IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-161

No. COA19-555

Filed 20 April 2021

Gaston County, Nos. 17 CRS 53205-06; 53210; 53291; 53298; 53399; 54016; 54018

STATE OF NORTH CAROLINA

v.

BRIAN THAD CARVER

Appeal by defendant from judgment entered 2 August 2018 by Judge Jesse B. Caldwell, III in Superior Court, Gaston County. Heard in the Court of Appeals 28 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Francisco Benzoni and Brenda Menard, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant.

STROUD, Chief Judge.

¶ 1 Defendant appeals from his convictions for first degree felony murder, common law robbery, conspiracy to commit common law robbery, two separate counts of first degree kidnapping, larceny of a motor vehicle, two separate counts of robbery with a dangerous weapon, larceny of a firearm, and possession of a firearm by a felon. Defendant argues "the trial court coerced a jury verdict on the charge of first-degree

felony murder by sending the jury back to continuing deliberations after their second report of deadlock on this charge and specific indication from all twelve jurors that no amount of additional deliberation was likely to result in a unanimous verdict, in violation of Article I, Section 24 of the North Carolina Constitution." (Original in all capitals.) Defendant argues in his primary brief that the standard of review for this issue is *de novo*:

> Whether the actions of a trial judge coerced a verdict in violation of N.C. Const. art. I, § 24 is a question of law determined by an appellate court de novo based on the totality of the circumstances. *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496, *aff'd per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002).

But *State v. Dexter* does not mention *de novo* review of this issue, nor do the cases upon which *Dexter* relies. *See Dexter*, 151 N.C. App. 430, 566 S.E.2d 493, *aff'd*, 356 N.C. 604, 572 S.E.2d 782 (2002). Also, *Dexter* addresses an issue arising from the trial court's instructions to two jurors in the absence of the remainder of the jury. *Id.* at 434, 566 S.E.2d at 496.

¶ 2 Our Supreme Court clarified the standard of review for this issue in *State v. May,* 368 N.C. 112, 772 S.E.2d 458 (2015). In *May*, the trial court twice instructed the jury to continue deliberations after the jurors had reported that they were deadlocked. *Id.* at 115-16, 772 S.E.2d at 461. The Court of Appeals determined the trial court's instructions had violated North Carolina General Statute § 15A-1235(c)

and had committed constitutional error, and the Court of Appeals granted the defendant a new trial. *Id.* at 116, 772 S.E.2d at 461. The defendant in *May* had not objected when the trial court instructed the jury after the reports of deadlock, but the Court of Appeals "concluded that the State had the burden of proving that the error was harmless beyond a reasonable doubt." *Id.* at 117, 772 S.E.2d at 461. The Supreme Court reversed the Court of Appeals ruling and held that this issue is reviewed for plain error in the absence of an objection at trial. *Id.* at 122, 772 S.E.2d at 465. The Supreme Court explained,

> Defendant relies on *State v. Wilson*, in which the jury notified the court that a problem existed with the foreperson. Without objection by counsel for either party, the trial judge conducted several discussions with the foreperson while the other empaneled jurors were absent from the courtroom. The defendant argued that this procedure violated his right under the Constitution of North Carolina to a unanimous verdict. We agreed and held that "where the trial court instructed a single juror in violation of defendant's right to a unanimous jury verdict under Article I, Section 24, the error is deemed preserved for appeal notwithstanding defendant's failure to object."
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> However, *Wilson* is distinguishable from the case at bar. Unlike the defendant in *Wilson*, who focused on instructions given to less than the full jury, defendant here argues that the instruction in question, given to the entire panel, was coercive. The Court of Appeals agreed, holding that the rule in *Wilson* applied to coercive instructions. However, this Court carefully constrained the breadth of the holding in *Wilson* so that not all violations of Article I, Section 24 are deemed preserved. This Court specified in *Wilson* that when a violation of Article I, Section 24 involves an instruction to less than all the jurors, that error

> is preserved as a matter of law. The pertinent cases cited in *Wilson* to support the determination that the error relating to a unanimous jury verdict was deemed preserved also involve circumstances in which the entire jury panel did not receive the instructions at issue. In contrast, the violation of Article I, Section 24 alleged here involves the content of instructions given to the entire jury panel. Because this alleged error does not fit within the constraints explicitly set out in *Wilson*, that case is inapposite. Thus, we apply the general rule that "failure to raise a constitutional issue at trial generally waives that issue for appeal." Nevertheless, because the alleged constitutional error occurred during the trial court's instructions to the jury, we may review for plain error.

Id. at 117-18, 772 S.E.2d at 462 (citations omitted).

¶ 3 As in *State v. May*, Defendant has argued the trial court erred by its instructions to the entire jury panel. Therefore, as in *State v. May*, this issue was not preserved for appellate review without objection by Defendant. *See id.* While we may review this issue for plain error, *id.*, Defendant has not "specifically and distinctly contended" the trial court's failure amounts "to plain error." N.C. R. App. P. 10(a)(4).

¶ 4 Defendant did not argue plain error in his primary brief. After the State pointed out the correct standard of review, Defendant argued in his reply brief: "However there is one important part of the decision in *May* that the State neglects to mention. The opinion makes it clear that, even under plain error review, an appellate court must address the issue of whether the verdict was coerced based on the totality of the circumstances." While we agree that under the plain error standard

of review we would consider the "totality of the circumstances" in reviewing this issue, the burden is still on Defendant to argue plain error in his primary brief. N.C. R. App. P. 10(a)(4). Accordingly, this argument was not preserved for appellate review and is dismissed. *See State v. Davis*, 202 N.C. App. 490, 498, 688 S.E.2d 829, 835 (2010) ("Moreover, Defendant did not allege plain error on appeal and, thus, is not entitled to plain error review of this issue."); *State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485 (2014) ("In his brief, defendant does not ask this Court to review the issue under the plain error standard. When the State noted defendant's failure to argue plain error in the State's brief, defendant attempted to cure this deficiency by mentioning plain error in defendant's reply brief. However, a reply brief is not an avenue to correct the deficiencies contained in the original brief.").

DISMISSED.

Judges INMAN and COLLINS concur.

Report per Rule 30(e).