

STATEMENT OF THE CASE

Appellant-Petitioner, Valentin Jaramillo (Jaramillo), appeals the post-conviction court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

Jaramillo raises two issues for our review, which we restate as:

- (1) Whether his trial counsel provided ineffective assistance of counsel; and
- (2) Whether his appellate counsel provided ineffective assistance of counsel.

FACTS AND PROCEDURAL HISTORY

We reviewed the factual background in the first of three prior appeals in this case as follows:

[A]pproximately 2:30 a.m. on August 29, 2002, Jaramillo was driving eastbound on U.S. Highway 20 in Steuben County, Indiana. He crossed the centerline and drove into the westbound lane. At that time, Margaret Pocock was driving a pickup truck westbound on U.S. 20. She saw Jaramillo cross into her lane and she swerved to her left in an unsuccessful attempt to avoid him. Jaramillo's vehicle struck the passenger side of Pocock's truck. Pocock's husband, Brian, was sitting in the passenger seat of the truck and was killed. When police officers arrived on the scene a short time later, they noticed that Jaramillo smelled of alcohol. A blood-alcohol test was performed on Jaramillo and revealed that he had a blood-alcohol content of .137%.

Jaramillo was charged with operating while intoxicated (OWI) causing death. That charge was elevated from a class C to a class B felony because the State alleged that, within the five years preceding the commission of the offense, Jaramillo had a prior unrelated OWI conviction. [Ind. Code] § 9-30-5-5(a). The State also alleged that Jaramillo was a habitual substance offender, based upon two previous OWI convictions. Jaramillo was convicted as set out above [...].

Jaramillo v. State, 803 N.E.2d 243, 245 (Ind. Ct. App. 2004), *aff'd in part, vacated in part*, 823 N.E.2d 1187 (Ind. 2005), *cert. denied*, 546 U.S. 1030 (2005). [On appeal, we found that the State failed to prove Jaramillo's prior conviction as was required for both the enhanced sentence and the habitual substance offender charge, but that double jeopardy did not bar retrial of these issues.] *Jaramillo*, 803 N.E.2d at 247-48, 250. The State appealed to our supreme court, which held that double jeopardy did not prevent re-prosecution of the habitual offender enhancement. *Jaramillo*, 823 N.E.2d at 1191.

On May 25, 2006, Jaramillo was re-tried and convicted on the prior conviction used to enhance his sentence and to support the habitual offender charge. On June 23, 2006, Jaramillo was re-sentenced. Jaramillo challenged his sentence on appeal, and we reversed and remanded for clarification of Jaramillo's sentence. *Jaramillo v. State*, No. 76A03-0608-CR-372, slip op. at 2-3 (Ind. Ct. App. Feb. 15, 2007), *trans. denied*. On May 16, 2007, the trial court issued an amended abstract of judgment with Jaramillo receiving a twenty-three year sentence.

On October 9, 2009, Jaramillo filed a petition for post-conviction relief, which was amended on July 6, 2010. On August 6, 2010, Jaramillo filed a second amended petition for post-conviction relief. On September 10, 2010, the post-conviction court held an evidentiary hearing on Jaramillo's second amended petition. On February 23, 2011, the post-conviction court denied post-conviction relief.

Jaramillo now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

To determine whether a petitioner has established his claims to post-conviction relief, we use a preponderance of the evidence standard. Ind. Post-Conviction Rule 1, § 5; *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). Appeal from a denial of post-conviction relief is equivalent to appeal from a negative judgment. *Henley*, 881 N.E.2d at 643. We will therefore not reverse unless the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.* at 643-44. Where the post-conviction court has entered findings of fact and conclusions of law, findings of fact are accepted unless clearly erroneous, but conclusions of law are accorded no deference. *Id.* at 644.

II. *Ineffective Assistance of Trial Counsel*

Ineffective assistance of counsel claims are subject to the two prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's performance must fall below an objective standard of reasonableness in light of professional norms, and must prejudice the defendant. *Johnson v. State*, 832 N.E.2d 985, 996-97 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. Prejudice is measured by a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different. *Id.*

Jaramillo offers three separate allegations of ineffective assistance from his trial counsel: (1) failure to object to a jury instruction misstating the law; (2) failure to tender his own jury instructions; and, (3) failure to object to the State's rebuttal argument.

In his first allegation, Jaramillo claims that the pattern jury instruction relied upon by the trial court in both the preliminary and final jury instructions failed to correctly state the law with respect to the level of causation required to convict Jaramillo under I.C. § 9-30-5-5(a), and that trial counsel was ineffective by failing to object to this jury instruction. Jaramillo's second allegation of ineffectiveness involves trial counsel's failure to tender his own jury instruction on causation. We review the jury instruction at issue to dispose of Jaramillo's first and second allegations.

We note that ineffective assistance of counsel claims premised on a failure to object require a finding that the trial court would have sustained such an objection if made. *Little v. State*, 819 N.E.2d 496, 506 (Ind. Ct. App. 2004), *trans. denied*. Even if there is an error in one instruction, where the instructions as a whole correctly state the law, we will not reverse; rather, the jury instructions as a whole must misstate the law. *Snell v. State*, 866 N.E.2d 392, 396 (Ind. Ct. App. 2007). Likewise, incorrect jury instructions allegedly triggering due process violations are examined in "the context of all relevant information given to the jury, including closing argument . . . and other instructions." *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002) (internal citations omitted). No due process violation exists "where all such information, considered as a whole, does not mislead the jury as to a correct understanding of the law." *Id.* With these rules in mind, we note that the trial court issued the following instruction, in pertinent part, without objection as both a preliminary and a final instruction:

The crime of operating a vehicle while intoxicated is defined by statute as follows:

A person who operates a vehicle while intoxicated commits a Class A misdemeanor. It is a Class C felony if the crime results in the death of another

person.

To convict the Defendant, the State must have proved each of the following elements:

The Defendant

1. Operated a vehicle
2. While intoxicated

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of operating a vehicle while intoxicated, a Class A misdemeanor.

If the State further proved beyond a reasonable doubt that the crime resulted in the death of Brian Pocock, you should find the Defendant guilty of operating a vehicle while intoxicated, a Class C felony.

(Petitioner’s Exh. 1-D, pp. 71, 88). This instruction is based on the then existing pattern jury instruction. *See* 1 Indiana Pattern Jury Instructions–Criminal, Instruction No. 7.115 (2d ed. Supp. 1997).¹

Jaramillo cites two propositions in support of his contention that the foregoing jury instruction misstated the State’s burden of proof regarding causation. First, the jury instruction’s use of the words “results in the death” failed to convey the requirement that the jury should convict Jaramillo only on a showing of proximate cause. Second, the language of the jury instructions conflicted with the version of I.C. § 9-30-5-5² in effect at the time of Jaramillo’s trial.

A conviction under I.C. § 9-30-5-5 requires proof beyond a reasonable doubt that the

¹ We note that this particular pattern jury instruction was later renumbered and revised to eliminate reference to the language “resulted in the death of” and now simply lists the elements of the crime, including the phrase “caused the death of.” However, the comments have kept the phrase “resulting in death.” *See* 1 Indiana Pattern Jury Instructions–Criminal, Instruction No. 7.114 (3d ed. Supp. 2011) and comments thereto.

² I.C. § 9-30-5-5 has been amended several times. We cite to the version of the statute in effect when Jaramillo committed the crime at issue. *See* I.C. § 9-30-5-5 (West Supp. 2002). We also note that I.C. § 9-30-5-5 was

defendant's conduct is the proximate cause of death. *Abney v. State*, 766 N.E.2d 1175, 1177-178 (Ind. 2002). *Abney* asserted that the victim's death was the result of two causes: first, another vehicle struck the victim, and second, the defendant's car struck the victim. *Id.* at 1176. In rejecting the trial court's instruction enabling the jury to find the defendant guilty if his driving constituted a "contributing cause" of the victim's death, *i.e.*, not the primary cause, but a cause merely playing a part in the death, our supreme court reaffirmed the long standing principle that the State must prove proximate cause beyond a reasonable doubt in order to convict a defendant for his act of operating a motor vehicle under the influence causing death. *Id.* at 1177-178. Further, the supreme court found that the trial court's rejection of the defendant's tendered instruction was error because the tendered instruction quoted from existing precedent requiring the State to prove proximate cause, *i.e.*, that defendant's actions, rather than another actor's, caused death. *Id.* at 1178.

Based on *Abney*, we cannot agree with Jaramillo's argument that the jury instruction was defective. First, *Abney* cited the prior language of I.C. § 9-30-5-5 that used the words "the crime results in." *Abney*, 766 N.E.2d at 1177. Second, we note, as the post-conviction court did, that no contributing cause instruction was used at Jaramillo's trial. Third, Jaramillo did not tender a jury instruction on causation. Thus, there would be little likelihood that the jury would convict Jaramillo on a lesser standard of causation. In essence, the jury was left with a decision to believe either the State or Jaramillo's assertions on the proximate cause of death. The jury chose the State's version. Accordingly, we cannot say that the

pattern jury instruction used at Jaramillo’s trial failed to state the level of causation required under *Abney*.

Jaramillo’s other allegation concerns the discrepancy between the jury instructions and the language of I.C. § 9-30-5-5(a) existing at the time of Jaramillo’s trial. Specifically, Jaramillo contrasts the pattern jury instruction’s use of the phrase “resulted in” with the language of I.C. § 9-30-5-5(a), which uses the language “causes.” Although the language of I.C. §9-30-5-5(a) differed from the jury instructions, we perceive no fundamental change in the level of causation required for a conviction.

Further, the other instructions used by the trial court were sufficient to apprise the jury of the elements required to convict Jaramillo. The jury was instructed to consider all the instructions as a whole, and forbidden to single out any certain sentence and ignore the others. Next, the jury was instructed that Jaramillo was charged with “OPERATING A MOTOR VEHICLE WHILE INTOXICATED CAUSING DEATH” in preliminary and final jury instructions. (Petitioner’s Exh. 1-D, pp. 69, 86)³ (emphasis in original). These jury instructions also quoted a portion of the charging information *verbatim*, which stated Jaramillo “did cause the death of Brian Pocock.” (Petitioner’s Exh. 1-D, pp. 69, 86). Thus, we cannot say that an isolated deviation from the express terms of I.C. § 9-30-5-5(a) in one jury instruction, when viewed in light of other jury instructions, resulted in a misstatement of the law sufficient to confuse the jury. In light of the foregoing, we cannot conclude that Jaramillo’s trial counsel’s performance was deficient for failing to object to the jury

results in” with the word “causes.” See P.L. 53-1994, Sec. 5, effective July 1, 1994.

instruction.

Having found that Jaramillo's trial counsel was not ineffective for failing to object to the jury instruction, we turn to whether trial counsel was ineffective for failing to submit his own instruction on causation. To demonstrate ineffectiveness of trial counsel in this regard, Jaramillo must show trial counsel's unreasonable failure to request the instruction and that prejudice resulted from such failure. *Potter v. State*, 684 N.E.2d 1127, 1134 (Ind. 1997).

We do not find that trial counsel unreasonably failed by not requesting the instruction because even if offered, the instruction would have been rejected. Jaramillo's trial counsel testified at the petition hearing that he usually considers drafting his own jury instructions, but did not do so in Jaramillo's case. Therefore, he must have rejected the need to do so. Since Jaramillo did not tender instructions, we cannot know what instruction he would have offered. As discussed above, the jury instructions adequately instructed the jury that Jaramillo's actions must have been the proximate cause of the victim's death. Under these circumstances, we cannot conclude that there is a reasonable probability that the jury would have determined that Jaramillo was not the sole cause of the accident had Jaramillo's trial counsel tendered his own instruction on causation. We therefore affirm the post-conviction court's denial of Jaramillo's petition on this issue.

Jaramillo's remaining contention regarding trial counsel's ineffectiveness stems from trial counsel's failure to object to the State's rebuttal argument. Jaramillo contends that the State impermissibly misstated the burden of proof by stating, "[trial counsel] told you that

this is about fault, and it's not.” (Petitioner’s Exh. 1-A, pp. 242-43). We note that otherwise inappropriate comments made by the State on rebuttal are permitted when made in response to opposing counsel’s comments in their closing argument. *See Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006). Here, the State’s comment was made in response to a statement made during Jaramillo’s closing argument that “if this was a civil case the issue of fault would already have been decided by a preponderance of the evidence.” (Petitioner’s Exh. 1-A, pp. 241-42). We agree with the post-conviction court’s finding that the State’s comment was made in response to Jaramillo’s closing argument. We cannot therefore say that Jaramillo’s counsel was ineffective by failing to object to the State’s comment.

In sum, the post-conviction court did not err in determining that trial counsel’s performance was not deficient. Because we decide these issues based on trial counsel’s performance, we need not address Jaramillo’s arguments regarding prejudice. Jaramillo was not denied effective assistance of trial counsel.

III. *Ineffective Assistance of Appellate Counsel*

Jaramillo also contends that his appellate counsel was ineffective by failing to raise fundamental error arising from the jury instruction regarding causation and trial counsel’s failures related thereto.

The standard of review for claims of ineffective assistance of appellate counsel is the same as for trial counsel’s ineffective assistance. *Fisher v. State*, 810 N.E.2d 674, 676 (Ind. 2004). Indiana law recognizes three basic categories for claims of appellate counsel’s ineffectiveness: “(1) denial of access to an appeal; (2) waiver of issues; and (3) failure to

present issues well.” *Id.* at 677 (citing *Biehler v. State*, 690 N.E.2d 188, 193-95 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)). Here, Jaramillo’s claims fall into the waiver of issues category.

Fundamental error allows appellate review despite counsel’s failure to properly object at trial. *Benefield v. State*, 945 N.E.2d 791, 801 (Ind. Ct. App. 2011). Errors prejudicial to the extent that a fair trial is impossible are fundamental. *Id.* Fundamental error is “extremely narrow,” and appropriate only where there is substantial potential or actual harm, “a blatant violation of basic principles,” and a denial of fundamental due process. *Id.* (quotations omitted).

As Jaramillo’s trial counsel did not object to the jury instructions, Jaramillo now challenges appellate counsel’s election not to pursue fundamental error on direct appeal. However, we need not determine whether fundamental error should have been raised by appellate counsel because of our prior determination that the jury instructions were sufficient to inform the jury that Jaramillo must have proximately caused the death. We therefore do not find that Jaramillo’s appellate counsel’s performance was deficient for failing to raise fundamental error on direct appeal.

CONCLUSION

Based on the foregoing, we conclude that the post-conviction court did not err when it found that Jaramillo did not receive ineffective assistance of trial and appellate counsel.

Affirmed.

NAJAM, J. and MAY, J. concur