v. Beckelheimer*, 366 N.C. 127, 131–32, 726 S.E.2d 156, 159–60 (2012). Evidence which is otherwise admissible must also pass scrutiny under Rule 403, which will render evidence inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." N.C. R. Evid. 403.

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. If we determine that the trial court erred in admitting evidence under Rule 404(b), we "must then determine whether that error was prejudicial." *State v. Pabon*, 380 N.C. 241, 260, 867 S.E.2d 632, 645 (2022). The admissibility of evidence under Rule 403 "'is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Young*, 368 N.C. 188, 210–11, 775 S.E.2d 291, 306 (2015) (citation omitted).

Here, the State offered evidence that Defendant was involved in a single motor vehicle infraction six years prior, the charges for which were dismissed. Even if we were to hold that the trial court erred in allowing this evidence under Rule 404(b) or Rule 403, we cannot hold that such error was prejudicial. The State offered the evidence to prove the element of malice in their claim for second-degree murder. *See State v. Bethea*, 167 N.C. App. 215, 218, 605 S.E.2d 173, 177 (2004) ("The elements of second-degree murder are: '1. [the] defendant killed the victim; 2. [the] defendant acted intentionally and with malice; and 3. [the] defendant's act was a proximate cause of the victim's death.'" (citation omitted)). The court accompanied this evidence with a limiting instruction when it was admitted into evidence, and again during jury instructions, which limited it "solely for the purpose of showing malice." "'This Court presumes that jurors follow the trial court's instructions.'" *State v. Bowman*, 349 N.C. 459, 472, 509 S.E.2d 428, 436 (1998) (citation omitted).

The jury did not find Defendant guilty of second-degree murder, even though it received this evidence of malice. Further, with respect to the element of malice, the State's evidence was not limited to Defendant's prior motor vehicle infraction. The State also presented evidence that Defendant drove while his BAC was over the legal limit, drove while his license was revoked, fled the scene of the accident, and did not check on Lopez or inquire as to her safety. *State v. Gardner*, 289 N.C. App. 552, 560, 891 S.E.2d 7, 13 (2023) ("Malice may be inferred by the nature of the crime and the circumstances of the victim's death." (citation omitted)); *State v. McAllister*,

138 N.C. App. 252, 260, 530 S.E.2d 859, 864 (2000) (finding evidence of malice where, *inter alia*, the "defendant drove while impaired by alcohol and at a time when his license was in a state of permanent revocation"). We cannot say that this evidence was prejudicial to the jury's consideration of Defendant's remaining charges.

III. Conclusion

For the foregoing reasons, we hold Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges COLLINS and THOMPSON concur.

Report per Rule 30(e).