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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-722

Filed: 16 June 2020

Edgecombe County, Nos. 16 CRS 53227, 803

STATE OF NORTH CAROLINA

v.

LEON DECHAS DICKENS

Appeal by defendant from judgments entered 15 November 2018 by Judge Walter H. Godwin Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 31 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather H. Freeman, for the State.

Paul F. Herzog for defendant.

DIETZ, Judge.

Defendant Leon Dechas Dickens has a decades-long history of driving while impaired. In 2016, he crashed his car into a tree while driving drunk. His girlfriend, a passenger in the car, died as a result.

On appeal from his convictions for second degree murder and DWI, Dickens argues that the trial court improperly admitted his previous DWI convictions into

evidence; committed plain error by using the pattern jury instructions for second degree murder and involuntary manslaughter without providing a further definition of “culpable negligence”; and violated his constitutional rights against double jeopardy by failing, on the court’s own initiative, to arrest judgment on the DWI conviction.

We reject these arguments. The prior DWI convictions properly were admitted because they established a “clear and consistent pattern of criminality” that was probative of Dickens’s mental state and thus the intent element of the second degree murder charge. Second, Dickens cannot show that the trial court’s use of the pattern jury instructions, without objection, was error. Finally, Dickens’s double jeopardy argument is not preserved for appellate review under controlling precedent from our Supreme Court. Accordingly, we find no error in the trial court’s judgments.

Facts and Procedural History

Around 11:00 p.m. on 14 October 2016, Lester Howard had just arrived home from work when he saw a black Mustang crashed against a tree across the street from his house. Howard ran to the car, which had caught fire, and found Leon Dechas Dickens trying to get out from the driver’s side.

Howard helped Dickens out of the car and laid him down in the yard next door. Howard asked Dickens if there was anyone else in the car, and Dickens said “yes.” Dickens also told Howard there was a beer can inside the car. Howard ran to the

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passenger side of the vehicle and saw an injured, unresponsive woman. Howard's neighbor, Missy Naccarato, had seen Howard assisting Dickens and helped Howard pull the woman out of the car before it exploded.

First responders and police officers arrived at the scene a short time later. They identified the injured woman as Chanel Bryant, Dickens's girlfriend. Bryant had suffered severe head trauma and one of her arms was "almost amputated." Police also observed a large gash across Bryant's forehead, which was consistent with windshield damage on the passenger side of the partially-exploded car.

An officer approached Dickens, who was still lying on the grass. Dickens's breath smelled strongly of alcohol, and he had bloodshot, glassy eyes and slurred speech. Dickens told the officer that Bryant was driving the car when it crashed, but Howard and Naccarato told the officer they saw Dickens exiting the driver's side and Bryant on the passenger side.

Two days after the crash, Bryant passed away in the hospital. Dickens, who had also been hospitalized, sustained a three to four-inch abrasion on his collarbone that was consistent with an injury from the driver's side seatbelt. Results from a blood draw confirmed that Dickens consumed alcohol and marijuana on the day of the crash.

On 13 November 2018, Dickens was tried by a jury for second degree murder and driving while impaired. Bryant's cousin, Belvin Pressley, testified that Bryant

was at his house before the crash. He saw Dickens drive up in a black Mustang. Dickens was slurring his speech and “seemed to be under the influence.” Pressley saw Bryant enter the car on the passenger side and watched Dickens drive off “at a very high rate of speed.” The State also presented a forensic DNA analysis of swabs taken from the passenger side of the car, showing a major contributor profile consistent with Bryant’s DNA.

The jury found Dickens guilty of second degree murder and driving while impaired. The trial court sentenced him to consecutive sentences of 180 to 228 months in prison for second degree murder and 24 months in prison for DWI. Dickens appealed.

Analysis

I. Rule 404(b) Evidence

Dickens first argues that the trial court improperly admitted evidence of his previous DWI convictions. After overruling a timely objection from Dickens, the trial court admitted evidence of his DWI conviction in 1999; another DWI conviction in 2008; two more DWI convictions in 2014; and a conviction for driving with a revoked license in 2016, which stemmed from an earlier DWI conviction. The State introduced these convictions under Rule 404(b) of the Rules of Evidence as evidence of intent for second degree murder. Dickens challenges only the admission of his 1999 and 2008

DWI convictions, arguing that those convictions are too remote in time to be admissible under Rule 404(b).

This Court reviews a trial court's admission of evidence under Rule 404(b) by examining the legal conclusions *de novo* and the trial court's underlying Rule 403 determination for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Rule 404(b) permits evidence of other crimes, wrongs, or acts to be used for purposes other than "to prove the character of a person in order to show that he acted in conformity therewith." N.C. R. Evid. 404(b). So, for example, "evidence of prior convictions is admissible under Rule 404(b) to show the malice necessary to support a second-degree murder conviction." *State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 306 (2000). Although Rule 404(b) is a general rule of inclusion, it is still constrained by the requirements of "similarity and temporal proximity." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993). These limitations ensure a sufficient connection between the evidence and the purpose of its admission under Rule 404(b). *Id.*

Our Supreme Court, in a discussion of the use of prior DWI convictions in a second degree murder case involving drunk driving, held that there is no "fixed temporal maximum" for the admissibility of past offenses. *State v. Maready*, 362 N.C. 614, 625, 669 S.E.2d 564, 571 (2008). Instead, the Supreme Court held that courts must examine the evidence of prior convictions on a "case-by-case basis" to determine

whether their probative value relates solely to the defendant's propensity to commit the crime charged, or whether they properly address some permissible Rule 404(b) issue such as intent. *Id.* The Supreme Court emphasized that the "relevance of a temporally remote traffic-related conviction to the question of malice does not depend solely upon the amount of time that has passed since the conviction took place." *Id.* at 624, 669 S.E.2d at 570. "Rather, the extent of its probative value depends largely on intervening circumstances." *Id.*

So, for example, DWI convictions that occurred many years ago likely are insufficient, standing alone, to be admissible under Rule 404(b) to show malice. *See, e.g., State v. Goodman*, 357 N.C. 43, 577 S.E.2d 619 (2003). But in *Maready* the Supreme Court held that a sixteen-year-old DWI conviction that is part of a series of DWI offenses over time is admissible because those offenses, collectively, "constitute part of a clear and consistent pattern of criminality that is highly probative" of the defendant's mental state. 362 N.C. at 624, 669 S.E.2d at 570. The Supreme Court also emphasized in *Maready* that "remoteness in time generally affects only the weight to be given 404(b) evidence, not its admissibility." *Id.* "This is especially true when, as here, the prior conduct tends to show a defendant's state of mind, as opposed to establishing that the present conduct and prior actions are part of a common scheme or plan." *Id.*

Applying *Maready* here, we hold that the trial court properly admitted these convictions under Rule 404(b). The convictions—in 1999, 2008, and then two more in 2014, all leading up to this offense in 2016—established a pattern of criminality in the same way as in *Maready*, where the defendant was “convicted of DWI four times in the sixteen years” before the crime at issue. *Id.* This evidence assists the jury in the difficult task of inferring intent by establishing that Dickens “was aware that his conduct leading up to the collision at issue here was reckless and inherently dangerous to human life.” *State v. Jones*, 353 N.C. 159, 173, 538 S.E.2d 917, 928 (2000).

Thus, the trial court properly determined that the remoteness of the challenged convictions did not render them inadmissible under the particular circumstances of this case; instead, that remoteness in time “affects only the weight to be given” to that evidence by the jury. *Maready*, 362 N.C. at 624, 669 S.E.2d at 570. We therefore find no error in the admission of this evidence under Rule 404(b).

II. Jury Instructions

Next, Dickens argues that the trial court erred by failing to adequately explain the meaning of “culpable negligence” in its jury instructions. Dickens acknowledges that he did not object to the court’s instruction, or request an alternative instruction, and we therefore review this argument for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *Id.* at 518, 723 S.E.2d at 334. “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* In other words, the defendant must show that, “absent the error, the jury probably would have returned a different verdict.” *Id.* at 519, 723 S.E.2d at 335. Plain error should be “applied cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 518, 723 S.E.2d at 334.

The trial court instructed the jury by using the North Carolina Pattern Jury Instructions for second degree murder by impaired driving and the lesser offense of involuntary manslaughter. The court’s second degree murder instruction (copied from the pattern instruction) included a detailed explanation of malice and an explanation that the malice element “distinguishes second-degree murder from manslaughter.”

The court also explained, during the manslaughter instruction, that if “the defendant drove a motor vehicle on a street and without malice but in a culpably negligent manner,” the jury should find Dickens guilty of involuntary manslaughter.

During deliberations, the jury sent a note asking for the “written definition” of malice and manslaughter. The trial court re-instructed the jury using the same pattern jury instructions.

Dickens argues that the court’s instructions were not specific enough to help the jury distinguish between the two crimes and that the “responsibility rested with the trial judge, even in the absence of an objection by counsel” to provide a more detailed description of the term “culpable negligence.”

We reject this argument. The trial court used the pattern jury instructions for these two offenses, which is the preferred manner of instructing the jury on all issues. *State v. Coleman*, 254 N.C. App. 497, 505, 803 S.E.2d 820, 826 (2017). Moreover, the court emphasized for the jury the difference between malice and culpable negligence, and how those differing elements distinguished the two offenses.

To be sure, if Dickens had proposed an additional instruction providing more detail on the meaning of culpable negligence, and that instruction accurately stated the law, our analysis might be different. But under the high standard for plain error review, we cannot find error when the trial court instructed the jury, without objection, using the pattern jury instructions for these two offenses, and emphasized in those instructions the difference between their respective intent elements. Accordingly, we find no error, and certainly no plain error, in the trial court’s instructions to the jury.

III. Double Jeopardy

Finally, Dickens contends that “double jeopardy principles preclude his conviction and sentencing for both second degree murder (where DWI was an element

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of that crime) and driving while impaired separately.” Dickens concedes that he did not move to arrest judgment on the DWI conviction or otherwise raise this constitutional issue in the trial court.

We cannot reach the merits of this question because our Supreme Court has held that this type of double jeopardy argument must be asserted at sentencing to be preserved for appellate review. *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010). In *Davis*, faced with a similar argument from the defendant, the Supreme Court explained that the “defendant was required to object at sentencing to preserve his arguments for appeal. To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.” *Id.*

We note that the State asserts, citing case law from this Court, that “double jeopardy is not implicated where a defendant is convicted and separately sentenced for second degree murder and for DWI.” See *State v. McAllister*, 138 N.C. App. 252, 256–57, 530 S.E.2d 859, 862–63 (2000). We cannot reach the merits of this unpreserved issue; Dickens must pursue it, if at all, through a post-conviction motion for appropriate relief.

Conclusion

We find no error in the trial court’s judgments.

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NO ERROR.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).