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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1161

Filed: 4 December 2018

Brunswick County, No. 15 CRS 53194, 15 CRS 53196

STATE OF NORTH CAROLINA

v.

JOSEPH SIMEON SMITH, Defendant.

Appeal by Defendant from judgment entered 25 May 2017 by Judge James G. Bell in Brunswick County Superior Court. Heard in the Court of Appeals 3 May 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.*

*Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.*

MURPHY, Judge.

Defendant, Joseph Simeon Smith, was driving on a street in Southport after the city's annual Fourth of July fireworks display when he struck a 12-year-old pedestrian, Michael<sup>1</sup>, causing extensive injuries. When law enforcement officers arrived at the scene, Defendant exhibited signs of impairment, and a subsequent

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<sup>1</sup> A pseudonym is used to protect the identity of the minor victim.

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Intox EC/IR II breath test evidenced a blood alcohol concentration of 0.12. Defendant was charged with felony serious injury by vehicle, driving while impaired, and failure to reduce speed. At trial, Defendant introduced evidence that Michael failed to yield the right-of-way and attempted to introduce expert testimony as to the “causative factor of the collision.” The trial court excluded the expert opinion as intruding on the role of the jury to determine the ultimate issue of proximate causation.

Rule 704 allows an expert to testify in the form of an opinion even if it embraces the ultimate issue to be decided by the jury. However, it is impermissible for the expert to opine on whether a legal standard has been met or whether a legal conclusion should be drawn from the evidence presented. Yet, we need not decide whether the trial court erred in excluding the expert opinion on the cause of the collision. Even assuming error, Defendant has failed to demonstrate that the exclusion of the expert opinion was prejudicial. Where sufficient evidence was presented of Defendant’s impairment that inhibited his ability to exercise due care while driving at the time of the collision, Michael’s alleged negligence would have been, at most, a concurring proximate cause of that collision which did not break the chain of Defendant’s culpable negligence. When the chain of Defendant’s culpable negligence was not broken, it was only necessary for the jury to find that Defendant was *a* direct and proximate cause of the serious injuries in order to hold him criminally liable. Accordingly, Defendant has failed to show that the jury would have

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reached a different result had the trial court admitted the expert opinion that Michael was the proximate cause of his injuries.

**BACKGROUND**

On 4 July 2015, the City of Southport held its annual fireworks display at its Fourth of July Festival along its waterfront for approximately 45,000 attendees. Within minutes of the fireworks ending, the attendees began exiting the waterfront area, and the surrounding streets became heavily congested with pedestrians and vehicles. Emergency personnel described the area as “mass chaos,” and noted, “There were people everywhere. Traffic was deadlocked.”

During this time of congestion, Defendant was driving his vehicle, a white SUV, toward the waterfront. One witness noted that the white SUV did not slow down as it went through the intersection and described it as “running awfully fast to be going through here.” Several witnesses reported hearing “a thump” or “a loud noise.” One of the witnesses then approached the white SUV and saw “a little boy . . . probably 12 years old . . . and he looked to be dead.” When a member of the EMS team arrived through the crowds, he found the boy, later identified as Michael, “convulsing from head to toe” with serious and extensive injuries.

The crowds around the scene of the collision continued to grow as EMS transported Michael from the scene, with a number of people screaming and yelling. Officers and emergency personnel backed the crowds away from the scene and found

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Defendant acting “irate” and exhibiting signs of intoxication such as red, glassy eyes, a “strong odor consistent with alcoholic beverage coming from his breath[,]” and “swaying from side to side while standing still.” Defendant then consented to field sobriety tests and later submitted a breath sample which evidenced a blood alcohol concentration of 0.12. Defendant was subsequently charged with felony serious injury by vehicle, driving while impaired, and failure to reduce speed.

At trial, Defendant called Trooper Xavier McPherson (“Trooper McPherson”) as a witness. Trooper McPherson was accepted as an expert in the field of accident reconstruction and testified to his examination of Defendant’s vehicle, the location of the collision, photographs taken of the scene, the direction Defendant was driving and Michael was walking when the collision occurred, and the duties of pedestrians and drivers. Defendant’s attorney then asked Trooper McPherson whether he was “assigned to figure out fault, as far as what happened at this crash scene, who was at fault, to try to give as many other answers as [he] can come up with[.]” Trooper McPherson responded, “Yes. Well, actually determine as to what was the causative factor of the collision. What caused it to occur.” Defendant’s attorney subsequently asked, “And were you able to form an expert opinion as to the cause of the accident?” The State objected, and, after *voir dire* examination, the trial court excluded the proffered opinion on the ground that “it goes to the ultimate issue of this case: proximate cause.”

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Defendant was convicted of felony serious injury by vehicle and failure to reduce speed, and the trial court sentenced Defendant in the presumptive range to an active sentence of 13 to 25 months.

**ANALYSIS**

Defendant contends that Trooper McPherson's opinion on "the factor(s) causing the collision" was permissible under Rules 702 and 704 and was not a legal conclusion barred by our caselaw. Defendant, therefore, argues the trial court erred in excluding this expert testimony and that he was prejudiced by its exclusion such that a different result would have been reached at trial had the testimony been admitted. We conclude that the alleged error, if any, was not prejudicial.

"[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review*

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*denied*, 354 N.C. 223, 554 S.E.2d 650 (2001) (quoting *State v. Anthony*, 133 N.C. App. 573, 579, 516 S.E.2d 195, 199 (1999)).

Expert testimony may be admitted under Rule 702, which provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion . . . .

N.C.G.S. § 8C-1, Rule 702. “Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

N.C.G.S. § 8C-1, Rule 704. However, “[i]t is for *the court* to explain to the jury the given legal standard or conclusion at issue and how it should be determined. To permit the expert to make this determination usurps the function of the judge. . . .

[A]n expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion.” *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587, 403 S.E.2d 483, 489 (1991) (emphasis added).

Here, Defendant attempted to elicit Trooper McPherson’s “expert opinion as to the cause of the accident.” The trial court excluded this expert testimony “[s]ince it goes to the ultimate issue of this case: proximate cause.” We need not determine whether the trial court erred in its determination that this was an improper expert opinion that draws a legal conclusion. Presupposing that the trial court did err in its

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determination, Defendant has not shown that, had the expert opinion been admitted, the outcome of the trial would have been different.

In order for Defendant to be convicted of felony serious injury by vehicle, the State was required to show that Defendant's impaired driving under N.C.G.S § 20-141.4(a3)(2) was the proximate cause of the serious injury. "It is well settled . . . that contributory negligence is no defense in a criminal action[,]" but intervening negligence is relevant to determining whether a defendant's actions were the proximate cause of a decedent's injury. *State v. Bailey*, 184 N.C. App. 746, 749, 646 S.E.2d 837, 839 (2007) (internal quotation marks and alterations omitted). "In 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." *Id.*, citing *State v. Hollingsworth*, 77 N.C. App. 36, 334 S.E.2d 463 (1985).

The State presented evidence that Defendant's impaired driving at the time of the collision was a proximate cause of Michael's injuries. There was ample evidence that Defendant was impaired while he was driving at the time of the collision. Officers testified that Defendant exhibited signs of intoxication, such as red glassy eyes, a "strong odor consistent with alcoholic beverage coming from his breath[,]" and "swaying from side to side while standing still." Moreover, his blood alcohol

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concentration was 0.12. While intoxicated, there was evidence that Defendant's SUV "was running awfully fast" and that Defendant did not slow down as he passed through the intersection just before striking Michael. Thus, Defendant's impairment "inhibited [his] ability to exercise due care and to keep a reasonable and proper lookout in the direction of travel[,]" making his negligence a proximate cause of Michael's injuries. *See State v. Cox*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 800 S.E.2d 692, 701 (2017), *disc. rev. denied*, 370 N.C. 71, 803 S.E.2d 153 (2017).

Assuming that Michael was negligent in his action preceding the collision, Michael's alleged negligence would not have broken the causal chain of Defendant's negligence given Defendant's impairment and manner of driving at the time of the collision that inhibited his ability to exercise due care. Accordingly, Defendant's culpable negligence remained a proximate cause of Michael's injuries, and Michael's alleged negligence was, at most, a concurring proximate cause. The jury, in convicting Defendant of felony serious injury by vehicle, found that Defendant was a proximate cause of Michael's injuries. This finding that Defendant was a proximate cause was sufficient to hold Defendant criminally liable on these facts. Therefore, the admission of Trooper McPherson's expert opinion that Michael was the proximate cause of the accident would not have led to a different result, and its exclusion was not prejudicial.

**CONCLUSION**

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Given that the jury was properly instructed on the role of intervening negligence in determining proximate causation, any alleged error by the trial court in excluding Trooper McPherson's expert opinion was not prejudicial.

NO PREJUDICIAL ERROR.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).