

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-947

Filed: 16 May 2017

Wake County, No. 14 CRS 214112

STATE OF NORTH CAROLINA

v.

MELVIN LEROY FOWLER, Defendant.

Appeal by Defendant from judgment entered 2 March 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 8 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Melvin Leroy Fowler (“Defendant”) appeals a jury verdict convicting him of driving while impaired (“DWI”). On appeal, Defendant contends the trial court erred by: (1) instructing the jury on a theory of impaired driving unsupported by the evidence, thus violating Defendant’s constitutional right to a unanimous jury verdict; and (2) allowing Officer Monroe to testify as an expert witness regarding the horizontal gaze Nystagmus (“HGN”) test. For the following reasons, we grant Defendant a new trial.

I. Factual and Procedural Background

On 19 June 2014, Officer R. P. Monroe of the Raleigh Police Department (“RPD”) stopped Defendant and arrested him for DWI. On 24 February 2015, Wake County District Court Judge James R. Fullwood found Defendant guilty of DWI. Defendant appealed to superior court for a jury trial, pursuant to N.C. Gen. Stat. § 15A-1431 (2016).

On 1 March 2016, the trial court called Defendant’s case for trial. The evidence at trial tended to show the following.

The State first called Officer Monroe. On Thursday, 19 July 2014, Officer Monroe worked the night shift for the RPD. Aware the Wake County Sheriff’s Office set up a checkpoint on Gorman Street, Officer Monroe visited the checkpoint to see if he could assist.

Officer Monroe rode down Avent Ferry Road on his motorcycle. When he was less than a half a mile from Gorman Street, he came to a point where Crest Road T-intersects with Avent Ferry Road. Officer Monroe saw Defendant’s truck on Crest Road. Defendant pulled out in front of Officer Monroe’s motorcycle. Officer Monroe “lock[ed] the bike up”¹, “ma[d]e an evasive maneuver”, and “dip[ped]” into the right lane to avoid hitting Defendant’s truck. Officer Monroe’s motorcycle and Defendant’s truck came within “maybe two or three feet” of each other. Officer Monroe activated

¹ Officer Monroe explained to “lock the brakes up” means to employ the antilock brake on the motorcycle.

his blue lights and stopped Defendant for unsafe movement. Defendant stopped his truck at a stop sign at the intersection of Avent Ferry Road and Champion Court.

Officer Monroe introduced himself and explained he stopped Defendant because Defendant almost ran into his motorcycle. Officer Monroe saw Defendant's red, glassy eyes. He smelled a "medium" odor of alcohol on Defendant's breath. Defendant spoke with slurred speech. Officer Monroe asked Defendant why he pulled out in front of his motorcycle. Defendant remarked Officer Monroe had enough room and he "was catching [Officer Monroe's] curiosity."

Officer Monroe asked Defendant if he drank any alcohol that night. Defendant responded "one to two" servings of Jägermeister, and he was only driving a short distance. Officer Monroe asked Defendant to get out of his truck to participate in a series of field sobriety tests. Defendant agreed.

Officer Monroe conducted three field sobriety tests: HGN, walk-and-turn, and one-leg stand. Officer Monroe first conducted the HGN test. Officer Monroe turned Defendant away from traffic, so passing headlights did not affect Defendant's eyes. He directed Defendant to stand facing him, with his feet together and hands to the side. Officer Monroe elevated Defendant's head slightly and held his finger in front of Defendant. He informed Defendant he was going to move his finger from left to right and instructed Defendant to follow his finger with Defendant's eyes. Defendant stated he understood the instructions, and Officer Monroe started the test. During

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the test, Defendant displayed a lack of “smooth pursuit” in both eyes, which Officer Monroe considered “two clues.” Defendant ultimately displayed six out of six possible clues, three in each eye. Based on this test and the odor of alcohol, Officer Monroe concluded Defendant “had an impairing amount of alcohol in his system.”

Officer Monroe also conducted two “divided attention” tests. The first test is the walk-and-turn. Officer Monroe instructed Defendant to place his left foot in front, with both hands to his sides, and move his right foot heel-to-toe. Officer Monroe told Defendant to stay in the heel-to-toe position while he gave Defendant further instructions. Officer Monroe next instructed Defendant to take nine heel-to-toe steps while keeping his hands at his sides, and counting out loud.

Defendant failed to follow instructions. Defendant swayed and stepped out of the starting stance. Officer Monroe instructed Defendant to return to the starting stance. Defendant then started the test too soon, stepped out of position, and lost his balance. Officer Monroe again instructed Defendant to stand in the starting position, but Defendant stepped out. The third time Officer Monroe instructed Defendant to get back in starting position, Defendant told Officer Monroe he could not do the test. Defendant then told Officer Monroe he was not going to do the test without his kneepads. Officer Monroe concluded the test.

Officer Monroe asked Defendant if he was willing to do the one-leg stand test. Defendant agreed. Officer Monroe instructed Defendant to keep his feet together,

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put his hands to his side, and stay in that position. Defendant was then to lift one foot with his toes pointed to the ground, and keep his foot parallel with the ground. While looking at his foot, Defendant would count to three. Next, Defendant should put his foot down and repeat the lift, as he continued counting from where he left off.

Defendant swayed when Officer Monroe started the test. Defendant also failed to follow the instructions. Defendant “barely got his foot off the ground” and failed to look down at his toes. When Officer Monroe instructed Defendant to lift his foot six inches off the ground, Defendant told Officer Monroe he did not know how much six inches was. Officer Monroe offered to demonstrate the test again. Defendant said he no longer wanted to do the test.

Officer Monroe told Defendant he would like to take a preliminary sample of Defendant’s breath. He explained this test was not admissible in court, but rather just a test for positive or negative of alcohol. Defendant refused.

Officer Monroe arrested Defendant for DWI. After booking Defendant, Officer Monroe brought Defendant into the DWI testing room. He presented Defendant with a form for implied consent. Officer Monroe read Defendant his rights. Defendant signed the form, acknowledging he understood his rights. Defendant then placed a call. Officer Monroe did not know if Defendant called someone to observe the administration of tests.

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Thirty minutes later, Officer Monroe administered the Intoxilyzer test. Officer Monroe instructed Defendant on how to correctly blow into the breathalyzer. However, Defendant stopped blowing air into the instrument before Officer Monroe told him to stop. The instrument “shut[] down” and displayed “insufficient sample.” Officer Monroe again instructed Defendant on how to correctly blow into the instrument. Defendant said he had cancer, which prevented him from properly blowing into the instrument. Defendant then told Officer Monroe he was not going to blow into the instrument. Officer Monroe explained to Defendant his breathing was sufficient, but Defendant prematurely stopped blowing. Officer Monroe told Defendant if Defendant did not blow into the instrument, he was “going to refuse him.” “Refusing” constitutes pressing the refusal button on the instrument, which indicates Defendant’s “willful refusal not to provide a breath sample on the instrument for the purposes of a DWI investigation.”

The State rested, and Defendant moved to dismiss the case. The trial court denied Defendant’s motion to dismiss. Defendant did not present any evidence. Defendant renewed his motion to dismiss, and the trial court denied Defendant’s motion.

When discussing jury instructions, the State requested “the .08 instruction.” Defendant objected to the .08 instruction, because “there was no evidence to [any]

sort of an actual number of any blood alcohol level” The trial court decided it would use the .08 instruction and reasoned:

Well, if you argue they haven’t shown .08 I’m going to give that instruction or they haven’t shown his blood alcohol content I will give that instruction because you can’t have it both ways. You can’t -- you can’t object to the instruction and argue that they haven’t shown his [blood alcohol content] because there [is] more than one way to prove the offense.

The jury found Defendant guilty of driving while impaired. Defendant admitted to the existence of two driving while impaired convictions. Defendant admitted to the aggravating fact of driving while license revoked due to a DWI conviction. The trial court sentenced Defendant as an Aggravated Level One offender and sentenced him to 24 months imprisonment. Defendant gave timely oral notice of appeal.

II. Standard of Review

Challenges to the trial court’s “decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). In a *de novo* review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008)(internal quotation marks and citation omitted).

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“It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated.” *Piedmont Triad Reg’l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted). If an error is preserved for review, but does not arise under the Constitution of the United States, we review for prejudicial error. N.C. Gen. Stat. § 15A-1443(a) (2016).

Lastly, in regards to Officer Monroe’s expert opinion testimony, the trial court’s ruling on expert testimony under Rule 702 is typically reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, ___, 787 S.E.2d 1, 11 (2016) (citation omitted). “And ‘a trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.’” *Id.* at ___, 787 S.E.2d at 11 (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). However, “[w]here the [defendant] contends the trial court’s decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*.” *State v. Torrence*, ___ N.C. App. ___, ___, 786 S.E.2d 40, 41 (2016) (quotation marks and citations omitted).

III. Analysis

We review Defendant’s contentions in two parts: (A) jury instructions for impaired driving under N.C. Gen. Stat. § 20-138.1 (a)(2); and (B) Officer Monroe’s expert testimony regarding the HGN test.

A. Jury Instructions for Impaired Driving

On appeal, Defendant contends the trial court erred by instructing the jury on driving while impaired under N.C. Gen. Stat. § 20-138.1 (a)(2), which violated Defendant's constitutional right to an unanimous jury verdict. We address Defendant's contentions regarding the jury instructions together and agree the trial court committed reversible error.

N.C. Gen. Stat. § 20-138.1(a) states:

A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed a sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
- (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 138.1(a).

“Both the North Carolina Constitution and the North Carolina General Statutes protect the right of the accused to be convicted only by a unanimous jury in open court.” *State v. Walters*, 368 N.C. 749, ___, 782 S.E.2d 505, 507 (2016) (citing N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1237(b)). “But it does not follow from

these constitutional and statutory guarantees that every disjunctive jury instruction violates one or both of those guarantees.” *Id.* at ___, 782 S.E.2d at 507.

As explained by our Supreme Court:

a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, either which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

...

[I]f the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied.

Id. at ___, 782 S.E.2d at 507-08 (internal quotation marks, citations, and emphases omitted).

This Court recently stated:

North Carolina’s appellate courts have consistently held that “a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.” *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). That is because the purpose of jury instructions is “the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.” *Id.* An instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence.

State v. Malachi, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA16-752, 2017 WL 1381592, *2 (2017).

Typically, disjunctive jury instructions for impaired driving are permissible. *State v. Oliver*, 343 N.C. 202, 215, 470 S.E.2d 16, 24 (1996). When a disjunctive jury instruction is permitted, the State must still present evidence to support both theories. *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007). When a disjunctive jury instruction is improperly given, it violates the Defendant's right to a unanimous jury, because it is impossible to determine upon what theory of the case the jury decided. *State v. Funchess*, 141 N.C. App. 302, 308, 540 S.E.2d 435, 438-39 (2000) (citations omitted).

Here, the State specifically requested the .08 instruction "just so [counsel could] use it in [his] argument." Defendant objected because "there was no evidence to sort of an actual number of any blood alcohol level" The trial court overruled Defendant's objection and instructed the jury as follows, *inter alia*:

The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt:

First, that the defendant was driving a vehicle.

Second, that the defendant was driving that vehicle upon a highway or street within the state.

And third, that the defendant was driving that vehicle, (1) that the defendant was under the influence of

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an impairing substance. Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has consumed a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties, or (2) that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. A relevant time is any time after driving that the driver still has in the driver's body alcohol consumed before or during driving. If the evidence tends to show that a chemical test known as an Intoxilyzer was offered to the defendant by a law enforcement officer and that the defendant refused to take the test or that the defendant refused to perform a field sobriety test at the request of an officer, you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time that the defendant drove a motor vehicle.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a highway or street in the state and that when doing so the defendant was under the influence of an impairing substance or that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of the breath, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant argues the trial court erred in instructing the jury under N.C. Gen. Stat. § 20-138.1 (a)(2), and such error is reversible error. The State concedes the trial

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court erred in its jury instructions. However, the State contends any error was harmless error, and Defendant is not entitled to a new trial.

We agree with both Defendant and State and hold the trial court erred in instructing the jury under both N.C. Gen. Stat. § 20-138.1(a)(1) and (a)(2). Although disjunctive jury instructions are generally permissible for impaired driving, in this case, the State presented *no* evidence supporting the section 20-138.1(a)(2) instruction. *Compare Oliver*, 343 N.C. at 215, 470 S.E.2d at 24, *with Johnson*, 183 N.C. App. at 582, 646 S.E.2d at 127. Defendant did not properly participate in the Intoxilyzer test, and the State introduced no evidence of blood alcohol tests. As such, the trial court improperly instructed the jury on alternate theories, one of which the evidence did not support.

It is impossible to conclude, based upon the record and general verdict form, upon which theory the jury based its verdict. Our case law mandates our Court to “assume the jury based its verdict on the theory for which it received an improper instruction.” *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (citations omitted).

Furthermore, cannot agree with the State that the error was harmless or non-prejudicial. It is settled law this error entitles Defendant to a new trial. Under controlling case law:

[w]here the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be

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erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (citation omitted). See *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (holding such error entitled defendant to a new trial); *Malachi*, ___ N.C. App. at ___, ___ S.E.2d at ___; *State v. Jefferies*, ___ N.C. App. ___, ___, 776 S.E.2d 872, 880 (2015); *Johnson*, 183 N.C. App. at 585, 646 S.E.2d at 128; *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994); *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994) (citation omitted); *State v. Dick*, No. COA15-1400, 2016 WL 5746395 (unpublished) (N.C. Ct. App. Oct. 4, 2016). See also *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted) ("Where jury instructions are given without supporting evidence, a new trial is required.").

Moreover, this is not a case where there is overwhelming evidence of Defendant's impaired driving. Before beginning the field sobriety tests, Defendant told Officer Monroe he suffers from knee pain. During the tests, Defendant told Officer Monroe he needed his knee pads to complete the tests. Officer Monroe testified Defendant lost his balance. However, Defendant neither fell during the tests, nor did he stumble or try to lean upon anything for balance.

Accordingly, we vacate Defendant's conviction for impaired driving and grant him a new trial.

B. Expert Testimony

Defendant also contends the trial court erred by allowing Officer Monroe to testify as an expert in "the administration and interpretation" of the HGN test. Although the issue of expert testimony for the HGN test needs to be resolved, the record and arguments in this case are insufficient to address this issue. Because we grant Defendant a new trial based on the trial court's error in jury instructions, we need not address this issue on appeal.

IV. Conclusion

For the foregoing reasons, we vacate Defendant's conviction and grant him a new trial.

NEW TRIAL.

Judge CALABRIA concurs.

Judge BERGER concurring in a separate opinion.

BERGER, Judge, concurring.

I reluctantly concur in the result reached by this Court as I am compelled to follow the law as it currently exists. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). However, it seems that, given the reasoning in recent opinions from our Supreme Court, harmless error analysis should be undertaken.

It is uncontroverted that, in the State’s case-in-chief for the driving while impaired charge, there was no evidence presented at trial regarding Defendant’s blood alcohol concentration, only evidence concerning an appreciable impairment theory. The trial court conducted a charge conference at the conclusion of all the evidence, and the record shows the court initially intended to instruct only on the appreciable impairment theory. However, the State argued, as shown below, that Defendant’s counsel intended to argue in closing that the State had failed to prove Defendant’s blood alcohol concentration:

THE COURT: I plan on giving . . . 270.20A, impaired driving. I will give the instructions on appreciable impairment as I assume that's the theory that the state is proceeding under.

. . .

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[THE STATE]: Your Honor, I would request the .08 instruction just so I can use it in my argument.

THE COURT: All right.

[ATTORNEY FOR DEFENDANT]: As there was no evidence to sort of an actual number of any blood alcohol level, I would object to that instruction.

THE COURT: Well, if you argue they haven't shown .08 I'm going to give that instruction or they haven't shown his blood alcohol content I will give that instruction because you can't have it both ways. You can't -- you can't object to the instruction and argue that they haven't shown his BAC because there are more than one way to prove the offense.

[ATTORNEY FOR DEFENDANT]: Well, my argument about the blood would be more along the line of not talking about any number at any point, just amount. If the blood came back and it was clear of all alcohol, there's no alcohol, there cannot possibly be an alcohol impairment. If there was only a minimal amount, .01 or .02, it couldn't be impairment.

THE COURT: Well, why agree with that because someone could have a .01 and .02 and still be impaired with that particular person. I mean, the only evidence is that there was consumption of alcohol. I mean, I will --

[THE STATE]: Your Honor, I'm almost confident [Attorney for Defendant]'s going to be arguing a portion of the blood test not being done and, you know, I mean, I think that that would

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allow us to at least have that instruction and then kind of explain why we don't have that in this case, so, I mean, I think it's appropriate to put it in there.

THE COURT: I'll go ahead and give B. Anything further?
And I note your objection.

The trial court then instructed the jury consistent with the Pattern Jury Instruction for Driving While Impaired, as follows:

The defendant has been charged with impaired driving. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt:

First, that the defendant was driving a vehicle.

Second, that the defendant was driving that vehicle upon a highway or street within the state.

And third, that the defendant was driving that vehicle, (1) that the defendant was under the influence of an impairing substance. Alcohol is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has consumed a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties, or (2) that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of breath. A relevant time is any time after driving that the driver still has in the driver's body alcohol consumed before or during driving.

If the evidence tends to show that a chemical test known as an Intoxilyzer was offered to the defendant by a law enforcement officer and that the defendant refused to

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take the test or that the defendant refused to perform a field sobriety test at the request of an officer, you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time that the defendant drove a motor vehicle.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a highway or street in the state and that when doing so the defendant was under the influence of an impairing substance or that the defendant had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more grams of alcohol per 210 liters of the breath, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The trial court erred in giving the instructions regarding .08 blood alcohol concentration, where it should have only instructed the jury on appreciable impairment. A disjunctive instruction is erroneous if there is no “evidence to support all of the alternative acts that will satisfy the element.” *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007). The North Carolina Supreme Court held in *State v. Pakulski* that:

Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987). See also *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (“[W]e must assume the jury based its verdict on the theory for which it received an improper instruction.” (citations omitted)); *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990); *State v. Johnson*, 183 N.C. App. 576, 646 S.E.2d 123 (2007); *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994) (“We are required, we believe, to order a new trial”), *disc. review denied*, 337 N.C. 697, 448 S.E.2d 536 (1994); *State v. Dick*, ___ N.C. App. ___, 791 S.E.2d 873 (2016) (unpublished); *State v. Malachi*, ___ N.C. App. ___, ___ S.E.2d ___, COA16-752, 2017 WL 1381592 (2017). These cases set forth a *per se* plain error rule requiring a new trial when a disjunctive instruction is given and there is no evidence to support each of the theories submitted to the jury.

However, the North Carolina Supreme Court appears to be shifting away from this *per se* plain error rule for disjunctive jury instructions. In *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012), that Court reaffirmed and clarified that “the plain error standard of review applies on appeal to unpreserved instructional” errors in the context of jury instructions. *Lawrence*, at 518, 723 S.E.2d at 334. The Supreme Court also noted that N.C. Gen. Stat. § 15A-1443 differentiated the harmless error standard of review, which applies only to preserved errors.

[H]armless error review functions the same way in both federal and state courts: Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable

doubt. . . . [A]n error . . . [is] harmless if the jury verdict would have been the same absent the error. Under both the federal and state harmless error standards, the government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error. But if the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. In such cases the defendant must show a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

Lawrence, at 513, 723 S.E.2d at 331 (internal citations, quotation marks, and brackets omitted).

In *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), our Supreme Court, after directing this Court to follow the analysis in *Lawrence*, adopted a dissent from the Court of Appeals which applied plain error review to an unpreserved error concerning a jury instruction for which there was no evidence. *See State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting), *dissent adopted by* 366 N.C. 548, 742 S.E.2d 798 (2013).

More recently, the Supreme Court remanded to this Court the case of *State v. Martinez*, in which the trial court erred when it instructed the jury in a sexual offense case on a theory not supported by the evidence offered at trial. *State v. Martinez*, ___ N.C. App. ___, 795 S.E.2d 433 (2016) (unpublished), *writ dismissed*, ___ N.C. ___, 797 S.E.2d 5 (2017). Initially, this Court held that “there was an ambiguity as to which sexual act the jury found Defendant had committed, and therefore [we] ‘must resolve

this ambiguity in favor of Defendant.’” *Id.* at ____ (quoting *State v. Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326) (brackets omitted). Our Supreme Court remanded the case, directing us to determine whether or not the trial court’s instructions in that matter amounted to plain error as set forth in *Boyd*.

However, in the case *sub judice*, the error under review was preserved, as Defendant’s counsel objected to the instruction. For preserved error, harmless error analysis should be applied pursuant to the plain language of N.C. Gen. Stat. § 15A-1443 and as discussed in *Lawrence*. But, this is not the current state of the law. Even so, the majority engages in a harmless error analysis when it states, “this is not a case where there is overwhelming evidence of Defendant’s impaired driving” and then discusses the facts it believes supports that conclusion.

Were we to engage in a harmless error analysis, which under current case law we cannot do, I believe a different conclusion would be required. The evidence in the record tended to show that Defendant drove his truck into the path of Officer Monroe’s motorcycle. In order to avoid a collision with Defendant’s vehicle, Officer Monroe was forced to “lock the bike up and then immediately make an evasive maneuver” and abruptly shift lanes. Officer Monroe initiated a traffic stop, and observed that Defendant had red, glassy eyes, spoke with slurred speech, and had a medium odor of alcohol on his breath. When asked why he pulled out into the path of the officer’s motorcycle, Defendant said the officer had enough room and that he

“was catching [the officer’s] curiosity.” Officer Monroe then asked Defendant if he had consumed any alcohol prior to driving that evening, and Defendant responded that “he had one to two drinks” of Jägermeister. Defendant was asked to exit the vehicle to perform field sobriety tests.

Defendant was visibly swaying and unable to keep his balance while the officer was providing instructions for the walk-and-turn test. Defendant also began the test before being instructed to do so on two occasions. At this point, Defendant told Officer Monroe “that he can’t do the test, he’s not going to do the test.”

Officer Monroe then attempted to have Defendant perform the one-legged stand test. Defendant again was visibly swaying and unable to perform the test as instructed. When Officer Monroe offered to demonstrate the test again, Defendant indicated he did not want to perform the test.

After he was arrested for driving while impaired, Defendant was taken to the Raleigh Police Department. There, Officer Monroe attempted to administer a blood alcohol test on the ECIR-2 (“Intoxilyzer”). Defendant took a breath and blew into the instrument to provide a sample. Defendant was performing this test as instructed, but then he stopped and indicated he was not going to continue with the test. Defendant’s failure to complete the Intoxilyzer test resulted in a refusal. No blood test was performed, and no numerical value was ever obtained for Defendant’s blood alcohol concentration for this incident.

It was this evidence upon which the jury deliberated and convicted Defendant. The jury heard no evidence regarding a numerical finding of Defendant's blood alcohol concentration, yet we are required to assume the jury's verdict was based upon a finding that Defendant's blood alcohol concentration was .08 or higher. *See State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993) (citation omitted) (“[W]e must assume the jury based its verdict on the theory for which it received an improper instruction.” (citations omitted)).

Jurors are instructed prior to every trial that they should “use the same good judgment and common sense that you use[] in handling your own affairs” N.C.P.I.--Crim. 100.21 (2015). In reviewing the entire record in this case, one could reasonably conclude that, because there was no evidence of impaired driving under N.C. Gen. Stat. § 20-138.1(a)(2), the jurors did as they were instructed: they used their “good judgment and common sense,” and relied upon the appreciable impairment theory.

Concluding the harmless error analysis, it cannot be said that a different result would have been reached in this case had the error in question not been committed. Defendant failed to establish that there was a reasonable possibility that the .08 instruction contributed to his conviction given the evidence of appreciable impairment. I would find the erroneous instruction harmless beyond a reasonable doubt.

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BERGER, J., Concurring

While this may be the analysis the North Carolina Supreme Court would prefer us to utilize given the plain language of N.C. Gen. Stat. § 15A-1443 and a broader reading of *Lawrence*, *Boyd*, and *Martinez*, this Court must apply the law as it is. If the North Carolina Supreme Court is, in fact, changing the standard of review we are to apply to disjunctive instructions given in error, straightforward direction from that higher court would be beneficial.