IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-827

Filed: 6 August 2019

Forsyth County, Nos. 16CRS59105; 16CRS59400

STATE OF NORTH CAROLINA,

v.

IVAN JONATHAN PRUDENTE-ANORVE, Defendant.

Appeal by defendant from judgments entered 17 November 2017 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 14 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Mark Montgomery for defendant-appellant.

BERGER, Judge.

Ivan Jonathan Prudente-Anorve ("Defendant") was convicted by a Forsyth County jury on November 17, 2017 of two counts of second degree murder and two counts of felony death by motor vehicle. Judgment was arrested for the felony death by motor vehicle convictions.

Defendant argues that his convictions should either be vacated because the trial court erred by denying Defendant's motion to dismiss, or Defendant should receive a new trial because the trial court erred when it admitted Defendant's prior traffic violations into evidence. On these issues, we disagree and find no error. Defendant also argues that the trial court made a clerical error when it entered judgment for two B1 felonies, whereas Defendant had been indicted for two B2 felonies and was sentenced in the presumptive range of a B2 felony on each conviction. We agree, and remand for correction of the clerical error.

Factual and Procedural Background

In the early morning hours of October 1, 2016, Defendant was driving a Chevrolet Trailblazer north on Vargrave Street toward the intersection of Vargrave and Waughtown Street in Winston-Salem. At the same time and place, Cameron Francis ("Francis") was driving with passengers in his Toyota Corolla west on Waughtown Street approaching the same intersection. The traffic signals at this intersection operate in a nighttime flash mode between 9 p.m. and 6 a.m., in which the signals regulating traffic on Vargrave Street flash red and those on Waughtown Street flash yellow.

Defendant was traveling at approximately 48 miles per hour as he approached the intersection, did not stop for the flashing red traffic signal, and collided with Francis' Toyota. The front of his Trailblazer hit the driver's side of Francis' Toyota,

an impact that pushed the Toyota into a guardrail and flipped Defendant's Chevrolet upside down.

After the vehicles had come to a rest, Defendant crawled out of the driver's side door of his vehicle and was helped to his feet by someone who had witnessed the accident. Defendant told this witness to "[c]all my girl," and then he passed out. Francis was pinned inside his Toyota, and had to be extracted by first responders. Francis suffered significant internal injuries and died a few hours after the crash. Francis' passenger, Marquice Gaines, had severe brain injury and died seven days after the accident. Two other passengers in the Toyota survived the crash.

Defendant's driver's license had been revoked in 2013 because of a prior conviction for driving after consuming alcohol while being under the age of twenty-one. Defendant's driver's license remained revoked on the date of this incident.

A warrant for Defendant's arrest issued on October 3, 2016 for the charges of second degree murder and driving while impaired while having a revoked license. Ten days later a warrant was issued for an additional second degree murder charge. On August 14, 2017, Defendant was indicted for two counts of second degree murder, two counts of felony death by motor vehicle, and driving while license revoked. Defendant was convicted of two counts of second degree murder and two counts of felony death by motor vehicle. Judgment was arrested for the felony death by motor

vehicle convictions, and Defendant was sentenced to consecutive terms of 200 to 252 months in prison. Defendant timely appeals.

Analysis

I. Motion to Dismiss

Defendant first argues that the trial court erred in denying his motion to dismiss the second degree murder charges because the State did not introduce sufficient evidence at trial to prove that he had acted with the requisite malice. 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 (2000) (citation 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) (citation omitted).

"In making its determination, the trial court must consider all evidence admitted . . . 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).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (*purgandum*).

"Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Rick*, 342 N.C. 91, 98, 463 S.E.2d 182, 186 (1995) (citation omitted). Where "[t]he malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief[,]" that "murder shall be punished as a Class B2 felon . . . ." N.C. Gen. Stat. § 14-17(b)(1) (2017). "[M]alice, like intent, is a state of mind and as such is seldom proven with direct evidence. Rather, malice is ordinarily proven by circumstantial evidence from which it may be inferred." *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 58 (2003).

> The State need only show that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result,

> thus evidencing depravity of mind to survive a motion to dismiss based on the absence of the element of malice.

State v. Miller, 142 N.C. App. 435, 441, 543 S.E.2d 201, 205 (2001) (citation and quotation marks omitted).

"Reckless conduct during the course of driving while impaired can fulfill the malice element necessary to sustain a conviction of second-degree murder." *State v. Patterson*, 209 N.C. App. 708, 715, 708 S.E.2d 133, 137-38 (2011) (citation omitted). "[A]ny reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path." *State v. Fuller*, 138 N.C. App. 481, 488, 531 S.E.2d 861, 867 (2000) (citation and quotation marks omitted). Additionally, this Court has found that where a defendant continues to drive, with knowledge that his license had been revoked, this evidence "indicates defendant acted with a mind regardless of social duty and with recklessness of consequences." *State v. Byers*, 105 N.C. App. 377, 382, 413 S.E.2d 586, 589 (1992) (citation and quotation marks omitted).

Here, the State introduced sufficient evidence to establish each element of second degree murder and that Defendant was the perpetrator. Defendant's blood alcohol concentration was 0.15, and Defendant was knowingly driving with a revoked license. These circumstances give rise to an implication of malice and a reckless disregard of a "social duty." *Id.* The direct and circumstantial evidence introduced

by the State at trial tended to show that Defendant had clear "intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result." *Miller*, 142 N.C. App. at 441, 543 S.E.2d at 205 (citation and quotation marks omitted). The evidence on the issue of malice was sufficient to survive a motion to dismiss, and Defendant's motion was properly denied.

II. Evidence of Prior Traffic Violations

Defendant next argues that the trial court erred when it admitted his prior traffic violations into evidence. We disagree.

This Court reviews the "trial court's determination to admit evidence under Rules 404(b) and 403 [of the North Carolina Rules of Evidence] for abuse of discretion." *State v. Paddock*, 204 N.C. App. 280, 284, 696 S.E.2d 529, 532 (2010). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

"Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ." N.C. R. Evid. 404(a) (2017). However, "[e]vidence of other crimes, wrongs, or acts . . . [may] 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. R. Evid. 404(b) (2017).

> It is well-established that Rule 404(b) sets forth a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Jones, 176 N.C. App. 678, 686, 627 S.E.2d 265, 270 (2006) (citation and quotation marks omitted). Even if the trial court found that evidence can be properly admitted under Rule 404(b), "the court must still decide whether there exists a danger that unfair prejudice substantially outweighs the probative value of the evidence." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citation omitted).

"In order for the State to prove malice, it may present evidence of the defendant's acts which indicate criminal intent and other evidence which shows the defendant's mental state." *Byers*, 105 N.C. App. at 383, 413 S.E.2d at 589 (citation omitted). "Prior driving convictions of a defendant are admissible to show malice, and the showing of malice in a second-degree murder case is a proper purpose within the meaning of Rule 404(b)." *State v. Westbrook*, 175 N.C. App. 128, 132, 623 S.E.2d 73, 76 (2005) (citations omitted); s*ee also State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 306 (2000) ("In affirming the trial court's admission of the prior speeding convictions to show malice, the Court of Appeals noted that it has previously and repeatedly held that evidence of prior convictions is admissible under Rule 404(b) to show the malice necessary to support a second-degree murder conviction." (citation

and quotation marks omitted)). Therefore, the trial court did not err in allowing this evidence to be presented to the jury.

III. Sentencing

Finally, Defendant argues that the trial court erred in entering judgment for two Class B1 felonies. We agree, and remand for correction of this clerical error.

Defendant was indicted for two B2 felonies. However, the judgments for the two convictions are listed as B1 felonies. Defendant was properly sentenced on B2 felonies. Classifying Defendant's conviction as a B1 felony was a clerical error. *See State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (" 'Clerical error' has been defined recently as: 'An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.' " (citation omitted)).

> It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record, and no lapse of time will debar the court of the power to discharge this duty.

State v. Cannon, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956) (citations omitted). Accordingly, we remand for correction of this clerical error.

Conclusion

For the reasons stated above, we find no error in part. We remand for the limited purpose of correcting the clerical error described above.

NO ERROR IN PART; REMANDED IN PART.

Chief Judge MCGEE and Judge MURPHY concur.

Report per Rule 30(e).