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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-334

Filed: 17 April 2018

Buncombe County, Nos. 15 CRS 87388-93, 15 CRS 83196-99, 15 CRS 749-52

STATE OF NORTH CAROLINA

v.

BYRON BENSON FULGHUM, JR., Defendant.

Appeal by defendant from judgments entered 16 June 2016 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 24 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy C. Johnson, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

ZACHARY, Judge.

Defendant Byron Benson Fulghum, Jr. appeals from judgments entered upon jury verdicts finding him guilty of four counts of assault with a deadly weapon, four counts of reckless driving, four counts of injury to personal property, and six counts of insurance fraud. On appeal, defendant argues that the trial court erred by admitting evidence of his prior automobile collisions and in denying his motion to

dismiss the charges related to the 3 January 2015 automobile collision. For the reasons that follow, we find no error.

Background

In November 2015, the Buncombe County Grand Jury indicted defendant for four counts of assault with a deadly weapon, four counts of reckless driving, four counts of injury to personal property, and six counts of insurance fraud arising from four automobile collisions which occurred on the following dates: 2 December 2014, 3 January 2015, 9 February 2015, and 26 March 2015. The charges against defendant came on for trial at the 13 June 2016 criminal session of Buncombe County Superior Court, the Honorable J. Thomas Davis presiding. Defendant did not present evidence at trial, and the State's evidence showed the following:

On 26 March 2015, defendant was involved in an automobile collision with Ms. Ruby Franklin on Interstate 26 in Asheville, North Carolina. Detective Travis Barkley of the Asheville Police Department ("APD") drove past the aftermath of this automobile collision. Another officer from the APD, Officer Ervin Hunter, responded to the collision, but Det. Barkley was later notified of a YouTube video of that same collision. After viewing the video, he discovered that the YouTube user had posted videos of two additional collisions, dated 3 January 2015 and 9 February 2015. The videos were posted under the profile name "Ben Fulghum," and the YouTube profile had multiple subscriptions to YouTube car crash channels.

The following day, Det. Barkley reviewed the APD accident report from the 26 March 2015 collision, determined that defendant was involved in that collision, and saw that the vehicle involved was the same one shown in the YouTube video. Over the course of the investigation, he was also able to determine that the voice heard on the video was defendant's. Det. Barkley testified that on the 26 March 2015 video, it appeared as if the driver of defendant's vehicle, rather than try to slow down or to avoid the collision with Ms. Franklin, actually attempted to steer into her vehicle as it was merging in front of him. Subsequently, Det. Barkley reviewed the collision reports from the 3 January 2015 and 9 February 2015 collisions and discovered that all three collisions involved defendant. In addition, he examined defendant's driving record, which revealed that defendant had been involved in eighteen automobile collisions within a two to three year period.

Based upon this information, Det. Barkley obtained and executed a search warrant for defendant's residence, where he seized defendant's computer and car camera. He found additional videos and photographs on both. The videos depicted numerous automobile collisions involving defendant, including four videos of a 9 December 2014 collision that occurred in the same location as the 26 March 2015 collision. Three of these four videos included commentary from defendant relating what occurred during the 9 December 2014 collision and depicting him driving in the same path. Det. Barkley also acquired videos related to the 3 January 2015 collision,

which happened at the same location as the 9 December 2014 and 26 March 2015 collisions. Other videos showed a number of collisions involving defendant in the area of Brevard Road and N.C. Hwy 191 at Interstate 40. There were additional videos and photographs presenting the damage to defendant's vehicle and the accident scenes, including one photograph of the vanity plate "(Caution) Stunt Driver" displayed on defendant's vehicle.

Prior to trial, defendant filed a motion *in limine* seeking to exclude evidence of fourteen automobile collisions in which he was involved "but not charged criminally." The trial court denied defendant's motion, finding that evidence of other automobile collisions was admissible under Rule 404(b) to show intent, plan, or the absence of mistake or accident. In addition, defendant filed a supplemental motion *in limine* requesting the exclusion of evidence of these same collisions, asserting that such evidence was "inadmissible hearsay, would violate [his] sixth amendment right to confront and cross examine witnesses against him, [was] inadmissible testimonial evidence, and . . . would violate due process of the defendant to admit into evidence." This motion was also denied by the trial court. Defendant made three additional oral motions *in limine* that were denied, but which are not contested on appeal.

A jury trial was held beginning on 15 June 2016 before the Honorable J. Thomas Davis. At trial, in addition to evidence regarding the collisions related to the

charges against defendant, the State offered evidence of other collisions in which defendant was involved, including:

> (a) Det. Barkley's testimony that defendant was involved in a total of 18 collisions in a span of roughly two to three years.
>
> (b) Officer Phil Murphin's testimony regarding the 23 October 2014 and 9 December 2014 collisions in which defendant was involved and Officer Murphin was the investigating officer.
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> (c) Officer Murphin's collision reports from the 23 October 2014 and 9 December 2014 collisions which he investigated.
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> (d)Four videos of the 9 December 2014 automobile collision.
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> (e) Two videos of the 3 January 2015 automobile collision.
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> (f) One video of the 7 February 2015 automobile collision.
>
> (g) One video of the 25 February 2015 automobile collision.
>
> (h) One video of the 2 March 2015 automobile collision.
>
> (i) One photograph of the 9 February 2015 automobile collision scene.

Defendant objected to this evidence throughout trial and his objections were overruled. When the State rested its case, defendant moved to dismiss all charges against him, which was denied. Defendant presented no evidence, but renewed his motion to dismiss all charges against him, which the trial court also denied. On 16 June 2016, the jury returned verdicts finding defendant guilty of all charges. The

trial court consolidated all of defendant's convictions into six judgments. After judgments were entered, defendant gave notice of appeal in open court.

Discussion

I. Admission of Evidence of Defendant's Other Automobile Collisions

Defendant first argues that the trial court erred in admitting evidence of automobile collisions in which he was involved other than those listed in the indictments. Defendant contends that such evidence was not probative of his guilt because "the State's evidence of other accidents was offered without much, if any, testimony or explanation," and "did not explain or describe the intent or plan of these accidents." We disagree.

A. Standard of Review

"[W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). First, where "the trial court has made findings of fact and conclusions of law to support its Rule 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions." *Id*. We review *de novo* the trial court's legal conclusion that evidence of prior acts is, or is not, admissible pursuant to Rule 404(b). *Id*. "[W]e review the trial court's Rule 403 determination for abuse of discretion." *Id*.

B. Admissibility of Evidence of Prior Automobile Collisions

The trial court admitted the evidence of automobile collisions in which defendant was involved other than those directly related to the charges against defendant pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), which provides:

> (b) Other crimes, wrongs, or acts.–Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2016). Rule 404(b) is considered a "rule of inclusion of relevant evidence of other crimes, wrongs or acts by defendant." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis omitted). "[I]n many situations, proof of absence of mistake or accident has 'logical relevancy.' This is particularly true of evidence showing motive, intent, preparation, and design or plan." *State v. Stager*, 329 N.C. 278, 304-05, 406 S.E.2d 876, 891 (1991) (quoting 1 Brandis on North Carolina Evidence § 92 (3d ed. 1988)). Futhermore, "Rule 404(b) evidence 'may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from the conduct.' " *Id.* at 305, 406 S.E.2d at 891 (quoting *Huddleston v. United States*, 485 U.S. 681, 685, 99 L. Ed. 2d 771, 780 (1988)).

It is well established, however, that evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2016). " Unfair prejudice" suggests "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, as an emotional one. " *State v. DeLeonardo,* 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (citation and quotation marks omitted).

Defendant contends that the State's evidence of other collisions "did not explain or describe the intent or plan for these accidents" because it "was offered without much, if any, testimony or explanation," which resulted in the jury being "left to speculate the defendant's intent or plan for these accidents, based on the cumulative nature of this evidence." Thus, defendant maintains that the evidence was not "relevant for the purposes stated by the court." Additionally, defendant argues that "there was no evidence offered that any investigating officer or investigating insurance company found [defendant] to be at fault in any [automobile collision]" and therefore evidence of defendant's prior automobile collisions was not probative of defendant's intent.

This evidence was patently relevant and allowed the jurors to make reasonable inferences about defendant's "intent, plan, or absence of mistake or accident." As the

State correctly asserts, witnesses are not required to explain or describe defendant's intent or plan. The defendant's prior automobile collisions, without further explanation or suggestion, could offer the jurors some insight into defendant's intent. Moreover, as required when admitting evidence of prior acts under Rule 404(b), the trial court made specific findings that the collisions for which defendant was not charged were sufficiently similar to and not too remote in time from the crimes charged. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). Many of defendant's collisions involved similar circumstances, took place in the same or similar locations, and occurred within a two to three year period.

Finally, defendant claims that the probative value of the evidence of the other collisions was "substantially outweighed by the danger of unduly prejudicing the defendant in the eyes of the jury for the crime charged," and thus the evidence should have been excluded pursuant to Rule 403 of the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 403 (2016). In response, the State asserts that the probative value of the evidence as tending to show defendant's intentional conduct outweighs any prejudice to defendant. "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d. 266, 270 (1994). Rule 403 provides for a balancing test, "within the trial court's sound discretion." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted). The trial court did not abuse its

discretion in concluding pursuant to Rule 403 that the probative value of the evidence of the prior collisions was not substantially outweighed by any danger of unfair prejudice, confusion of the issues, or misleading the jury.

We conclude that evidence of defendant's prior automobile collisions was relevant, that it was admissible to show intent, plan, or absence of mistake or accident, that the collisions were sufficiently similar to and not too remote in time from the crimes charged, and that the probative value of the evidence was not outweighed by any undue prejudice. Defendant's arguments to the contrary are without merit.

C. Foundation for the Admission of Video and Photographic Evidence

Defendant next argues that the State did not lay a sufficient foundation for the introduction of photographic and video evidence regarding other collisions in which defendant was involved. We disagree.

In the present case, the evidence regarding other collisions was admitted at trial for substantive purposes. N.C. Gen. Stat. § 8-97 provides that "[a]ny party may introduce a photograph, videotape, . . . as substantive evidence upon laying a proper foundation." N.C. Gen. Stat. § 8-97 (2016). A proper foundation for such evidence can be laid by:

> (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed, (illustrative purposes); (2) proper testimony concerning the checking and operation of the video camera and the chain of evidence

> concerning the videotape . . . , (3) testimony that the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing, (substantive purposes); or (4) testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.

State v. Cannon, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-609 (1988) (citations and quotation marks omitted).

This Court has recently established the proper foundation for screenshots of social media. In *State v. Ford*, we upheld the trial court's admission of two screenshots taken from defendant's social media webpage where the State presented substantial evidence that tended to show that it was defendant's webpage because it contained content unique to defendant, including his nickname, pictures of defendant and his dog, and videos of his dog. *State v. Ford*, __ N.C. App. __, 782 S.E.2d 98 (2016).

In the instant case, Det. Barkley, who was trained in digital forensics, testified to the authenticity of the videotapes and photographic images admitted at trial, the chain of custody of the videos, the recording process of defendant's dashcam videos, and the retrieval process. Det. Barkley also testified that the voice in the videos matched defendant's voice and that the videos found on defendant's home computer matched those posted on YouTube under the name "Ben Fulghum." We conclude that this testimony established a sufficient foundation for the admission of the videos and photographs depicting other collisions in which defendant was involved.

D. Constitutional Right to Confront Accusers

Next, defendant argues that the trial court erred by admitting evidence of defendant's other automobile collisions, including the 3 January 2015 collision with William Capps for which defendant was charged, because it violated his right under the United States Constitution and the North Carolina Constitution to confront and cross-examine his accusers. We disagree.

Under the Sixth Amendment to the United States Constitution, a criminal defendant is guaranteed the right to confront and cross-examine witnesses against the defendant. U.S. Const., amend. VI. The Sixth Amendment applies to state criminal proceedings as well. *Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923 (1965). The North Carolina Constitution similarly provides that "[i]n all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . ." N.C. Const. art. I, § 23.

"[W]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). Thus, we review whether a defendant's Sixth Amendment right of confrontation was violated by determining: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v.*

Clark, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004) (citing *Crawford*, 541 U.S. at 59-60, 158 L. Ed. 2d at 197). While courts have not adopted a precise definition of "testimonial" evidence, the Supreme Court has stated:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because–having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial–they are not testimonial.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 174 L. Ed. 2d 314, 329 (2009). This Court has also held that driving records are non-testimonial. *See State v. Clark*, 242 N.C. App. 141, 775 S.E.2d 28 (2015).

In the present case, defendant argues that evidence of his past driving record and prior accidents is testimonial in nature and that he was not given an opportunity to cross-examine the officers who investigated the collisions or the other drivers who were involved in those collisions. However, no testimonial statements from the officers and other drivers were admitted, and evidence of defendant's driving record is non-testimonial. *Id.* at 145, 775 S.E.2d at 31. The State entered into evidence the accident reports from collisions in which defendant was involved from 3 January 2015, 9 December 2014, and 23 October 2014. Officer Murphin, who investigated the 9 December 2014 and 23 October 2014 collisions and prepared both reports, testified at trial. The 3 January 2015 accident report was entered into evidence as part of the

insurance adjustor's business file, who also testified at trial. We conclude that defendant's right to confront witnesses and accusers against him was not violated.

II. Motion to Dismiss Charges from 3 January 2015 Automobile Collision

In addition, defendant argues that the trial court erred in denying his motion to dismiss the charges against him related to the 3 January 2015 automobile collision because "there was no competent evidence offered to support the charges." Defendant's argument is without merit.

"The extent to which the evidence presented at trial suffices to support the denial of a motion to dismiss for insufficiency of the evidence is a question of law reviewed *de novo* by the appellate court." *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citation omitted). When ruling on a motion to dismiss for insufficient evidence, "the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation omitted). As this Court has stated:

> When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the record evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. The State is entitled to every reasonable intendment and inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State. The only issue before the trial court in such instances is whether there is substantial evidence of each essential element of the offense charged and of the defendant being

> the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. As long as the evidence permits a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence.

State v. Worley, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009) (citations and quotation marks omitted). Furthermore, it appears that defendant misapprehends the standard of review on motions to dismiss: "[a]ll evidence, both competent and incompetent . . . must be considered in the light most favorable to the State." *State v. Blakney*, 233 N.C. App. 516, 518, 756 S.E.2d 844, 846 (2014) (citations and quotation marks omitted).

In this case, the State presented the following evidence: (1) two videos depicting the collision; (2) testimony from Det. Barkley about the photographs and videos he found on defendant's home computer and car camera; (3) testimony from two insurance adjustors, Ms. Katrina Parker with GEICO and Chris Copeland with USAA, who investigated the collision; (4) the collision report that was part of Ms. Parker's insurance file; (5) a recorded statement that defendant gave to Ms. Parker concerning the accident; and (6) a transcript of defendant's interview with Mr. Copeland. We are satisfied that this evidence was sufficient to "permit[] a reasonable inference of the defendant's guilt." *Worley*, 198 N.C. App. at 333, 679 S.E.2d at 861

(citation omitted). Thus, we hold that the trial court did not err in denying defendant's motion to dismiss.

Conclusion

For the reasons stated above, we conclude that defendant received a fair trial, free from error.

NO ERROR.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).