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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-864

Filed 05 July 2023

Wayne County, Nos. 16 CRS 54517-18

STATE OF NORTH CAROLINA

v.

SCOTT ST. JOHN PAINTER

Appeal by defendant from judgment entered 24 May 2021 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 6 June 2023.

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

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.

ARROWOOD, Judge.

Scott St. John Painter (“defendant”) appeals from the judgment entered upon his conviction for second-degree murder following a fatal car accident. On appeal, defendant argues the trial court erred in: (1) admitting his prior traffic convictions as evidence of malice under Rules 404(b) and 403; (2) denying his motion to dismiss for insufficient evidence of malice; and (3) sentencing him in the aggravating range,

since the evidence supporting the aggravating factor was the same evidence supporting the conviction of second-degree murder. For the following reasons, we find the trial court did not err.

I. Background

On 11 October 2016, Robert Gibson Woodcock (“Mr. Woodcock”), his fiancée, Alyssa Lee Van Bourgondien (“Ms. Van Bourgondien”), and their dog, were traveling down Kelly Springs Road in his Nissan Frontier truck. The couple, who were on the way to Wilmington for their wedding, set to occur in five days, were unable to take their usual route due to road closures, and had to utilize this rural, two-lane road. There was no water on the road, it was still daytime, and the weather was clear.

As their vehicle was “approaching a curve” in the road, Mr. Woodcock saw a white Dodge truck in the wrong lane of traffic, traveling “at a very high speed” towards them head on. Although Mr. Woodcock attempted to slam on his brakes in the “split second” he had to react, he was unable to avoid the collision. Mr. Woodcock heard Ms. Van Bourgondien scream and his dog yelp, as he felt the “substantial” “force of the impact[.]”

After he caught his “breath from the force of the impact[.]” Mr. Woodcock attempted to get out of the vehicle, but his “legs were trapped under the steering column” and his door was badly damaged. Once he was able to get free, he went to check on Ms. Van Bourgondien. Ms. Van Bourgondien’s side of the vehicle had taken the majority of the impact, and she was “trapped” in the vehicle, making only her

upper torso visible. Ms. Van Bourgondien had “blood on her neck[,]” mouth, and forehead, “her arm was severely broken” with an open fracture, and she had no pulse. Mr. Woodcock attempted to get his first aid kit, and when he opened a door to the vehicle, his dog “fell out completely stiff” and he “knew that she had probably been killed” in the accident. The items the couple had planned to use to decorate their wedding venue and Mr. Woodcock’s dress blues, which he intended to wear at the wedding, were “thrown out of the truck” by the impact and strewn “all over the road.”

While Mr. Woodcock was attempting to aid Ms. Van Bourgondien, he realized the driver of the white truck, later identified as defendant, was inside the truck, attempting to leave, and on the phone, telling someone “that he had just hit someone and that he needed to leave.” Mr. Woodcock noticed defendant’s “speech was heavily slurred,” and he sounded drunk. At no time did defendant attempt to aid Mr. Woodcock or Ms. Van Bourgondien and he never called 911 to report the accident.

Shortly after the collision, Morris Carmack, II (“Mr. Carmack”), arrived at the scene. Mr. Carmack observed Mr. Woodcock trying to get out of his vehicle, but his “door was wedged[.]” Mr. Carmack heard Mr. Woodcock yell at defendant that he had “killed her” and Mr. Carmack looked inside the vehicle and saw Ms. Van Bourgondien was not breathing. Mr. Carmack saw defendant “digging for something” in his vehicle and noticed defendant had slurred speech and was “intoxicated[.]” Defendant threatened to “kill all of [them]” and he had a revolver in a holster on his thigh.

Sheila Faulk (“Ms. Faulk”) was driving down Kelly Springs Road with her

husband, David Faulk (“Mr. Faulk”), on the day of the accident. After she passed defendant’s truck, she looked in her rearview mirror and saw defendant’s “whole” truck in the opposite lane of traffic headed towards oncoming traffic and told Mr. Faulk that defendant “was going to kill somebody.” Ms. Faulk saw defendant’s “white truck hit” Mr. Woodcock’s vehicle. Ms. Faulk saw defendant’s truck travel on the wrong side of the road for about 100-150 feet. Ms. Faulk did not know how fast defendant’s truck was going, but opined that “he was going too fast, for that curve.”

After witnessing the accident, Ms. and Mr. Faulk called 911 and turned around to go to the scene of the accident. When Mr. Faulk approached defendant’s truck, he noticed defendant was attempting to leave so he “reached in to cut [the vehicle] off” and defendant told Mr. Faulk “to leave him alone[.]” Ms. Faulk also noticed defendant was attempting to leave the scene of the accident, and both Ms. and Mr. Faulk believed defendant was impaired.

Duplin County EMS was dispatched to the accident around 4:45 in the afternoon. Although EMS attempted to locate a heartbeat for Ms. Van Bourgondien, she was ultimately pronounced deceased at the scene. Ms. Van Bourgondien was pinned inside the vehicle, and the Jaws of Life had to be used to extricate her body from the vehicle. During the accident, Ms. Van Bourgondien suffered “a closed femur fracture [to] [her] right thigh” and head trauma. Her cause of death was determined to be blunt force trauma, with the closed femur fracture being “a contributing factor[.]” as a result of the car accident.

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The Mt. Olive Police Department was dispatched at 5:01 p.m. and arrived on scene three minutes later. Officer Dennis Brock (“Officer Brock”) and Officer Blake Turner (“Officer Turner”) were the first law enforcement officers to arrive. Officer Brock, who knew defendant “through a personal relationship with his son” and considered defendant a “second father[,]” immediately “recognized [defendant] standing on the passenger side of the truck” where the victim was when he arrived. Officer Turner noticed defendant “appeared to be talking to the passenger of the Nissan” and making “vulgar statements[,]” such as, “I’ll kill every f[*****] one of you[.]” Defendant then “retrieved [a pair of sweatpants that were tied up] from [his] truck and then started walking down Kelly Springs Road, away from the crash” and away from law enforcement.

Officer Brock “went and stopped [defendant] . . . so that he could not leave the scene[,]” and noticed a “very strong” odor of alcohol coming from defendant’s breath, that defendant “was having difficulty walking normal[,]” and “his speech was slurred.” Defendant told Officer Brock that he was “good[,]” but needed “to get the hell out of there.” Officer Brock placed defendant in handcuffs because he was “appreciably impaired” and would attempt to leave if not secured. Officer Turner also noted defendant had “a strong odor of alcohol coming from his breath, red and glassy eyes and slurred speech.” Defendant told Officer Turner that he “had a ride on the way[,]” to “just let him go,” to “let [him] go so [he] c[ould] leave already,” and to “just f[*****] shoot [him] already[.]”

When Officer Brock realized that the accident resulted in a fatality, he walked over to defendant, grabbed him “by the collar of his shirt[,]” and yelled at defendant that he “f[*****] killed her[,]” and he “thought [they] f[*****] told [him] not to do this.” An “emotional” Officer Brock had to be pulled off defendant by a sergeant on scene.

At 5:19 p.m., Trooper Justin Arnette (“Trooper Arnette”) with the North Carolina Highway Patrol was dispatched to assist the Mt. Olive Police Department with a traffic accident involving a fatality. While investigating the scene, Trooper Arnette determined the “area of impact” to be the lane of travel Mr. Woodcock was in, meaning that defendant was traveling “on the wrong side of the road” when the collision occurred. When he spoke with defendant, defendant admitted to having three shots of alcohol sometime before the accident. Furthermore, in the sweatpants defendant was trying to leave the scene with, there were three bottles of Crown Royal Apple, with one of the bottles “obviously missing some of it.” Trooper Arnette estimated the pint was missing “a half to a third of” liquor.

Trooper Arnette noticed defendant had a “strong odor of alcohol on his breath” that became “stronger when he spoke[,]” “his eyes were red and glassy[,]” his speech was “thick[,]” and “it was obvious that he had a drunk like appearance.” Trooper Arnette thought it was “obvious” that defendant was impaired. Trooper Arnette followed as an ambulance transported defendant to Mt. Olive Family Medical Practice, which “had been set up as a makeshift hospital” for triage.

Although defendant initially agreed to provide a blood sample, he revoked consent and “become irate” after the paramedic could not get a sample and poked him “a couple times[.]” Defendant began “yelling” and “threatening” to “kick [Trooper Arnette’s] f[*****] a[**],” so the doctor asked Trooper Arnette to leave the room so defendant would calm down. At this time, defendant began emptying “the contents of his wallet looking for his lawyer’s card.” Thereafter, defendant was transported to Vidant Duplin hospital.

At the hospital, defendant continued “yelling and cussing and threatening to kill [Trooper Arnette][.]” Once defendant calmed down, he “extended his hand, and told [Trooper Arnette] that if [he] would shake [defendant’s] hand, that [they] would basically call it even[.]” When Trooper Arnette refused to shake defendant’s hand, he again “became belligerent and threatened to kill [Trooper Arnette].” Just the sight of Trooper Arnette “appeared to enrage [defendant][.]” and he had to be administered a sedative. A blood sample was obtained from defendant at 8:44 p.m. that evening, and he was discharged with “abrasions,” neck pain, and “alcohol intoxication,” but no other injuries.

Upon release from the hospital, defendant was transported to jail, and charged with DWI, “open container of alcohol, reckless driving, and felony death by motor vehicle[.]” On 6 February 2017, defendant was indicted for second-degree murder, felony death by motor vehicle, impaired driving, transporting an open container of alcohol, and reckless driving. The matter came on for trial on 17 May 2021 in Wayne

County Superior Court, Judge Bland presiding.

At trial, two drivers who encountered defendant prior to the accident testified. George Faison (“Mr. Faison”) testified that on 11 October 2016, he was driving his 18-wheeler truck down 55 East, which intersects with Kelly Springs Road, when a white pickup truck passed him, and three vehicles ahead of him, on a double yellow line. Mr. Faison testified that it was “a situation” where the truck “shouldn’t have been passing” him, since it required everyone to brake “to make room for [the truck] to just merge in without causing a head-on [collision][.]” since other vehicles in the opposite lane of traffic were approaching.

Patrick Schroeder (“Mr. Schroeder”) was operating a backhoe on the road on the day of the accident. While he was going down the road, a “white pickup truck came” approximately “5 to 10 feet” from hitting him as it passed him on the double yellow line. Sometime later, Mr. Schroeder was alerted that there was an accident close to his location, so he went “to see what happened.” Mr. Schroeder recognized the white pickup truck belonging to defendant as the one that had passed him earlier.

Officer Brock testified that on one occasion, he had to pick up defendant from a residence because he was impaired, and “arguing that he was going to drive and that he would leave when he felt like leaving and he would do it how he felt like doing it.” Officer Brock testified that he provided defendant a ride home that night and told defendant that “he was going to kill somebody” if he “didn’t stop drinking and driving[.]” Officer Turner also testified that it was his “opinion” that defendant “was

highly” intoxicated on the day of the accident “and should not have been behind the wheel of any kind of vehicle.”

Trooper Arnette testified that Mr. Woodcock’s Nissan sustained “heavy front end damage” mostly on the front passenger side, which was “destroyed.” Trooper Arnette also testified that although the speed limit on Kelly Springs Road was 55 miles per hour, with “a suggested speed of 35 miles per hour [when] approaching the curves[,]” data from defendant’s vehicle showed that “[f]ive seconds prior to airbag deployment [defendant]’s speed was 85 miles per hour.” Defendant’s final recorded speed was 30 miles per hour, indicating there was some braking but this was not necessarily the impact speed, which could have been higher.

Over defense’s objection, a redacted version of defendant’s certified driving record was admitted and published to the jury. The record showed a 2012 conviction for reckless driving and a 2008 safe movement violation. Although defendant objected to the introduction of the driving record, the trial court found it to be “probative of malice” and that “its probative value is not substantially outweighed by any of the concerns of Rule 403[,]” and the exhibit was admitted into the record. The court also found the prior convictions were temporally proximate to the date of the offense. Lastly, Paul Glover testified that based on defendant’s blood sample taken at the hospital, he calculated defendant’s “BAC at the time of the crash was equal to .19 or greater[,]” and the alcohol missing from the pint defendant was attempting to leave the scene with did contribute to his BAC.

At the close of the State's evidence and at the close of all evidence, defendant made a motion to dismiss for insufficient evidence, arguing the State did not present sufficient evidence of malice. Both motions were denied. Defendant did not present any evidence.

On 24 May 2021, defendant was found guilty of all charges. Thereafter, the jury found defendant guilty of the aggravating factor of "knowingly creat[ing] a great risk of death to more than one person by means of a motor vehicle, which would normally be hazardous to the lives of more than one person." The State did not present any additional evidence at this stage of the trial. Judgments for the impaired driving and felony death by motor vehicle convictions were arrested, and defendant was sentenced in the aggravated range of 196-248 months imprisonment for the second-degree murder conviction. Defendant gave oral notice of appeal in court following his sentencing.

II. Discussion

On appeal, defendant argues the trial court erred in: (1) admitting his prior traffic convictions as evidence of malice under Rules 404(b) and 403; (2) denying his motion to dismiss for insufficient evidence of malice; and (3) sentencing him in the aggravated range, since the evidence supporting the aggravating factor was the same evidence supporting the conviction of second-degree murder. We address each argument in turn.

A. Defendant's Prior Driving Record

In his first argument on appeal, defendant contends “[t]he trial court erred in admitting [his] prior traffic convictions as evidence of malice under Rules 404(b) and 403” since the State did not establish “temporal proximity and similarities between the prior offenses and the present offense[.]” Furthermore, defendant argues “the probative value of the redacted driving record was substantially outweighed by the danger of unfair prejudice” and should have been excluded under Rule 403.

This Court reviews whether prior bad act evidence is admissible under Rule 404(b) *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). If admissible, we “then review the trial court’s Rule 403 determination for abuse of discretion.” *Id.*

Under Rule 404(b), “[e]vidence 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 may “be admissible for other purposes, such as 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) (2022). There is “a clear 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) (emphasis in original).

Still, the rule of inclusion “is constrained by the requirements of similarity and

temporal proximity.” *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007) (citation and internal quotation marks omitted). “Under Rule 404(b) a prior act or crime is similar 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) (citation and internal quotation marks omitted). “However, it is not necessary that the similarities between the two situations rise to the level of the unique and bizarre[,] . . . [r]ather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts.” *Id.* at 304, 406 S.E.2d at 891 (emphasis in original) (citation and internal quotation marks omitted).

Furthermore, “[t]he relevance of a temporally remote traffic-related conviction to the question of malice does not depend solely upon the amount of time that has passed since the conviction took place. Rather, the extent of its probative value depends largely on intervening circumstances.” *State v. Maready*, 362 N.C. 614, 624, 669 S.E.2d 564, 570 (2008). Generally, “remoteness in time . . . *affects only the weight to be given such evidence, not its admissibility.*” *Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (emphasis added) (citation omitted). “This is especially true when, as here, the prior conduct tends to show a defendant’s state of mind, as opposed to establishing that the present conduct and prior actions are part of a common scheme or plan.” *Maready*, 362 N.C. at 624, 669 S.E.2d at 570 (citation omitted).

The North Carolina Supreme Court “has held evidence of a defendant’s prior

traffic-related convictions [are] admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide.” *Maready*, 362 N.C. at 620, 669 S.E.2d at 568 (citation omitted). Additionally, the State need “not present evidence of the specific circumstances surrounding the prior convictions,” if “the similarity was evident from the nature of the charges.” *State v. Schmieder*, 265 N.C. App. 95, 100, 827 S.E.2d 322, 327, *disc. review denied*, 372 N.C. 711, 830 S.E.2d 832 (Mem) (2019).

Despite defendant’s contention that the trial court did not explain the circumstances surrounding the convictions, and his contention that the similarity of the previous convictions are not evident from their nature, we find *State v. Schmieder* controlling. In *Schmieder*, the defendant was charged with second-degree murder after he crossed a double yellow line on a two-lane road when he was attempting to illegally pass a vehicle while speeding, causing a head-on collision resulting in a fatality. *Id.* at 96-97, 827 S.E.2d at 325.

At trial, the defendant’s prior driving convictions were admitted over his objection, which showed multiple convictions for speeding, illegal passing, reckless driving, driving with a revoked license, and accidents. *Id.* at 97-98, 827 S.E.2d at 325-26. This Court affirmed the trial court’s admission of the record and finding that the defendant’s convictions were similar to his present charge, as a “vast majority of the charges in the driving record involved the same types of conduct Schmieder was alleged to have engaged in here[.]” and although the State failed to present the

“specific circumstances surrounding” each conviction, “the similarity was evident from the nature of the charges.” *Id.* at 100, 827 S.E.2d at 327. Furthermore, we concluded that the “[t]he gaps in time between charges, never greater than three or four years, were not significant.” *Id.*

Here, defendant’s driving record showed a 2012 conviction for reckless driving and a 2008 safe movement violation. These charges involve mainly the same activity defendant allegedly engaged in before the fatal accident, as there was testimony he was driving over double yellow lines in opposite lanes of travel, in a manner that was unsafe considering the circumstances. Although the trial court did not specifically find the convictions were similar, it is evident that they pertained to unsafe driving, which defendant was alleged to have engaged in here.

Furthermore, we find the trial court did not err in its finding of temporal proximity. As an initial matter, we note there is no bright line rule “of a fixed temporal maximum.” *Maready*, 362 N.C. at 625, 669 S.E.2d at 571. This is generally an issue of weight, not admissibility, especially when the prior conviction relates to “a defendant’s state of mind.” *Id.* at 624, 669 S.E.2d at 570; *Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (citation omitted). Here, defendant was convicted of the prior convictions in 2012 and 2008, four and eight years before the accident with a four-year gap between the convictions. As in *Schmieder*, we find these gaps insignificant. *Schmieder*, 265 N.C. App. at 100, 827 S.E.2d at 327.

Still, defendant argues that even if the driving record was admissible under

Rule 404(b), the trial court abused its discretion in admitting the record pursuant to Rule 403. Under Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2022). However, this Court has held that evidence which proves malice is “clearly highly probative[.]” and “the danger of unfair prejudice [i]s significantly mitigated by the trial” court providing a limiting instruction. *State v. Lloyd*, 187 N.C. App. 174, 178, 652 S.E.2d 299, 301 (2007), *cert. denied*, 363 N.C. 586, 683 S.E.2d 214 (Mem) (2009).

Here, the evidence was highly probative, as the trial court found it was admissible to prove malice, and a limiting instruction regarding the driving record was provided. Furthermore, the trial court redacted the driving record so the jury would not see that two reckless driving charges were originally DWI charges. Accordingly, we hold the trial court did not abuse its discretion in holding the redacted driving record’s probative value was not substantially outweighed by the danger of unfair prejudice. *See id.*

B. Motion to Dismiss

Next, defendant argues the trial court erred in denying his motion to dismiss the second-degree murder charge “because there was insufficient evidence of malice[.]” This argument is without merit.

Our “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) (citation omitted). “In

ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.” *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and internal quotation marks omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation and internal quotation marks omitted). “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, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

“In order to be submitted to the jury for determination of defendant’s guilt, the ‘evidence need only give rise to a reasonable inference of guilt.’” *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citation omitted). If the court decides that a reasonable inference of the defendant’s guilt may be drawn from the circumstances, then “it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.” *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation, internal quotation marks, and emphasis omitted). However, if the evidence “is sufficient only to raise a suspicion or conjecture as to either the commission of the

offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citation omitted).

“Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation.” *State v. Rick*, 342 N.C. 91, 98, 463 S.E.2d 182, 186 (1995) (citation and internal quotation marks omitted). To prove malice in motor vehicle accident cases, “the State does not need to demonstrate [d]efendant had a specific intent to kill, but it must show ‘that . . . 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. Williamson*, 283 N.C. App. 91, 95, 872 S.E.2d 388, 392 (citation omitted), *disc. review denied*, 881 S.E.2d 291 (2022). As discussed above, our precedent holds that “evidence of a defendant’s prior traffic-related convictions [are] admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide.” *Maready*, 362 N.C. at 620, 669 S.E.2d at 568 (citation omitted).

However, defendant’s prior convictions were not the only evidence presented by the State to prove malice. Evidence demonstrating malice in a traffic accident may include: (1) someone “warning defendant of the dangers of drinking and driving”; (2) “defendant’s blood alcohol level”; (3) “defendant’s swerving off the road . . . prior to the collision, giving defendant notice that his driving was dangerous”; and (4) “defendant’s failure to call 911 and attempt to provide aid to the victims.” *State*

v. Grooms, 230 N.C. App. 56, 68-69, 748 S.E.2d 162, 170, *disc. review denied*, 367 N.C. 281, 752 S.E.2d 148 (Mem) (2013). Here, the State presented evidence that Officer Brock had warned defendant of the dangers of drinking and driving, defendant was driving above the speed limit, passing multiple vehicles on a double yellow line, and driving in the opposite lane of traffic.

Furthermore, defendant's BAC was .19 or higher at the time of the accident, and each of the witnesses testified defendant was attempting to flee the scene and not once offered to aid the passengers of the vehicle he hit head on, nor did he ever contact emergency services. This evidence, collectively, in the light most favorable to the State, was sufficient for a reasonable jury to conclude that defendant acted with malice. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

C. Aggravating Factor

Lastly, defendant contends the trial court erred in sentencing him in the aggravated range, "because the evidence supporting the aggravating factor was the same evidence as the evidence supporting the elements of second-degree murder by motor vehicle." This argument is without merit.

"This Court reviews alleged sentencing errors for whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Bacon*, 228 N.C. App. 432, 434, 745 S.E.2d 905, 907 (2013) (citation, brackets, and internal quotation marks omitted). "Under N.C. Gen. Stat. § 15A-1340.16(a), a trial

court must consider evidence of aggravating or mitigating factors, but the decision to depart from the presumptive range is within the trial court's discretion." *Id.* However, "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" N.C. Gen. Stat. § 15A-1340.16(d) (2022).

This Court's opinion in *State v. Ballard*, 127 N.C. App. 316, 489 S.E.2d 454 (1997), *rev'd in part per curiam, appeal dismissed in part*, 349 N.C. 286, 507 S.E.2d 38 (Mem) (1998), is instructive. In *Ballard*, the defendant was tried for second-degree murder following a fatal accident where he "accelerated, passing a car on a double solid line into oncoming traffic, . . . sped off down the road[,] . . . ran a stop sign and collided with a utility pole[.]" *Id.* at 319, 489 S.E.2d at 456. The passenger was pronounced deceased at the scene, and the defendant's BAC was .18 at the time of the accident. *Id.*

On appeal, the defendant in *Ballard* argued "that his reckless use of a motor vehicle provided the necessary inference of malice, an essential element of the offense of second degree murder, and therefore, [could not] be used as a factor in aggravation." *Id.* at 322, 489 S.E.2d at 458. We disagreed, and found:

[I]t is the reckless and wanton nature of the act committed which leads to the inference of malice. On the other hand, it is the use of a device, normally hazardous to the lives of more than one person, to create a risk of death to more than one person which supports the aggravating factor at issue. Therefore, we hold that the defendant's operation of the motor vehicle did not constitute one of the elements of second degree murder. Accordingly, we affirm the trial court's finding as an aggravating factor that defendant

knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person.

Id. at 323, 489 S.E.2d at 459.

Here, the same jury instruction on malice was provided to the jury as in *Ballard*, and the same aggravating factor is at issue. *Id.* at 323, 489 S.E.2d at 458-59. Accordingly, *Ballard* is instructive, and we hold the trial court did not err in finding the aggravating factor.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err.

NO ERROR.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).