No. COA23-111 DISTRICT 21

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Forsyth
	)	
RAFAEL MARROQUIN	)	

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DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED

I. Whether the trial court plainly erred by admitting lay opinion officer testimony regarding the cause of the accident with which Mr. Marroquin was charged.

II. Whether the trial court erred by admitting evidence that six years previously, Mr. Marroquin sideswiped his neighbor's vehicle without reporting it, because such evidence failed to meet the requirements of Rule 404(b) and was unduly prejudicial.

STATEMENT OF THE CASE

On May 23-27, 2022, Mr. Marroquin was tried on indictments alleging resisting arrest, driving left of center while impaired, driving while license revoked, felony hit and run inflicting death or serious bodily injury, felony death by vehicle, and second degree murder. (R pp 1, 12-25). The jury acquitted Mr. Marroquin of felony hit and run inflicting death or serious bodily injury and second degree murder, and convicted him of the other charges. (R pp 121-125). Mr. Marroquin was sentenced to a consolidated term of 73 to 100 months' imprisonment. (R p 131). He gave oral notice of appeal in open court and filed a written notice of appeal. (R pp 135-136).

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Mr. Marroquin appeals from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) and § 15A-1444(a).

STATEMENT OF THE FACTS

On July 19, 2020, at around 11:20 p.m., Mr. Marroquin and Stephanie Lopez were involved in a collision just past a curve on Indiana Avenue in Winston-Salem, North Carolina. As a result of the tragic accident, Lopez was killed. The primary factual issue at trial was whether Mr. Marroquin or Lopez caused the accident. (T pp 205-06, 210-11).

The State admitted videos from surveillance cameras at businesses on Indiana Avenue from around the time of the accident. (T pp 281, 285; State's

Ex. 9, 10). The videos were taken from a distance of about 100-125 and 200 yards respectively, or up to two football field lengths away. (T p 316). The videos are dark and grainy and do not show whether Mr. Marroquin or Lopez crossed the center line. (T p 316). The video also shows a person walking down the street, but it is impossible to identify the person. (T p 317). The streetlight above where the accident occurred was broken. (T p 352). Based on the video, the State's witnesses testified that it was impossible to "definitively say which vehicle crossed the center line," and that "[t]he video itself doesn't determine who is at fault." (T pp 316, 430).

The State called one eyewitness to the incident, Martinique Felder. (T pp 212-230). Felder testified that on the night of July 19, 2020, he was pulling out of a Citgo station parking lot when the accident occurred. (T p 221). Felder testified that as he was pulling out of the gas station parking lot, he saw Mr. Marroquin in a white SUV cross the center line and hit Lopez. Felder estimated that he was four car lengths behind Lopez. (T p 214). Felder's vehicle, however, could not be seen in the surveillance videos of the accident. (T p 317). Felder testified that he did not have to slam on his brakes to avoid the accident because he was far enough away not to be in danger of collision. (T p 222). The surveillance video does not show any other cars going by until several seconds after the accident. (T p 318).

Two officers, Elijah Cox and Mouhamadou Dime, testified regarding their opinion of the cause of the accident, even though neither of them observed the accident. (T pp 291-92, 323-24). Neither witness was qualified as an expert in accident reconstruction. (T pp 290-91, 321-22).

Officer Cox testified that when he arrived at the scene, he observed that Lopez was deceased in her Honda Civic. (T pp 291-92). The driver of the white Ford Explorer was not on scene. (T p 291). The airbags in both vehicles had been deployed. (T pp 265, 431). Officer Cox went to the nearby Citgo station and Hometown Auto to collect surveillance footage. (T pp 303-311). He testified, based on viewing the footage, that Lopez was in the "inner south lane" and that the "vehicle that struck her" was traveling north. (T pp 305-06). On cross-examination, Officer Cox clarified that prior to obtaining the videos, he had already come to the conclusion that Mr. Marroquin crossed the center line and hit the Honda Civic "[b]ased on what I saw at the scene." (T p 314). He explained, "[w]e're trained to look at the evidence on scene, and based on those observations we can determine basically which direction cars were coming, approach angle, departure angles and so on." (T p 315). But he could not definitively say, "based on the videos alone," which vehicle had crossed the center line, because he was basing his analysis on additional information from viewing the scene. (T p 316).

Officer Dime, the lead investigator, testified that he arrived on scene after the accident. He noticed that both vehicles were damaged, and that the driver of the Ford Explorer was not on scene. (T pp 323-34). Officer Dime testified that he was "a hundred percent certain," "[w]ithout a doubt," that the "crash happened in Ms. Lopez' lane of travel." (T p 421). Officer Dime based this assessment on his "training" and "the roadway evidence that I observed at the scene." (T p 421). Specifically, it was his opinion that most of the "debris field" from the collision was in Lopez's lane of travel. (T p 330). Officer Dime explained that a "debris field" is a cone that spreads out from the area of impact. (T p 332). Officer Dime also looked for "gouge marks," which refers to a "scratch mark" or "groove" that is left in a head-on collision when "vehicles begin to crumple" and "all those metal parts are going to fall and hit the ground." (T pp 330-31). Officer Dime testified that based on the location of debris field and gouge marks, "I was able to determine that the crash had actually happened in Ms. Stephanie's lane of travel. Which means that the Ford Explorer had to cross the double yellow line, came into her lane of travel before they collided." (T p 336).

Additionally, Officer Dime testified about the presence of "yaw marks." (T p 336). He explained that a "yaw mark is whenever the tire is rotating like it's supposed to, but sliding in a lateral direction. So it's rotating and it's sliding to the left or to the right, and that causes a yaw." (T p 336). Officer

Dime explained that along with yaw marks, there were "striations" across the double yellow line. A "striation" refers to "the parallel lines that goes along the tire, whenever it's moving sideways, it's causing a rubber transfer between the tire and the roadway." (T p 338). According to Officer Dime, the yaw marks and striations supported his opinion that "Ms. Stephanie Lopez's vehicle was traveling southbound in the far-left lane, his was going northbound in the far-left lane. So they hit driver's side to driver's side. Because the collision happened in this lane of travel, the yaw is closer to the double yellow line, and it's going off the road." (T pp 339-40). Officer Dime acknowledged, however, that there was a chance that the marks on the road were from an earlier accident, such as someone who did not report a wreck earlier that day. (T pp 427-28). Officer Dime concluded that "[b]ased on the roadway evidence, it was evident that the crash happened in Ms. Lopez's lane of travel." (T p 348). He elaborated that the "specific force" of the vehicles colliding explained why the vehicles rotated counterclockwise and came to rest in their respective positions on the roadway. (T pp 348-49).

Officer Dime acknowledged that the surveillance video of the incident "doesn't determine who is at fault" for the incident because "[a]ll you see is, you know, Mr. Marroquin's vehicle rotating and a subject running from the scene." (T p 430). Officer Dime's opinion that Mr. Marroquin was at fault for the accident was not based on the video or his personal observations of the

accident, but rather "the roadway evidence and the evidence sustained on the vehicles." (T p 430).

Following the crash, Mr. Marroquin was found approximately one-half mile north of the site of the crash on an embankment off the roadway. (T p 251). Mr. Marroquin consistently told the officers, "he hit me." (T pp 273, 274). Officers testified that Mr. Marroquin was slurring his words and his eyes were "glassy." (T p 353). Mr. Marroquin spoke with a heavy accent and it was apparent that English was not his first language. (T p 273).

Officer Dime testified that Mr. Marroquin failed a standardized field sobriety test, but contrary to standard best practices, Officer Dime did not investigate whether Mr. Marroquin had any head injuries or seek medical attention before the test. (T pp 257, 270, 432-33). Officer Dime acknowledged that Mr. Marroquin had asked others for medical attention and that it was possible he was denied medical attention when he needed it. (T pp 432-34). Mr. Marroquin was taken into custody and was not able to go to the hospital, even though he had just been in a crash so serious that somebody died. (T pp 432-33). Officer Dime also acknowledged that officers were communicating with Mr. Marroquin in English, even though he was obviously not fluent, and that he failed to request the assistance of an interpreter even though it would have been best practice to do so. (T pp 437-38). Nor did Officer Dime request the assistance of Spanish-speaking officers

who were on scene. (T p 438). Three hours after the incident, while in custody, Mr. Marroquin had a breath test result of .11. (T p 471).

During jury deliberations, the jury announced that it could not reach a unanimous verdict. (R p 101; T pp 676-680). After being instructed to continue deliberating, the jury requested to view the videos from the Citgo gas station and Hometown Auto again. (R p 102; T pp 681-83). Ultimately, the jury acquitted Mr. Marroquin of second degree murder and felony hit and run inflicting serious injury or death, and convicted him of the remaining charges. (R pp 121-25). In acquitting Mr. Marroquin of second degree murder, the jury rejected the State's theory that Mr. Marroquin acted with malice by callously disregarding human life and social duty. (T p 601). The jury also found that the State failed to prove the aggravating factor that Mr. Marroquin knowingly created a great risk of death to more than one person by means of a hazardous weapon or device. (R p 126, T p 726).

ARGUMENT

I. The trial court plainly erred by admitting lay opinion officer testimony regarding the cause of the accident with which Mr. Marroquin was charged.

Standard of Review

Because Mr. Marroquin did not object to the admission of lay opinion officer testimony regarding the cause of the accident, this Court's review is for plain error. To show plain error, a defendant must demonstrate that

there was a "fundamental" error at trial that "had a probable impact on the jury verdict." *State v. Lawrence*, 365 N.C. 506, 518 (2012).

Argument

The trial court plainly erred in admitting the lay opinions of Officers Cox and Dime that Mr. Marroquin was the cause of the fatal accident with which he was charged, even though the officers had not personally seen the accident and were not qualified to testify as expert witnesses. This issue is controlled by this Court's decision in *State v. Denton*, which held that "[a]ccident reconstruction analysis requires expert opinion testimony." *State v. Denton*, 265 N.C. App. 632, 636 (2019).

In *Denton*, this Court explained that under North Carolina Rule of Evidence 701, if a witness is not testifying as an expert, "his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 701)). Moreover, "[o]pinion evidence is generally inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts." *Id.* (citation omitted).

After surveying cases, the Court stated that "we can find no instance of *lay* accident reconstruction analysis testimony in North Carolina." *Id.*; *see State v. Maready*, 205 N.C. App. 1, 17 (2010) ("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."). Rather, accident reconstruction testimony "by its very nature requires expert analysis of the information collected from the scene of the accident and falls under Rule of Evidence 702." *Id.* Rule 702, in turn, requires "that expert opinions be supported by sufficient facts or data," meaning "that the expert considered sufficient data to employ the methodology." *Id.* (citation omitted). These principles follow directly from several prior decisions of this Court. *Id.* at 638-39 (citing cases).

As these decisions make clear, a lay witness officer "who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved." *Blackwell v. Hatley*, 202 N.C. App. 208, 214 (2010). However, the officer may not provide opinions beyond these personal observations, because "[t]he jury is just as well qualified as the witness to determine what inferences the facts will permit or require." *Id.* at 215.

These principles were violated in this case when Officers Cox and Dime were permitted to testify directly regarding their opinion that Mr. Marroquin caused the accident, even though they did not personally observe the accident and were not qualified as expert witnesses in accident reconstruction. There can be no doubt from the officers' testimony that their testimony was not limited to factual observations properly allowed by a lay witness who did not observe the accident, such as describing the scene or damage to vehicles. Rather, both witnesses stated their opinion that Mr. Marroquin had crossed the center line and hit Lopez's vehicle. *See State v. Wells*, 52 N.C. App. 311, 314 (1981) ("In the present case, the most crucial question for the jury on the manslaughter charge was whether defendant caused the collision which resulted in decedent's death by crossing the center line into decedent's lane of travel. By testifying that his investigation revealed the point of impact between the two cars to be in decedent's lane of travel, Trooper Parks stated an opinion or conclusion which invaded the province of the jury."). Moreover, the officers relied on technical terms, knowledge, and training that are not within the province of a lay witness, such as "yaw marks" and "striations."

This error fundamentally undermined the fairness of Mr. Marroquin's trial and likely affected the jury's verdict. Officer Dime testified that he was "a hundred percent certain," "[w]ithout a doubt," that the "crash happened in Ms. Lopez' lane of travel." (T p 421). His improper opinion testimony was

bolstered by Officer Cox, who testified that based on his training and observations at the scene, he formed the opinion that Lopez was in the "inner south lane" when another vehicle "struck her." (T pp 305-06). Meanwhile, the State did not call any certified experts in accident reconstruction; thus, the jury was left to rely solely on the improper opinions of the officers at the scene. *Cf. Denton*, 265 N.C. App. at 639 (noting possibility that error could be harmless where "there was expert testimony to the same opinion as presented by the lay witness"). Though Officers Cox and Dime were "in no better position than the jury to consider" the evidence, *id.* at 640, a reasonable jury would likely give "significant weight" to their improper opinion testimony due to their position as police officers and the authority with which they presented themselves based on their training and experience, *State v. Belk*, 201 N.C. App. 412, 418 (2009).

This improper opinion testimony was especially prejudicial because it "played a significant if not vital role in the State's case." *Id.* The surveillance videos of the accident did not show who was at fault, as Officers Cox and Dime themselves unequivocally confirmed. T p 316 (Officer Cox's testimony confirming that based on the video, it is impossible to "definitively say which vehicle crossed the center line"); T p 430 (Officer Dime's testimony that "[t]he video itself doesn't determine who is at fault"). The State's only eyewitness to the accident was pulling out of a parking lot when the accident occurred,

admitted that he was a significant distance away—at least far enough away that he did not have to slam his brakes to avoid the accident, which occurred at high speed on a major road—and provided an estimation of distance that did not match the surveillance video, which showed no other cars behind Lopez for several seconds. These discrepancies are unsurprising given that the accident occurred late at night and the streetlight above the accident was broken. The State urged the jury during closing argument to consider that the eyewitness testimony was "substantiated and corroborated by the independently verifiable physical evidence on the roadway," which, according to the officers' testimony, "demonstrated that this happened in her lane, not his." (T p 606). Put simply, the State's showing on this crucial issue was not overwhelming, thus forcing the State to rely on improper opinion testimony.

Moreover, the jury's uncertainty about its verdict underscores the likelihood that the officers' improper testimony affected the outcome. After deliberating for several hours, the jury announced that it was unable to reach a verdict and requested instructions on how to proceed. (R p 101; T pp 676-680). After the jury was instructed to continue deliberating, the jury specifically requested to view the surveillance videos of the accident, thus indicating that the source of the jury's uncertainty was whether Mr. Marroquin or Lopez was at fault. (R p 102; T pp 681-83).

In sum, the admission of the officers' improper lay opinion testimony on the most crucial issue in the case was plain error, which likely affected the jury's verdict. Alternatively, Mr. Marroquin requests that the Court review this issue for ineffective assistance of counsel. To prove ineffective assistance of counsel, the defendant "is required to demonstrate that his trial counsel's performance was deficient and that this deficient performance 'prejudiced the defense.'" *State v. Pemberton*, 228 N.C. App. 234, 240 (2013) (citation omitted). The test is whether 'there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 240-41 (citation omitted). While reviewing courts generally "do not second-guess the strategic or tactical decisions made by a defendant's counsel," those decisions "can, however, be so unreasonable as to result in the provision of constitutionally deficient representation." *Id.* (citations omitted).

Here, the law governing the admission of Officer Cox's and Officer Dime's opinion testimony is straightforward, as it establishes a bright-line rule that such testimony cannot be admitted except through an expert witness. *Denton*, 265 N.C. App. at 636. Given this settled precedent, there was no reasonable basis for counsel not to object to the improper opinion testimony. Moreover, even if there was some plausible strategy for not objecting, it would be unreasonable under the circumstances of this case. It is reasonably possible that the error in failing to object affected the outcome

because it resulted in the admission of improper, highly prejudicial testimony on a crucial issue in the case. This Court need not reach the issue of counsel's performance because the error was plain, but Mr. Marroquin respectfully asserts this alternative claim to preserve his rights on the issue.

II. The trial court erred by admitting evidence that six years previously, Mr. Marroquin sideswiped his neighbor's vehicle without reporting it, because such evidence failed to meet the requirements of Rule 404(b) and was unduly prejudicial.

Standard of Review

This Court reviews *de novo* "the legal conclusion" that evidence is "within the coverage of Rule 404(b)." *State v. Pabon*, 2022-NCSC-16, ¶ 58, 380 N.C. 241, 257 (citation omitted). When the trial court "has made findings of fact and conclusions of law to support its 404(b) ruling," this Court "look[s] to whether the evidence supports the findings and whether the findings support the conclusions." *Id.* Additionally, the Court reviews the trial court's Rule 403 determination for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130 (2012).

Argument

The trial court erred by admitting evidence that six years before the accident in this case, Mr. Marroquin sideswiped his neighbor's parked, unoccupied vehicle on the street and failed to report it. (T pp 484-85). This incident did not result in a conviction, as the charge was dismissed. (T p

493). Mr. Marroquin moved in limine to preclude this evidence and timely objected to its admission at trial. (R pp 28-29; T pp 26-27, 483-495, 504).

This evidence was not sufficiently probative to be admissible under Rule 404(b), and its admission was unduly prejudicial under Rule 403. Relying on *State v. Maready*, 362 N.C. 614 (2008), the trial court concluded that evidence of the sideswiping incident was admissible to show that Mr. Marroquin acted with malice, thus supporting a conviction for second degree murder. (T p 498). The trial court further concluded that the sideswiping incident was sufficiently similar to this case to be admissible, and that its probative value outweighed the prejudice to Mr. Marroquin. (T p 499). But the circumstances of *Maready* are starkly different from this case, and do not support the trial court's conclusions.

In *Maready*, our Supreme Court held that evidence that a defendant had been convicted of DWI *four times* in the sixteen years prior to the vehicular homicide with which he was convicted was admissible to show that he acted with malice. *Maready*, 362 N.C. at 623. The Court distinguished its prior decision in *State v. Goodman*, in which the Court had held that evidence of six prior DWI convictions was *not* sufficiently probative to be admissible because only one of the convictions occurred within sixteen years preceding the crime at issue in that case. *Id.* (citing *State v. Goodman*, 357 N.C. 43 (2003)). The Court explained that "[t]he driving record in this case

demonstrates a much more consistent, and therefore more probative, pattern of criminal behavior than the record in *Goodman*." *Id.* at 623. The Court emphasized that Rule 404(b) determinations depend on the circumstances of the case, and that they are based on whether prior convictions "constitute part of a clear and consistent pattern of criminality that is highly probative of his mental state at the time of his actions at issue here." *Id.* at 624.

Whereas *Maready* involved a clear pattern of serious, and factually related, criminal convictions leading up to the crime of conviction, Mr. Marroquin's dismissed misdemeanor charge for sideswiping a parked vehicle without reporting it is extremely dissimilar from the fatal accident at issue in this case. *Cf. State v. Davis*, 208 N.C. App. 26, 43 (2010) (prior DWI convictions "were too temporally remote to be admissible" and "do not 'constitute part of a clear and consistent pattern of criminality'" (citation omitted)). The sideswiping incident did not involve a collision between moving vehicles and did not result in any injuries. Nor is there any evidence that alcohol was involved. The remoteness in time, six years earlier, further attenuates the relevancy of the incident to any issue in this case. The fact that the charge was dismissed by the State prior to any adjudication of guilt raises further concerns about the fairness of using the evidence and the prejudice to Mr. Marroquin. *Cf. State v. Gray*, 137 N.C. App. 345, 349 (holding that evidence of prior alcohol-related driving conviction was

admissible to show malice, and citing other cases where prior driving convictions were admitted). These circumstances fall short of the showing upheld in *Maready*, as well as other cases where this Court held evidence of prior convictions admissible to show malice. *See id.*

Though the jury ultimately rejected the State's malice theory and acquitted Mr. Marroquin of second degree murder, the error was nonetheless prejudicial. The admission of this evidence created a danger that the jury would rely on it to conclude that Mr. Marroquin had the propensity to commit the offenses of which he was convicted. In other words, there is a reasonable possibility that the jury concluded that Mr. Marroquin was more likely to have committed the offenses because he committed another traffic offense in the past. That is especially so given the other weaknesses in the State's case and evidentiary errors, as described above.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted, this 10th day of May, 2023.

/s/ Electronically submitted
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CERTIFICATE OF COMPLIANCE

I certify that, in accordance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure, the attached brief uses 13-point Century Schoolbook type and contains less than 8,750 words (excluding the parts excluded by rule).

This 10th day of May, 2023.

/s/ Electronically submitted
Caryn Strickland

CERTIFICATE OF SERVICE

I certify that today, I caused the attached document to be served on all counsel by email, addressed to:

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This 10th day of May, 2023.

/s/ Electronically submitted
Caryn Strickland