

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

NO. COA11-544
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Catawba County
Nos. 08 CRS 57419-20

JONATHAN CALEB BURKE

Appeal by defendant from judgments entered 4 January 2011 by Judge Robert C. Ervin in Catawba County Superior Court. Heard in the Court of Appeals 17 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tamera S. Hill, for the State.

Don Willey for defendant appellant.

McCULLOUGH, Judge.

Jonathan Caleb Burke ("defendant") appeals from judgments dated 4 January 2011 and entered upon his guilty plea to second-degree murder, driving while impaired, felony hit-and-run, and misdemeanor reckless driving. The trial court found defendant had a prior record level of III, based on five prior record level points. The court consolidated defendant's convictions for second-degree murder, felony hit-and-run, and misdemeanor

reckless driving into a single judgment for sentencing, and sentenced defendant to a term in the mitigated range of 132 to 168 months' imprisonment. The court found defendant was a level II for sentencing purposes for his conviction for driving while impaired, and sentenced defendant to an additional term of 12 months' imprisonment. Defendant gave notice of appeal in open court.

Defendant's sole argument on appeal is that the trial court erred in assessing a prior record level point for his prior conviction for driving while impaired, thereby increasing his prior record level from II to III, because the conviction was used by the State at trial as evidence of malice, a necessary element for his conviction for second-degree murder. Defendant's argument is misplaced.

This Court has previously decided the issue presented by defendant, and held that a trial court does not err in "using the same prior conviction[] introduced by the State as evidence of malice during trial to increase the defendant's prior record level at sentencing." *State v. Bauberger*, 176 N.C. App. 465, 474, 626 S.E.2d 700, 706, *disc. review denied in part*, 360 N.C. 537, 634 S.E.2d 218, *aff'd per curiam without precedential value in part*, 361 N.C. 105, 637 S.E.2d 536 (2006). Defendant argues

that the North Carolina Supreme Court was equally divided in its holding affirming *Bauberger*, and thus this Court's opinion stands without precedential value. *State v. Bauberger*, 361 N.C. 105, 637 S.E.2d 536 (2006). However, this Court's opinion in *Bauberger* addressed two issues: (1) whether the jurors in defendant's trial improperly considered dictionary definitions during deliberations, and (2) whether the trial court erred in calculating the defendant's prior record level. *Bauberger*, 176 N.C. App. at 468, 473, 626 S.E.2d at 703, 706. This Court was only divided on the first issue, and that was the only issue addressed by our Supreme Court. *See State v. Bauberger*, 360 N.C. 537, 634 S.E.2d 218 (2006) (denying defendant's petition for discretionary review as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals). We are thus bound by this Court's holding in *Bauberger* regarding the use of the same prior conviction at sentencing as was used by the State as evidence of malice at trial. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we affirm the trial court's judgments.

Affirmed.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).