NO. COA11-599
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Catawba County
No. 06 CRS 57194

ENRIQUE CARDENAS-ZAVALA

Appeal by Defendant from judgment entered 19 October 2007 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 26 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for Defendant.

BEASLEY, Judge.

Enrique Cardenas-Zavala (Defendant) appeals from judgment entered on his 19 October 2007 convictions for second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, driving after consuming alcohol while less than 21 years of age, and failure to stop at a red light. For the reasons stated below, we find no error.

Defendant was indicted on 6 November 2006 for the offenses of murder, assault with a deadly weapon inflicting serious injury, driving while impaired, driving after consuming alcohol while less than 21 years of age, and failure to stop at a red light. All offenses arose out of a car accident on 29 September 2006. On 19 October 2007, Defendant was found guilty of all charges by a Catawba County jury. Additionally, the jury found the existence of an aggravating factor, serious injury to another person caused by Defendant's impaired driving at the time of the offense, beyond a reasonable doubt. Defendant was sentenced to 141 to 179 months' imprisonment for the charge of second-degree murder, and 22 to 36 months' imprisonment for the remaining charges. Defendant did not file a timely notice of appeal, but petitioned this Court for a writ of certiorari under N.C.R. App. P. 21. That petition was allowed by order filed 18 October 2010.

I.

Defendant first argues that the trial court violated N.C. Gen. Stat. § 9-6(b)-(e) (2009), governing jury selection, when it denied Defendant's challenge of juror number eight. We disagree.

It is required that "defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial. . . . That is, defendant must prove that a reasonable possibility exists that, had the error not been committed, a different result would have been reached at trial." *State v. Garcia*, 358 N.C. 382, 406-07, 597 S.E.2d 724, 743 (2004). Defendant does not even argue that he suffered prejudice, or that there is any possibility that a different result would have been reached had juror number eight been dismissed. Even assuming, *arguendo*, the inclusion of juror number eight was in error, the only resulting disadvantage that Defendant asserts is that he was "forced to accept an undesirable juror." Defendant does not advance any competing arguments that this Court should find a reasonable possibility exists that a different result would have been reached at trial had he been excluded. We find this argument without merit, and accordingly it is overruled.

II.

Defendant next contends that the trial court erred by failing to instruct the jury on felony death by vehicle as a lesser-included offense of second-degree murder. We disagree.

Rule 10 of the North Carolina Rules of Appellate Procedure governs the preservation of issues for appeal, and as it pertains to jury instructions, the rule states:

> **A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict**, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. App. P. 10(a)(2) (emphasis added). However, the rule provides for an exception in criminal cases, allowing that "an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

We reverse judgments on the basis of plain error "only in the most exceptional cases, and only when we are convinced that the error was either a fundamental one resulting in a miscarriage of justice or one that would have altered the jury's verdict." *State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 303 (2009)(citations omitted). "Indeed, even when the 'plain

error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

Defendant has failed to show that the trial court made any error at all, much less plain error. Defendant asserts that felony death by vehicle should have been charged as a lesser-included offense, standing between second-degree murder and involuntary manslaughter. This argument is without merit. Although it is true that "[w]hen the evidence supports the submission of a lesser included offense, it is error for the judge not to instruct on that offense," the fact is that "[f]elony death by vehicle is not a lesser included offense of second-degree murder." *State v. Grice*, 131 N.C. App. 48, 52, 505 S.E.2d 166, 169 (1998) (citations omitted). Accordingly, we cannot find that the trial court erred by failing to instruct the jury on the charge of felony death by vehicle. Moreover, Defendant cannot show that if there was error it amounted to plain error. There are no facts in the record from which to conclude that a miscarriage of justice occurred. The exclusion

of an instruction on felony death by vehicle, particularly considering that Defendant did not even ask for such an instruction at trial, cannot be considered an error so fundamental that justice was not served.

III.

Finally, Defendant argues that the trial court erred in denying his motion for a mistrial, or alternatively for sanctions against the State, after the prosecutor posed an improper question while cross-examining Defendant's witness. We disagree.

"Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995) (citation omitted). A mistrial should be granted "only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982) (citing *State v. Chapman*, 294 N.C. 407, 241 S.E.2d 667 (1978)).

Here, although the question the prosecutor posed was unarguably improper, the trial court promptly instructed the

jury to disregard the question. It is well settled that "[t]his Court presumes that jurors follow the trial court's instructions." *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996) (citation omitted). There is no evidence in the record that indicates otherwise, so in this case the trial court's prompt and explicit curative instruction ensured that Defendant received a fair trial. Accordingly, we find that the trial court properly denied Defendant's motion for a mistrial.

Defendant also argues that the trial court erred by not sanctioning the State for the improper question; specifically by refusing to grant Defendant the last argument even though he had put on evidence. This Court has held that "[w]here a defendant offers evidence at trial, the prosecution has a right to make the opening and closing argument to the jury." *State v. Pickard*, 107 N.C. App. 94, 101, 418 S.E.2d 690, 694 (1992) (citation omitted). Accordingly, this argument is without merit.

No Error.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).