IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-612

No. COA22-10

Filed 6 September 2022

Mecklenburg County, Nos. 16 CRS 223316, 223318

STATE OF NORTH CAROLINA

v.

GAVIN SELBOURNE LARKIN

Appeal by defendant from judgments entered 10 June 2021 by Judge George Cooper Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Steven Armstrong, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant.

ARROWOOD, Judge.

¶ 1 Gavin Selbourne Larkin ("defendant") appeals from judgments following jury verdicts of guilty for felony hit and run and misdemeanor reckless driving, sentencing him to 24 months' probation on both charges. For the reasons that follow, we conclude that the trial court did not err in denying defendant's pretrial motion to dismiss and in admitting into evidence defendant's driving record, but that it did err in sentencing

defendant to 24 months' probation on the misdemeanor reckless driving charge.

I. Background

¶ 2 On 2 June 2016, a "Selbourne Larkin" rented a 2016 Dodge Ram Truck (the "truck") from Enterprise Car Rental ("Enterprise"). On 14 June 2016, the truck, while in transit, struck a telephone pole and then a house in Cornelius, North Carolina. The owner of the house came outside to the scene of the accident and discovered Devin Gallion ("Gallion") laying on the ground. Gallion was transported to a hospital for treatment of his injuries, where he remained for several weeks. The truck was "towed from the scene to be returned to Enterprise . . . ."

¶ 3 On 16 June 2016, defendant "called 911" to report that the truck "was taken by either his brother . . . or . . . Gallion, as both lived with him." Thereafter, police officers came to defendant's home, looked up the accident report, and confronted defendant, stating that witnesses at the scene of the accident on 14 June 2016 had identified him as the driver of the truck; defendant denied the allegation. On that same day, Enterprise "secured" someone "to retrieve the truck from [a] tow yard . . . ."

¶ 4 On 19 June 2016, arrest warrants were filed in Mecklenburg County against defendant alleging one count each of hit and run and aggressive driving.[1] On

[1] Defendant originally had a third charge against him for driving while license revoked. The State later dismissed the charge because "there was no notice provided to the [d]efendant of the revocation prior to . . . the offense date of this case."

20 February 2017, the Mecklenburg County Grand Jury indicted defendant on charges of felony hit and run and misdemeanor reckless driving; defendant was later indicted on 15 July 2019 via a superseding indictment on the charge of felony hit and run.

¶ 5 On 19 May 2021, defendant filed a pretrial motion to dismiss, arguing that the State had violated defendant's constitutional rights by releasing the truck without processing it and thus failing to make it available to defendant "for inspection and testing . . . ." The motion came on for a pretrial hearing on 27 May 2021 in Mecklenburg County Superior Court, Judge George Cooper Bell presiding.

¶ 6 The trial court received testimony from Officer Bryan McGahan ("Officer McGahan") and Lieutenant Steve Davis ("Lieutenant Davis"), as well as, among other things, photographs of the truck at the scene of the accident, Gallion's statement to police, and an "unauthorized use report." Gallion's statement to the police from the night of the accident read:

> Coming from Charlotte headed back to Cornelius . . . . We stopped at a restaurant in Huntersville. When [defendant] got back in the truck Savannah was getting mad at him and they started arguing. When we left Huntersville and stopped at the Cashion's Quick Stop. [Sic] [Defendant] and I went inside and bought two Mike's Hard Lemonades. When we left the . . . store I got in the back passenger side seat. [Defendant] got in the driver's seat and we left to go home. I was about to put my seatbelt on and he said "Dude why do you always put your seatbelt on you b**** a** n****" so I took my seatbelt off. . . . . We started going

> super fast, like 80mph, then we hit something. I was bouncing all over the place so I grabbed the passenger seat and we hit the house. The air bags went off then I blacked out. I woke up to someone pulling me out of the truck.

¶ 7 Officer McGahan testified that he was the first officer to arrive at the scene of the accident on the night of 14 June 2016; he parked about 50 yards away from the house into which the truck had collided due to downed power lines. Lieutenant Davis, as well as several other officers, then responded to the scene. A crowd began to form; someone from the crowd "pointed out an individual, and claimed that to be the driver of the truck[.]" When Officer McGahan "saw that individual walking away" he tried to "catch up" to get the individual to stop, but was unsuccessful. Officer McGahan stated that "the person running away" from him that night "could have" been defendant, based on Officer McGahan's prior dealings with defendant, as "[t]he stature was about the same."

¶ 8 Officer McGahan observed Gallion "lying on the driveway close to the truck[,]" as well as "another female somewhere near the truck . . . ." Officer McGahan quickly determined that the truck belonged to Enterprise, though he was unable to determine who had rented the truck that night. Officer McGahan learned firsthand from Gallion and "the female" that they had been occupants of the truck at the time of the crash. Gallion and "the female" then "spoke to other officers on the scene." Later on

that night, Officer McGahan learned that defendant was the third "suspected occupant" of the truck.

¶ 9 Officer McGahan observed "the truck . . . against the house[,]" while its interior had "property scattered throughout" and "[a]irbags deployed." Officer McGahan did not, however, see any blood inside the truck. He testified that the truck was photographed at the scene, but was neither processed for evidence nor "ceased [sic] for investigative purposes[.]" Instead, Officer McGahan "requested a tow truck to remove it" so that it could be returned to Enterprise. While testifying, Officer McGahan could not recall why he "didn't process the scene[.]" Officer McGahan also did not "collect" the "cans of Mike's Hard Lemonade" located inside the truck.

¶ 10 At the close of all evidence at the pretrial hearing, the trial court denied defendant's motion to dismiss in open court. The trial court later filed a written order reflecting the same, in which it reasoned that, "[e]ven if the truck and its contents *might* have been *potentially* favorable to the Defense, . . . [d]efendant failed to demonstrate what could have been done to determine who was driving the truck *at the time* of the crash[.]" (Emphasis in original.) Furthermore, defendant had failed to show "irreparable prejudice . . . ." The trial court quoted the following in its analysis: "[T]he Due Process Clause does not 'impose[ ] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.' " *State v.*

Taylor, 362 N.C. 514, 525-26, 699 S.E.2d 239, 253 (2008) (second alteration in original) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L .Ed. 2d 281, 289 (1988)).

¶ 11 The matter proceeded to trial. The State offered testimony from, among others, Gallion and Julie Barnes ("Barnes"), one of the owners of the home into which the truck had collided.[2] The State also offered into evidence, among other things, photographs of the scene of the accident and the truck, a rental agreement from Enterprise, an "unauthorized use report[,]" a statement from Officer McGahan, Gallion's medical records, and defendant's North Carolina Department of Motor Vehicles record (the "DMV record"). The defense did not offer any testimony or evidence.

¶ 12 Gallion testified that he had known defendant for two years at the time of the accident, and that, to him, defendant "was like family[,] . . . [a] brother that [he] never had[.]" Gallion had started working for defendant in 2016 in a vehicle detailing business, and testified that defendant used the truck for personal use and for transporting equipment for the business.

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[2] Savannah Robinson, who was a passenger in the truck on 14 June 2016, was also present at trial as a witness for the State. However, after she began to testify, the trial court struck her testimony upon discovering that she had accepted money from Gallion during the trial to pay for her transportation to court.

¶ 13 On 14 June 2016, Gallion and defendant were spending time together. Defendant drank one bottle of "Mike's Hard Lemonade[,]" and then the two drove the truck from Cornelius to Charlotte, where they met a friend, Savannah Robinson ("Robinson"), at her home. There, the three "started drinking peach [v]odka." Though Gallion was not sure how much vodka defendant and Robinson drank that night, he knew that the bottle was full when they began drinking and was "gone" by the time they left Robinson's house.

¶ 14 The three left Charlotte in the truck; defendant drove while Gallion sat in the back passenger seat behind Robinson, who sat in the front passenger seat. According to Gallion, defendant was "speeding like crazy down the damn highway." Defendant then stopped in a restaurant parking lot "somewhere in Huntersville[,]" leaving Gallion and Robinson in the truck for about 20 minutes. When defendant returned to the truck, he and Robinson got into an argument. Then, defendant drove to a gas station, where he and Gallion each bought two "Mike's Hard Lemonades."

¶ 15 After leaving the gas station, Gallion began to put his seat belt on, "until [defendant] told [him] to take it off and quit being a little b**** about it." Defendant continued: "I'm not going to wreck the damn truck. You should know me better than that." Gallion decided to take his seat belt off because he trusted that defendant "would be able to control the vehicle even though [Gallion] already knew that [defendant] was intoxicated and high." According to Gallion, every time he had seen

defendant "intoxicated and high" in the past, defendant "always had control of that vehicle all the time."

¶ 16 Defendant sped down the road while continuing to argue with Robinson. Gallion told defendant to "slow down," but defendant did not listen to him. Gallion then tried to "go to sleep and just wake up until it was over." When Gallion woke up, the truck "hit something." He "immediately grabbed the back of the seat" and was "knocked out unconscious." Gallion then faded in and out of consciousness, and woke up in a hospital. Months after the collision, defendant approached Gallion in public "to apologize for leaving [him] in the truck[.]"

¶ 17 Barnes testified that on the night of 14 June 2016, she heard "a loud vehicle coming down the road" followed by "a loud pop." Then, she heard the truck "riveting [sic] towards the house" and felt "the house shaking." She called 911, walked outside with her husband, and saw two people: "a girl standing kind of limping" and "a guy laying on the ground." The truck was "up against [her] house."

¶ 18 Barnes observed "a separate gentleman walking down the street that came over the power lines to" the man on the ground. Barnes told the third individual "to get off the property[,]" but "[h]e did not." She also told him not to touch the man on the ground, but "[h]e did." "He rolled him over once and flipped him back over and then medic came." Barnes then observed the third individual speak to the "fire department or medic . . . ." When "the police department finally came to get a

statement," the "man who was on the ground" repeated the name "Gavin" "a couple of times."

¶ 19 After Barnes's testimony, the State offered into evidence defendant's DMV record dated 25 August 2016, which indicated that defendant's driver's license was suspended at the time of the accident. The defense objected, arguing that the DMV record was irrelevant because "[t]he State ha[d] dismissed the driving while license revoked charge . . . ." The defense also argued that the DMV record "would be misleading because" there was no proof that defendant had notice "that his license was in a state of revocation." The State argued that the DMV record was relevant because, among other reasons, it established defendant's identity, as the person "listed on these Enterprise business records is a Selbourne Larkin living at that same address[,]" and because it supported defendant's "motive for fleeing the wreck" to avoid being "caught without a license." The trial court concluded that, under Rule 403, the DMV record constituted "probative information that the jury needs to see[,]" and thus received into evidence a redacted version of the DMV record. The State and the defense then rested.

¶ 20 The jury returned a guilty verdict for felony hit and run inflicting serious bodily injury and a guilty verdict for misdemeanor reckless driving. The trial court entered judgments finding defendant to be a Prior Record Level II for sentencing purposes, sentenced defendant to concurrent sentences of 15-to-27 months on the felony hit and

run charge and 30 days on the misdemeanor reckless driving charge, then suspended the sentences in favor of 24 months' supervised probation for each charge. Defendant gave notice of appeal in open court.

II. Discussion

¶ 21 Defendant argues that the trial court erred by denying his motion to dismiss, admitting into evidence his DMV record, and by sentencing him to 24 months' probation for misdemeanor reckless driving.

A. Motion to Dismiss

¶ 22 Defendant contends the police's failure to make the truck available to the defense "violated [his] constitutional and discovery rights." Particularly, defendant argues that "forensic testing of the airbags could have shown who was driving" the truck on the night of the collision. Thus, according to defendant, the trial court erred in denying his pretrial motion to dismiss.

¶ 23 "We review a trial court's denial of a motion to dismiss *de novo*." *State v. Thomas*, 268 N.C. App. 121, 131, 834 S.E.2d 654, 662 (2019) (citation omitted), *disc. review denied*, 374 N.C. 434, 841 S.E.2d 531 (2020). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *State v. Hunt*, 345 N.C. 720, 725, 483 S.E.2d 417, 420 (1997) (quotation marks omitted) (alteration in original) (quoting *Arizona v. Youngblood,* 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289 (1988)).

¶ 24 Here, the trial court concluded that defendant had not shown that the Cornelius Police Department acted in bad faith by not processing the truck and releasing it to Enterprise. This reasoning is supported by the record; Officer McGahan testified that police officers took multiple pictures of the contents of the truck, which were subsequently presented to the trial court, and that there were no signs of blood in the truck. Furthermore, the State had access to plenty of documentary and testimony evidence indicating that defendant was the driver on the night of the accident. Defendant has thus failed to demonstrate that the truck possessed "apparent" "exculpatory value"; a mere remark that it *could have* shown, against the greater weight of the other evidence, who was the driver on the night of 14 June 2016 is insufficient. *See id.* at 725, 483 S.E.2d at 421 (citation omitted).

¶ 25 Lastly, defendant's argument that "the *Youngblood* bad faith test should be rejected under our State Constitution" starkly contrasts with our applicable law. Indeed, as quoted above, our Supreme Court adopted the "*Youngblood* bad faith test" in whole in *State v. Hunt*. *See id.* at 725, 483 S.E.2d at 420. Thus, defendant's argument is of no moment.

¶ 26 Accordingly, we are persuaded that the trial court did not err in denying defendant's motion to dismiss.

B. Driving Record

¶ 27 Defendant argues the trial court erred by admitting into evidence defendant's redacted DMV record showing that his license had been suspended at the time of the collision "where there was no evidence [he] had notice of the suspension." Specifically, defendant argues he was prejudiced by this admission because, "[i]f the jury believed that [defendant] was driving," it would have been swayed to view his driving with a suspended license as exhibiting "a disregard for the law and public safety[.]"

¶ 28 Rule 403 of our Rules of Evidence provides: "Although relevant, 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 (2021). "This Court reviews a trial court's admission of evidence under Rule 403 . . . for abuse of discretion . . . ." *State v. Enoch*, 261 N.C. App. 474, 487, 820 S.E.2d 543, 553 (2018) (citations omitted). "An abuse of discretion occurs when the trial court's ruling is manifestly unsupported by reason." *Id.* (citation and quotation marks omitted).

¶ 29 "When reviewing a trial court's Rule 403 evidentiary ruling, we generally give great deference to the sound discretion of the trial court." *Id.* at 496, 820 S.E.2d at 559 (citation and quotation marks omitted). Thus, an "appellant must demonstrate a reasonable possibility that, but for the admission of this evidence, the jury would

have reached a different result." *Id.* at 487, 820 S.E.2d at 553 (citations and quotation marks omitted).

¶ 30 Here, not only is the DMV record relevant for identifying defendant as the individual to whom Enterprise had rented the truck, but defendant has not shown that, absent this admission, the jury would have reached a different result. Indeed, the DMV record did not alone tip the scales against defendant; rather, the trial court received an abundance of evidence, all of which pointed to defendant as the driver of the truck on the night of the accident. Gallion's testimony, in particular, illustrated in substantial detail the events leading up to the accident, painting a vivid picture of defendant as a dangerous driver. Even assuming, *arguendo*, that the trial court erred in receiving the redacted DMV record, the remaining evidence was more than sufficient for a jury to conclude it was defendant who drove the truck in "disregard for the law and public safety" on the night of the accident.

¶ 31 Accordingly, defendant has not shown prejudice, and the trial court did not err in allowing the redacted DMV record into evidence.

C. Misdemeanor Reckless Driving Sentencing

¶ 32 Defendant argues that the trial court erred in sentencing him to 24 months' probation for the misdemeanor reckless driving charge because it failed to state the aggravating factors as required by N.C. Gen. Stat. § 15A-1343.2(d)(1), which provides that, absent said factors, a misdemeanor warrants only a maximum of 18 months'

probation. "Alleged statutory errors are questions of law reviewed de novo on appeal." *State v. Porter*, 2022-NCCOA-166, ¶ 5 (citation and quotation marks omitted).

¶ 33 "N.C. Gen. Stat. § 15A-1343.2(d)(1) . . . provides that a defendant who is sentenced to community punishment for a misdemeanor shall be placed on probation for no less than 6 months and no more than 18 months, unless the trial court enters specific findings that longer or shorter periods of probation are necessary." *State v. Sale*, 232 N.C. App. 662, 664, 754 S.E.2d 474, 476 (2014). "This Court has remanded for resentencing where the trial court violated section 15A-1343.2(d)(1) by entering a period of probation longer than 18 months without making the necessary findings that the extension was necessary." *Id.* (citations omitted).

¶ 34 The record and transcript indicate that the trial court did not make specific findings as to why a period of probation longer than 18 months was warranted for misdemeanor reckless driving. Furthermore, the trial court failed to mark on the sentencing form that a longer period of probation than what N.C. Gen. Stat. § 15A-1343.2(d) provides for misdemeanors was necessary. *See Porter*, ¶ 4 ("The State concedes that 'the trial court erred when it failed to correctly mark the check box on the sentencing form' to indicate that the trial court found a longer period of probation than that specified in N.C.G.S. § 15A-1343.2(d)(1) was necessary."). "This omission constitutes error." *Id.* ¶ 6 (citations omitted).

¶ 35 The State fails to address N.C. Gen. Stat. § 15A-1343.2(d) or the case law that is directly contrary to its position. The State's attempt to argue that defendant's conduct would support such an enhancement of the period of probation without addressing the controlling statutory and case law to the contrary borders on misrepresentation of the law to the Court, which would be sanctionable.

¶ 36 We vacate the misdemeanor reckless driving judgment "and remand this portion of defendant's case for resentencing." *State v. Love*, 156 N.C. App. 309, 318, 576 S.E.2d 709, 714 (2003) (citation and quotation marks omitted). "The trial court must reduce defendant's probation to the statutory period of [six to eighteen months] or enter appropriate findings of fact that a longer period of probation is necessary." *Id.* (citation and quotation marks omitted) (alteration in original).

III. Conclusion

¶ 37 For the foregoing reasons, we conclude that the trial court did not err in denying defendant's motion to dismiss and in admitting into evidence defendant's DMV record. We also conclude that the trial court erred by failing to make specific findings indicating why a period of probation longer than what is provided by statute was warranted for defendant's misdemeanor reckless driving charge. Accordingly, we affirm the trial court's felony hit and run judgment and remand the misdemeanor reckless driving judgment for resentencing.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge STROUD and Judge COLLINS concur.

Report per Rule 30(e).