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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-829

No. COA22-247

Filed 6 December 2022

Union County, Nos. 18 CRS 52019, 704375; 19 CRS 530

STATE OF NORTH CAROLINA

v.

BUCKY SCOTT SMITH

Appeal by defendant from judgment entered 4 May 2021 by Judge Patrick Thomas Nadolski in Union County Superior Court. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State.

William D. Spence for defendant.

DIETZ, Judge.

¶ 1 Defendant Bucky Smith appeals his conviction for second degree murder stemming from a fatal motor vehicle accident. Smith makes a series of evidentiary challenges, asserts that the trial court abused its discretion in a ruling on discovery violations, and challenges the sufficiency of the evidence to support the murder conviction.

¶ 2 As explained below, Smith has not shown that the admission of the challenged expert testimony rose to the level of plain error or that admission of the Rule 404(b) evidence was error. Smith likewise has not shown that the trial court's discovery ruling amounted to an abuse of discretion. Finally, the State presented substantial evidence of the essential elements of the second degree murder charge, meaning the trial court properly denied Smith's motion to dismiss. We therefore find no plain error in part and no error in part in the trial court's judgment.

Facts and Procedural History

¶ 3 Around 1:30 a.m. on 19 March 2018, paramedic Daniel Beekman and his partner were on duty in Union County when they discovered an upside-down Jeep in a ditch on the side of the road. Beekman saw Defendant Bucky Smith "standing at the driver's side" of the vehicle. Smith approached the ambulance, saying, "get Crissy out, get Crissy out."

¶ 4 Beekman walked down the embankment toward the passenger side of the Jeep. Beekman located a woman, Smith's cousin Crissy, lying face down underneath the vehicle. Her head and torso were through the windshield and pinned under the passenger-side dashboard and hood of the vehicle. She had a weak pulse, nonlife-sustaining breathing, and multiple severe injuries. After first responders removed Crissy from underneath the vehicle, they pronounced her dead at the scene. Smith did not have any obvious injuries. Smith declined treatment, "[t]o the point of

becoming very belligerent and aggressive," and he refused to answer questions or give his name.

¶ 5 Around 2:00 a.m., law enforcement officers, including Trooper Joseph Lindley and Sergeant Jeffrey Nash, responded to the scene of the crash. The officers noticed beer cans and a case of beer around the Jeep, and observed that Smith appeared to be intoxicated, with red glassy eyes, slurred speech, and a strong odor of alcohol on his breath. Sergeant Nash attempted to speak with Smith, but Smith only responded that Crissy was driving and otherwise refused to talk to the officers. Smith also told Trooper Lindley that he was in the passenger seat at the time of the crash and that Crissy was driving. When Lindley asked how the wreck happened, Smith responded, "Y'all need to fix all these f***ing potholes." Trooper Lindley then asked Smith about evidence of a burnout from tire tracks in the road, and Smith "became more belligerent again," stating things like "talk to my F'ing lawyer" and "Why would I help you."

¶ 6 In 2019, the State charged Smith with second degree murder, felony death by vehicle, and driving while license revoked for impaired revocation. The case went to trial in April 2021.

¶ 7 At trial, witnesses testified to the events leading up to the time of the crash. Crissy's friend, Heather Rogers, testified that Smith came to her house on the evening of 18 March 2018 to pick up Crissy, and that Smith drove there in his Jeep. Rogers

explained that Crissy lived with her in March 2018 and that Crissy did not have a car at the time and never drove anyone else's car during that time period. Rogers testified that she thought Smith was drunk because she heard him slurring his speech. Rogers begged Crissy to stay with her instead of going with Smith, but Crissy got into the front passenger seat of Smith's Jeep and Smith drove away.

¶ 8 Another friend, Amber Craig, testified that Smith and Crissy arrived at her home at 1:09 a.m. on 19 March 2018. Craig observed that Smith had a beer and his keys in his hand. Smith "was drunk" and "couldn't even stand straight." Craig was mad at them for coming to her house at such a late hour and they left after 15 to 20 minutes. Craig stated that the site of the wreck was only about three minutes away from her house.

¶ 9 Beekman, Trooper Lindley, and Sergeant Nash testified to the events following the crash on 19 March 2018 as detailed above. Trooper Lindley also testified that Smith repeatedly refused to submit to breath tests or blood draws at the scene, at the hospital, or at the jail following his arrest. Trooper Lindley ultimately obtained a search warrant for Smith's blood. Blood drawn from Smith at 7:13 a.m. on 19 March 2018 showed a blood alcohol concentration of .12. Smith's blood also tested positive for cocaine.

¶ 10 Sergeant Nash testified as an expert in accident reconstruction, stating that he determined from his review of the evidence that the Jeep did a burnout and

performed a complete donut in the road. Nash explained that marks on the road and surrounding area indicated that the driver tried to straighten out, but overcorrected and ran off the left side of the road into the grass before turning back towards the right and driving across the right side of the road, overcorrecting again to the left and causing the vehicle to fishtail into the left shoulder and off the road, overturning onto the passenger side of the vehicle. Most of the damage to the vehicle as it rolled over was to the front passenger side, leaving the driver's area mostly intact. Based on the physical evidence, Nash opined that Smith was the driver, that Crissy was in the front passenger seat, and neither was wearing a seatbelt.

¶ 11 The State also presented testimony from Paul Glover as an expert in blood alcohol physiology and pharmacology, including retrograde extrapolation. Glover testified that, according to his calculations, approximately one hour after the crash, Smith's blood alcohol concentration was equal to or greater than .20.

¶ 12 Trooper Lindley testified that, when he brought Smith to a magistrate for processing on the driving charges, the magistrate asked Smith if "he wanted to add anything" to Lindley's summary of the basis for Smith's arrest. Smith stated, "I was dropping my cousin off," and then "put his head down and stated, 'oh, shit.'" The magistrate then asked Smith if he "knowingly" drove the vehicle "knowing your license was suspended," and Smith responded, "yes, ma'am."

¶ 13 The State also presented testimony that Smith wrote a letter to Crissy's father

in May 2020, asking for forgiveness. In the letter, Smith wrote, "I'm truly sorry for my decisions again. Please find some way to forgive me. It was an accident caused by bad decisions."

¶ 14 The trial court permitted the State to present evidence of Smith's prior convictions for driving without a license and driving while license revoked, along with a July 2013 driver's license revocation letter. The letter stated that Smith's driving privilege was suspended "for refused chemical test." The trial court ruled that this evidence was admissible under Rule 404(b) to show malice, the intent element of the second degree murder charge.

¶ 15 At the close of the State's evidence and again at the close of all evidence, Smith moved to dismiss the second degree murder charge, arguing that the State failed to present sufficient evidence to prove that he was driving or that he acted with the requisite malice. The trial court denied the motions. Smith did not present any evidence.

¶ 16 The jury convicted Smith of all charges. The trial court sentenced Smith to 309 to 383 months in prison for second degree murder and arrested judgment on the remaining charges. Smith appealed.

Analysis

I. Admission of testimony of accident reconstruction expert

¶ 17 Smith first argues that the trial court committed plain error by allowing the

State's accident reconstruction expert, Sergeant Nash, to testify to his opinion that Crissy was in the passenger seat at the time of the accident and that the accident occurred when Smith drove recklessly and overcompensated after losing control of the vehicle. Smith contends that this expert testimony lacked a sufficient foundation as required by Rule 702 of the Rules of Evidence.

¶ 18 Smith concedes that he did not object to this testimony at trial and thus it is reviewable only for plain error. The plain error test has three general components. First, the defendant must show that "a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Second, the defendant must show that the error had a probable impact on the outcome—that is, "that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Finally, because plain error "is to be applied cautiously and only in the exceptional case," the defendant must show that the error is the type that seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334.

¶ 19 Rule 702 requires that expert testimony must be "based upon sufficient facts or data," be "the product of reliable principles and methods," and demonstrate that the "witness has applied the principles and methods reliably to the facts of the case." N.C. R. Evid. 702(a)(1)–(3). "To satisfy Rule 702's three-pronged reliability test, an expert witness must be able to explain not only the abstract methodology underlying

the witness's opinion, but also that the witness reliably applied that methodology to the facts of the case." *State v. McPhaul*, 256 N.C. App. 303, 316, 808 S.E.2d 294, 305 (2017). Importantly though, "Rule 702(a) . . . does not mandate particular procedural requirements for exercising the trial court's gatekeeping function over expert testimony," and in many cases, "the area of testimony may be sufficiently common or easily understood that the testimony's foundation can be laid with a few questions in the presence of the jury." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citations omitted).

¶ 20 "Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury." *State v. Maready*, 205 N.C. App. 1, 17, 695 S.E.2d 771, 782 (2010). This Court has recognized accident reconstruction as a sufficiently reliable method of scientific testing. *State v. Speight*, 166 N.C. App. 106, 116–17, 602 S.E.2d 4, 12, *aff'd as modified,* 359 N.C. 602, 614 S.E.2d 262 (2005), *cert. granted, judgment vacated on other grounds,* 548 U.S. 923 (2006).

¶ 21 The trial court properly may admit expert testimony on accident reconstruction where the expert witness testifies to their qualifications in the field as an experienced law enforcement officer with specialized training in accident reconstruction and "the record shows that [the expert] had acquired skills to the

extent that they were better qualified than the jury to form an opinion." *Id.*

¶ 22 Here, before providing his expert opinions about where Smith and Crissy were seated in the vehicle, who was driving, and how the crash occurred, Sergeant Nash testified at length about his training and experience in accident reconstruction and collision investigations as a law enforcement officer. He further explained how he applied that training and experience to his investigation in this case, describing in detail how his observations of the physical evidence at the scene of the crash in this case—specifically, the marks in the road and on the sides of the road, the damage to and location of the vehicle, the location of and injuries to Crissy's body, the lack of injuries to Smith and his presence as the only other person at the scene after the crash aside from first responders—led Sergeant Nash to form his conclusions about how the crash occurred and where the individuals involved were located in the vehicle.

¶ 23 Smith asserts that this foundation was insufficient because there were no "facts or data offered in evidence" to support Nash's opinion that Smith "was the driver of the Jeep or that he had been driving recklessly prior to overcompensating" and no testimony explaining how Nash applied the principles and methods of accident reconstruction. We disagree. Sergeant Nash's testimony provided a sufficient foundation to show that, based on his training and experience, he had "a superior ability to form conclusions based upon the evidence gathered from the scene of the

accident" than the jury. *Maready*, 205 N.C. App. at 17, 695 S.E.2d at 782; *see also Speight*, 166 N.C. App. at 116–17, 602 S.E.2d at 12. Nash both explained his general procedures for conducting accident investigations and reconstruction and how he applied those procedures to draw his conclusions in this case. *McPhaul*, 256 N.C. App. at 316, 808 S.E.2d at 305.

¶ 24 Moreover, even assuming error in the admission of Nash's expert testimony, Smith has not met his burden to show that this is the type of "exceptional case" where the error seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. This type of expert testimony on accident reconstruction routinely is used in cases involving motor vehicle accidents when there are no eyewitnesses to the event. *Speight*, 166 N.C. App. at 116–17, 602 S.E.2d at 12. The record in this case demonstrates that Nash was trained and qualified to analyze the physical evidence at the crash scene to determine what had happened and that he followed standard law enforcement procedures in doing so. If Smith thought that additional foundation was necessary, he could have raised an objection or requested an opportunity for additional *voir dire* questioning of Nash. Not only did not Smith not do so, but he went on to cross-examine Nash about his opinions and "elicited much of the same testimony," leaving "nothing in the record to indicate to us that this line of questioning was not one Defendant wished to pursue at trial." *Maready*, 205 N.C. App. at 17, 695 S.E.2d at 782.

¶ 25 Finally, Nash's opinions about the nature of the crash—specifically his opinions that Smith was the driver and had been driving recklessly—were consistent with and corroborated by the testimony of the other witnesses at trial who described the events leading up to the accident and their observations at the crash site. *See State v. Sasek*, 271 N.C. App. 568, 574–75, 844 S.E.2d 328, 333–34 (2020); *State v. Piland*, 263 N.C. App. 323, 338–39, 822 S.E.2d 876, 888 (2018); *State v. Belk*, 201 N.C. App. 412, 419, 689 S.E.2d 439, 443 (2009). In light of Sergeant's Nash foundational testimony, and the other evidence supporting the same inferences and conclusions, Smith has not met his burden to show that the admission of Nash's expert testimony was a fundamental error that had a probable impact on the outcome and that calls into question the fairness and integrity of the judicial system. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. Accordingly, we hold that the trial court did not commit plain error by admitting Sergeant Nash's expert testimony.

II. Admission of testimony of retrograde extrapolation expert

¶ 26 Smith next argues that the trial court erred by allowing the State's expert on retrograde extrapolation, Paul Glover, to give his opinion in his written report and accompanying testimony that "the poor driving and observed signs of impairment demonstrated by the defendant are consistent with the calculated" blood alcohol concentration. Smith asserts that Glover had "no basis or foundation for asserting such an opinion" because he "had no contact with defendant nor did he observe the

driver of the Jeep at the time of the accident."

¶ 27 Our review of this issue is again limited to plain error. Although Smith objected to Glover's testimony and the admission of his written report at trial, he did not challenge the admission of this evidence on the grounds asserted on appeal.

¶ 28 Glover made the challenged statements as part of his explanation of how he conducts an accurate retrograde extrapolation of a person's blood alcohol concentration. Glover testified that he has "to look and see if the calculation, based on my experience and training, is consistent with any observations that were made or any evidence with respect to the crash" because retrograde extrapolation is "not simply a question of calculating or doing the math. I have to look to see if a behavior in my opinion is consistent with the calculated value."

¶ 29 An expert witness "may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion." *State v. Wade*, 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979). This is so because the "jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it." *Id.* at 463, 251 S.E.2d at 412. Thus, an expert witness "should be allowed to relate what matters he necessarily considered as a 'case history' not as to indicate the ultimate truth thereof, but as one of the bases for reaching his conclusion." *Id.*

¶ 30 Considering Glover's challenged statement in context, Glover was not

testifying to his personal observation or belief that Smith exhibited signs of impairment, that Smith was driving, or that Smith drove recklessly. Glover merely was explaining that part of his retrograde extrapolation process was to compare the results of his calculation with the other information he received in the case to see if the extrapolation was consistent with the information described in the investigating officer's report. We thus find that the challenged statement from Glover was properly admitted for the purpose of explaining how he conducted his retrograde extrapolation analysis. *Id.* at 462–63, 251 S.E.2d at 412.

¶ 31 In any event, even assuming error in the admission of the challenged statements, Smith has not shown plain error. Other witnesses testified at trial that they personally observed Smith showing obvious signs of severe impairment both before and immediately after the crash. The State presented witnesses who testified that Smith was driving the car on the night of the crash, that Crissy did not drive, that Crissy was riding in the passenger seat that night, and that Crissy's body was pinned under the heavily damaged passenger side of the vehicle. The State also presented evidence that Smith did not have a driver's license and that Smith knew his license had been revoked. Finally, the investigating officers, whose report Glover relied upon in his testimony, testified at trial about their own observations and the investigation. In light of this other evidence, Smith has not shown that, but for the challenged statements during Glover's retrograde extrapolation testimony, the jury

probably would have reached a different verdict. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. Accordingly, we hold that the trial court did not commit plain error by admitting Glover's testimony.

III. Denial of request for discovery sanctions

¶ 32 Smith next argues that the trial court erred by declining to dismiss the charges against him or continue the case as a sanction for a discovery violation that occurred when the State initially submitted an incomplete copy of Trooper Lindley's "Driving While Impaired Report" that omitted some writing along the outside margin of the report. The State later submitted the complete report including that writing along the margins.

¶ 33 "We review a ruling on discovery matters for an abuse of discretion. An abuse of discretion will be found where the ruling was so arbitrary that it cannot be said to be the result of a reasoned decision." *State v. Pender*, 218 N.C. App. 233, 240, 720 S.E.2d 836, 841 (2012) (citations omitted).

¶ 34 Here, the record indicates that the discovery violation was minor, likely inadvertent, and not prejudicial. The State corrected the omission by submitting the complete report to Smith's counsel in November 2020, well in advance of trial. Additionally, the complete document did not include any new information and was duplicative of other information that had already been provided to Smith in discovery.

¶ 35 At the pretrial hearing on this issue, the trial court reviewed the documents

and determined that Smith was not prejudiced by the discovery violation because the additional notes in the complete copy of the report did not include any new information. The trial court also permitted Smith to ask for additional time to review the documents during trial if necessary. In light of these factors, the trial court's decision not to dismiss the charges or impose any other sanction for the violation was a reasoned one and well within the trial court's sound discretion. *State v. Allen*, 222 N.C. App. 707, 733, 731 S.E.2d 510, 528 (2012). We therefore reject this argument.

IV. Admission of evidence of prior charges

¶ 36 Smith next argues that the trial court erred by allowing the State to admit into evidence the July 2013 letter revoking Smith's driver's license. He contends that the letter should have been redacted to remove the reference to his refusal to submit to a chemical test. Without that redaction, Smith argues, the letter was inadmissible under Rule 404(b) of the Rules of Evidence because it improperly indicated he had a "habit or propensity" to drive while impaired.

¶ 37 "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith," but it is "admissible for other purposes," including to show "intent." N.C. R. Evid. 404(b). Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs

or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990).

¶ 38 Smith cites to *State v. Scott,* 167 N.C. App. 783, 785–86, 607 S.E.2d 10, 12 (2005), to support his contention that the admission of suspension letters without redaction of the specific offenses that caused the revocations is a violation of Rule 404(b). But *Scott* concerned a defendant charged with driving while license revoked and this Court held that, although the letters were "appropriate as evidence of notice" for that charge, there was no proper evidentiary basis to admit the underlying reasons for the license revocations. *Id.*

¶ 39 Here, by contrast, the State charged Smith with second degree murder, which required the State to prove the intent element of malice. The trial court found that Smith's prior convictions for driving while license revoked and driving without a license, along with the July 2013 revocation letter, were admissible to support the intent element of that second degree murder charge under Rule 404(b). The trial court also gave the jury a limiting instruction, stating that the prior charges could only be considered for the limited purpose of showing the intent element of that offense. The trial court's ruling, in combination with its limiting instruction, is consistent with the admissibility rules of Rule 404(b).

¶ 40 In any event, Smith cannot prevail on this issue unless he can show that this error is prejudicial—that is, that there is a reasonable possibility that "absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001). In this case, even setting aside the revocation letter, the State presented ample other evidence from which the jury could conclude that Smith was driving while impaired at the time of the crash. The jury heard evidence that Smith had the keys and was driving the Jeep in the hours and minutes leading up to the time of the crash; that Smith appeared drunk or intoxicated both before the crash and after; that Smith's blood alcohol concentration was still above the legal limit when a blood draw was completed more than five hours after the accident; that Smith made statements under oath after the crash that he had been driving; that Smith wrote a letter to Crissy's father asking for forgiveness and apologizing for the accident; and that the physical evidence at the scene indicated that Smith was driving and Crissy was in the passenger seat. In light of this other evidence of Smith's guilt in this case, there is no reasonable possibility that, had the unredacted letter not been admitted, the jury would have reached a different verdict.

V. Denial of motion to dismiss for insufficient evidence

¶ 41 Finally, Smith argues that the trial court erred by denying his motion to dismiss the second degree murder charge. Smith contends that the State failed to present sufficient evidence that he "was the driver of the Jeep automobile at the time

of the fatal collision" or that he "acted with the requisite degree of recklessness" to constitute malice.

¶ 42 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 43 A jury can "reasonably infer from the physical evidence" that the defendant was the driver of a vehicle based on witnesses' observations of the injuries resulting from the accident and the location of blood in the vehicle and on the occupants. *State v. Hernandez*, 188 N.C. App. 193, 198, 655 S.E.2d 426, 430 (2008). The State is not required to "prove to a scientific certainty that defendant was the driver of the car"

but instead must present evidence from which a reasonable juror could infer the fact from available direct and circumstantial evidence. *State v. Dula*, 77 N.C. App. 473, 474–75, 335 S.E.2d 203, 204 (1985).

¶ 44 Similarly, a reasonable jury can find malice from evidence of an act "which is inherently dangerous to human life" and that is "done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48–49 (2000). For example, evidence that the "defendant knew that he was driving with a suspended license tends to show that he was acting recklessly, which in turn tends to show malice." *State v. Rollins*, 220 N.C. App. 443, 450, 725 S.E.2d 456, 462 (2012). Likewise, evidence that the defendant drove while impaired can support a finding of malice because "any reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death." *State v. Fuller*, 138 N.C. App. 481, 488, 531 S.E.2d 861, 867 (2000).

¶ 45 Applying this precedent, the evidence presented at trial was sufficient to send the charge to the jury. Witnesses testified that Smith had the keys in his possession and was driving the Jeep both several hours and several minutes before the crash. When paramedics arrived on the scene immediately after the crash, Smith was "standing at the driver's side" of the vehicle. First responders testified all of the damage to the overturned Jeep was on the passenger side, that the driver's side was

intact, that Crissy was pinned under the passenger side and severely injured, and that Smith—the only other person at the scene other than first responders—appeared uninjured. And the State presented evidence that Smith acknowledged he was driving under oath before a magistrate and that he wrote a letter apologizing for the accident and his "decisions."

¶ 46 The physical evidence of the circumstances at the scene of the crash, considered together with witnesses' testimony about the events leading up to the crash and after the crash, was ample evidence from which the jury could infer Smith was the driver. *Hernandez*, 188 N.C. App. at 198, 655 S.E.2d at 430; *Dula*, 77 N.C. App. at 474–75, 335 S.E.2d at 204.

¶ 47 The State further presented evidence that Smith was heavily intoxicated and knew that he did not have a valid driver's license at the time of the crash. The State's witnesses testified that Smith was drinking before the crash; that Smith appeared drunk or intoxicated both before and after the crash; that Smith's blood alcohol concentration was well above the legal limit for a significant period of time after the crash; and that Smith knew his driver's license had been revoked. This evidence, indicating that Smith was driving while intoxicated and with knowledge that his license was revoked at the time of the accident, was sufficient for a reasonable jury to infer malice. *Rollins*, 220 N.C. App. at 450, 725 S.E.2d at 462; *Fuller*, 138 N.C. App. at 488, 531 S.E.2d at 867. Accordingly, we hold that the trial court did not err by

denying Smith's motion to dismiss the second degree murder charge.

Conclusion

¶ 48 For the reasons explained above, we find no plain error in part and no error in part in the trial court's judgment.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judges INMAN and JACKSON concur.

Report per Rule 30(e).