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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1055

Filed: 18 February 2020

Mecklenburg County, No. 16 CRS 5813

STATE OF NORTH CAROLINA

v.

GREGORY ALAN WHEELING, JR.

Appeal by defendant from judgment entered 21 November 2017 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 April 2019.

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

Patterson Harkavy LLP, by Narendra K. Ghosh, Bradley J. Bannon, and Paul E. Smith, for defendant-appellant.

BRYANT, Judge.

Where the trial court denied defendant's request to instruct the jury on the offense of misdemeanor death by vehicle, we hold no error. Where a magistrate erred by failing to set a bond for defendant on a non-capital offense, but defendant failed to establish prejudice to his ability to obtain evidence for his defense, we hold no

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prejudicial error. Where the trial court's ruling to redact portions of an EMT record was proper, there was no error. Accordingly, we hold there was no prejudicial error in the trial of this case.

On 29 February 2016, a Mecklenburg County grand jury indicted defendant Gregory Alan Wheeling, Jr., on the charge of second-degree murder. In a motion filed 11 April 2017, defendant moved to dismiss the charges against him. Because a magistrate failed to set a bond for defendant's non-capital offense, defendant argued that he was prejudiced in his right to obtain evidence in preparation of his defense. In an order entered on 13 November 2017, the Honorable Yvonne Mims Evans, Resident Superior Court Judge presiding in Mecklenburg County Superior Court, denied the motion.

Defendant's case came on for trial before a jury in Mecklenburg County Superior Court on 6 November 2017, Judge Evans presiding. At trial, the evidence tended to show that on 17 January 2016, Kellie Putnam (hereinafter "the decedent") and her boyfriend Brosnyn Stewart attended the National Football Conference Championship game played at the Bank of America Stadium in Charlotte. After the game, the decedent and her boyfriend walked to a local bar for drinks. Afterward, the couple continued to walk south on South Boulevard. At the intersection of South Boulevard and E. Tremont Avenue, the couple separated but continued to walk down South Boulevard on opposite sides of the street. Stewart described the scene as

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having a celebratory atmosphere: The Carolina Panthers football team had won the NFC Championship game. There were a lot of people on the street; “[e]verybody was celebrating, happy.” While standing near the intersection of South Boulevard and Iverson Way, Stewart heard a car engine “like somebody just gunned it”; “[p]edal to the floor.” He turned to see the decedent crossing South Boulevard, within the 2300 block, a four-lane roadway with an additional center turn lane. The decedent was not at a crosswalk. After crossing the outside lane, the decedent was struck by a vehicle traveling in the inside lane. Stewart testified that the vehicle was traveling “at least 65 miles per hour or more.” Stewart did not observe the vehicle attempt to avoid the collision or slow down before striking the decedent. After the collision, the vehicle swerved and struck a power pole.

Before the NFC Championship football game, Ashley Campbell, Kelsey Ireland, and brothers Johnny and Joshua Siff met to go tailgating. The four then took an Uber to Whiskey Warehouse where they planned to meet defendant Gregory Alan Wheeling, Jr., and his girlfriend, Julie, and watch the football game. When she arrived at Whiskey Warehouse, Campbell observed three beer bottles at the table where defendant and Julie were sitting. During the course of the game, each member of group—with the exception of Campbell—consumed beer, “shots” of alcohol, and/or mixed alcoholic beverages. Defendant’s vehicle was parked at Whiskey Warehouse; Campbell’s vehicle was parked at the Light Rail station. After the game, all six

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members of the group entered defendant's vehicle. Campbell—who had not consumed alcohol—drove. While headed down South Boulevard, Campbell pulled into a gas station. The occupants exited the vehicle, and some used a restroom. When they returned, defendant demanded to drive: "I'm going to drive my own f*cking car." Campbell testified that "[h]e told me . . . that he was driving the rest of the way [to her car] because I was going too slow, he wanted to get there faster." Campbell gave the following testimony:

A. . . . [When the vehicle left the gas station,] [defendant] was swerving in and out of lanes [on South Boulevard]. He was going very fast. I felt like I was on the interstate. That is how fast he was going.

But we even yelled at him telling him to slow down. And I remember Julie saying he does this all the time. And then it happened.

. . . .

Q. Were there other vehicles on the road?

A. Yes.

Q. Could you see other pedestrians walking on the sidewalks?

A. Yes.

Q. How would you say that traffic conditions were like while he was swerving in and out of lanes?

A. Busy. I mean, it was just after a Panthers football game and we won. So every -- there was a lot of people on the road. I was even afraid that we were going

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to hit cars in front of us just by the way that he was driving, swerving in and out of the lanes

Q. What makes you say he was going very fast?

A. I know what it feels like to be on the interstate. Obviously, all of us have been on the interstate once in our life. So I even felt like we were going faster than I would on the interstate. Just even coming here, I was just -- you know, when you think about your body in the car on the interstate, you know the speed. And I know South Boulevard, the speed limit is 35 miles an hour. On the interstate it's usually 65, 70. Well, I felt like I was on the interstate.

. . . .

Q. And from your vantage point, were you ever able to -- during the course of the Defendant's driving, over the course of his swerving, over the course of his driving very fast, were you ever able to see the speedometer?

A. Yes, I did see it at one point.

Q. And at one point when you looked at the speedometer, what speed did you see?

A. 62.

Q. And this was while you were on South Boulevard?

A. Yes.

. . . .

Q. And at the time he hit Kelli, how fast do you think he was going?

A. I mean, I can estimate around 60.

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Joshua Siff who was sitting in the front passenger seat when defendant drove from the gas station on South Boulevard, testified to feeling “very uncomfortable” while defendant was driving: defendant was speeding, “[w]eaving in and out of cars,” and Siff “couldn’t even look out the front window. [He] was scared.”

Q. Did there come a time when you felt the Defendant wasn’t speeding?

A. Maybe when we first got on the road.

Q. But after that?

A. We accelerated.

. . . .

Q. . . . Do you know about how soon after you left the Shell station that he hit something?

A. I don’t know the exact time but it was -- it was pretty soon.

. . . .

Q. What did you come to learn he hit?

A. A woman had run out into the street and he had struck her.

. . . .

Q. Now, did you see the woman before he hit her?

A. Yes.

. . . .

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Q. You talked earlier about the Defendant's driving, about the swerving. At the time he hit the woman, how fast do you feel he was going?

. . . .

A. 60.

Q. How did that compare to his speed earlier in the drive?

A. Once we got up to it, it stayed about there.

After the collision, Siff testified that defendant looked at him and said, "what happened." Then, the vehicle struck a telephone pole.

Catherine Londry, a pedestrian, was standing with her husband at the intersection of South Boulevard and Iverson Way. Londry testified that the traffic on South Boulevard was "intermittent. There were people leaving town from the Panthers game and . . . quite a bit of traffic headed towards town." There were a "few pedestrians." She observed a black Audi driving on South Boulevard "[d]efinitely faster than anybody I saw driving that day." Londry approximated that the vehicle was traveling "[o]ver 60 miles an hour." As the couple began to cross the street, Londry's husband uttered, "he's going to hit that girl." Londry looked and observed the collision. "[The decedent was] in the left lane of the outbound traffic."

Q. Did you see any brake lights from the Audi?

A. No.

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Q. Did you hear any screeching tires?

A. No.

Q. Did you see the car slowing down prior to hitting her?

A. No

Detective Nathan Crum with the Charlotte-Mecklenburg Police Department, Major Crash Unit, testified that he responded to the report of an accident in the 2300 block of South Boulevard just after 5:00 pm on 17 January 2016. Detective Crum described South Boulevard that day as “very busy.” The accident scene included multiple emergency vehicles, law enforcement officers, “a bunch of civilians moving around.” Detective Crum observed a vehicle with front-end damage resting against a utility pole and an injured woman in the roadway. Detective Crum made contact with defendant while defendant was standing near the damaged vehicle. “[O]ne of the first things I observed when he started to speak to me [was] that his words were slightly slurred[,] and I could smell an odor of an alcoholic beverage.” Detective Crum asked defendant to perform roadside sobriety tests; defendant refused.

At trial, defendant stipulated to the following facts: he had been transported to CMC Mercy Hospital in Charlotte where he consented to a blood draw. A nurse withdrew defendant’s blood and submitted the drawn blood to a Charlotte-Mecklenburg Police officer for testing. The test results provided that defendant’s blood alcohol concentration was 0.13. At trial, Detective Crum presented defendant’s

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DMV driving record which reflected a conviction for impaired driving charged on 4 April 2012 (blood alcohol content 0.19) and an alcohol restriction of 0.04 still in effect as of 17 January 2016.

The lead investigator in the collision, Detective Curt Gormican, with the Charlotte-Mecklenburg Police Department, Major Crash Unit, was ruled to be an expert in accident reconstruction. Detective Gormican testified that he performed a traffic crash reconstruction and determined that at the time of impact, defendant's vehicle was traveling between 51 and 63 miles per hour.

Defendant called several witnesses including Tyler Black, who worked with Delta V Forensic Engineering, an accident reconstruction firm. Black testified that the speed of defendant's vehicle just before impact was 51 miles per hour.

Following the presentation of the evidence—witness testimony and exhibits—and the trial court's instruction to the jury, the jury returned a guilty verdict against defendant for second-degree murder. The trial court entered judgment against defendant in accordance with the jury verdict and sentenced defendant to a term of 156 to 200 months. Defendant appeals.

On appeal, defendant argues that the trial court erred by (I) failing to instruct the jury on the lesser included offense of misdemeanor death by vehicle; (II) denying

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defendant's motion to dismiss; and (III) failing to admit the EMT record describing the estimated speed of defendant's vehicle.

I

Defendant first argues that the trial court erred by failing to instruct the jury on the lesser-included-offense of misdemeanor death by vehicle. Defendant contends that the jury could have reasonably determined his collision with the decedent was caused by speeding rather than his impairment. We disagree.

“[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Gates*, 245 N.C. App. 525, 527, 781 S.E.2d 883, 886 (2016) (alteration in original) (citation omitted).

“[D]ue process requires only that a lesser offense instruction be given if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983) (citation omitted), overruled in part by *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State’s evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Larry, 345 N.C. 497, 517, 481 S.E.2d 907, 918 (1997) (citation omitted). “Even in the absence of a special request, judges are required to charge upon lesser-included

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offenses if the evidence supports such a charge.” *State v. Hunt*, ___ N.C. App. ___, ___, 790 S.E.2d 874, 878 (2016) (citing *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985)).

Defendant was indicted on the charge of second-degree murder. During the charge conference, defendant requested that as lesser-included offenses of second-degree murder, the trial court instruct the jury on the offenses of involuntary manslaughter and misdemeanor death by vehicle. After hearing arguments from the State and defendant as to whether defendant was entitled to an instruction on misdemeanor death by vehicle, the trial court agreed to instruct the jury on the offense of second-degree murder and involuntary manslaughter, but not misdemeanor death by vehicle.

“Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.” *State v. Jones*, 287 N.C. 84, 100, 214 S.E.2d 24, 35 (1975) (citations omitted). “Involuntary manslaughter, which is a lesser included offense of second degree murder[,] is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.” *State v. Debiase*, 211 N.C. App. 497, 505, 711 S.E.2d 436, 441 (2011) (citations omitted). “Involuntary manslaughter [has also been defined as] the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to

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human life, or (2) *a culpably negligent act or omission.*” *State v. James*, 342 N.C. 589, 594, 466 S.E.2d 710, 714 (1996) (emphasis added) (citation omitted).

“[T]he difference between . . . malice . . . and culpable negligence [can be] the degree of recklessness that would support a finding of each.” *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (citation omitted). “The 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.” N.C. Gen. Stat. § 14-17(b)(1) (2017).

Culpable or criminal negligence has been defined as “ ‘such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.’ ” *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (quoting *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933)). . . . We note, too, that N.C.G.S. § 20–138.1, which prohibits drivers from operating motor vehicles while under the influence of impairing substances, is a safety statute designed for the protection of human life and limb and that its violation constitutes culpable negligence as a matter of law. *McGill*, 314 N.C. at 637, 336 S.E.2d at 93.

State v. Jones, 353 N.C. 159, 165, 538 S.E.2d 917, 923 (2000).

“Misdemeanor death by vehicle is a lesser included offense of involuntary manslaughter.” *State v. Williams*, 90 N.C. App. 614, 619, 369 S.E.2d 832, 836 (1988) (citations omitted). “The distinction [between involuntary manslaughter and

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misdemeanor death by vehicle] is that the lesser offense does not depend upon the presence of culpable or criminal negligence, it being enough to convict if death proximately results from the violation of a traffic statute or ordinance.” *State v. Lackey*, 71 N.C. App. 581, 583, 323 S.E.2d 32, 34 (1984) (citation omitted).

Before the trial court, both the State and defendant presented arguments on whether to instruct the jury on the offense of misdemeanor death by vehicle. Defendant argued that the jury could find there was no evidence of malice or culpable negligence. Specifically, the trial court heard arguments as to whether the State’s evidence of impairment at the time of the collision had been contested. The State argued that regardless of appreciable impairment, the evidence established that defendant was driving on a public roadway with a blood alcohol concentration measured at 0.13, which constituted a violation of section 20–138.1 (“Impaired Driving”), and thus, constituted culpable negligence as a matter of law and would preclude a finding of misdemeanor death by vehicle. *See Jones*, 353 N.C. at 165, 538 S.E.2d at 923. Defendant contended that he presented substantial evidence he was not appreciably impaired at the time of the collision and cited *State v. Narron*, 193 N.C. App. 76, 666 S.E.2d 860 (2008), for the proposition that a blood alcohol concentration measurement created only a rebuttable presumption that he was impaired. “[I]f the jury disregards [the alcohol], there is evidence a jury could find

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misdemeanor death by vehicle based in large part on the speed” The trial court denied defendant’s request to instruct the jury on misdemeanor death by vehicle.

We cannot accept the argument defendant presented before the trial court, that, based on *Narron*, the measurement of his blood alcohol concentration at 0.13 created only a presumption that he was impaired by alcohol, because that is a mischaracterization of *Narron*, 193 N.C. App. 76, 666 S.E.2d 860.¹

On appeal, before this Court, defendant argues that the trial court erred by denying his request for an instruction on misdemeanor death by vehicle. Defendant contends there was evidence that the collision and fatality were caused by a traffic violation other than driving while impaired: specifically, defendant argues the decedent’s death was solely the result of defendant’s speeding. Defendant cites *Williams*, 90 N.C. App. 614, 369 S.E.2d 832.

In *Williams*, the defendant was tried before a jury and convicted, in pertinent part, on two counts of involuntary manslaughter and driving while impaired. *Id.* at 615, 369 S.E.2d at 833. The evidence presented at trial showed that a two-vehicle collision occurred on U.S. Highway 158, a two-lane roadway, outside of Henderson City. *Id.* at 615, 369 S.E.2d at 833–34. Three people, including the defendant, were

¹ In *Narron*, the Court considered whether our General Assembly’s 2006 amendment to N.C. Gen. Stat. § 20-138.1 (“Impaired Driving”) created an impermissible presumption by adding the language “[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration[.]” 193 N.C. App. at 82, 666 S.E.2d at 865. This Court concluded that the challenged provision d[id] not create an evidentiary or factual presumption, but simply state[d] the standard for *prima facie* evidence of a defendant’s alcohol concentration.” *Id.* at 83, 666 S.E.2d at 865.

in the defendant's vehicle; the defendant was driving. *Id.* One of the vehicle occupants testified that he and the defendant had spent the afternoon "drinking," and at the time the defendant entered the vehicle, there was conflicting evidence as to whether the defendant was impaired. *Id.* at 616–17, 369 S.E.2d at 834; *id.* at 620, 369 S.E.2d at 836. While the defendant was driving, a vehicle occupant and the defendant began to argue. *Id.* at 616–17, 369 S.E.2d at 834. During the argument, the defendant's vehicle ran off the roadway; the defendant "tried to snatch the car back. When he got it back straight, that[s] when he hit the [decedents' vehicle] head-on." *Id.* This Court reasoned

there . . . was evidence presented from which the jury could have found that the only act of [the] defendant which proximately contributed to the collision and ensuing deaths was some other violation of the traffic law, such as failure to maintain a proper lookout, failure to keep his vehicle under proper control, or operating his vehicle on the left-hand side of the highway, contrary to the laws provided therefor.

Id. at 619–20, 369 S.E.2d at 836. Accordingly, this Court held that the trial court was required to instruct the jury on the lesser included offense of misdemeanor death by vehicle. *Id.* at 620, 369 S.E.2d at 836. *See also Lackey*, 71 N.C. App. at 583–84, 323 S.E.2d at 34 (reversing the defendant's conviction for involuntary manslaughter despite evidence the defendant's blood alcohol concentration was 0.19 holding the trial court erred by failing to give an instruction on misdemeanor death by vehicle

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where the defendant rear-ended a vehicle which had entered the roadway before careening off and colliding with the decedent's vehicle head-on).

However, the record evidence presented in *Williams* and *Lackey* is distinguishable from the record evidence before us. Taking the evidence in the light most favorable to defendant and crediting his argument that the State's evidence of culpable negligence or malice based on impairment was challenged, it remains that all of the testimony and other evidence presented indicates defendant's speeding and aggressive driving reflected a degree of recklessness which meets the standard defined as culpable negligence² if not malice.³

After drinking, defendant demanded that he drive ("I'm going to drive my own f*cking car."): the previous driver—who had not consumed alcohol—had been driving too slowly. Despite the presence of pedestrians nearby, other vehicles on the roadway, and five passengers in defendant's vehicle, defendant accelerated his vehicle to 60 mph on a roadway in downtown Charlotte with a 35 mph speed limit, and proceeded to aggressively weave around other vehicles on the roadway while maintaining that excessive speed. Moments before the collision, the decedent was

² "Culpable or criminal negligence has been defined as such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Jones*, 353 N.C. at 165, 538 S.E.2d at 923 (citation omitted).

³ "The 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." N.C.G.S. § 14-17(b)(1).

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observed by several people as she stepped into the roadway, one who stated, “[defendant’s] going to hit that girl”; and Joshua Siff, who was sitting in the front passenger seat of defendant’s vehicle (“Q. Now, did you see the woman before he hit her? A. Yes.”). Despite being observed by multiple people, defendant points to no evidence which indicates he reacted to the decedent’s presence in the roadway. No witness testified to observing defendant’s brake lights flash, to hearing screeching tires; or to seeing the vehicle slow down or otherwise attempt to avoid the decedent. Moreover, immediately after the collision, defendant asked “what happened?” *Cf. Williams*, 90 N.C. App. 614, 369 S.E.2d 832; *Lackey*, 71 N.C. App. at 583–84, 323 S.E.2d at 34.

The evidence presented before the trial court on the recklessness of defendant’s driving was not challenged or otherwise in conflict, and that evidence met the standard of culpable negligence,⁴ if not malice.⁵ *See Larry*, 345 N.C. at 517, 481 S.E.2d at 918 (“The test . . . is . . . whether the State’s evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.”). With substantial and unchallenged evidence of recklessness to a degree of culpable negligence or malice, the evidence was such that a rational juror would not be permitted to find defendant guilty of misdemeanor death

⁴ *See* case cited *supra* note 2.

⁵ *See* statute cited *supra* note 3.

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by vehicle—an offense independent of culpable negligence or malice—and acquit defendant of second-degree murder and involuntary manslaughter. *See Strickland*, 307 N.C. at 286, 298 S.E.2d at 654 (“[A] lesser offense instruction [is required to] be given if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater.” (citation omitted)). Therefore, the record evidence did not support defendant’s request to instruct the jury on the offense of misdemeanor death by vehicle. Accordingly, defendant’s argument is overruled.

II

Next, defendant argues that the trial court erred by denying his motion to dismiss the charges against him based on a violation of his right to a bond. We disagree.

On 11 April 2017, defendant filed a motion to dismiss the charges of aggravated death by vehicle and second-degree murder then pending against him. In the motion, defendant stated the following:

Defendant attempted to effectuate his release so he could obtain his own independent blood sample but was illegally and unjustly detained by the “no bond” being imposed by the magistrate in [the charge for the offense of Aggravated Felony Death by Vehicle, a Class D felony in violation of General Statutes, section 20-141.4(a5)], in violation of not only the Mecklenburg County Bond Rules . . . but also in violation of the North Carolina and United States Constitution and North Carolina General Statutes § 15A-533(b) [(“Right to pretrial release in capital and noncapital cases”)], § 15A-534 [(“Procedure for Determining Conditions of Pretrial Release”)], § 15A-534.2 [(“Detention

of Impaired Drivers”)] and §15A-535 [(“Issuance of Policies of Pretrial Release”)].

Where this Court has reviewed a trial court order on a defendant’s motion to dismiss the offenses charged for a violation of the statutory right to pretrial release in a noncapital case, we have considered whether there is competent evidence to support the findings of fact and conclusions of law. *See State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001) (“When a defendant alleges he has been denied his right to communicate with counsel, family, and friends, the trial court must conduct a hearing on defendant’s motion to dismiss and make findings and conclusions. On appeal, the standard of review is whether there is competent evidence to support the findings and the conclusions.” (citing *State v. Cumberland*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982))).

Pursuant to our General Statutes, section 15A-511 (“Initial appearance”),

(a) Appearance before Magistrate.—

(1) A law-enforcement officer making an arrest with or without a warrant must take the arrested person without unnecessary delay before a magistrate as provided in G.S. 15A-501.

. . . .

(b) Statement by the Magistrate.—The magistrate must inform the defendant of:

(1) The charges against him;

(2) His right to communicate with counsel and friends; and

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- (3) The general circumstances under which he may secure release under the provisions of Article 26, Bail.

N.C. Gen. Stat. § 15A-511(a)(1), (b) (2017). Pursuant to Article 26 (“Bail”), “[a] defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.” *Id.* § 15A-533(b).

Pursuant to section 15A-534 (“Procedure for determining conditions of pretrial release”),

[i]n determining conditions of pretrial release a judicial official must impose at least one of the following conditions:

- (1) Release the defendant on his written promise to appear.
- (2) Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.
- (3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.
- (4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage pursuant to G.S. 58-74-5, or by at least one solvent surety.
- (5) House arrest with electronic monitoring.

Id. § 15A-534(a).

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Defendant's motion to dismiss was heard before Judge Evans. On 13 November 2017, the trial court entered an order in which it made the following unchallenged findings of fact.

2. Defendant was involved in an automobile collision at approximately 5:06 pm [17 January 2016] on South Boulevard in Charlotte when he struck a pedestrian, [the decedent]

3. Charlotte Mecklenburg Police officers arrived on the scene immediately after the collision and took custody of the Defendant at approximately 5:15 pm.

4. Defendant called his father . . . while still on the scene. He told his father that [he] had been involved in a wreck and that someone died.

5. Defendant was arrested between 5:40 and 5:55 pm and originally charged with Driving While Subject to an Impairing Substance.

. . . .

7. . . . [An attorney] advise[d] [defendant's father] of the arrest process; how bond would be set, and that an independent test should be requested.

8. At CMC-Mercy [Hospital], Defendant was advised of his rights pursuant to NCGS § 20-16.2(a) then he was asked to submit to a test of his blood. Defendant verbally consented but refused to sign the DHHS 4081 form [A law enforcement officer] waited 30 minutes. Defendant used his phone during that 30 minute period. He told one person not to come to the hospital, but to go to the jail. He did not ask anyone to serve as a witness, nor did he request an attorney. . . .

9. The blood was drawn at 7:34 pm by a registered

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nurse. Two vials were taken; one to be tested by the CMPD laboratory, the second to be used by Defendant for independent testing if requested. . . . Defendant has not asked to have the second vial of blood tested by a laboratory of his choice since the date of his arrest.

. . . .

11. . . . [T]he Defendant was then transported to the Mecklenburg County Jail

12. At the jail, the Defendant . . . [was] seen by the magistrate between 9:49 and 10:35 pm.

13. . . . [A law enforcement officer] and Defendant appeared before the magistrate. . . . The magistrate set a bond of \$1000 unsecured on the DWI charge. The magistrate set no bond on the Aggravated Felony Death by Vehicle, a Class D felony.

14. The magistrate presented the Defendant with an Implied Consent Offense Notice AOC-CR-271 which provides information about Defendant's right to have others appear at the jail to observe his condition or to administer an additional chemical analysis. Defendant did not wish to contact anyone.

15. The magistrate also provided Defendant with a copy of a "Witness Procedures" document which set out the procedures to be followed if Defendant requested a person to come and obtain blood or urine sample to be tested. Defendant did not make this request. He signed both documents acknowledging receipt of the same.

16. That Defendant was permitted to use the phone while still in the booking area of the jail.

17. [Defendant's sister,] . . . arrived at the jail at about 9:00 pm. She immediately asked about Defendant She was accompanied by . . . a bail bondsman.

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. . . .

19. [Defendant's sister] spoke with a detention officer at approximately 10:45. She was told that Defendant would not be released because he had "no bond". She asked about the possibility of getting an independent test and was told that he would not get one.

20. [Defendant's sister] asked to see her brother. She was permitted to see him for about ten minutes. She requested copies of Defendant's documents and then left the jail.

. . . .

22. That under the Mecklenburg County bonding policy in effect at the time of the Defendant's arrest, the normal bond for a homicide by auto was between \$10,000 and \$100,000.

23. That Defendant appeared in District Court on Tuesday, January 19, 2016 when a bond was set on the Aggravated Felony Death by Vehicle charge in the amount of \$100,000. He was released on bond the same day.

Defendant challenged the evidentiary support for finding of fact 21, which stated, "[t]hat Defendant at no time asked to have an independent analysis of his blood, urine or breath on January 17, 2016, even though he was provided with information on how to do so and there was a procedure in place had he asked to have an independent analysis."

Based on these findings of fact, the trial court concluded that by failing to set a bond on the Aggravated Felony Death by Vehicle, the magistrate violated

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defendant's right to pretrial release as set forth in General Statutes, sections 15A-533 and 534.

2. This violation by the magistrate did not substantially or irreparably prejudice Defendant's right to obtain evidence in preparation of his defense since he could have asked to have an independent person come to the jail to draw blood and his family was able to assist him. Additionally, a second vial of blood is available to be tested.

3. That Defendant was not denied access to friends or family. He spoke with several people by phone and he saw his sister at the jail.

As there is no dispute that the magistrate violated defendant's right to pretrial release, our review focuses on the conclusion that "the magistrate did not substantially or irreparably prejudice Defendant's right to obtain evidence in preparation of his defense"

"[P]rejudice will not be assumed to accompany a violation of defendant's statutory rights, but rather, defendant must make a showing that he was prejudiced in order to gain relief." *State v. Knoll*, 322 N.C. 535, 545, 369 S.E.2d 558, 564 (1988).

We note that when defendant was taken to CMC-Mercy Hospital, two vials of blood were taken—one to be tested by the CMPD laboratory and one to be tested by defendant, should he request it. Defendant did not request that an independent laboratory test the second vial. The magistrate provided defendant with an Implied Consent Offense Notice (form AOC-CR-271), which provided defendant with notice that he could request others to appear at the jail to observe his condition or

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administer a chemical analysis, as well as a Witness Procedures document which set out procedures to be followed if defendant requested a blood or urine sample. While we acknowledge the substantial efforts of defendant's family, defendant was permitted the use of his phone while at the hospital and while in the booking area of the jail. He did not ask anyone to serve as a witness during the blood draw conducted at the hospital, nor did he request an attorney. Defendant did not request that other persons appear at the hospital to witness the blood draw or the jail to observe his condition despite being notified of his right to such observation. Furthermore, defendant did not request a chemical analysis of the second vial of blood drawn at the hospital.

We hold that defendant has failed to establish he was prejudiced in his ability to gather evidence for his defense as a result of the magistrate's failure to set a bond. *See Knoll*, 322 N.C. at 545, 369 S.E.2d at 564; *see also State v. Townsend*, 236 N.C. App. 456, 462, 762 S.E.2d 898, 903 (2014) (holding the defendant failed to establish prejudice where "[he] had several opportunities to call counsel and friends to observe him and help him obtain an independent chemical analysis, but . . . failed to do so"; moreover, the defendant asked that his wife be called but only for the purpose of telling her he had been arrested); *State v. Labinski*, 188 N.C. App. 120, 128, 654 S.E.2d 740, 745 (2008) (holding the defendant failed to establish prejudice where she was informed of her right to have a witness present for the intoxilyzer test but did

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not request a witness, even though four of her friends were present at the detention center). Accordingly, defendant's argument is overruled.

III

Lastly, defendant argues that the trial court erred by preventing defendant from introducing the portion of the EMT record describing the speed of his vehicle. We disagree.

"We review *de novo* the trial court's determination of whether an out-of-court statement is admissible pursuant to N.C.R. Evid. Rule 803." *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512, 515 (2009) (citing *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000)) (citation omitted).

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2017).

Defendant argues that he was prejudiced by the trial court's ruling to redact the exhibit of the EMT report which stated "[i]t is reported on scene that the car was travelling 40 to 45 MPH." Defendant contends that the issue of his speed at the time of the collision was a contested issue and evidence that he was traveling only ten mph

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above the speed limit would further support his argument that the cause of the collision was the decedent's conduct. We are unpersuaded.

The witnesses who observed the collision, including those in the car with defendant, each testified that defendant's vehicle was traveling around 60 mph. The redacted portion of the EMT report was based on hearsay and failed to provide any direct evidence of how the estimated speed of the vehicle was determined. The trial court did not err by failing to admit the estimated speed of defendant's vehicle as provided in the EMT report. Accordingly, defendant's argument is overruled.

NO ERROR; NO PREJUDICIAL ERROR.

Judges STROUD and COLLINS concur.

Report per Rule 30(e).