

DWI AND FATALITIES

(1) Defendant May Not Be Sentenced for Both Involuntary Manslaughter and Felony Death by Vehicle Based on Same Death

(2) Defendant May Not Be Sentenced for Both Felony Death by Vehicle and DWI Based on Same Incident

(3) Trial Court Did Not Commit Error Concerning Defendant's Right to Unanimous Verdict When Involuntary Manslaughter Jury Instruction on Culpable Negligence Allowed Jury to Consider One or More Traffic Violations to Establish Element

(4) Court Orders Remand for Resentencing

State v. Davis, ___ N.C. App. ___, 680 S.E.2d 239 (4 August 2009).

The defendant was convicted of DWI, involuntary manslaughter, and felony death by vehicle arising from a crash in which the defendant was impaired and one person died as a result of the crash. The trial court imposed sentences for all three convictions. (1) Although the court, based on North Carolina Supreme Court cases, rejected the ruling in *State v. Williams*, 90 N.C. App. 614 (1988), that the offenses of felony death by vehicle and involuntary manslaughter have the same elements, it ruled that the legislature did not intend that a defendant could be sentenced for convictions of both offenses. (2) The court ruled, relying on *State v. Richardson*, 96 N.C. App. 270 (1989), that the defendant could not be sentenced for both DWI and felony death by vehicle. (3) The court ruled, relying on *State v. Funchess*, 141 N.C. App. 302 (2000), that the trial court did not commit error concerning the defendant's right to a unanimous verdict when the involuntary manslaughter jury instruction on culpable negligence allowed the jury to consider one or more traffic violations to establish the element. (4) The court ordered that on remand for resentencing, if the trial court vacates the conviction of involuntary manslaughter and sentences the defendant for felony death by vehicle, then the court must arrest the DWI judgment. If the trial court vacates the felony death by vehicle conviction, the defendant may be sentenced for both involuntary manslaughter and DWI.

Evidence Of Malice Based On Driving Recklessly, Drinking Before and While Operating A Motor Vehicle, Prior Convictions For Impaired Driving and DWLR, And Fleeing And Engaging In Elusive Behavior After Accident

State v. Tellez, ___ N.C. App. ___, ___ S.E.2d __ (Nov. 3, 2009).

There was sufficient evidence of malice to sustain a second-degree murder conviction where the defendant drove recklessly, drank alcohol before and while operating a motor vehicle, had prior convictions for impaired driving and driving while license revoked, and fled and engaged in elusive behavior after the accident.

Homicide—second-degree murder—officer's death during high speed chase—malice

State v. Bethea, 167 NCA 215 (2004)

The trial court correctly denied defendant's motion to dismiss a second-degree murder charge for insufficient evidence of malice in the death of an officer in an automobile accident while he was chasing defendant at high speed. While prior second degree murders from automobile accidents have involved impaired driving, defendant's conduct here was equally reckless and wanton.

Homicide—second-degree murder—officer's death in high speed chase—proximate cause

State v. Bethea, 167 NCA 215 (2004)

There was sufficient evidence of proximate cause in a second-degree murder case arising from the death of an officer in an automobile accident while he was chasing defendant at high speed. A reasonable mind might conclude that defendant's reckless flight and wanton violation of the traffic laws caused or directly contributed to the victim's death.

Homicide-second-degree murder—death of officer in car chase--requested instructions--insulating negligence

State v. Bethea, 167 NCA 215 (2004)

The court gave in substance all but one of the instructions on proximate cause requested by a second-degree murder defendant prosecuted for the death of an officer who was chasing defendant at high speed. There was no error in not giving an instruction on insulating negligence because contributory negligence has no place in criminal law and no reasonable person could conclude that the officers' actions intervened to be the cause of death.

Homicide—felony murder—motorist's death during flight from robbery—driving at the speed limit—not a break in circumstances

State v. Doyle, 161 NCA 247 (2003)

Defendant's driving at the speed limit for a time between an armed robbery and the beginning of a high speed chase did not separate the subsequent death of a motorist from the robbery and flight. Escape need not be accomplished at high speeds; defendant presented no evidence that he was diverted from his chosen route and his motion to dismiss a first-degree felony murder charge was correctly denied.

Homicide—felony murder—motorist's death during high speed chase—insulating negligence—use of stop sticks foreseeable

State v. Doyle, 161 NCA 247 (2003)

Defendant's requested special instructions on insulating negligence were correctly denied in a felony murder prosecution for the death of a motorist which occurred

as defendant avoided stop sticks (devices used by police to puncture automobile tires) while fleeing from an armed robbery. The use of stop sticks was reasonably foreseeable.

Homicide; Assault– traffic offense–culpable negligence–alcohol not involved

State v. Wade, 161 NCA 686 (2003)

There was sufficient evidence of culpable negligence to support defendant's convictions on charges of assault and involuntary manslaughter arising from a traffic accident in which alcohol was not involved. There is precedent for recognizing that the operation of a vehicle can lead to involuntary manslaughter even without alcohol, and, although this may be the first such holding in the absence of alcohol, defendant's actions were also sufficient for assault with a deadly weapon inflicting serious injury.

Evidence - prior DWI convictions - admissible for malice

State v. Smith, 157 N.C. App. 493 (2003)

Defendant's prior convictions for driving while impaired were admissible in his second-degree murder and impaired driving prosecution where the prior convictions were remote in time but were offered to establish malice. (1984; 1990) See Farb P. 29

Homicide–second-degree murder–sufficiency of evidence–malice–driving while impaired

State v. Locklear, 159 NCA 588 (2003)

The evidence of malice was sufficient in a second-degree murder prosecution where defendant was driving with an alcohol concentration of .08 when he collided with another vehicle; a seven-year-old boy in the other vehicle suffocated when the shoulder belt tore his windpipe; and a prior conviction put defendant on notice of the consequences of driving while impaired.

Homicide--second-degree murder–impaired driving--sufficiency of evidence

State v. Vasse, 154 NCA 384 (2002)

The trial court did not err by failing to dismiss the charge of second-degree murder because there was substantial evidence that defendant's impaired driving caused the accident in which his girlfriend was killed including that: (1) defendant consumed at least ten to twelve beers over a course of six hours; (2) defendant stated he had been drinking beer heavily and possibly champagne as well; (3) defendant's employer who was in defendant's presence for at least twenty minutes the morning of the accident testified that defendant was still heavily drunk some six hours after defendant last reported consuming alcohol; (4)

defendant's employer testified that defendant not only reeked of alcohol but that his eyes were glassy and his speech was slightly slurred; (5) the physical evidence from the crash site showed that, although road conditions were clear, defendant lost all control of the vehicle he was driving; and (6) defendant made a deliberate decision to drive despite the fact that he had no license and was impaired at the time, and defendant had been convicted of driving while impaired and with a revoked license on numerous occasions.

Evidence; Motor Vehicles--driving while impaired--blood test--motion in limine--motion to suppress

State v. McDonald, 151 NCA 236 (2002)

The trial court did not abuse its discretion in a second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, failure to stop at a stop sign, driving left of center, and consumption of alcohol by an individual less than twenty-one years of age case by denying defendant's motion in limine and motion to suppress the results of a blood test even though defendant's blood sample was left in a box in an officer's patrol car for three days before being tested, because: (1) the accuracy of the analysis is what is at issue as opposed to the status of the blood sample itself; (2) the evidence presented at trial showed the State followed the guidelines set forth in N.C.G.S. § 20-139.1; (3) there was no question of a mistake or an incorrect administration of the blood testing of the sample of defendant's blood; (4) there was evidence that the effect of the blood being left in the car for three days, if any, was that the alcohol content would evaporate and actually lower the alcohol concentration, which would be to defendant's benefit; and (5) the uncertainty regarding the effect of leaving the samples in the patrol car for three days goes to the weight of the evidence.

Homicide--second-degree murder--malice--motion to dismiss--sufficiency of evidence

State v. McDonald, 151 NCA 236 (2002)

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder at the close of all evidence based on alleged insufficient evidence of malice, because there was substantial evidence of malice by driving in such a reckless manner including: (1) defendant had previously been convicted of consuming alcohol while under the age of twenty-one; (2) defendant knew his conduct at the time of the accident was illegal; (3) defendant was driving without looking at the road in order to pick up a lit cigarette he had dropped; (4) defendant's truck literally flew across the intersection; (5) defendant's blood-alcohol level was almost twice the legal limit; and (6) although defendant was not cited for speeding, defendant drove at 55 mph without looking at the road.

Homicide--second-degree murder--driving while intoxicated--malice--sufficiency of evidence

State v. Goodman, 149 NCA 57 (2002)

The trial court did not err by failing to dismiss the charge of second-degree murder arising out of defendant's driving while intoxicated based on the sufficiency of the evidence concerning malice, because: (1) the State introduced evidence of defendant's extensive driving-related convictions, including prior convictions for driving while impaired; and (2) the evidence also showed that defendant ran a red light while traveling approximately forty to forty-five miles per hour with his head and arm hanging out of the window.

Homicide--second-degree murder--driving while intoxicated--failure to submit misdemeanor death by vehicle

State v. Goodman, 149 NCA 57 (2002)

The trial court did not err in a second-degree murder case arising out of defendant's driving while intoxicated by failing to submit to the jury the possible verdict of misdemeanor death by vehicle under N.C.G.S. § 20-141.4(a2), because misdemeanor death by vehicle is a lesser included offense of involuntary manslaughter, and since the jury rejected involuntary manslaughter in favor of second-degree murder, it would also have rejected the lesser offense of misdemeanor death by vehicle.

Homicide--first-degree murder--felony murder rule--assault with deadly weapon inflicting serious injury--operation of motor vehicle to elude arrest

State v. Woodard, 146 N.C. App. 75 (2001)

The trial court erred by allowing the underlying felonies of assault with a deadly weapon inflicting serious injury and operation of a motor vehicle to elude arrest to support the State's application of the felony murder rule and defendant's subsequent conviction of first-degree murder, because: (1) our Supreme Court has already held that it is improper to base a first-degree murder charge on the underlying felony of assault with a deadly weapon inflicting serious injury; and (2) felonious operation of a motor vehicle to elude arrest under N.C.G.S. § 20-141.5 does not provide an intent requirement for the aggravating factors necessary to raise the violation from a misdemeanor to a felony, and culpable negligence cannot serve as the basis for intent in a first-degree murder conviction.

Evidence--prior crime or act--DWI convictions

State v. Woodard, 146 N.C. App. 75 (2001)

The trial court did not err in a first-degree murder case, arising out of a fatal vehicle collision occurring after defendant drove his vehicle at an excessive rate of speed through an intersection in an effort to elude pursuing law enforcement officers, by admitting evidence of and instructing the jury on defendant's prior DWI charges and convictions because: (1) evidence of other crimes or wrongful acts by a defendant may be used under N.C.G.S. § 8C-1, Rule 404(b) to demonstrate malice; and (2) defendant's prior DWI convictions tended to demonstrate that defendant was aware that his conduct leading up to the collision in this case was reckless and inherently dangerous to human life.

Homicide--second-degree murder--driving while impaired--instruction--malice

State v. Carr, 145 NC App 335 (2000)

The trial court did not err when instructing the jury on malice in a second-degree murder prosecution arising from driving while impaired.. Although defendant contended that the court erred by not stating that the act must be performed intentionally, the court gave an instruction expressly approved in.

Evidence--prior convictions--driving while impaired--reckless driving--malice

State v. Miller, 142 N.C. App. 435 (2001)

The trial court did not err in a prosecution for second-degree murder arising from defendant's impaired driving by admitting defendant's prior convictions for driving while impaired and careless and reckless driving to establish that defendant acted with malice.

Homicide--second-degree murder--driving while impaired--sufficiency of evidence

State v. Miller, 142 N.C. App. 435 (2001)

The trial court properly denied defendant's motion to dismiss a charge of second-degree murder arising from driving while impaired for lack of sufficient evidence where defendant had prior convictions, was swerving prior to the accident, and had a blood alcohol level far beyond the legal limit four hours after the accident.

Homicide--second-degree murder--driving while impaired-- malice--sufficiency of evidence

State v. Fuller, 138 NC App 481 (2000)

The trial court did not err by denying defendant's motion to dismiss the two charges of second degree murder based on substantial evidence revealing that defendant had malice of the type manifesting a mind utterly without regard for

human life and social duty, because: (1) defendant operated his automobile with a high degree of alcohol in his blood and after numerous prior driving convictions including reckless driving, speeding and driving while license was revoked due to his habitual offender status; (2) during a 16.7 mile chase by a police officer, defendant ran both a stop sign and a red stop light, passing stopped traffic at speeds of 90-95 miles per hour; and (3) both passengers in the truck defendant struck during the high speed chase died as a result of the collision.

Evidence--prior bad acts--driving while impaired--prior conviction--pending charge--malice

State v. Mcallister, 138 N.C. App. 252 (2000)

The trial court did not err in a prosecution for second-degree murder and driving while impaired by admitting evidence of defendant's prior conviction and pending charge for impaired driving because: (1) the 1991 conviction was probative of defendant's state of mind and to show malice; and (2) the pending 1997 driving while impaired case is admissible as evidence of malice to support a second-degree murder charge, and the trial court properly instructed that the 1997 incident pertained to a pending trial rather than a conviction. N.C.G.S. § 8C-1, Rule 404(b).

Homicide--second-degree murder--motion to dismiss--sufficiency of evidence--malice

State v. Mcallister, 138 N.C. App. 252 (2000)

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder because: (1) the State need not show that defendant intended to kill in order to establish malice, but instead may meet its burden by showing 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; and (2) the evidence reveals malice since defendant drove while impaired by alcohol and at a time when his license was in a state of permanent revocation, he was previously convicted in 1991 for driving while impaired, and he had a 1997 conviction for driving while impaired that was on appeal.

Homicide--felony murder--DWI--implied intent

State v. Jones, 353 N.C. 159 (2000)

First-degree murder convictions which arose from driving while impaired were reversed where the defendant was found guilty under the felony murder rule, based upon injuries to others in the victims' car and resulting assault convictions.

The North Carolina murder statute, N.C.G.S. § 14-17, designates five specific felonies as the basis for felony murder, each requiring actual intent to commit the crime; while there is a catchall category of felonies committed with a deadly weapon (such as an automobile), all of the crimes qualified by case law require actual intent to commit the underlying crime. There is no first-degree murder case premised on implied intent as evidenced by culpable or criminal negligence and no language in N.C.G.S. § 14-17 suggesting that the legislature intended or even contemplated that first-degree murder might be premised on implied intent; however, the General Assembly has passed N.C.G.S. § 20-141.4, felony and misdemeanor death by vehicle, in contemplating situations similar to the case at hand. Moreover, the State's theory as to the applicability of the felony murder rule in reckless driving cases has the potential for profoundly unjust results, and it is presumed that the legislature did not intend an unjust result. If culpable negligence is to be a building block in a capital case, it must be by clear mandate of the legislature and not through judicial fiat or through innovative application by prosecutors. There is, however, ample evidence in the record to support a charge of second-degree murder.

Evidence--murder prosecution--pending DWI charge--malice

State v. Jones, 353 N.C. 159 (2000)

The trial court did not err in a prosecution for murder and assault arising from driving while impaired by admitting defendant's pending DWI charge. The circumstances attendant to the pending charge, such as speeding on the wrong side of the road and running another motorist off the road, demonstrate that defendant was aware that his conduct was reckless and inherently dangerous. The evidence therefore tended to show malice, an element of second-degree murder, and was properly admitted under N.C.G.S. § 8C-1, Rule 404(b).

Homicide--DWI--proximate cause and insulating negligence--denied--instructions denied

State v. Jones, 353 N.C. 159 (2000)

The trial court did not err in a prosecution for murder and assault resulting from driving while impaired by not instructing the jury on proximate cause and insulating acts of negligence. The requested instruction that defendant's actions must be the sole and only proximate cause of the collision in order to hold him criminally liable was a misstatement of the law and the record shows no evidence of any negligence by the driver of the other car. Defendant was in her lane and she was forced to swerve into the left lane to try to avoid a collision; defendant's argument that she should have swerved to the right and hit a telephone pole and/or mailboxes is entirely unpersuasive.

Evidence - Relevancy - homicide - impaired driving - prior conviction

State v. Gray, 137 N.C. App. 345 (2000)

The trial court did not err in a prosecution for impaired driving second-degree murder by admitting a prior conviction for violation of N.C.G.S. § 20-138.3, which makes it unlawful for a person under 21 to drive while consuming alcohol.

Evidence - Photographs - crash victims' automobile

State v. Gray, 137 N.C. App. 345 (2000)

The trial court did not err in an impaired driving second-degree murder prosecution by admitting photographs of the victims' vehicle.

Homicide - Second-degree murder - impaired driving - malice - sufficiency of evidence

State v. Gray, 137 N.C. App. 345 (2000)

There was sufficient evidence of malice in an impaired driving second-degree murder prosecution where defendant's blood alcohol level was .113 three hours after the accident, the collision occurred in the victim's lane of travel, and charges of driving while impaired and driving while license revoked were pending against defendant at the time of the accident.

Homicide - malice - instructions - second-degree murder - automobile accident – attitudinal circumstances

State v. Rich, 351 N.C. 386 (2000)

The trial court did not err in a prosecution for second-degree murder by instructing the jury that malice may be present if only one of the attitudinal circumstances constituting malice - wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, a mind regardless of social duty and deliberately bent on mischief - is found to exist. The attitudinal circumstances listed by the trial court in the instruction serve only as descriptive words or phrases and do not constitute elements of malice so that the State need not prove each and every one of those attitudinal examples of malice in order for the jury to infer malice.

Homicide - instructions - malice - recklessness of consequences

State v. Rich, 351 N.C. 386 (2000)

The trial court's instruction allowing the jury in a second-degree murder case to find malice based on "recklessness of consequences" did not lower the culpability level required to convict a defendant of second-degree murder to a level of culpable negligence since the trial court's instructions as a whole reflected terms

which described the degree of recklessness sufficient for the jury to find the state of mind which constitutes malice, and the jury could not have confused such a high degree of recklessness with mere culpable negligence.

Homicide - instructions - malice - deliberately bent on mischief

State v. Rich, 351 N.C. 386 (2000)

The trial court did not err in its definition of "deliberately bent on mischief" as used in its instruction on malice in a prosecution for second-degree murders arising from an automobile accident by failing to convey the appropriate concepts of deliberateness and intention since it was necessary for the State to prove only 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; the State was not required to show that defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill; and the State presented testimony that defendant drove his vehicle at a high rate of speed while impaired, on the wrong side of the road, in a no-passing zone and in violation of right-of-way rules. Therefore, the jury was properly focused on defendant's intention to perform an act which reflected the level of intent that is associated with a person being "deliberately bent on mischief."

Homicide - instructions - malice - deliberately bent on mischief

State v. Rich, 351 N.C. 386 (2000)

The trial court's instruction on the meaning of "deliberately bent on mischief" in a prosecution for second-degree murders arising from an automobile accident could not have caused the jury to confuse malice with culpable negligence where the trial court never mentioned culpable negligence to the jury in connection with its charge on second-degree murder but focused on the term "malice"; and the instructions clearly required a finding of malice sufficient to support second-degree murder if the jury concluded that defendant's actions were such as to be inherently dangerous to human life and were done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

Automobiles and Other Vehicles 790 (NCI4th) - murder - driving while impaired - evidence of malice - sufficient

State v. McBride, 109 N.C. App. 64 (1993) 425 S.E.2d 731

There was sufficient evidence of malice in a second degree murder prosecution arising from an automobile accident where defendant drove his car knowing that his license was permanently revoked, indicating that he acted with a mind without

regard for social duty and with recklessness of consequences; the fact that defendant used false license tags and lied to inspection personnel to obtain an inspection sticker indicates a mind deliberately bent on mischief; and defendant's driving while substantially impaired after prior convictions for driving while impaired and while his license was revoked manifests a mind utterly without regard for human life and social duty.

Criminal Law 1149 (NCI4th) - knowingly creating risk to more than one person with device normally hazardous to more than one person - drunk driver - fatal accident - finding of aggravating factor proper

State v. McBride, 118 N.C. App. 316 (1995)

The trial court did not err in finding as an aggravating factor for second-degree murder and impaired driving 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, since an automobile driven by an intoxicated driver is a device which in its normal use is hazardous to the lives of more than one person, and defendant's prior convictions for driving while impaired and his reckless operation of his automobile on the night in question, together with his factual misrepresentations, supported the conclusion that defendant knowingly created this risk.

Criminal Law § 1095 (NCI4th Rev.) - second-degree murder - automobile accident – aggravating factor - position of trust or confidence - insufficient evidence

State v. Ballard, 349 N.C. 286 (1998)

The evidence was insufficient to support the trial court's finding of the aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense of second-degree murder arising from the death of a twelve-year-old child in an automobile accident while defendant was intoxicated and being pursued by a deputy sheriff.

Homicide - felony death by motor vehicle - not a lesser included offense of second-degree murder

State v. Grice, 131 N.C. App. 48 (1998)

The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident resulting from defendant's impaired driving by

instructing the jury on second-degree murder, involuntary manslaughter, and misdemeanor death by vehicle, but refusing to instruct on felony death by motor vehicle. Felony death by motor vehicle is not a lesser included offense of second-degree murder.

Criminal Law - prior convictions - admitted to show malice - limiting instructions

State v. Grice, 131 N.C. App. 48 (1998)

The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident which resulted from defendant's impaired driving by admitting DUI convictions from 1980. Prior driving while impaired convictions may be offered to show malice and the trial court correctly gave a limiting instruction.

