IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-474

No. COA20-602

Filed 7 September 2021

Forsyth County, Nos. 18 CRS 57884, 18 CRS 58396-97

STATE OF NORTH CAROLINA

v.

TYRONE VINCENT DILLARD

Appeal by defendant from judgments entered 9 December 2019 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 10 August 2021.

Joshua H. Stein, Attorney General, by Assistant Attorney General M. Shawn Maier, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant.

ARROWOOD, Judge.

¶ 1 Tyrone Vincent Dillard ("defendant") appeals from judgments entered following convictions for the following offenses: felony possession of cocaine, misdemeanor death by vehicle, driving while license revoked for impaired driving revocation, failure to yield, and felony hit and run resulting in serious bodily injury

or death. For the following reasons, we conclude that defendant received a fair trial free of error. Moreover, we dismiss defendant's claims for ineffective assistance of counsel ("IAC") without prejudice to defendant's right to file a motion for appropriate relief ("MAR") in the trial court.

I. Background

¶ 2 On 23 August 2018, Nathan Hayes ("Hayes") was traveling northbound on Peters Creek Parkway in Winston Salem, North Carolina, on a motorcycle. Contemporaneously, defendant was heading southbound on Peters Creek Parkway (in a Toyota Prius) and slowing to turn left into a shopping center. At this critical juncture, defendant was positioned in the left lane of Peters Creek Parkway just north of an intersection dividing Peters Creek Parkway and Silas Creek Parkway. As Hayes proceeded through said intersection, defendant turned left through incoming traffic and collided with Hayes. The force of the impact knocked off Hayes' helmet[1] and propelled his body to a location approximately fifty feet from the site of the collision.

¶ 3 Per chance, however, three EMS employees—Hal Tanner ("Tanner"), Matt Shouse ("Shouse"), and Jason Lockwood ("Lockwood")—witnessed the crash firsthand from the vantage of a restaurant in the shopping center that defendant had

[1] It was later determined that Hayes' helmet was not approved by the North Carolina Department of Transportation.

attempted to enter. The EMS trio immediately sprinted to the scene and began administering aid to Hayes. They also called 911 and requested immediate medical and law enforcement assistance. According to Shouse, Hayes "needed rapid transport to the hospital, and he needed a trauma team, like, immediately."

¶ 4 After colliding with Hayes, defendant exited the Prius and approached Lockwood and Shouse (both of whom were attending to Hayes). According to Lockwood, defendant was pacing back and forth and saying things like, " 'Oh my God,' and 'I can't believe this happened,' or 'What happened?' " Lockwood and Shouse requested defendant to reenter and remain in his vehicle while they attended to Hayes.

¶ 5 Law enforcement arrived at the scene of the accident within minutes. Officer J.T. Hiatt ("Officer Hiatt") of the Winston-Salem Police Department was one of the first officers to arrive at the crash site. Once at the scene, Officer Hiatt asked Lockwood and Shouse about the whereabouts of the driver of the Toyota Prius. Lockwood told the officer that they had requested the driver (*i.e.*, defendant) to remain in his vehicle while they cared for Hayes. Office Hiatt found no occupants in the Prius, however.

¶ 6 Given the calamity of the incident, several people had gathered in the shopping center adjacent to the crash site. Officer Hiatt spoke to several on-lookers, including a security guard, one of whom informed him that the "driver of the vehicle involved

in the crash was walking away towards the Bank of America." Officer Hiatt then proceeded to the Bank of America parking lot and spotted defendant speaking on his cell phone. Officer Hiatt sprinted after defendant and instructed him to stop. It took Officer Hiatt approximately thirty-nine seconds to locate defendant near the Bank of America after speaking with civilian on-lookers. When Officer Hiatt reached defendant, defendant did not flee and stated that "he was just making phone calls." Defendant's phone records indicated that defendant had placed several calls in the wake of the crash; however, the records did not reveal any calls to 911 or emergency services.

¶ 7 Upon reaching defendant in the vicinity of the Bank of America, Officer Hiatt immediately detained defendant, placed him in cuffs, and "explained to him that he cannot leave the scene of a crash[.]" Defendant was cooperative with law enforcement once taken into custody, though, according to Officer Hiatt's trial testimony, defendant was "shaken up." Furthermore, while in custody, defendant asked to be examined by EMS personnel prompting Officer Hiatt to remove defendant from the cruiser and escort him to an ambulance on scene. Defendant vomited in the ambulance and was taken to the hospital for treatment. Hayes was likewise transported to the hospital but never regained consciousness, ultimately succumbing to his head wounds.

¶ 8 Law enforcement searched the Toyota Prius involved in the crash and found an identification card belonging to "Daniel Ferbie" as well as a small plastic bag containing a white substance later determined to be cocaine. In addition, while frisking defendant, Officer Hiatt found a digital scale on his person that was consistent with those "used to weigh drugs." Law enforcement confiscated these items, along with defendant's cellular device.

¶ 9 At trial, witnesses proffered varying estimates of Hayes' speed at the time of the accident. For example, an accident reconstructionist testified that Hayes was traveling 28 miles per hour at the time of the crash. Shouse and Lockwood estimated Hayes' speed to have been between 30 and 45 miles per hour and 35 to 45 miles per hour, respectively. Lockwood, moreover, testified that he observed Hayes drive through the Silas Creek and Peters Creek intersection "at a constant speed maintaining his lane. His headlight was operational . . . [and] [h]e didn't seem to be doing any erratic movements." According to Lockwood, after proceeding through the intersection, Hayes "got just to the side entrance of that shopping center, and unfortunately, collided with a red Toyota vehicle." On the other hand, two other eyewitnesses placed Hayes' speed between 50 and 60 miles per hour at the time of the accident; however, neither witness could recall the actual posted speed limit on Peters Creek Parkway—which was 45 miles per hour. In the collective, eyewitness

testimony put Hayes' speed anywhere between 30 and 60 miles per hour at the time of the incident.

¶ 10 On 2 December 2019, defendant pled guilty to driving with a revoked license in Case No. 18 CRS 58396 but not guilty to the remaining charges. On 9 December 2019, the jury found defendant guilty of all remaining charges in Case Nos. 18 CRS 58396 and 18 CRS 58397 and guilty of the lesser-included offense of felony possession of cocaine in Case No. 18 CRS 57884. Defendant was sentenced to a minimum of 19 months and maximum of 32 months in prison for the felony hit and run conviction, 150 days for the misdemeanor death by vehicle conviction, and 1 day for the driving with a revoked license and failure to yield convictions, all to be served consecutively. In Case No. 18 CRS 57884, the trial judge imposed a suspended sentence of 6 to 17 months' imprisonment for felony possession of cocaine and placed defendant on 36 months' probation to begin at the expiration of his active sentences. Defendant filed a timely notice of appeal on 16 December 2019.

¶ 11 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat. § 15A-1444 (2019).

II. Discussion

¶ 12 Defendant argues that the trial court committed plain error by giving an incomplete jury instruction regarding the felony hit and run charge (particularly with respect to the terms "willful" and "scene of the crash"). Alternatively, defendant

contends that his trial counsel was ineffective by (1) not objecting to the trial court's "willfulness" instruction; (2) not requesting a complete "willfulness" instruction; (3) not requesting a "risk-of-injury" defense instruction; and (4) not requesting a special instruction defining the phrase "scene of the crash" as those words are used in the felony hit and run statute. In addition, defendant claims that the trial court erred by denying his motion to dismiss the felony hit and run count in Case No. 18 CRS 58397 and the misdemeanor death by vehicle and failure to yield charges in Case No. 18 CRS 58396. We will address each issue in turn.

A. Felony Hit and Run Jury Instruction

¶ 13 During the jury charge, the trial judge gave the following instruction regarding felony hit and run:

> For you to find the defendant guilty of this offense, the State must prove six things beyond a reasonable doubt.
>
> First, that the defendant was driving a vehicle.
>
> Second, that the vehicle was involved in a crash.
>
> Third, that a person died as a result of the crash.
>
> Fourth, that the defendant knew or reasonably should have known that the defendant was involved in a crash and that a person suffered either serious bodily injury or died as a result of the crash.
>
> Now, the defendant's knowledge can be actual or implied. The defendant's knowledge may be inferred or the circumstances proven, are such that would lead the

> defendant to believe that the defendant had been in a crash where serious bodily injury or death occurred to another person.
>
> Fifth, that the defendant, after stopping, did not remain at the scene of the crash until a law enforcement officer completed the investigation or that a law enforcement officer authorized the defendant to leave.
>
> And the sixth, that the defendant's failure to remain at the scene of the crash was willful, that is, it was intentional.
>
> Thus, if you find from the evidence beyond a reasonable doubt that on or about August 23, 2018, the defendant was driving a vehicle that was involved in a crash, and that a person died as a result of the crash, and that the defendant knew or reasonably should have known that the crash involved serious bodily injury or death, and that the defendant intentionally failed to remain at the scene of the crash until a law enforcement officer completed the investigation or until a law enforcement officer authorized the defendant, it would be your duty to return a verdict of guilty of hit-and-run involving death.

Defense counsel did not object to any portion of this charge, nor did counsel request specific instructions explaining the terms "willful" and "scene of the crash" as used in the charge. In addition, defendant's trial counsel did not request an instruction on the "risk-of-injury" defense, which was raised by counsel (at least implicitly) over the course of the trial—predominantly during closing argument.

¶ 14 Because defendant did not object to the aforesaid jury charge, this Court is guided by plain-error review. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983); N.C.R. App. P. 10(a)(4). Under this standard, defendant must show that the

alleged error is so fundamental as to amount to a miscarriage of justice or that it had a probable impact on the jury's finding of guilt. *Id.* at 660, 300 S.E.2d at 378. The alleged error must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). "For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (citation omitted).

¶ 15 "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citing *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999)). "The trial court has the duty to 'declare and explain the law arising on the evidence relating to each substantial feature of the case.' " *State v. Snelling*, 231 N.C. App. 676, 679, 752 S.E.2d 739, 742 (2014) (quoting *State v. Hockett*, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983)). "A defendant's failure to request an instruction as to a substantial and essential feature of the case does not vitiate the trial court's affirmative duty." *State v. Scaturro*, 253 N.C. App. 828, 835, 802 S.E.2d 500, 506 (2017) (citation omitted).

¶ 16 In Case No. 18 CRS 58397, as mentioned *supra*, defendant was convicted of felony hit and run resulting in serious bodily injury or death under N.C. Gen. Stat. § 20-166. Section 20-166 states, in relevant portion, the following:

> (a) The driver of any vehicle who knows or reasonably should know:
>
> (1) That the vehicle which he or she is operating is involved in a crash; and
>
> (2) That the crash has resulted in serious bodily injury, as defined in G.S. 14-32.4, or death to any person;
>
> shall immediately stop his or her vehicle at the *scene of the crash*. The driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, *unless remaining at the scene places the driver or others at significant risk of injury*.
>
> Prior to the completion of the investigation of the crash by a law enforcement officer, or the consent of the officer to leave, the driver may not facilitate, allow, or agree to the removal of the vehicle from the scene for any purpose other than to call for a law enforcement officer, to call for medical assistance or medical treatment as set forth in subsection (b) of this section, *or to remove oneself or others from significant risk of injury*. If the driver does leave for a reason permitted by this subsection, then the driver must return with the vehicle to the accident scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer. A *willful violation* of this subsection shall be punished as a Class F felony.
>
> . . . .

> (b) In addition to complying with the requirements of subsections (a) and (a1) of this section, the driver as set forth in subsections (a) and (a1) shall give his or her name, address, driver's license number and the license plate number of the vehicle to the person struck or the driver or occupants of any vehicle collided with, provided that the person or persons are physically and mentally capable of receiving such information, and shall render to any person injured in such crash reasonable assistance, including the calling for medical assistance if it is apparent that such assistance is necessary or is requested by the injured person. A violation of this subsection is a Class 1 misdemeanor.

N.C. Gen. Stat. § 20-166(a)(1)-(2), (b) (2019) (emphasis added). With this background, we now turn to each of defendant's "sub-claims" vis-à-vis the felony hit and run jury instruction.

1. Willfulness

¶ 17 Defendant argues that the trial court committed plain error by failing to instruct the jury that an act is not "willful" under N.C. Gen. Stat. § 20-166 if it occurs "without justification or excuse" as articulated in the North Carolina pattern jury instructions. Put differently, defendant posits that a person may leave the scene of an accident intentionally and still not "willfully" violate N.C. Gen. Stat. § 20-166 if his intentional departure was justified or with excuse. It follows then, according to defendant, because the trial judge did not include the "without justification or excuse"

language in the jury charge, the trial court committed plain error. We do not find this argument convincing.

¶ 18 In order to convict under N.C. Gen. Stat. § 20-166(a), the State must present sufficient evidence that "defendant's failure to stop was wil[l]ful, that is, intentional and without justification or excuse." *State v. Acklin*, 71 N.C. App. 261, 264, 321 S.E.2d 532, 534 (1984) (citation omitted). Although our General Assembly did not define "willful" in N.C. Gen. Stat. § 20-166(a), this Court has defined "willful" as the "wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (citation omitted). As noted by defendant, North Carolina's pattern jury instruction for felony hit and run provides specific instructions regarding the element of willfulness. North Carolina Pattern Instruction 271.50 states that the State must prove that "defendant's failure to remain at the scene of the crash was willful, that is, intentional (and without justification or excuse)." N.C.P.I. 271.50 (2019).

¶ 19 Here, the trial court instructed the jury that it must find beyond a reasonable doubt that the "defendant's failure to remain at the scene of the crash was willful, that is, it was intentional." While the trial judge did not inform the jury that a person may intentionally leave the scene of the crash but not necessarily willfully violate N.C. Gen. Stat. § 20-166(a) if his intentional departure was justified or with excuse,

justification or excuse was not a substantial feature of defendant's case as there was insufficient evidence that his departure was justified or excused under N.C. Gen. Stat. § 20-166(a) or (b). Nevertheless, defendant contends that his felony hit and run conviction must be vacated per *State v. Scaturro*. The facts of this case are very much different than those in *Scaturro*. In *Scaturro*, the defendant had a statutory obligation to seek medical help for the victim and left the scene for that purpose. *Scaturro*, 253 N.C. App. at 837, 802 S.E.2d at 507. Here, defendant presented no evidence that he left the scene of the crash for any purpose justified or excused under N.C. Gen. Stat. § 20-166(a) or (b). Against requests from EMS, defendant left the crash site and walked hundreds of yards away to make calls to non-medical personnel. Thus, the trial court's omission of a further explanation of the word "willful" was appropriate because there was no evidence from which the jury could have inferred that defendant's failure to remain at the scene was justified or excused. *See State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted) ("[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.").

¶ 20 Because the jury charge was proper in the first place, *ipso facto*, it did not amount to plain error. *See generally Odom*, 307 N.C. at 661, 300 S.E.2d at 378. Assuming *arguendo* that defendant's requested instruction had been given, it is not

probable that the jury would have concluded that defendant had a vindicating reason for leaving the scene of the accident.

2. "Scene of the Crash"

¶ 21 Defendant next argues that the trial court committed plain error by failing to give a special instruction defining "scene of the crash" as that phrase is used in N.C. Gen. Stat. § 20-166(a). It is undisputed that defendant did not reenter the Prius or remain nearby the vehicle after the accident. Once Officer Hiatt arrived at the scene and noticed that the driver of the Prius was missing, it took him thirty-nine seconds to locate defendant near the Bank of America—approximately 800 to 900 feet from the crash site.

¶ 22 The felony hit and run statute requires that a "driver shall remain with the vehicle at the *scene of the crash* until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury." N.C. Gen. Stat. § 20-166(a) (emphasis added). Similar to the term "willful," the General Assembly did not define the phrase "scene of the crash" as used in N.C. Gen. Stat. § 20-166(a), and neither this Court nor our Supreme Court has shed light on this language in the felony hit and run context.

¶ 23 As noted above, the trial court instructed the jury as follows:

> Fifth, that the defendant, after stopping, did not remain at

> the *scene of the crash* until a law enforcement officer completed the investigation or that a law enforcement officer authorized the defendant to leave.
>
> . . . .
>
> Thus, if you find from the evidence beyond a reasonable doubt that on or about August 23, 2018, the defendant was driving a vehicle that was involved in a crash, and that a person died as a result of the crash, and that the defendant knew or reasonably should have known that the crash involved serious bodily injury or death, and *that the defendant intentionally failed to remain at the scene of the crash until a law enforcement officer completed the investigation or until a law enforcement officer authorized the defendant*, it would be your duty to return a verdict of guilty of hit-and-run involving death.

(emphasis added). Defendant did not request a special instruction defining the phrase "scene of the crash" and did not object to the charge given by the trial court. Moreover, on appeal, defendant acknowledges that the phrase "scene of the crash" is not "defined in [N.C. Gen. Stat.] § 20-166, nor has this Court or the Supreme Court defined it." We have held that a defendant fails to meet his burden under plain-error review where he "fails to cite to any case law or statute which requires the trial court to define [the requested] terms during its jury instruction." *State v. Wood*, 174 N.C. App. 790, 794, 622 S.E.2d 120, 123 (2005). For this reason, and for the same reasons

that the trial court did not commit plain error by failing to expand upon the term "willful," we overrule this assignment of error.[2]

3. "Risk-of-Injury" Defense

¶ 24 Defendant contends that the trial court committed plain error by failing to give a "risk-of-injury" defense instruction.[3] According to defendant, "[h]ad the trial court informed jurors of the risk-of-injury defense, it's probable the jury would've had reasonable doubt about the willfulness element and acquitted [defendant] of the felony hit and run resulting in serious bodily injury/death count."

¶ 25 "A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (1997) (citation omitted). "The trial court need not give the requested instruction verbatim, however; an instruction that gives the substance of the requested instructions is sufficient." *Id.* (citation omitted). Thus, to show that the refusal to give an instruction was error, defendant "must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Garvick*, 98 N.C. App. 556, 568, 392 S.E.2d 115, 122

---

[2] Because defendant has not met his burden of showing plain error, we decline to elaborate on the phrase "scene of the crash" as used in N.C. Gen. Stat. § 20-166.

[3] Defendant's proposed "risk-of-injury" defense instruction was as follows: "The Defendant may be justified or excused in failing to remain at the scene of a crash if the Defendant left the scene of the crash to call for law enforcement, medical assistance, or to remove h[im]self or others from significant risk of injury."

(citation omitted), *aff'd*, 327 N.C. 627, 398 S.E.2d 330 (1990). "The defendant also bears the burden of showing that the jury was misled or misinformed by the instructions given." *State v. Beck*, 233 N.C. App. 168, 171, 756 S.E.2d 80, 82 (2014) (citation omitted). When the jury charge as a whole presents the law fairly and accurately, the instructions will be upheld. *State v. Roache*, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004) (citation omitted).

¶ 26 For a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense "when the evidence viewed in the light most favorable to the defendant reveals substantial evidence of each element of the defense." *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000) (quotation marks omitted) (quoting *State v. Hayes*, 130 N.C. App. 154, 178, 502 S.E.2d 853, 869-70 (1998)). "Whether the evidence presented constitutes 'substantial evidence' is a question of law." *State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) (citing *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982)).

¶ 27 The felony hit and run statute states that a "driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, *unless remaining at the scene places the driver or others at significant risk of injury*." N.C. Gen. Stat. § 20-166(a) (emphasis added). In other words, the driver

is excused from criminal liability for leaving the scene if leaving is necessary to remove oneself or others from significant risk of injury.

¶ 28 We reject defendant's argument that the trial court plainly erred by not providing a risk-of-injury defense instruction. Defendant asserts that "it simply wasn't safe for [him] to re-enter the Prius or stand directly beside it as traffic continually drove past the scene until law enforcement arrived and cordoned off the traffic." However, defendant was required to remain with the vehicle, not necessarily inside it, and while he may leave the scene for an authorized purpose, "the driver must return with the vehicle to the accident scene within a reasonable period of time, unless otherwise instructed by a law enforcement officer." N.C. Gen. Stat. § 20-166(a). Defendant in this case walked hundreds of yards away from the crash site and never returned. The evidence adduced at trial suggested that it was physically safe to remain much closer to the vehicle as multiple civilian onlookers had safely gathered approximately 100 yards from the crash site in the wake of the accident. Moreover, the trial record is devoid of evidence indicating that defendant's departure from the scene was necessary to remove himself or others from significant risk of injury. Indeed, given that Lockwood and Shouse requested defendant to reenter and remain in his vehicle while they attended to Hayes, it is more probable than not that remaining with the Prius posed minimal if any risk of injury to defendant. Put

simply, defendant has failed to show that substantial evidence supported the omitted risk-of-injury jury instruction. *See Garvick*, 98 N.C. App. at 568, 392 S.E.2d at 122.

4. Cumulative Error

¶ 29 Defendant contends that should this Court conclude that no single error (or "sub-claim") was sufficiently prejudicial to warrant a new trial, the cumulative errors collectively deprived him of a fair trial. We disagree.

¶ 30 "Cumulative errors lead to reversal when 'taken as a whole' they 'deprived [the] defendant of his due process right to a fair trial free from prejudicial error.' " *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) (quoting *State v. Canady*, 355 N.C. 242, 254, 559 S.E.2d 762, 768 (2002)). A new trial is required when "none of the trial court's errors, when considered in isolation, were necessarily sufficiently prejudicial to require a new trial, [but] the cumulative effect of the errors created sufficient prejudice to deny defendant a fair trial." *State v. Canady*, 355 N.C. 242, 246, 559 S.E.2d 762, 764 (2002).

¶ 31 Here, defendant "has asserted a series of questionable instances of plain error, all of which we have found not to constitute plain error. Given the overwhelming evidence of defendant's guilt in this case, the cumulative effect of any of the asserted errors does not come close to constituting plain error." *State v. Howard*, 215 N.C. App. 318, 329, 715 S.E.2d 573, 580 (2011). We have reviewed the record as a whole and, after comparing the overwhelming evidence of defendant's guilt with the alleged

assignments of errors, we conclude that, taken together, these errors (even if valid) did not deprive defendant of his due process right to a fair trial. In other words, these alleged errors—even if meritorious—individually or collectively, do not fatally undermine the State's case. *See Wilkerson*, 363 N.C. at 426, 683 S.E.2d at 201 (concluding same).

5. Ineffective Assistance of Counsel

¶ 32 Defendant argues that trial counsel was ineffective by (1) not objecting to the trial court's "willfulness" instruction; (2) not requesting a complete "willfulness" instruction; (3) not requesting a "risk-of-injury" defense instruction; and (4) not requesting a special instruction defining the phrase "scene of the crash" as that phrase is used in the felony hit and run statute.

¶ 33 "On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citing *State v. Martin*, 64 N.C. App. 180, 181, 306 S.E.2d 851, 852 (1983)).

¶ 34 In order to establish that counsel was ineffective, defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the

> deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Givens*, 246 N.C. App. 121, 124, 783 S.E.2d 42, 45 (2016) (citation and quotation marks omitted) (quoting another source).

¶ 35 Importantly, however, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citing *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)). A motion for appropriate relief is the preferable mechanism to raise such a claim because "[t]o defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citation omitted). "[S]hould the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice

to the defendant's right to reassert them during a MAR proceeding." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citing *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985)).

¶ 36 Accordingly, we dismiss defendant's IAC claims without prejudice to his right to file a MAR in the trial court.

B. Motion to Dismiss

¶ 37 At the close of the State's evidence, defendant moved to dismiss all counts, which the trial court denied. Defendant then renewed the motion to dismiss after presenting his case in chief, which, again, the trial court denied. On appeal, defendant argues that the trial court erred by denying his motion to dismiss the felony hit and run count in Case No. 18 CRS 58397 and the misdemeanor death by vehicle and failure to yield charges in Case No. 18 CRS 58396. We disagree.

¶ 38 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and quotation marks omitted). Substantial evidence has been defined by our North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to

support a conclusion." *State v. Lee,* 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick,* 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

¶ 39 In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone,* 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull,* 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965) (citations omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)).

¶ 40 In order to convict defendant of the charged offenses, as noted above, the State had the burden of presenting substantial evidence of each essential element of the offenses to warrant submitting its case to the jury. *See Acklin*, 71 N.C. App. at 264, 321 S.E.2d at 534 (enumerating essential elements of the charge of felony hit and run).

¶ 41 Defendant argues that the State failed to present substantial evidence of two essential elements of felony hit and run: namely, that defendant (1) "left the scene of the crash" and (2) that he did so "willfully." For the reasons discussed above, this argument is without merit as the State presented substantial evidence of each essential element of the offense of felony hit and run as set forth in the operative statute: N.C. Gen. Stat. § 20-166(a). Specifically, the State presented evidence that after speaking with EMS personnel, defendant traveled hundreds of yards away into the Bank of America parking lot. Defendant was not visible from the scene of the accident. In fact, defendant was not located until Officer Hiatt spoke with several onlookers who informed him that the driver of the Prius was walking away from the crash site toward the Bank of America. Giving the State the benefit of all reasonable inferences and viewing the evidence in the light most favorable to the State, we conclude that there was substantial evidence from which the jury could have inferred that defendant failed to remain at the "scene of the crash" and that his departure was

not excused or justified under N.C. Gen. Stat. § 20-166. As such, the trial court properly denied defendant's motion to dismiss the felony hit and run charge.

¶ 42 Defendant was also convicted for violating N.C. Gen. Stat. § 20-141.4(a2) and N.C. Gen. Stat. § 20-155(b) for the offenses of misdemeanor death by vehicle and failure to yield, respectively.

¶ 43 The indictment in Case No. 18 CRS 58396 alleged the following:

> [Defendant] unlawfully and willfully did unintentionally cause the death of NATHAN HAYES while engaged in a violation of [N.C. Gen. Stat. §] 20-155(B), applying to the operation and use of a vehicle and to the regulation of traffic, that the defendant unlawfully and willfully did drive a vehicle on PETERS CREEK PARKWAY . . . by failing to yield the right of way to vehicles approaching from the opposite direction while making a left turn into a driveway leading into a shopping center parking lot. This violation was the proximate cause of the death.

¶ 44 A person is guilty of misdemeanor death by vehicle if he (1) unintentionally causes the death of another person, (2) was engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, and (3) the commission of the offense or violation proximately caused the victim's death. *See* N.C. Gen. Stat. § 20-141.4(a2) (2019).[4]

---

[4] We note that Hayes' failure to wear a helmet approved by the North Carolina Department of Transportation "shall not be considered negligence per se or contributory negligence per se in any civil action." N.C. Gen. Stat. § 20-140.4(b) (2019). To be sure, though, defendant elicited no evidence that Hayes' fate would have been different had he been wearing an approved helmet.

¶ 45 "There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death." *State v. Cummings*, 301 N.C. 374, 377, 271 S.E.2d 277, 279 (1980) (citations omitted). Thus, the State is not required to show that defendant's negligence was the sole proximate cause of the death; it is sufficient to show that defendant's actions were one of the proximate causes. *See State v. Doyle*, 161 N.C. App. 247, 253, 587 S.E.2d 917, 922 (2003) (citation omitted) ("A showing that the defendant's actions were one of the proximate causes is sufficient."). "To insulate the defendant from criminal liability, the negligence of another must be such as to break the causal chain of defendant's actions." *Id.* (citing *State v. Jones*, 353 N.C. 159, 173, 538 S.E.2d 917, 928 (2000)).

¶ 46 To convict for failure to yield, the State must prove that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway [failed to] yield the right-of-way to any vehicle approaching from the opposite direction which [wa]s within the intersection or so close as to constitute an immediate hazard." N.C. Gen. Stat. § 20-155(b) (2019). "The phrase right of way has been interpreted to mean the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path." *Bennett v. Stephenson*, 237 N.C.

377, 379, 75 S.E.2d 147, 149 (1953) (citations and internal quotation marks omitted) (quoting another source).

¶ 47 Defendant contends that the State failed to present sufficient evidence showing that he failed to yield before colliding with Hayes and likewise failed to demonstrate that his alleged failure to yield proximately caused Hayes' death. We disagree.

¶ 48 Hayes had the right of way as he traveled southbound on Peters Creek Parkway. Defendant had an obligation to yield. N.C. Gen. Stat. § 20-155(b). As Hayes approached the intersection of Peters Creek and Silas Creek Parkways, intending to continue through, "he had the right to assume and act on the assumption that all other travelers would observe the law and not block his lane by a left turn until such movement could be made in safety. A left turn across an open travel lane leaves a through traveler little time and opportunity to avoid a collision." *Harris v. Parris*, 260 N.C. 524, 526, 133 S.E.2d 195, 197 (1963). While there was conflicting evidence on the speed that Hayes was traveling and whether the traffic light at the intersection had turned red before Hayes proceeded through the same, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *Barnes*, 334 N.C. at 75, 430 S.E.2d at 918 (citation omitted). In addition, the State presented substantial evidence that Hayes' death was proximately caused by defendant's failure to yield. The uncontroverted evidence

indicated that defendant struck Hayes as defendant attempted to turn left across Peters Creek Parkway. Even if Hayes' speed had been a contributing factor to the collision—which is a dubious proposition—defendant's actions were undoubtedly a proximate cause of Hayes' death. *See Doyle*, 161 N.C. App. at 253, 587 S.E.2d at 922 (citation omitted) ("A showing that the defendant's actions were one of the proximate causes is sufficient."). Viewing the evidence in the light most favorable to the State, there was substantial evidence of each of the elements of the crimes for which defendant was charged and convicted. The trial court did not err by denying defendant's motion to dismiss the felony hit and run count in Case No. 18 CRS 58397 and the misdemeanor death by vehicle and failure to yield charges in Case No. 18 CRS 58396.

III. Conclusion

¶ 49 For the foregoing reasons, we hold that the trial court did not err by denying defendant's motion to dismiss as the State offered substantial evidence to prove each essential element of the subject offenses. We further hold that the trial court's jury instructions regarding felony hit and run (and all other charges) did not amount to plain error. Lastly, we dismiss defendant's IAC claims without prejudice to defendant's right to file a MAR in the trial court.

NO ERROR; DISMISSED IN PART.

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).