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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-708

Filed: 17 March 2020

Buncombe County, No. 15CRS004921, 15CRS091259

STATE OF NORTH CAROLINA

v.

MICHAEL SHANE WELLS, Defendant.

Appeal by Defendant from judgment entered 30 August 2018 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 21 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.*

*W. Michael Spivey for Defendant.*

BROOK, Judge.

Michael Shane Wells (“Defendant”) appeals from judgment entered upon jury verdict for felony death by a motor vehicle. On appeal, Defendant argues the trial court erred in considering one statutory aggravating factor. Defendant further argues the trial court erred in finding that two of his out-of-state offenses were

substantially similar to North Carolina offenses for sentencing. For the reasons stated below, we uphold Defendant's sentence.

I. Factual and Procedural History

A. Trial: Guilt-Innocence Phase

On 18 October 2015, Defendant was at his house drinking beers and talking with Jennifer Bowen and Matthew Benham. Mr. Benham testified at trial that Defendant had "about two beers" while they were at his house, and then the three decided to drive to the store. Defendant drove while Ms. Bowen sat in the front passenger seat, and Mr. Benham sat in the back seat. On the way to the store, according to Mr. Benham, Defendant stopped at a gas station and "grabbed two Bootleggers," which he and Ms. Bowen drank. Defendant then decided he wanted to see his girlfriend and drove towards Gerton, a neighboring community.

Mr. Benham testified Defendant continued drinking while driving, was speeding, "doing 180's in the middle of the road," not using his brakes on sharp turns while driving on curvy, mountain roads, and that Defendant was "[n]o doubt . . . impaired[.]" According to Mr. Benham, Defendant also said, "[I]f I'm going to take my life, I'll take your-all's, too." Soon after, the car ran off the road, crashed into a tree, and landed on its roof. Ms. Bowen died at the scene. Defendant was charged with reckless driving, driving while impaired, and felony death by a motor vehicle.

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Trooper Brandon Livingston investigated the collision and spoke with Defendant at the hospital about three hours after the crash. Trooper Livingston testified that he noticed the odor of alcohol on Defendant's breath, and that based on his investigation, he believed Defendant's speed and intoxication were factors in the collision. The State also introduced Defendant's toxicology report from the hospital, which showed Defendant's blood alcohol concentration was .10 on the night of the crash.

The jury returned verdicts of guilty for driving while impaired and felony death by a motor vehicle. The jury found Defendant not guilty of reckless driving.

B. Trial: Sentencing

At the sentencing hearing, the State submitted to the jury the aggravating factor that Defendant knowingly created a great risk of death to more than one person by means of a weapon or device, which normally would be hazardous to the lives of more than one person. The State argued that "the fact that Defendant was impaired, the speed, the manner in which he was driving that took him off the side of the road that ultimately resulted in the death of Miss Bowen and also the fact that Mr. Benham was also in the car" showed that Defendant did knowingly create a great risk of death to more than one person. The jury found the aggravating factor beyond a reasonable doubt.

The trial court then found that Defendant had previously been convicted of third-degree burglary in Kentucky, grand larceny in Virginia, theft by unlawful taking of less than \$300 in Kentucky, and contributing to the delinquency of a minor in Virginia. The trial court found all of the offenses were substantially similar to North Carolina offenses and assigned Defendant six prior record points, making Defendant a prior record level III for sentencing.

Defendant also offered evidence to support factors in mitigation, which the trial court did find. The trial court then found that the factor in aggravation outweighed the factors in mitigation and sentenced Defendant in the aggravated range as a prior record level III for a minimum of 90 months' and a maximum of 120 months' active imprisonment.

The trial court arrested judgment on the driving while impaired conviction because the jury instruction for felony death by a motor vehicle required the jury to find that Defendant was driving while impaired.

Defendant timely noticed appeal.

## II. Analysis

On appeal, Defendant argues the trial court erred in submitting to the jury the aggravating factor that "the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Defendant contends the evidence

used to support the aggravating factor was the same evidence used to support an element of the felony death by a motor vehicle and that using evidence to support a factor in aggravation that had previously served to prove the underlying offense violates N.C. Gen. Stat. § 15A-1340.16(d).

Defendant also argues that the trial court erred in finding that the out-of-state offenses of third-degree burglary and grand larceny were substantially similar to the North Carolina Class H offenses of felony breaking and entering and felony larceny, and that the trial court's errors prejudiced him.

After careful review, we hold that that the evidence used to support the aggravating factor was not the same as that used to support the felony death by a motor vehicle. We further hold that, even if we accept Defendant's argument that the trial court erred in its classification of the out-of-state offenses, its errors did not prejudice Defendant.

#### A. Aggravating Factor

In the instant case, the jury found Defendant guilty of felony death by a motor vehicle and not guilty of reckless driving.

Defendant argues that, since the jury found him not guilty of reckless driving, the only evidence the jury could rely upon to find the aggravating factor was his operation of a vehicle while impaired. According to Defendant, since evidence of

impairment was necessary to convict him of felony death by a motor vehicle, the finding of aggravation here violates N.C. Gen. Stat. § 15A-1340.16(d).

The State argues there was other evidence, apart from Defendant's impairment, from which the jury could have found the aggravating factor. Specifically, the State argues there was evidence Defendant was "doing 180's," driving "way over" the speed limit, not using his brakes correctly, and driving on underinflated tires.

i. Standard of Review

This Court reviews alleged sentencing errors for "whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Jeffery*, 167 N.C. App. 575, 578, 605 S.E.2d 672, 674 (2004) (citation and internal marks omitted).

ii. Merits

Under N.C. Gen. Stat. § 15A-1340.16(a) (2019), a trial court must consider evidence of aggravating or mitigating factors that make an aggravated or mitigated sentence appropriate. The State bears the burden of proving beyond a reasonable doubt that the aggravating factor exists. *Id.* If the defendant does not admit to the existence of the aggravating factor, only a jury may determine if an aggravating factor is present. *Id.* § 15A-1340.16(a1). "If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it

may impose a sentence that is permitted by the aggravated range[.]” *Id.* § 15A-1340.16(b).

The aggravating factor which was submitted to the jury and considered by the trial court provides that “[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.” *Id.* § 15A-1340.16(d)(8). “[T]he manner in which an automobile is driven, i.e. at a high rate of speed, can serve as an appropriate basis for finding th[is] aggravating factor . . . when the operation of the vehicle results in a vehicular-related death.” *State v. Bacon*, 228 N.C. App. 432, 434-35, 745 S.E.2d 905, 907 (2013) (citation omitted).

However, “[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]” N.C. Gen. Stat. § 15A-1340.16(d). Our case law illuminates where this impermissible overlay has and has not occurred.

In *State v. Garcia-Lorenzo*, the defendant was convicted of driving while impaired and involuntary manslaughter based on the impaired driving for a vehicular homicide. 110 N.C. App. 319, 324, 430 S.E.2d 290, 293 (1993). The jury found the aggravating factor that the defendant knowingly created a great risk of death to more than one person, and on appeal the defendant argued the evidence used to prove involuntary manslaughter—driving while impaired—was used to prove the aggravating factor. *Id.* at 335, 430 S.E.2d at 299. We held that there was evidence

of the defendant's "reckless driving of his automobile in a neighborhood where he was likely to injure a number of people[.]" which was not an element of the involuntary manslaughter charge, and upheld the aggravating factor. *Id.* at 336, 430 S.E.2d at 300.

Conversely, in *State v. Bacon*, we held the trial court erred when the evidence used to support the involuntary manslaughter conviction also served as the basis for aggravation. 228 N.C. App. at 436, 745 S.E.2d at 908. The defendant pleaded guilty to involuntary manslaughter, and the State noted in its summary of the facts supporting the guilty plea that the defendant was not impaired at the time of the accident but "the defendant was driving at a high rate of speed." *Id.* at 435, 745 S.E.2d at 908. We held since the defendant was not impaired at the time of the accident, the defendant's speed was the only evidence that would support "the aggravating factor that he used a device in a manner normally hazardous to the lives of more than one person." *Id.* at 436, 745 S.E.2d at 908. "Because the evidence of [the] defendant's speed was required to prove the charge of involuntary manslaughter and the finding of the aggravating factor, the trial court erred in sentencing defendant in the aggravated range[.]" *Id.* We therefore remanded to the trial court for resentencing. *Id.*

Here, the trial court instructed the jury on the charge of felony death by a motor vehicle as follows:



First, that the Defendant was driving a vehicle.

Second, that the Defendant was driving that vehicle upon a highway within the state.

Third, that at the time the Defendant was driving that vehicle, the Defendant was under the influence of an impairing substance. Alcohol is an impairing substance.

...

And fourth, that the impaired driving by the Defendant proximately but unintentionally caused Jennifer Bowen's death. Proximate cause is real cause. A cause without which Jennifer Bowen's death would not have occurred; and one that a reasonably[] careful, and prudent person could foresee would probably produce such injury or some similar injurious result.

...

If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Since impaired driving was used as an element of the offense of felony death by a motor vehicle, the jury could not consider evidence of Defendant's impairment in finding the aggravating factor. See N.C. Gen. Stat. § 15A-1340.16(d) (2019). However, it was not prohibited from considering evidence of "the manner in which" Defendant drove his vehicle; specifically, that Defendant was speeding and driving erratically. See *Bacon*, 228 N.C. App. at 434-35, 745 S.E.2d at 907. That evidence was both not necessary to prove an element of the offense of felony death by a motor

vehicle and supports the finding of the aggravating factor. *See Garcia-Lorenzo*, 110 N.C. App. at 336, 430 S.E.2d at 300.

Contrary to Defendant's assertion, we cannot categorically assume that by acquitting Defendant of reckless driving, the jury did not believe Defendant was driving in a reckless manner and thus impermissibly based their finding of the aggravating factor solely on Defendant's impaired driving. Though not at issue in this case, the legal reasoning behind inconsistent verdicts provides a helpful framework in analyzing Defendant's claim. *See State v. Mumford*, 364 N.C. 394, 401 699 S.E.2d 911, 916 (2010) ("[T]he prudence of the inconsistent verdict rule has guided this Court in analyzing conflicting and unexplained verdicts.").

In cases where juries have acquitted defendants of lesser offenses but returned guilty verdicts on greater offenses, we have drawn a distinction between results that are "merely inconsistent" and those that are "legally inconsistent *and* contradictory." *Id.* at 398, 699 S.E.2d at 914 (emphasis in original) (citations omitted). "Inconsistent verdicts . . . present a situation where error, in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." *United States v. Powell*, 469 U.S. 57, 65, 105 S. Ct. 471, 477, 87 L. Ed. 2d 461, 468-69 (1984) (internal marks omitted). Legally inconsistent verdicts, by contrast, occur when a verdict "purports to establish that the [defendant] is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of

one necessarily excludes guilt of the other.” *Mumford*, 364 N.C. at 400, 699 S.E.2d at 915 (citation and internal marks omitted); *see also State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 167 (1990) (granting defendant a new trial after the defendant was found guilty of both embezzlement and obtaining property by false pretenses “due to the mutually exclusive nature of those offenses.”) (citations omitted). “[I]nconsistencies [are] permissible, and not . . . legally contradictory, as long as there [is] sufficient evidence to support the guilty verdict.” *Mumford*, 364 N.C. at 400, 699 S.E.2d at 915.

While the jury acquitting Defendant of reckless driving and finding the aggravating factor based on reckless driving may be inconsistent, it is not legally inconsistent. *See id.* at 399, 699 S.E.2d at 915 (“It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise or lenity, arrived at an inconsistent conclusion on the lesser offense.”) (citation omitted).<sup>1</sup>

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<sup>1</sup> The jury was instructed that to find Defendant guilty of reckless driving it must find that “[Defendant] drove that vehicle by speeding, driving erratically, and doing three 180 degree spins in the highway. And that in doing so, he acted without due caution or circumspection.” During deliberations, the jury sent a note that read, “In the three things beyond a reasonable doubt, we are having issues with one of the elements, the three 180 degree spins. If we don’t believe he did the spins but everything else, would we return a not guilty verdict?” The trial court then instructed the jury that it “must find that the State has proved beyond a reasonable doubt every element of each charge before you may return a verdict of guilty.” It is thus plausible that the jury believed Defendant was speeding and driving erratically but not “doing three 180 degree spins.” Similarly, it is also possible that the jury misunderstood the trial court’s instruction to mean that “speeding, driving erratically, and doing three 180 degree spins in the highway” were elements that they had to find beyond a reasonable doubt to return a guilty verdict rather than the different acts the jury could consider in determining whether Defendant “acted without due caution or circumspection.”

Moreover, there was sufficient evidence to support the aggravating factor, which included evidence that Defendant was speeding, not using his brakes correctly, and said, “[I]f I’m going to take my life, I’ll take your-all’s, too” before the collision.

There was evidence, beyond that used to support the elements of felony death by a motor vehicle, from which the jury could find the aggravating factor. And, though the jury found Defendant not guilty of reckless driving, that did not preclude them from finding the aggravating factor existed. We therefore conclude the trial court did not err by considering the aggravating factor in sentencing Defendant.

#### B. Out-of-State Convictions

Defendant next argues that the trial court erred in concluding that his prior third-degree burglary conviction in Kentucky was substantially similar to the North Carolina crime of felony breaking and entering and that his prior grand larceny conviction in Virginia was substantially similar to the North Carolina crime of felony larceny. Defendant further contends that because of these incorrect classifications, the trial court erroneously assigned him six record level points causing him to be sentenced as having obtained prior record level level III rather than a level II. We find that any error in classification, if present, did not prejudice Defendant.

##### i. Standard of Review

“[T]he question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law

requiring *de novo* review on appeal.” *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010) (internal marks and citation omitted). However, an error in classifying an offense for sentencing is not prejudicial if “the trial court’s sentence is within the presumptive range at the correct record level.” *State v. Ballard*, 244 N.C. App. 476, 481, 781 S.E.2d 75, 79 (2015) (citations omitted).

ii. Merits

We first address the State’s argument that this issue is not properly before this Court because Defendant did not present any argument to the trial court as to whether these particular offenses are substantially similar to North Carolina offenses. “It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court’s determination of a defendant’s prior record level to be preserved for appellate review.” *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citations omitted). We therefore proceed to Defendant’s claim.

“The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender’s prior convictions[.]” N.C. Gen. Stat. § 15A-1340.14(a) (2019). North Carolina General Statutes § 15A-1340.14 lays out a special classification rule for assigning points to a defendant’s out-of-state convictions. *Id.* § 15A-1340.14(e). By default, a prior conviction for a crime that another jurisdiction classifies as a felony counts as a Class I felony, *id.*, carrying two

points for felony record-level purposes, *id.* § 15A-1340.14(b)(4). Either the State or the defendant may attempt to depart from the default classification by presenting evidence that the out-of-state offense is substantially similar to a North Carolina offense with an offense class different from the default. *Id.* § 15A-1340.14(e).

Here, the State sought to depart from the default Class I classifications for Defendant's out-of-state convictions of third-degree burglary in Kentucky and grand larceny in Virginia. The trial court classified both offenses as Class H felonies, each carrying two points for felony sentencing. The trial court then assigned Defendant six prior record level points and sentenced him as a prior record level III for a Class D felony offense.

Defendant now argues on appeal that the out-of-state convictions should have been classified as misdemeanors carrying one point for felony sentencing. *See* N.C. Gen. Stat. § 14-54(b) (2019) (defining misdemeanor breaking and entering as a Class 1 misdemeanor); N.C. Gen. Stat. § 14-72(a) (2019) (defining misdemeanor larceny as a Class 1 misdemeanor); N.C. Gen. Stat. § 15A-1340.14(b)(5) (2019) (assigning one point for prior Class A1 or Class 1 nontraffic misdemeanor offenses for felony sentencing). Defendant argues his prior record level points for felony sentencing would be reduced from six to four points, which corresponds to a level II for felony sentencing. *See* N.C. Gen. Stat. § 15A-1340.14(c)(2).

However, assuming *arguendo* that Defendant should have been sentenced as

a prior record level II, any error in classification is not prejudicial. The aggravated range of minimum sentences for a prior record level II offender convicted of a Class D felony is between 73 and 92 months' imprisonment, while the aggravated range of minimum sentences for a prior record level III offender convicted of a Class D felony is between 84 and 105 months' imprisonment. *Id.* § 15A-1340.17(c). Defendant was sentenced to 90 to 120 months' imprisonment, which is within the aggravated range for both a level II and III offender. "An error in the calculation of a defendant's prior record level points is deemed harmless if the sentence imposed by the trial court is within the range provided for the correct prior record level." *Ballard*, 244 N.C. App. at 481, 781 S.E.2d at 79 (citations omitted).

### III. Conclusion

For the reasons stated above, we find no error in Defendant's sentence.

NO ERROR.

Chief Judge MCGEE and Judge STROUD concur.

Report per Rule 30(e).