

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-245

Filed: 19 September 2017

Guilford County, No. 14 CRS 075301, 075303, 075304

STATE OF NORTH CAROLINA,

v.

JEREMY JASON WALLACE, Defendant.

Appeal by Defendant from judgment entered 26 August 2016 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 22 August 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.*

*Mary McCullers Reece for Defendant-Appellant.*

INMAN, Judge.

A trial court does not err by failing to instruct the jury on intervening negligence in a criminal case when the evidence demonstrates that the defendant's impairment was at a minimum a concurring proximate cause and the defendant did not request an intervening negligence instruction.

Jeremy Jason Wallace (“Defendant”) appeals from his convictions for felony serious injury by vehicle and impaired driving. Defendant argues that the trial court committed plain error by failing to instruct the jury on intervening or insulating negligence because the victim’s actions were negligent, unforeseeable, and broke the chain of proximate causation. After careful review, we hold the trial court did not commit plain error.

### **Factual and Procedural History**

Defendant was indicted on 7 July 2014 for felony assault with deadly weapon inflicting serious injury, felony serious injury by vehicle, felony hit and run with serious bodily injury, felony assault inflicting serious bodily injury, driving while impaired, and careless and reckless driving. Defendant was tried before a jury on 22-24 August 2016. The State’s evidence tended to show the following:

On 3 May 2014, Michael Gilliland (“Gilliland”) was volunteering at a fundraiser held at the Double D Burnout Saloon (the “Double D”) in Kernersville, North Carolina. Gilliland was cooking on a large grill behind the saloon for those attending the event. Event patrons, including children, were gathered both inside and outside the saloon.

Defendant was at the Double D that day but was not volunteering in the fundraising event. By mid-afternoon, Defendant became drunk, belligerent, agitated, and started causing a scene. Defendant assaulted Gilliland and got into an

STATE V. WALLACE

*Opinion of the Court*

altercation with another patron, prompting the Double D's owner, David Thompson ("Thompson"), to ask Defendant to leave. Defendant refused to leave, got on his motorcycle, and drove it in "donuts" on the grass before crashing in nearby woods.

Several people, including Thompson, approached Defendant when he fell off his motorcycle and escorted him to a car owned by Defendant's cousin which was parked outside the Double D. After Thompson and others pleaded with Defendant to leave and threatened to call 9-1-1, Defendant left the saloon in the backseat of his cousin's car. Thompson promised to look after Defendant's motorcycle and truck, and assured Defendant that he could return the next day to pick them up. Defendant's cousin drove him to another bar in Kernersville.

Later that afternoon, Defendant called a friend to take him back to the Double D to retrieve his truck. As Defendant started his truck, Gilliland and several other patrons took notice and approached him. They were worried that Defendant was intoxicated and might hurt children and families at the fundraiser. Gilliland was attempting to remove the keys from Defendant's truck when Defendant put the truck in reverse, turned the wheel, and hit the gas. The truck pinned Gilliland to a metal pole before spinning him around and running him over.

After the impact, Gilliland lay motionless on the ground. Defendant left the scene and was arrested at a nearby bar later that evening. Several hours after the incident, and following his arrest, Defendant's blood alcohol content was .09.

STATE V. WALLACE

*Opinion of the Court*

Gilliland suffered broken facial bones, a broken neck, broken ribs, and a broken femur, in addition to numerous superficial wounds. His injuries required nearly two months of treatment in the hospital, including 34 days in the intensive care unit. Gilliland died approximately a month and a half after being released from the hospital from unrelated heart disease.

Defendant introduced testimony from several witnesses and took the stand himself. Defendant's evidence suggested that Gilliland instigated their first altercation and that Defendant attempted to leave on his motorcycle following the altercation but wet grass caused him to crash into a bush. Defendant denied doing "donuts" in the grass. He testified that his intent in returning to the Double D later that afternoon was to retrieve his truck because he feared it was going to be vandalized. Defendant testified that when he started up his truck, Gilliland reached through the driver's side window and began assaulting him. This assault, Defendant testified, caused him to let off the clutch, which made the truck move. At that point, people began throwing beer bottles at Defendant and he pulled out of the Double D in an attempt to escape the crowd. Defendant drove to the other bar and called police to explain what had occurred. He then waited for police to arrive and was taken into custody.

Following the presentation of evidence, the trial court instructed the jury on, *inter alia*, the elements of felony serious injury by vehicle pursuant to the North

Carolina Criminal Pattern Jury Instruction 206.57C, which included an instruction that the jury must find:

[T]hat the impaired driving by the defendant *proximately*, but unintentionally, *caused* the alleged victim's serious injury. *Proximate cause is a real cause*, a cause without which the victim's serious injury would not have occurred, *and one that a reasonably careful and prudent person could foresee would probably produce such injury* or some similar injurious result.

The defendant's acts need not have been the last, or nearest cause. *It is sufficient if they concurred with some other cause acting at the same time which in combination with them proximately caused the alleged victim's serious injury.*

N.C.P.I. Crim. 206.57C (2015) (emphasis added). The trial court also instructed the jury on Defendant's duress defense at the same time.

The jury returned a verdict finding Defendant guilty of felony serious injury by vehicle and impaired driving, and not guilty on the remaining charges. The trial court sentenced Defendant to a presumptive active sentence of 19 to 32 months of imprisonment for the felony serious injury by vehicle conviction and arrested judgment on the impaired driving conviction.

Defendant filed a written notice of appeal from the sentencing order. Defendant then filed a conditional petition for writ of certiorari seeking appeal from the underlying convictions. We grant Defendant's petition for writ of certiorari and address his appeal on the merits.

### **Analysis**

Defendant argues that the trial court committed plain error by failing to instruct the jury on intervening or insulating negligence. Defendant asserts that the evidence at trial revealed the existence of a legitimate dispute as to whether the victim's actions were unforeseeable and intervening, thereby breaking the chain of proximate causation so that Defendant's impairment was no longer a proximate cause of the victim's injuries. We disagree.

*1. Standard of Review*

Defendant did not properly preserve this issue for appeal, as he did not lodge an objection to the jury instructions given, nor did he request any additional instructions. "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). To show plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334. A fundamental error requires a defendant to establish prejudice, *i.e.*, that it "had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518, 723 S.E.2d at 334 (internal quotation marks and citations omitted). When reviewing a trial court's instructions, we must examine them contextually as a whole. *State v. Sturdivant*, 304 N.C. 293, 302, 283 S.E.2d 719, 726 (1981).

*2. Discussion*

To support a conviction for felony serious injury by vehicle, the State must prove beyond a reasonable doubt that:

(1) The person unintentionally cause[d] serious injury to another person,

(2) The person was engaged in the offense of impaired driving under [N.C. Gen. Stat. §] 20-138.1 or [N.C. Gen. Stat. §] 20-138.2, and

(3) *The commission of the offense in subdivision (2) of this subsection is the proximate cause of the serious injury.*

N.C. Gen. Stat. § 20-141.4 (a3) (2015) (emphasis added).

Ordinarily, “[c]ontributory negligence is no defense in a criminal action.” *State v. Tioran*, 65 N.C. App. 122, 124, 308 S.E.2d 659, 661 (1983) (internal quotation marks and citations omitted). However, in certain circumstances our Court has held that a victim’s own intervening negligence *may* relieve a defendant of criminal responsibility. *See State v. Bailey*, 184 N.C. App. 746, 748-49, 646 S.E.2d 837, 839-40 (2007). In *Bailey*, the defendant appealed a trial court’s denial of his request for a contributory negligence instruction in a trial for felony death by vehicle. *Id.* at 747, 646 S.E.2d at 838. This Court held that contributory negligence is an impermissible defense in criminal cases, but recognized that intervening negligence may be relevant to whether a defendant’s actions proximately caused the injury or death of a victim. *Id.* at 748-49, 646 S.E.2d at 839-40. After ruling that the trial court properly

instructed the jury on proximate cause, and therefore did not err in denying the defendant's instruction, the Court stated:

Even assuming [the victim] was negligent, “[i]n order for negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains a proximate cause, sufficient to find him criminally liable.” In the instant case, [the victim's] negligence, if any, would be, at most, a concurring proximate cause of her own death. This is especially true here, where the State's evidence tended to show that defendant's blood alcohol content was over twice the legal limit. *This impairment inhibited defendant's ability to “exercise [ ] due care [and] to keep a reasonable and proper lookout in the direction of travel[.]”*

*Id.* at 749, 646 S.E.2d at 839-40 (alteration in original) (emphasis added) (citations omitted). The same holds true here. Even assuming *arguendo* that Gilliland's negligence contributed to his injuries, Defendant's impaired driving was a concurring proximate cause.

The evidence reveals, and Defendant does not contest, that Defendant was impaired when he struck Gilliland with his truck. Defendant testified that “[a]t that time I didn't [know] if I'd run over [Gilliland] or not.” While Gilliland's attempt to reach into Defendant's truck may have contributed to his injuries, Defendant's impaired operation of the truck was a concurring proximate cause—that is, Defendant was operating the truck while impaired before, during, and after Gilliland reached into the truck. Moreover, the trial court properly instructed the jury on

proximate cause, which would have permitted the jury to find Defendant not guilty had it believed that Defendant's impairment did not proximately cause Gilliland's injuries. *See Bailey*, 184 N.C. App. at 749, 646 S.E.2d at 839 (“[T]he trial court accurately instructed the jury by stating that, [t]here may be more than one proximate cause of an injury. The State must prove beyond a reasonable doubt *only* that the defendant's negligence was a proximate cause.” (alteration in original) (emphasis added) (internal quotation marks omitted)).<sup>1</sup>

### **Conclusion**

For the foregoing reasons, we hold that Defendant has failed to demonstrate plain error.

NO ERROR.

Judges BRYANT and DAVIS concur.

Report per Rule 30(e).

---

<sup>1</sup> We note that Defendant asserts that *Bailey* is distinguishable because the defendant there did not assert plain error on appeal. However, this argument is without merit because the Court in *Bailey* did not dismiss the defendant's appeal for a procedural error but rather addressed the issue on the merits. 184 N.C. App. at 749, 646 S.E.2d at 839.