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IN THE COURT OF APPEALS OF NORTH CAROLINA

2023-NCCOA-16

No. COA22-628

Filed 17 January 2023

Wake County, Nos. 19CRS201042, 19CRS203119, 19CRS703266

STATE OF NORTH CAROLINA

v.

TIMOTHY RONALD COX, II, Defendant.

Appeal by defendant from judgments entered 11 January 2022 and 18 February 2022 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 29 November 2022.

Marilyn G. Ozer for defendant-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryne E. Hathcock, for the State-appellee.

GORE, Judge.

¶ 1

Defendant appeals the judgment rendered by jury verdict for second-degree murder. Defendant was convicted of second-degree murder and operating a motor vehicle to elude arrest after the jury returned guilty verdicts for both offenses. Upon review, we discern no error.

I.

¶ 2

On 16 January 2019, defendant was driving a Volkswagen GTI and began racing another driver in a BMW on US Highway 1. Law Enforcement Major Bird began following the racing vehicles in an “unmarked patrol” vehicle. The BMW driver exited the highway, and defendant continued on US 1. Defendant began speeding again and passed a vehicle in the “emergency section against the concrete median” so Major Bird turned on his lights to initiate a traffic stop. Defendant and Major Bird made eye contact when defendant turned and looked at Major Bird and then “floored it” and started passing cars to avoid being stopped. Major Bird was traveling about 100 mph chasing defendant, who was driving about 110 mph. Defendant then drove off into a grassy area near US-64 and Tryon Road and was “bouncing and getting airborne.”

¶ 3

Major Bird did not follow defendant at that point for safety reasons, and defendant soon ran into the back of a red vehicle that had come onto the US-64 ramp, which caused a “massive explosion of parts and steam and fluids everywhere.” Defendant claimed he “barely nicked” the right side of the red vehicle’s bumper and “clipped the . . . driver’s side taillight.” The red vehicle then crashed into a utility truck. The driver of the red vehicle, Scott Durso, sustained severe injuries from the force of the crash, and two days later was declared dead. At trial, Major Bird testified defendant told him at the crash site “I just didn’t want to get stopped.” Defendant

testified, “I was just being, you know a kid, you know, 24 years old. I thought I had a fast car, thought it was cool being out there. . . .” Additionally, he testified he had raced many times in the past and “had never hit nobody before, so [he] didn’t think [he] would hit anybody.”

¶ 4

During trial, the trial court overruled defendant’s pre-trial and trial objections to the State admitting multiple Facebook posts from defendant’s Facebook page. The Facebook posts admitted by the trial court included: (1) a shared post of a speedometer picture with the needle pointing at 100 mph and a caption, “Girls crying over dudes who think this is fast”; (2) a picture of a Volkswagon GTI with a caption over it, “Life’s a bitch, so I flirt with death”; (3) defendant’s post describing other drivers actions and his response, “Dude in his honda was in a turn right only lane tried going straight cause he was being impatient. . . . i already punched nailed 1 guy this one got his window smashed next one up is gonna require a casket I’ll deliver to his family in person y’all wanna drive like assholes down here Im showing you I’m better at being an asshole. . . .”; (4) defendant’s post, “Bitch on her cell phone took up 2 lanes I ran that that bitches off the road.. Think I feel bad? Hell nawwww”; (5) a picture of back of defendant’s Volkswagon GTI with caption, “Exhaust was done on Thursday”; (6) shared post stating, “What’s the max speed you’ve ever driven? Share if it was more than 120 mph,” defendant added, “173”; (7) defendant’s post, “This has now been the 3rd incident now where I’m am not driving like an asshole actually

following the road laws. That was the 3rd and final warning. I've gotten out of my car twice now in 3 weeks body counts are gonna start rising. I won't make it to a jail cell I'll take you and then I'll take my own. . . ."; (8) pictures of defendant's car with caption, "Proud 2012 Volkswagon GTI 2.0T owner!! More pictures later on!" (9) defendant's post, "Was in an accident This past saturday i was in passenger seat and walked away with a ruised asscheek the driver was brought to ER and has a broken arm. i Have no phone as it must have been thrown from the vehicle. I'm fine for anyone who doesn't know what happened. That was the shit news .. The good news is i GOT MY LICENSE BACK, just no vehicle. that's the iffy news! hope everyone has been good . . . !"

¶ 5

Defendant called an expert clinical psychologist witness who evaluated defendant and testified to defendant's mental state and previous diagnoses, which include: attention deficit hyperactivity disorder, major depressive disorder, generalized anxiety disorder, oppositional defiant disorder, bipolar disorder, and several learning disabilities. In admitting this evidence, defendant sought a defense that "he was in a manic state" when the incident occurred. Finally, defendant sought to include a jury instruction to allow the jury to consider defendant's mental capacity when considering the element of malice for second degree murder, but the trial court declined the request.

II.

¶ 6

Defendant argues the trial court erred by admitting defendant's Facebook page posts in violation of North Carolina Rules of Evidence 404(b), and that the admission of that evidence was unfairly prejudicial to defendant in violation of Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2022). Defendant also argues the trial court erred by denying defendant's request for a jury instruction that the jury could consider the evidence of defendant's mental state for avoidance of a mandatory presumption of malice.

A.

¶ 7

Defendant argues the trial court improperly applied Rule 404(b) in its overruling defendant's pretrial and trial objections to the admission of multiple Facebook posts. Additionally, defendant argues the trial court abused its discretion in determining these Facebook posts were more probative than prejudicial as defendant believes the posts were "grossly prejudicial." We disagree.

¶ 8

Our Supreme Court clarified the standard of review for evidentiary issues concerning Rule 404(b) and Rule 403 on appeal. If the trial court makes "findings of fact and conclusions of law," on appeal we review the record to determine if the "evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for

abuse of discretion.” *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Because there are multiple standards of review we must “conduct distinct inquiries.” *Id.*

¶ 9 The trial court in this case did not make findings of fact and conclusions of law in its overruling defendant’s objections. Defendant preserved the issue for appellate review by properly objecting during a pre-trial hearing and during the trial to the admission of defendant’s authored and shared Facebook posts. Accordingly, we review de novo the trial court’s application of Rule 404(b) to the admitted evidence.

¶ 10 The North Carolina Rules of Evidence 404(b) is a “general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant.” *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852 (1995) (citation omitted). The list of categories for “other crimes’ evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue” *Id.* at 284, 457 S.E.2d at 852–53 (citation omitted). However, this type of evidence may not be used to show defendant has a “propensity . . . to commit an offense of the nature of the crime charged.” *Id.* at 284, 457 S.E.2d at 852 (citation omitted).

¶ 11 The only limitations placed on this rule of inclusion, apart from propensity, are “similarity and temporal proximity.” *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (citation omitted). Similarity does not mean the prior act or crime must “rise to the level of the unique and bizarre,” but instead it qualifies “if there are some

unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.” *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890–91 (1991) (quotation marks and citation omitted). Our Supreme Court considers temporal proximity in conjunction with similarity and the relevant Rule 404(b) category. *See Lloyd*, 354 N.C. at 91, 552 S.E.2d at 610. It gives greater significance to timing when the previous act “arose out of a common scheme or plan” and gives less significance to timing when the prior act was considered a showing of “intent, motive, knowledge, or lack of accident.” *Id.* (citation omitted). In the latter situation, timing should be considered more for its credibility of the evidence rather than its appropriateness for admission. *Id.*

¶ 12 Once the trial court determines the evidence fits appropriately within Rule 404(b), it must apply the balancing test under Rule 403 to compare the probative value of the evidence with any prejudicial effect. N.C. Gen. Stat. § 8C-1, Rule 403. In balancing the probative value of the prior acts, wrongs, or crimes, the trial court has discretion to determine if the probative value is substantially outweighed by unfair prejudice. *State v. Fortney*, 201 N.C. App. 662, 666, 687 S.E.2d 518, 522 (2010). The trial court’s handling of this test may be indicative of its discretion, such as: hearing arguments “outside the presence of the jury,” including on the record its consideration of the “probative value versus prejudicial effect,” any exclusion of

evidence to suggest the court’s thoughtful determination, and the inclusion of limiting instructions. *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160–61.

¶ 13 The State admitted the Facebook posts as evidence supporting the element of malice for second-degree murder. The trial court overruled all except for one of defendant’s objections to admitting multiple Facebook posts as a show of defendant’s prior acts of “habitual bad driving” and a “mind bent on mischief.” “Second-degree murder is defined as (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation.” *State v. Arrington*, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018) (quotation marks and citation omitted). North Carolina Courts recognize multiple types of malice, but the State need only prove one type of malice to satisfy the element for second-degree murder. *See State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). The type of malice the State relied upon was an “inherently dangerous [act] . . . done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.” *Id.* This type of malice is “accompanied by a general intent to do the act itself but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing.” *State v. Snyder*, 311 N.C. 391, 394, 317 S.E.2d 394, 396 (1984) (citation omitted).

¶ 14 On appeal defendant challenges the factual similarity of the prior acts compared to the offenses tried by pointing to *State v. Al-Bayyinah* as support for when

a trial court erred in admitting evidence under Rule 404(b). 356 N.C. 150, 155–56, 567 S.E.2d 120, 123–24 (2002). In *Al-Bayyinah*, the trial court committed harmful error because it admitted evidence under Rule 404(b) for identity purposes that was “factually dissimilar” and involved “questionable identification procedures.” *Id.* at 157, 567 S.E.2d at 124.

¶ 15 This Court has previously stated that the purpose for admitting the evidence under Rule 404(b) affects the amount of significance placed upon the similarity between the prior act and the charged crimes. *State v. Golden*, 224 N.C. App. 136, 143–44, 735 S.E.2d 425, 431 (2012). When the evidence is admitted for identity or a common plan, the similarity between the acts is of greater significance, whereas, when it involves motive or intent, the similarity of the prior act is of lesser significance. *Id.* at 143–45, 735 S.E.2d at 431–32; *State v. Haskins*, 104 N.C. App. 675, 682, 411 S.E.2d 376, 382 (1991) (“When determining the relevancy of other crimes evidence offered to prove defendant’s motive, the degree of similarity . . . is considerably less important . . .”). Since the State offered the evidence in support of defendant’s intent for malice, less significance is attached to the similarity between the Facebook posts and the charged offenses.

¶ 16 Looking to the facts of this case and comparing them to the Facebook posts, we determine the trial court properly applied Rule 404 as the posts suggest knowledge and intent. Defendant argued a lack of knowledge and intent for the element of

malice in second degree murder. The trial court determined the various Facebook posts comported with the general intent of a mind bent on mischief. The Facebook posts contained a theme surrounding defendant's driving that suggested intentionality of defendant's high rates of speed and aggressive reactions to other drivers on the roadway.

¶ 17 The inclusive nature of Rule 404(b) allows this evidence to come before the jury since there are non-propensity purposes apparent from the evidence. The constraints of timing and similarity do not bar this evidence from admission. The challenged evidence on appeal was within two years of the incident, and was numerous enough to also suggest a pattern, a mode of operating when defendant drove a vehicle. While defendant is correct in arguing the Facebook posts do not directly deal with fleeing to elude the police, the State was only seeking to support one element of second-degree murder, the general intent to act "recklessly and wantonly . . . without regard for human life . . . and deliberately bent on mischief." *Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536. Given the charged offenses dealt with defendant driving at a high-speed to elude the police and driving in prohibited areas that ultimately led to the victim's death, the speed and disregard suggested in the Facebook posts are sufficiently similar within the Rule 404(b) analysis for inclusion. This evidence, taken together, meets the requirements for admission under Rule 404(b).

¶ 18 The trial court was then required to conduct a balancing test under Rule 403. The trial court applied the Rule 403 balancing test during the pre-trial hearing and determined “any potential prejudicial effect is outweighed by the indication of habitual bad driving, rise of malice, and a mind bent on mischief.” The trial court admitted the evidence over defendant’s objections during the trial. Our review is limited to whether the trial court abused its discretion in weighing the evidence.

¶ 19 Like in *Beckelheimer*, the trial court conducted similar procedures to properly balance the evidence under Rule 403. The trial court considered the parties arguments about the Facebook posts outside the jury’s presence, it excluded one of the Facebook posts as prejudicial and irrelevant, and communicated its weighing of the probative value versus the potential prejudicial effects, which taken together suggests the trial court thoughtfully considered and applied Rule 403. It appears the trial court relied on the intent and knowledge or absence of mistake categories in determining the probative value. Because the balancing test requires a substantial outweighing of prejudice to undermine the probative value, we discern no abuse of discretion in the trial court’s determination. *See* N.C. Gen. Stat. § 8C-1, Rule 403.

¶ 20 Finally, if the trial court did err in its ruling, we would only conclude defendant is entitled to a new trial if the error were prejudicial. The exclusion of the evidence admitted over defendant’s objections was unlikely to change the jury’s decision. The State presented evidence of defendant fleeing from the police at a high speed, driving

off the road and even into the grass before driving into the victim's car. These facts alone suggest malice. See *State v. Lloyd*, 187 N.C. App. 174, 180, 652 S.E.2d 299, 302 (2007) (“[T]he very act of fleeing from the police certainly constitutes malice.”); *State v. Bethea*, 167 N.C. App. 215, 219-20, 605 S.E.2d 173, 177 (2004) (discussing driving with a “revoked license,” avoiding the police, breaking multiple traffic laws, and at high speeds, showed “intent to perform the act of driving in . . . a reckless manner . . . thus evidencing depravity of mind.”). Therefore, the trial court did not err when it admitted the Facebook posts over defendant's objections.

B.

¶ 21 Defendant argues the trial court erred by denying his request to include the following jury instruction in connection with the malice element for second degree murder: “You may consider evidence about the defendant's mental condition in determining whether the defendant had the mental state of malice which is required for second degree murder.”

¶ 22 The trial court must instruct the jury on the applicable law that is supported by the evidence presented during trial. *State v. Whetstone*, 212 N.C. App. 551, 554, 711 S.E.2d 778, 781 (2011). Additionally, the trial court “consider[s] the evidence in the light most favorable to defendant” on the question of whether the evidence sufficiently supports a certain jury instruction. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988). The trial court errs when it does not “instruct upon all

substantive . . . features of the crime charged” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citation omitted). If the trial court does err in denying jury instructions, a new trial is only mandated when it is prejudicial, which is 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” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009).

¶ 23 Defendant argues the failure to include his requested instruction creates a “conclusive presumption” for the intent element and that this violates his due process rights. *See Reynolds*, 307 N.C. at 189–90, 297 S.E.2d at 535 (citation omitted) (defining a “conclusive presumption” to be a presumption “which testimony could not overthrow”). This is an inaccurate application of the law.

¶ 24 The legal analysis relating to conclusive presumptions and mandatory presumptions is only at issue with one type of malice. Our Supreme Court previously explained we recognize “at least three” types of malice for second degree murder. *Id.* at 191, 297 S.E.2d at 536. Two of these types of malice, including the type that “arises when an act which is inherently dangerous to human life 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” are supported by the evidence of those acts. *Id.* In other words, the evidence speaks for itself in those situations. Whereas, a third type of malice, “defined as . . . that condition of mind which prompts a person to take the

life of another intentionally without just cause, excuse, or justification,” is able to be “proved as a matter of law” by certain evidence the State presents and triggers the due process questions of conclusive versus mandatory presumptions. *Id.* (citation omitted).

¶ 25 As previously stated, the State sought to prove the second type of malice that arises when the act “manifests a mind utterly without regard to human life” and “deliberately bent on mischief.” *Id.* at 191, 297 S.E.2d at 536. The evidence viewed in the light most favorable to defendant is insufficient as a matter of law to support defendant’s requested jury instruction. The undisputed evidence was that defendant saw the police and fled to avoid being caught from the police. Defendant admittedly drove dangerously by driving onto the grass and outside the proper lanes at a high rate of speed. This evidence supports a finding of malice. Further, as stated in *State v. Page*, “For a conviction of second-degree murder, . . . the jury need not find that a defendant formed a specific intent to kill. . . . Diminished capacity not amounting to legal insanity is not a defense to the element of malice in second-degree murder.” 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997). Accordingly, this general intent type of malice supports a conviction of second-degree murder. *See State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978). The denial of the jury instruction was proper, its exclusion did not create any presumption, and given the undisputed

evidence that defendant was speeding, eluding the police, and driving dangerously, its exclusion was not prejudicial to defendant.

III.

¶ 26 For the foregoing reasons, the trial court did not commit error with the issues raised, and defendant received a jury trial free from prejudicial error.

NO ERROR.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).