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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-32

Filed: 19 July 2016

Pitt County, Nos. 13 CRS 61011, 14 CRS 1158

STATE OF NORTH CAROLINA

v.

BRANDON COLBY YAW

Appeal by Defendant from judgment entered 29 January 2015 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 9 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General Matthew L. Boyatt, for the State.

Hollers & Atkinson, by Russell J. Hollers, III, for Defendant.

STEPHENS, Judge.

In this case, Defendant Brandon Colby Yaw appeals from the judgment entered upon his conviction of felony hit and run. Yaw argues that the trial court erred in failing to give his proposed special jury instruction and plainly erred in admitting three graphic photographs of the injured victim into evidence. Because Yaw failed to make his request in writing, we find no error in the court's refusal to give the special

instruction. Because Yaw failed to include the challenged photographs in the record on appeal, we find no error in their admission.

Facts and Procedural Background

The evidence at trial tended to show the following: On 12 December 2013, Yaw's former girlfriend, Caroline Fleming, asked him to meet her in a local Walmart parking lot to return some of her personal property. Yaw, accompanied by his current girlfriend, Jessica Anderson, and her friend, Casey Powell, drove his Ford Explorer ("the SUV") to the Walmart, where they saw Fleming standing with a group of people in the parking lot.

Yaw parked his vehicle, and, as he walked toward Fleming, one of the men in the group, Ricky Heath, approached Yaw in an aggressive manner. After Yaw got back into the SUV, Heath banged on and attempted to open the doors. Shouting that he was going to "F [sic] [Yaw] up[,]" Heath punched Yaw through an open window and then forced the driver's door open. Yaw got out of the SUV and a brief scuffle ensued, during which Yaw knocked Heath to the ground. During the struggle between Yaw and Heath, Anderson stepped out of the SUV in an apparent attempt to calm the situation. As Heath continued his attack, Yaw re-entered the SUV, placed it into gear, and rapidly accelerated, tragically knocking Anderson to the ground where she was crushed by both right-side wheels of the SUV.

Witnesses testified that the vehicle lurched upwards and made a crunching noise as it drove over Anderson. Powell, who was still a passenger in Yaw's vehicle when it struck Anderson, testified that she could feel Anderson's body "tangling up under the car." She further testified that Yaw appeared dazed and in a state of shock, stopping his vehicle in the parking lot only long enough for Powell to get out before driving away.

Despite the efforts of a Walmart employee and medical professionals, Anderson died early the following morning from a cranial fracture. Officers with the Greenville Police Department ("GPD") arrived at the scene shortly after the incident and began an investigation. Yaw called Powell's cell phone as she was being interviewed by GPD Detective Stanley Styron. Given the phone by Powell, Styron told Yaw to return to the scene in the SUV. Yaw initially denied any wrongdoing and, even when he admitted to Styron that he knew had had hit "something," refused to acknowledge knowing he had run over Anderson. Later, Yaw and his father returned to the Walmart parking lot in a different vehicle and approached the cordoned-off crime scene. After a GPD officer told them that the section of the parking lot was closed, they drove away without Yaw identifying himself to the officer or explaining his role in the incident. Several hours later, Yaw was apprehended at his father's home.

On 14 April 2014, a grand jury indicted Yaw for felony hit and run and for having attained the status of an habitual felon. *See* N.C. Gen. Stat. §§ 20-166(a), 14-

7.1 (2015). The matter came on for trial at the 27 January 2015 criminal session of Pitt County Superior Court, the Honorable W. Russell Duke, Jr., Judge presiding. At trial, Yaw conceded most of the elements of the offense—that he had been driving the SUV which struck and killed Anderson and then failed to remain at the scene—contesting only (1) whether he knew or should have known that the SUV struck Anderson and (2) whether his failure to remain at the scene was willful and without justification or excuse. *See generally State v. Acklin*, 71 N.C. App. 261, 321 S.E.2d 532 (1984).

Yaw's theory of the case was that the violent and frantic confrontation with Heath both prevented him from realizing that he had run over Anderson and made it unreasonable and unsafe to remain at the scene. The State's case portrayed Yaw as a callous man with "no regard for the rules" and included the introduction of closed-circuit camera footage of Anderson being run over and three graphic photographs taken of Anderson in the hospital before she died. On the basis of this evidence, as well as witness testimony about the loud and violent nature of the collision, the State argued that any reasonable person would have been aware that Anderson had been struck and likely seriously injured. The State also noted that Yaw could have pulled the SUV over nearby and safely avoided Heath until police arrived.

During the charge conference, Yaw asked the trial court to give a special addition to the felony hit and run pattern jury instruction, to wit, informing the jury

that the hit and run statute expressly allows a defendant to leave the scene of an accident if remaining would place the driver in danger. The trial court rejected the proposed special instruction. After the jury found Yaw guilty of felony hit and run, he pled guilty to the habitual felon charge. The trial court consolidated the convictions for judgment and imposed a mitigated range sentence of 84 to 113 months in prison.

Discussion

On appeal, Yaw argues that the trial court (1) erred in rejecting his requested special jury instruction and (2) plainly erred in admitting the three photographs of Anderson taken in the hospital. We find no error.

I. Jury Instructions

Yaw first argues the trial court erred by not giving his requested addition to the pattern jury instruction on the offense of felony hit and run. We disagree.

During the charge conference, the trial court stated its intent to give the pattern jury instruction for felony hit and run which lists the six elements of the offense as follows:

> The Defendant has been charged with felonious hit and run that resulted in death. 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 motor vehicle. Second, that the vehicle was involved in a crash. . . . Third, that a person suffered serious bodily injury or died as a result of this crash. Fourth, that the Defendant knew or reasonably should

> have known that the Defendant was involved in a crash and that a person suffered serious bodily injury in or died as a result of this crash. . . . Fifth, that the Defendant did not stop the Defendant's vehicle immediately at the scene of the crash or after stopping, did not remain at the scene of the crash until a law enforcement officer completed the investigation or authorized the Defendant to leave. *And sixth, that the Defendant's failure to stop the Defendant's vehicle or remain at the scene of the crash was willful; that is intentional and without justification or excuse.*

(Emphasis added). Regarding the sixth element, Yaw asked the trial court to include an additional phrase taken from the hit and run statute in order to emphasize Yaw's defense that, in light of Heath's assault on him, it would have been dangerous for Yaw to remain at the scene:

> The [s]tatute says particularly, your Honor, that the driver shall remain with the vehicle at the scene of the crash until law enforcement authorizes—a law enforcement officer completes the investigation of the crash or authorizes the driver to leave their vehicle to be removed. And then the language is this. Unless remaining at the scene places the driver or others at significant risk of injury. And so that would be the justification that I would be asserting in element number six, that remaining at the scene would place the driver at significant risk of injury. And I think we have proven that given the nature of the assault, the fact that [Heath] chased the vehicle between 50 to 90 yards. And so while number six talks about a justification or excuse, I think the language of the [s]tatute would outline the justification that we are asserting in this case.

In response, the State noted that if the trial court gave Yaw's requested addition, it should also "include the language from the [s]tatute which says afterwards, 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 time period unless otherwise instructed by a law enforcement officer."[1] The trial court declined to include Yaw's requested additional language in the jury charge, but noted, "You can argue it to the jury, of course. Read them the law—the statute if you want to." During his closing argument, Yaw's counsel did in fact read this portion of the statute to the jury in making his case that Yaw had to flee the scene for his own safety.

Preliminarily, we address the State's assertion that this argument must be dismissed because Yaw "raise[s] the issue of a special jury instruction on justification or excuse for the first time on appeal." *See, e.g.*, *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (noting that appellate courts "will not consider arguments based upon matters not presented to or adjudicated by the trial court"), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). As reflected in the excerpts from the trial transcript quoted *supra*, the State's factual premise is simply incorrect: Yaw explicitly requested the addition of language from the hit and run statute during the charge conference.

However, that request was made orally rather than in writing, and, for that reason, Yaw's argument on appeal fails. Requesting modifications to pattern jury

[1] The statute provides, *inter alia*, that "[t]he driver shall remain with the vehicle at the scene of the crash . . . unless remaining at the scene places the driver or others at significant risk of injury" and, further, that "[i]f 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." N.C. Gen. Stat. § 20-166(a)(6).

instructions is "tantamount to a request for special instructions." *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). In North Carolina, requests for special jury instructions must be written and submitted to the trial judge at or before the charge conference. *See* N.C. Gen. Stat. § 15A-1231 (2015); Gen. R. Pract. Super. and Dist. Ct. 21, 2015 Ann. R. N.C. 16. Our Supreme Court has held that where a defendant "did not submit . . . his proposed modifications in writing, . . . it was not error for the trial court to fail to charge as requested." *McNeill*, 346 N.C. at 240, 485 S.E.2d at 288. Because Yaw's modification request was not made in writing, as a matter of law, there was no error in the trial court's denial of his request.

II. Admission of Photographic Evidence

Yaw next argues the admission of three photographs of Anderson in the hospital, to which he made no objection at trial, constituted plain error. Specifically, he contends that the photographs were irrelevant and that their probative value was outweighed by their prejudicial impact. We disagree.

We will only find plain error where the defendant can "not only show that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (citation, internal quotation marks, and brackets omitted), *cert. denied*, 558 U.S. 999, 175 L. Ed. 2d 32 (2009). However, Yaw failed to include the challenged photographs in the record on

appeal. When challenged photographic evidence is absent from the record on appeal, no error can be shown due to the presumption of regularity in the proceedings of the trial court. *State v. Samuel*, 27 N.C. App. 562, 564, 219 S.E.2d 526, 528 (1975) ("The photograph, about which [the] defendant complains, does not appear as a part of the record on appeal [and], therefore, no error is shown. There is a presumption in favor of regularity and it is incumbent on an appellant to show otherwise."). Accordingly, we find no error—let alone plain error—in the admission of the photographs.

NO ERROR.

Judges McCULLOUGH and ZACHARY concur.

Report per Rule 30(e).