

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-510

Filed 07 March 2023

Granville County, Nos. 18 CRS 611-14

STATE OF NORTH CAROLINA

v.

DEON PATRICK BOBBITT, Defendant.

Appeal by Defendant from judgment entered 13 August 2021 by Judge Josephine K. Davis in Granville County Superior Court. Heard in the Court of Appeals 11 January 2023.

*Ellis & Winters LLP, by Michelle A. Liguori, for Defendant-Appellant.*

*Attorney General Joshua H. Stein, by Special Deputy Attorneys General Kathryne E. Hathcock & Christopher W. Brooks, for the State.*

CARPENTER, Judge.

Deon Patrick Bobbitt (“Defendant”) appeals from judgment after a jury convicted him of second-degree murder by vehicle, aggravated death by vehicle, driving while impaired, driving with a revoked license, and careless and reckless driving. On appeal, Defendant argues: (1) the search warrant used to obtain his medical records lacked probable cause; (2) the testimony concerning Defendant’s

blood-alcohol test violated the Confrontation Clause; (3) the admission of Defendant's driving records violated Rule 404(b) of the North Carolina Rules of Evidence; and (4) the denial of Defendant's motion to dismiss his second-degree murder conviction was improper. After careful review, we discern no error.

### **I. Factual & Procedural Background**

On 1 October 2018, a Granville County grand jury indicted Defendant on the charges of second-degree murder by vehicle, in violation of N.C. Gen. Stat. § 14-17(b); driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1; driving with a revoked license, in violation of N.C. Gen. Stat. § 20-28(a); and careless and reckless driving, in violation of N.C. Gen. Stat. § 20-140(a). On 30 May 2018, Defendant crashed his vehicle into Curtis Wilkerson's ("Victim's") vehicle on I-85 North, and the collision killed Victim. Victim was driving north, and Defendant was driving south. Defendant was driving in the wrong direction.

The evidence at trial tended to show the following: At the crash scene, first responders found Victim dead and worked to save Defendant. Defendant was pinned inside his vehicle, where firefighters had to "cut" him out. Defendant's legs were broken and were eventually amputated. Also, Defendant could not breathe because of a collapsed lung. First responders reported Defendant's "condition was critical[,] and if "he [didn't] get help . . . he could die."

Trooper Alan Parrish of the North Carolina State Highway Patrol was dispatched to the crash at 9:04 p.m. and arrived at 9:15 p.m. Upon arrival, Trooper

Parrish observed Victim's car was "destroyed," and Defendant's car was "severely damaged[.]" While other first responders helped Defendant, Trooper Parrish investigated the crash, which included interviewing Barry Bobbitt<sup>1</sup> and Darrell Evans, witnesses to the crash. Based on his investigation, Trooper Parrish determined Defendant and Victim were involved in a head-on collision, with Defendant traveling on the wrong side of the road. Trooper Parrish did not try to gather additional probable cause of impairment from Defendant's person at the scene because of the critical nature of the crash and the priority of Defendant's emergency care. First responders transported Defendant to Duke University Medical Center ("DUMC"), where medical staff made the "medical decision[]" to draw and test Defendant's blood.

On 5 June 2018, Trooper Parrish applied for a search warrant concerning Defendant's DUMC medical records, specifically Defendant's blood-test results. In the application, Trooper Parrish stated, "[o]n May 30, 2018, on highway Interstate 85, [Defendant] operated a 1995 Chev. Astro[;] he was traveling southbound in the northbound lanes. He collided head on with a 2017 Ford Focus, causing the death of [Victim]." Trooper Parrish further stated, "[b]ased on all the foregoing, and on my training and experience, it is my opinion that evidence of impairing substance(s) could be present in the medical records of [Defendant], and that a search warrant

---

<sup>1</sup> Barry Bobbitt is unrelated to Defendant.

should be issued and executed in order to ascertain the same.” Travis Williams, Clerk of Durham County Superior Court, issued the search warrant.

On 9 August 2021, a jury trial commenced before the Honorable Judge Josephine K. Davis. Paul Glover, who analyzed Defendant’s blood sample collected from DUMC, testified as an expert witness for the State.<sup>2</sup> Glover opined at trial, based on his calculations, Defendant’s alcohol concentration was greater than the legal limit at the time of the crash. Defendant objected to Glover’s testimony based on Defendant’s inability to confront the DUMC employee who took and tested Defendant’s blood. Defendant based his objection on the Confrontation Clause. The trial court overruled Defendant’s objection. Defendant also moved to suppress the blood sample taken at DUMC by contending the search warrant, used to obtain the sample, lacked probable cause. The trial court denied Defendant’s motion.

At the time of the crash, Defendant’s driver’s license was suspended for multiple driving-while-impaired convictions. At trial, the State offered evidence of Defendant’s driving records to prove the malice element of second-degree murder. The trial court allowed testimony about Defendant’s driving records and allowed the records into evidence. Defendant objected to the admission of his driving records, contending it violated North Carolina Rule of Evidence 404(b). The trial court overruled Defendant’s objection. After the close of all evidence, Defendant moved to

---

<sup>2</sup> On appeal, Defendant does not challenge whether Mr. Glover was properly accepted as an expert pursuant to Rule 702.

dismiss all charges for insufficient evidence. The trial court denied Defendant's motion.

On 13 August 2021, the jury convicted Defendant on all counts, and the trial court entered judgment, sentencing Defendant for a term of 180 to 228 months in the custody of the North Carolina Department of Corrections. On 8 August 2021, Defendant gave oral notice of appeal.

## **II. Jurisdiction**

This Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

## **III. Issues**

The issues on appeal are whether: (1) the search warrant for Defendant's blood-alcohol test results was supported by probable cause; (2) expert testimony about Defendant's blood-alcohol concentration being greater than the legal limit violated the Confrontation Clause; (3) admission of Defendant's driving records violated Rule 404(b) of the North Carolina Rules of Evidence; and (4) the trial court erred in dismissing Defendant's motion to dismiss his second-degree murder conviction.

## **IV. Analysis**

### **A. Probable Cause**

In his first argument, Defendant contends the search warrant for his blood-alcohol test results lacked probable cause. We disagree.

This Court reviews conclusions of law regarding motions to suppress *de novo*.

*State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997) (citation omitted) (“[C]onclusions of law are fully reviewable on appeal.”).

In North Carolina, a search-warrant application must contain:

a statement that there is probable cause to believe that items subject to seizure under [N.C. Gen. Stat.] 15A-242 may be found in or upon a designated or described place, vehicle, or person; and . . . [a]llegations of fact supporting the statement. The statements must be supported by one or more *affidavits particularly setting forth the facts and circumstances establishing probable cause* to believe that the items are in the places or in the possession of the individuals to be searched[.]

N.C. Gen. Stat. 15A-244 (2021) (emphasis added). “Probable cause does not mean actual and positive cause nor import absolute certainty.” *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (citation omitted). “Probable cause . . . exists where the facts and circumstances within the affiant’s knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.” *State v. Flowers*, 12 N.C. App. 487, 492, 183 S.E.2d 820, 823 (1971). Probable cause is generally defined as “a reasonable ground” for suspicion of guilt. *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004); *see also Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769, 775 (2003) (citations omitted) (“The substance of all the definitions of probable cause is a reasonable ground for belief of guilt . . .”).

Concerning the task of a magistrate issuing a search warrant, the United

States Supreme Court in *Illinois v. Gates* put it this way:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983) (citation omitted). “The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender.” *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256 (citation omitted). “The Court emphasized in *Gates* that great deference should be paid a magistrate’s determination of probable cause[.]” *Id.* at 636, 319 S.E.2d at 256.

Driving the wrong way on an interstate highway is reckless. *See* N.C. Gen. Stat. § 21-140(b) (2021) (“Any person who drives any vehicle upon a highway or any public vehicular area without due caution . . . in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.”); *see also Marsh v. Trotman*, 96 N.C. App. 578, 580–81, 386 S.E.2d 447, 448–49 (1989) (holding that driving on the wrong side of the road and thereby causing a vehicular collision was reckless).

Here, when requesting a search warrant for Defendant’s blood-alcohol test results, Trooper Parrish averred Defendant “was traveling southbound in the

northbound lanes[,]” and “[Defendant] collided head on with a 2017 Ford Focus, causing the death of [Victim].” Trooper Parrish further stated, “[b]ased on all the foregoing, and on my training and experience, it is my opinion that evidence of impairing substance(s) could be present in the medical records of [Defendant], and that a search warrant should be issued and executed in order to ascertain the same.”

Defendant’s causing a violent collision by driving on the wrong side of an interstate highway is undeniably reckless. *See* N.C. Gen. Stat. § 21-140; *see also Marsh*, 96 N.C. App. at 580–81, 386 S.E.2d at 448–49. Such reckless driving is “sufficient unto [it]sel[f] to warrant a man of reasonable caution to believe” that Defendant was likely impaired while he was driving. *See Flowers*, 12 N.C. App. at 492, 183 S.E.2d at 823. Indeed, since “great deference should be paid a magistrate’s determination of probable cause[,]” *see Arrington*, 311 N.C. at 636, 319 S.E.2d at 256, such reckless driving asserted by a trained and experienced State Trooper “is a reasonable ground for belief” that Defendant was driving while impaired. *See Pringle*, 540 U.S. at 371, 124 S. Ct. at 800, 157 L. Ed. 2d at 775; *see also Yates*, 162 N.C. App. at 122, 589 S.E.2d at 904.

Accordingly, the trial court did not err in concluding Trooper Parrish established probable cause for the search-warrant application concerning Defendant’s blood-alcohol test results. *See Smith*, 346 N.C. at 797, 488 S.E.2d at 212; *see also Flowers*, 12 N.C. App. at 492, 183 S.E.2d at 823.

## **B. Confrontation Clause**



In his second argument, Defendant contends the expert testimony about Defendant's blood-alcohol content being greater than the legal limit violated the Confrontation Clause. We disagree.

This Court reviews claims of constitutional error, including claims concerning the Confrontation Clause, *de novo*. *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013).

“Where testimonial [statements] are at issue . . . the Sixth Amendment demand[s] what the common law required: unavailability and a prior opportunity for cross-examination” before the evidence can be admitted. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004). Testimonial statements include “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 51–52, 124 S. Ct. at 164, 158 L. Ed. 2d at 193. “[M]edical reports created for treatment purposes[.]” however, are not testimonial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312, 129 S. Ct. 2527, 2533, 174 L. Ed. 2d 314, 322 n.2 (2009).

Here, Glover's testimony was based on information derived from blood taken and tested by a DUMC employee. The DUMC employee's taking and testing of Defendant's blood, however, was a “medical decision[.]” Therefore, the test results were obtained “for treatment purposes” and were not testimonial. *See Melendez-Diaz*, 557 U.S. at 312, 129 S. Ct. at 2533, 174 L. Ed. at 322 n.2.

Accordingly, Defendant's inability to cross-examine the DUMC employee did not violate the Confrontation Clause because the blood-test results obtained by the DUMC employee were not testimonial. *See Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203; *Melendez-Diaz*, 557 U.S. at 312, 129 S. Ct. at 2533, 174 L. Ed. 2d at 322 n.2.

### **C. Rule 404(b)**

In his third argument, Defendant contends the admission of his driving records violated Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

"[This Court] review[s] *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) (emphasis added).

Rule 404(b) allows evidence of "[o]ther crimes, wrongs, or acts" for purposes other than to show the defendant "acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). Rule 404(b) is a "general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant[.]" *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). Such evidence includes "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b). Specifically, this Court has held evidence of a defendant's prior traffic-related convictions admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide. *State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000); *State v. Lloyd*,

187 N.C. App. 174, 178, 652 S.E.2d 299, 301 (2007) (“Whether 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.”).

When trying to prove *identity*, Rule 404(b) requires the other crime or act be “similar,” meaning there are “some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.” *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593 (1988) (quoting *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986)). “[T]he similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.” *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890 (1991); *see also State v. Schmieder*, 265 N.C. App. 95, 100, 827 S.E.2d 322, 327 (2019) (affirming an admission of the defendant’s driving records to show malice despite the State’s failure to “present evidence of specific factual circumstances surrounding the prior convictions”).

Defendant argues the admission of his driving records violated Rule 404(b) because there is insufficient similarity between his prior traffic convictions and the charges in this case. Defendant’s argument is misplaced. The State used Defendant’s driving records to prove intent, not identity. Because the State did not use Defendant’s driving records to prove Defendant’s identity, similarity between Defendant’s prior traffic convictions and the traffic convictions here is inconsequential. *See Green*, 321 N.C. at 603, 365 S.E.2d at 593; *see also Schmieder*,

265 N.C. App. at 100, 827 S.E.2d at 327.

Here, the State used Defendant's driving records to show Defendant previously drove while intoxicated and with a suspended license—the State did so to prove intent, not to prove propensity. Specifically, the State used Defendant's driving records to prove Defendant acted with malice. Because this Court has held evidence of a defendant's prior traffic-related convictions admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide, Defendant's driving records were appropriately admitted to prove malice. *See Rich*, 351 N.C. at 400, 527 S.E.2d at 307; *Lloyd*, 187 N.C. App. at 178, 652 S.E.2d at 301.

Therefore, the State properly used Defendant's driving records to prove malice, and the trial court did not err in finding the evidence was “within the coverage of Rule 404(b).” *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159; N.C. Gen. Stat. § 8C-1, Rule 404(b).

#### **D. Motion to Dismiss**

Lastly, Defendant argues the trial court's denial of his motion to dismiss the second-degree murder charge was inappropriate. Again, we disagree.

“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) (emphasis added). “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) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). “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, 265 S.E.2d 164, 169 (1980).

Second-degree murder is: “(1) the unlawful killing; (2) of another human being; (3) with malice; but (4) without premeditation and deliberation.” *State v. Banks*, 191 N.C. App. 743, 751, 664 S.E.2d 355, 361 (2008) (quoting *State v. Fowler*, 159 N.C. App. 504, 511, 583 S.E.2d 637, 642). To prove malice, specifically by driving recklessly, the State must prove Defendant “had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.” *State v. Miller*, 142 N.C. App. 435, 441, 543 S.E.2d 201, 205 (2001).

“[M]alice does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.” *State v. Wilkerson*, 295 N.C. 559, 578–79, 247 S.E.2d 905, 916 (1978); *see State v. Snyder*, 311 N.C. 391, 394, 317 S.E.2d 394, 396 (1984) (holding that reckless conduct during the course of drunk driving fulfills the malice element necessary to sustain a conviction of second-degree murder); N.C. Gen. Stat. § 20-140(a) (“Any person who drives any vehicle upon a highway . . . in a manner so as to

endanger or be likely to endanger any person or property shall be guilty of reckless driving.”).

Here, Defendant moved to dismiss his second-degree murder conviction for insufficient evidence, and the trial court denied Defendant’s motion. It is undisputed that Defendant unlawfully killed Victim; the only dispute is whether there is substantial evidence to conclude Defendant acted with malice. Defendant killed Victim by driving on the wrong side of the highway into oncoming traffic while intoxicated. Defendant’s driving on the wrong side of a highway into oncoming traffic endangered others and was therefore “reckless driving.” *See* N.C. Gen. Stat. § 21-140. Further, Defendant’s doing so while intoxicated “supplies the malice necessary to support a conviction for second degree murder.” *See Snyder*, 311 N.C. at 394, 317 S.E.2d at 394.

Evidence that Defendant was driving recklessly while intoxicated is “such relevant evidence as a reasonable mind might accept as adequate to support” the conclusion that Defendant’s actions showed “disregard of human life.” *See Wilkerson*, 295 N.C. at 578–79, 247 S.E.2d at 916. Therefore, there is “substantial evidence” to conclude Defendant acted with malice when Victim was killed. *See id.* at 578–79, 247 S.E.2d at 916; *Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169.

Accordingly, the trial court did not err in denying Defendant’s motion to dismiss the second-degree murder conviction because “there [was] substantial evidence (1) of each essential element of [second-degree murder] . . . and (2) of

defendant being the perpetrator of such offense.” *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

## **V. Conclusion**

We hold the trial court did not err in finding the State had probable cause to obtain Defendant’s blood-alcohol test results. *See Smith*, 346 N.C. at 797, 488 S.E.2d at 212; *see also Flowers*, 12 N.C. App. at 492, 183 S.E.2d at 823. We hold the trial court did not err in its Confrontation Clause ruling concerning the State’s expert testimony. *See Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203. We hold the trial court did not err in finding Defendant’s driving records admissible within the bounds of Rule 404(b). *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. Finally, we hold the trial court did not err in denying Defendant’s motion to dismiss his second-degree murder conviction. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

NO ERROR.

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).