IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-802

Filed: 2 July 2019

Forsyth County, No. 16 CRS 53157

STATE OF NORTH CAROLINA

v.

MATTHEW LAWRENCE STARK

Appeal by defendant from judgment entered 27 July 2017 by Judge Lori I. Hamilton in Forsyth County Superior Court. Heard in the Court of Appeals 12 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant-appellant.

BRYANT, Judge.

Where the superseding indictment charging defendant Matthew Lawrence Stark with misdemeanor death by vehicle contained a sufficient description of an underlying traffic offense, the indictment was not fatally defective. Where the trial court's jury instructions as a whole left no reasonable cause to believe the jury was

misled or misinformed, the court did not commit plain error by failing to include defendant's requested language in the final mandate. Where the State's witness testified without objection during direct examination and defendant cross-examined that witness about the evidence defendant now argues was inadmissible, defendant has joined in causing invited error and waived his right to review.

On 3 January 2017, a Forsyth County grand jury issued a presentment and indictment charging defendant with misdemeanor death by vehicle. On 20 March 2017, a grand jury issued a superseding misdemeanor death by vehicle indictment. The matter was brought on for trial during the 24 July 2017 criminal session of Forsyth County Superior Court, the Honorable Lori I. Hamilton, Judge presiding.

The evidence tended to show that on 6 October 2015, defendant, general manager for a Pizza Hut in Clemmons, left work about 9:30 p.m. and started to drive his usual route home, on Highway 158. Defendant described the pertinent part of Highway 158 as a four-lane road with a center turn lane. "Where the accident occurred, it was going slightly uphill with a left-hand curve, very slight, but very dark, no lights." Defendant testified that prior to the accident, he was not talking on his phone and was not eating or drinking, and he did not see anything ahead of him on the roadway before striking Jian Quin Yu (hereinafter "the victim").

Defendant testified that he did not see an illuminated taillight on the victim's moped. "I didn't know I struck something until I struck something." After defendant

called 9-1-1, law enforcement officers with the Forsyth County Sheriff's Department and State Trooper D.R. Lewis soon arrived on the scene, as well as EMS. The weather was clear; the roadway was dry; and it was dark. There was no evidence to indicate that defendant was traveling faster or slower than the speed limit (50 mph). Per defendant's statement to Trooper Lewis, defendant was traveling about 45 mph. Trooper Lewis testified that in his estimation the moped was traveling at 30 mph. Trooper David Deal, with the Collision Reconstruction Unit of the State Highway Patrol, which investigates motor vehicle collisions, testified that he examined the taillight assembly from Mr. Yu's moped and determined that it was operable and showed signs consistent with being lit at the time of impact with defendant's vehicle.

After the close of all of the evidence, the jury found defendant guilty of misdemeanor death by vehicle. The trial court sentenced defendant to an active term of 75 days, then suspended the sentence and placed defendant on supervised probation for 36 months and ordered defendant to complete 100 hours of community service. Defendant appeals.

On appeal, defendant raises the following arguments: (I) the indictment for misdemeanor death by vehicle was fatally defective because the underlying traffic offense was not a crime; (II) the trial court erred by failing to instruct the jury that in order to find defendant guilty they must find that his failure to reduce speed was

unreasonable; and (III) the trial court committed plain error by allowing Trooper Lewis to testify that the moped was moving at 30 mph.

I

Defendant argues that the superseding indictment charging him with misdemeanor death by vehicle was fatally defective. Defendant contends that a critical element of the offense was not pled, and thus, the trial court did not have jurisdiction over the case. More specifically, defendant contends that where General Statutes, section 20-141(m) ("Speed Restrictions") was asserted as the sole traffic violation, the indictment was defective because section 20-141(m) has been held to be unconstitutionally vague. We disagree.

> Where there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment. . . . When such a defect is present, it is well established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.

State v. Wilson, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998). "This Court review[s] the sufficiency of an indictment *de novo*." *State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citation omitted).

"North Carolina law has long provided that [t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation." *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007) (alterations in original) (citation

omitted). However, "[t]he law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed." *State v. Rankin*, ___ N.C. ___, 821 S.E.2d 787, 790–91 (2018) (citation omitted).

Defendant was indicted for violating General Statutes, section 20-141.4(a2) ("Misdemeanor death by vehicle").[1] This requires that a person be engaged in the violation of a State law applying to the operation of motor vehicle or to the regulation of traffic and that this violation unintentionally results in the proximate cause of another person's death. N.C. Gen. Stat. § 20-141.4(a2) (2017). In the indictment before us, the proximate cause of death for the victim was stated as a violation of N.C.G.S. § 20-141(m).

Per section 20-141, subsection (m),

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[1] Pursuant to our General Statutes, section 20-141.4(a2),

> A person commits the offense of misdemeanor death by vehicle if:
>
> (1) The person unintentionally causes the death of another person,
>
> (2) The person 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, other than impaired driving under G.S. 20-138.1, and
>
> (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death.

N.C. Gen. Stat. § 20-141.4(a2) (2017).

> [t]he fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the operator of a vehicle from the duty to decrease speed as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway, and to avoid injury to any person or property.

Id. § 20-141(m). This Court has held that subsection (m) must be construed consistently with subsection (a).[2] Pursuant to subsection 20-141(a), "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." *Id.* § 20-141(a).

In *State v. Worthington*, 89 N.C. App. 88, 365 S.E.2d 317 (1988), "[the] [d]efendant argue[d] that a literal application of G.S. 20–141(m) subjects a motorist to prosecution in almost any collision in which he is involved, whether or not he is at fault. Because the legislature obviously did not intend that result, defendant contend[ed], the statute is unconstitutionally vague . . . ." *Id.* at 91, 365 S.E.2d at 319. This Court disagreed and held the following:

> [*W*]*e construe G.S. 20–141(m) to impose liability on a motorist only when his failure to reduce speed to avoid a collision is not in keeping with the duty to use due care under the circumstances*. . . . G.S. 20–141(m) does not impose liability except in cases where a reasonable and ordinarily prudent person could, and would have, decreased his speed to avoid a collision.

[2] *See State v. Worthington*, 89 N.C. App. 88, 92, 365 S.E.2d 317, 320 (1988) ("G.S. 20–141(m) must be construed consistent with G.S. 20–141(a)'s requirement that no person shall drive at a speed greater than is reasonable and prudent under the circumstances").

Id. at 92, 365 S.E.2d at 320; *see also State v. Stroud*, 78 N.C. App. 599, 603, 337 S.E.2d 873, 876 (1985) ("N.C.Gen.Stat. 20–141(a) and N.C.Gen.Stat. 20–141(m), construed together, establish a duty to drive with caution and circumspection and to reduce speed if necessary to avoid a collision, irrespective of the lawful speed limit or the speed actually driven.").

While both *Worthington* and *Stroud* provide that the duty described in section 20-141, subsection (m) ("the duty to decrease speed as may be necessary to avoid [a] colli[sion]") is to be read consistent with the duty set forth in subsection (a) (directing that no person drive in a manner that is not "reasonable and prudent under the conditions then existing"), this does not establish that an indictment for misdemeanor death by vehicle pursuant to section 20-141.4(a2) must also reference section 20-141(a) where the underlying offense proximately resulting in death is alleged to be a violation of section 20-141(m).

Defendant's indictment stated the following:

> The jurors for the State upon their oath present that on or about the date(s) of the offense[, 10/06/2015,] . . . the defendant named above
>
> unlawfully and willfully did unintentionally cause the death of [the victim] when engaged in a violation of G.S. 20-141(m), applying to the operation and use of a vehicle and to the regulation of traffic, in that the defendant unlawfully and willfully did drive a vehicle on US HIGHWAY 158, a highway in WINSTON SALEM, NORTH CAROLINA and failed to decrease speed as was necessary to avoid a collision with a 2014 Tao Tao moped operated by

> [the victim] on the highway and to avoid injury to [the victim]. This violation of G.S. 20-141(m) was the proximate cause of the death of [the victim].

Defendant does not challenge the sufficiency of the indictment other than insisting it was necessary to include a reference to G.S. 20-141(a). Notwithstanding defendant's arguments, the indictment adequately expresses the charge—misdemeanor death by vehicle, in violation of section 20-141.4(a2)—and alleges every element of that offense, including a violation of State law applying to the operation of a vehicle, i.e. section 20-141(m) (failure to "to decrease speed as may be necessary to avoid colliding with any person[] [or] vehicle . . . on . . . the highway, and to avoid injury to any person or property"). *See Rankin*, ___ N.C. at ___, 821 S.E.2d at 790–91; *Kelso*, 187 N.C. App. at 722, 654 S.E.2d at 31. Accordingly, defendant's argument is overruled.

II

Next, defendant argues that the trial court erred or in the alternative, plainly erred by omitting his requested instruction from the final mandate. Defendant requested and received an instruction that jurors had a duty to find him not guilty if the State did not persuade them beyond a reasonable doubt that defendant's failure to reduce speed to avoid a collision was unreasonable. We hold no plain error.

Preservation

We first consider whether this issue has been preserved for our review.

During the charge conference, defendant requested the trial court instruct the jury in the first substantive paragraph of the instructions, in pertinent part, as follows: "A person fails to reduce speed when under the existing circumstances a reasonably careful and prudent person would have decreased speed to avoid colliding with any vehicle on the highway." All parties agreed that the proposed instruction was appropriate. And when instructing the jury, the court included the proposed language two times during the main instruction but did not include it in the final mandate.

Following the instructions, defendant raised no objection or request for correction. Thus, he failed to preserve the issue for review.[3]

Pursuant to our Rules of Appellate Procedure,

> [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.

[3] We note that the record on appeal fails to include a written copy of defendant's request for special instructions. N.C. Gen. Stat. § 1-181(a)(1) (2017) ("Requests for special instructions to the jury must be—(1) In writing . . . ."); *id.* § 15A-1231(a) ("At the close of the evidence or at an earlier time directed by the judge, any party may tender written instructions."); N.C. Super. Ct. & Dist. Ct. R. 21 ("If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference."). Moreover, during the charge conference, the trial court submitted via email written jury instructions for each party to review. These written instructions from the trial court were also not included in the record.

N.C. R. App. P. 10(a)(2) (2019). *See State v. Massenburg*, 234 N.C. App. 609, 611–12, 759 S.E.2d 703, 706 (2014) (holding that the defendant failed to preserve his challenge to jury instructions for appeal where he failed to object to the instructions before the trial court). Accordingly, defendant failed to preserve his argument for appeal to this Court, and our review is thus limited to plain error. *See State v. Turner*, 237 N.C. App. 388, 390–91, 765 S.E.2d 77, 81 (2014) ("[T]his Court reviews unpreserved instructional and evidentiary issues for plain error." (citation omitted)).

Standard of Review

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See* [*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)]. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." *See id.* (citations and quotation marks omitted); *see also* [*State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)] (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting [*United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)].

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

We review jury instructions:

> contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . . The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Hall, 187 N.C. App. 308, 316, 653 S.E.2d 200, 207 (2007) (alteration in original) (citation omitted).

Analysis

Defendant argues that the trial court committed plain error by failing to instruct the jury during the final mandate that they had a duty to find defendant not guilty if the State did not persuade them beyond a reasonable doubt that defendant's failure to reduce speed to avoid a collision was unreasonable. Defendant's argument is without merit. Defendant fails to provide any persuasive authority in support of his argument that failing to instruct the jury on the requested instruction in the final mandate amounted to reversible error.

The trial court twice included the language requested by defendant in the body of its instructions to the jury:

> The defendant has been charged with Misdemeanor

Death By Vehicle, which is the unintentional killing of a human being by a person engaged in the violation of a law or ordinance governing the operation of a motor vehicle[].

For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that the defendant violated the law of this state governing the operation of motor vehicles by failing to reduce speed to avoid a collision. *A person fails to reduce speed to avoid a collision when under the existing circumstances a reasonably careful and prudent person would have reduced speed to avoid colliding with any vehicle on the highway and to avoid injuries to any person or property.*

The motor vehicle law provides that the fact that a person is driving his vehicle at a speed lower than the posted speed limit does not relieve him of the duty to decrease his speed as may be necessary to avoid colliding with any person or vehicle on the highway and to avoid injury to any person or property.

Thus, even if you find that the speed of the defendant's vehicle was lower than the posted limit set by law, *if he failed to decrease speed when, under the existing circumstances, a reasonably careful and prudent person would have decreased speed to avoid colliding with any person or vehicle on the highway, and to avoid injury to any person or property, you would find the defendant had violated the law of this state governing the operation of motor vehicles by failing to reduce speed to avoid a collision.*

And second, that the defendant's violation of the law proximately caused the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred, and one that a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result.

The defendant's act need not have been the only

> cause nor the nearest cause. It is sufficient if it occurred with some other cause, acting at the same time or in combination with, caused the death of the victim.
>
> [Final mandate]
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant violated the law of this state governing the operation of motor vehicles by failing to reduce speed to avoid a collision and that this violation proximately caused the death of the victim, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of the things, it would be your duty to return a verdict of not guilty.

(emphasis added).

Reviewing the jury instructions contextually and in their entirety, the charge presents the law in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed. *See Hall*, 187 N.C. App. at 316, 653 S.E.2d at 207. The body of the trial court's instruction includes the language defendant proposed be added to the instruction during the charge conference.

As defendant cannot establish that the trial court's failure to include the requested language during the final mandate was—in light of the entire charge—likely to mislead the jury, defendant cannot establish plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the

entire record, the error had a probable impact on the jury's finding that the defendant was guilty." (citations omitted)). Accordingly, we hold no plain error.

III

Lastly, defendant argues that the trial court committed plain error by permitting Trooper Lewis to testify that the moped was moving at 30 miles per hour at the time of the collision. More specifically, defendant contends that because Trooper Lewis was neither an eye witness to the collision nor an expert in accident reconstruction, he was not entitled to give testimony regarding the speed of the victim's moped.

As defendant did not challenge Trooper Lewis's testimony regarding the potential speed of the moped at the time of impact, he requests that we review this matter for plain error. However, we note that Trooper Lewis testified to the potential speed of the moped at the time of impact on direct examination by the State without objection by defendant. Then on cross-examination, defendant questioned Trooper Lewis as to the potential speed of the moped. In essence, even if we presume the admission of Trooper Lewis's testimony was error, defendant invited the error he now challenges on appeal.

"[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Dew*, 225 N.C. App. 750, 758, 738 S.E.2d 215, 221 (2013) (quoting *State v. Barber*, 147 N.C. App. 69,

74, 554 S.E.2d 413, 416 (2001)); *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law."), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008). *See also State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) ("Ordinarily one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial. . . . Invited error is not ground for a new trial.").

Accordingly, this argument is dismissed.

AFFIRMED IN PART; NO PLAIN ERROR IN PART; DISMISSED IN PART.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).