IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-135

Filed: 2 October 2018

Wake County, No. 15CRS227310

STATE OF NORTH CAROLINA

v.

JARED JAMES LEMM, Defendant.

Appeal by Defendant from judgments entered 25 August 2017 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Meghan Adelle Jones for the Defendant.

DILLON, Judge.

Jared James Lemm ("Defendant") appeals from a judgment entered for assault with a deadly weapon inflicting serious injury and for felony hit and run resulting in injury. After careful review, we find no reversible error.

I. Background

The State's evidence tended to show as follows: Defendant and Amy Smith lived together but decided to see other people. Ms. Smith started dating Bruce Thompson. Defendant became jealous and confronted Mr. Thompson on occasion.

On 15 December 2015, Mr. Thompson was driving to work. As he was driving, he was rammed by a truck driven by Defendant. At some point, Mr. Thompson got out of his vehicle to assess the damage. When he was outside his vehicle, Defendant drove his truck into Mr. Thompson's vehicle, forcing Mr. Thompson's vehicle into an intersection. Defendant then drove into Mr. Thompson, knocking Mr. Thompson to the ground and proceeded to run his truck over Mr. Thompson. After running over Mr. Thompson, Defendant fled the scene in his truck. Mr. Thompson faded in and out of consciousness as he was being treated.

Defendant was charged with a number of crimes as a result of the incident. The jury convicted him of assault with a deadly weapon inflicting serious injury and felony hit and run resulting in injury. The trial court entered judgment based on the jury verdicts and sentenced Defendant to consecutive sentences. Defendant timely appealed.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Jury Instruction as to the Defense of Accident

In his first argument on appeal, Defendant contends the trial court plainly erred when it did not instruct the jury on the defense of accident as to the assault charge.

Defendant concedes that he did not object to the trial court's instruction on the assault charge and he did not request a specific instruction on the defense of accident. Therefore, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

Our Supreme Court has held that "[b]ecause plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Generally speaking, the rule provides that a criminal defendant is entitled to a new trial if the defendant demonstrates that the jury *probably* would have returned a different verdict had the error not occurred. *Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327.

In the present case, the State offered six eye-witnesses, including the testimony of the victim, which tended to show that Defendant backed up, swerved into the oncoming lane and hit Thompson as he ran from the truck, ran over him, and then sped away. In addition, the evidence from the several eyewitnesses showed that there was not any oncoming traffic at the time of the incident and that Defendant could have easily driven around the victim without running over him. The State also

presented evidence of two prior confrontations between Defendant and Thompson. The Defendant knew the victim, contrary to his statement to the investigators.

The trial court erred by failing to instruct on the defense of accident. *See State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988). However, where a defendant fails to request the accident instruction, our Supreme Court has instructed that we apply "plain error" review. *Id.* We conclude that such error did not amount to plain error. Based on the overwhelming evidence of guilt offered by the State, we cannot say that it is reasonably probable that the outcome would have been different had the jury been instructed on the defense of accident.

B. Jury Instruction as to the Element of Willfulness in Felony Hit and Run

Defendant argues that the trial court plainly erred when it did not instruct the jury on the element of willfulness in the felony hit and run charge. This argument is unpersuasive. Our Supreme Court has long recognized that " '[w]illful' is defined as 'the wrongful doing of an act without justifications or excuse, or the commission of an act purposely and deliberately in violation of law.' " *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009).

Defendant contends that he did not act "willfully" because he left the scene for a permitted purpose: he left to avoid being injured by Mr. Thompson. There was overwhelming evidence, however, that Defendant left the scene without any permitted purpose. Several State witnesses stated that Mr. Thompson never

threatened Defendant. There was also evidence that Mr. Thompson was fading in and out of consciousness after being run over by Defendant when Defendant fled the scene.

We conclude that it is not reasonably probable that the result regarding the hit and run charge would have been different had the jury been instructed as to willfulness. Therefore, Defendant has failed to show plain error.

NO PLAIN ERROR.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).