NO. COA10-663

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v. Onslow County
No. 08 CRS 055418;
08 CRS 055419

CARY LEVON LEE, JR.,
Defendant.

Appeal by defendant from order entered 18 March 2010 by Judge W. A. Cobb, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 3 November 2010.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

Marilyn G. Ozer for defendant.

ELMORE, Judge.

Cary Levon Lee, Jr. (defendant), appeals the trial court's denial of his motion to dismiss a charge of aggravated felony death by vehicle. After careful consideration, we find no error.

At trial, the State's reconstruction of the accident involving defendant came from Onslow County Deputy Sheriff Matthew Becker; Highway Patrol Sergeant Michael Collier; Highway Patrol Officer Sean Spring; and Captain Wilbur Oles of the United States Marine Corps. The first three were officers on the scene; Captain Oles

was an eyewitness to the accident. Their testimony together brought forth the following:

At around 2:30am on the morning of 17 July 2008, Captain Oles was driving south on U.S. Highway 17 near Jacksonville when he noticed a woman, later identified as Nicole Rhinehart (the victim), standing in the road, waving her arms. He turned his car around and pulled over near the median, facing oncoming traffic, with his flashers on. Captain Oles saw the victim's car in the dip of the median looking banged up. He dialed 911, but she asked him to hang up, stating that her license was expired; he did so, but the dispatcher called him back while he was repositioning his car. The victim told him to tell the dispatcher he had it "under control," but Captain Oles instead told the dispatcher that there had been an accident and that he believed the victim needed EMS attention. While he was doing so, the victim went back into the highway and flagged down another car; she spoke to its driver for a little while, at which point the car drove off. The victim came back to Captain Oles's car and tapped on the window, but he ignored her and continued talking to the dispatcher. She returned to the position she had been in before when trying to flag down traffic: straddling the fog line on the right side of the road.

As Captain Oles watched, one vehicle drove past the victim, and then a second vehicle came along and hit her, knocking her into the ditch next to the road. The vehicle did not stop, slow, or swerve before or after hitting her. She died at the scene. An

autopsy later determined her blood alcohol concentration at the time of her death to be approximately 0.28.

Shortly thereafter, Deputy Becker pulled defendant's car over in response to a broadcast "be on the lookout for" report describing a van with front end damage. Defendant's car has its right headlight out, and Deputy Becker discovered that defendant's license was suspended. Sergeant Collier later administered an Intoximeter test that reported defendant had a blood alcohol concentration of 0.10.

At the close of the State's evidence, defendant made a motion to dismiss all charges on the basis of insufficiency of the evidence. That motion was denied. Defendant was found guilty by a jury of aggravated felony death by vehicle, misdemeanor hit and run, and driving while impaired. The court arrested judgment on the driving while impaired conviction and sentenced defendant to fifty-five to seventy-five months' imprisonment for the other two convictions.

> A person commits the offense of aggravated felony death by vehicle if:
>
> > (1) The person unintentionally causes the death of another person,
> >
> > (2) The person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2,
> >
> > (3) *The commission of the offense in subdivision (2) of this subsection is*

> *the proximate cause of the death*, and
>
> (4) The person has a previous conviction involving impaired driving, as defined in G.S. 20-4.01(24a), within seven years of the date of the offense.

N.C. Gen. Stat. § 20-141.4(a5) (2009) (emphasis supplied). Defendant argues that the State did not provide sufficient evidence to prove that his impaired driving was the proximate cause of the victim's death. We disagree.

A defendant's challenge to the sufficiency of evidence is reviewed in the light most favorable to the State with all reasonable inferences drawn in the State's favor. *State v. Payne*, 149 N.C. App. 421, 424, 561 S.E.2d 507, 509 (2002). We determine whether substantial evidence was presented to support each essential element of the crime and to show that defendant was the perpetrator. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is that which a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000) (citation omitted).

Looking at the evidence in the light most favorable to the State, we cannot agree with defendant's argument. His was the third car to encounter the victim, but the only one to hit her; and, although it was dark, defendant's headlights and Captain Oles's headlights illuminated the scene. These facts, combined with defendant's failure to react in any way – by slowing,

swerving, or stopping – to the presence of a human being in the highway created a basis for a fair inference by the jury that defendant's drunk driving was the proximate cause of the accident.

Defendant further asserts that the victim's state and behavior – that is, her high level of intoxication and physical presence in the highway – created circumstances under which she would inevitably have been struck and killed by a vehicle. We note first that "[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) (quotations and citation omitted). However, a victim's own negligence *may* be found to relieve defendant of responsibility in certain circumstances: In *State v. Bailey*, the defendant was unable to stop his car behind the victim's car, causing an accident that killed her; at trial, he claimed that the victim had been driving erratically before coming to a sudden stop and that, although his blood alcohol concentration was 0.22, the victim's own actions were the proximate cause of her death. 184 N.C. App. 746, 747-48, 646 S.E.2d 837, 838-39 (2007). In considering this argument, this 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 (citations omitted). The same is true in the case at hand: at the least, assuming *arguendo* that the victim's own negligence contributed to her death, defendant's impairment was a concurring proximate cause. As such, we find no error.

No error.

Judges HUNTER, Robert C. and JACKSON concur.

Report per Rule 30(e).