18CA1357 Peo v Crews 12-17-2020

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA1357
City and County of Denver District Court No. 17CR7108
Honorable Shelley I. Gilman, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

N'Neka L. Crews,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE GROVE
Dailey and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 17, 2020

Philip J. Weiser, Attorney General, Paul Koehler, First Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Emily Hessler, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, N'neka L. Crews, appeals the judgment entered upon a jury verdict finding her guilty of leaving the scene of an accident. We affirm.

I. Background

¶ 2 Crews and the victim, Deangilo Howard, gave differing testimony at trial about the events of September 20, 2017.

¶ 3 Crews testified that, around noon on the day in question, she was visiting a friend at her apartment. Howard, with whom Crews had had a previous confrontation, was apparently nearby. When she came out of the apartment, he yelled, "Hey, bitch," and then approached her, continuing to yell obscenities. Crews and Howard argued for several minutes.

¶ 4 During the argument an acquaintance of both parties approached and asked what was going on. Crews testified that she explained to the acquaintance that Howard had threatened to hit her during a prior encounter. According to Crews, upon hearing this Howard threatened to shoot her and took off his shirt.

¶ 5 At this point the acquaintance stepped between the two and told Crews to get in her car, which she did. Crews attempted to drive away, but Howard stood in her way and yelled, "Bitch, you

ain't going nowhere." Crews yelled back for Howard to get out of the way, and Howard began to move out of the street. As Crews accelerated, however, Howard moved back into the road. The acquaintance testified that Crews "tried to maneuver around Howard," but she could not avoid him, and Howard jumped onto the car to avoid being run over. Crews stopped the car at the end of the street and looked in her rearview mirror to see what had happened. She thought she saw Howard bending over to pick up his gun and, afraid that he would shoot her, she drove away.

¶ 6 For his part, Howard testified that he was on the street talking to his girlfriend when a car, which he recognized as belonging to Crews, drove very close to him. He then visited his mother's house, but as he was walking out Crews appeared and began "talking shit." Howard testified that he "didn't get mad until [Crews] told [him] she was going to have somebody pull up over there to [his] mom's house," and he maintained that he neither had a weapon nor threatened to shoot or strike Crews in any way. Howard testified that as the argument wound down, he made a phone call, but as he did so he heard the engine of Crews's car revving as if it were

"coming towards [him] fast." He turned around just in time to jump onto the hood.

¶ 7 Howard was injured in the collision. Along with abrasions to the shoulder, he suffered lacerations to his head, face, arm, and leg that were treated with thirteen staples and thirty-two stitches. He had two spinal fractures, torn tendons in his elbow that required surgery to repair, and nerve damage and numbness in some of his fingers. Crews did not dispute the extent or severity of these injuries at trial.

¶ 8 Crews did not report the incident, but police responded to a reported hit and run. Crews was later arrested and charged with one count of first degree assault and one count of leaving the scene of an accident.[1] After a two-day trial, a jury acquitted her of first degree assault but convicted her of leaving the scene of an accident.

II. Choice of Evils Instruction

¶ 9 Crews contends that the trial court should have instructed the jury on Colorado's choice of evils affirmative defense. Defense counsel did not request the instruction at trial, and therefore we

[1] Crews was charged under sections 18-3-202(1)(a) and 42-4-1601, C.R.S. 2020, respectively.

must determine whether the court's failure to give the instruction was plain error. We conclude that it was not.

A. Standard of Review

¶ 10 Where, as here, a defendant fails to request an instruction at trial, appellate review is limited to determining whether plain error occurred. *People v. Garcia*, 981 P.2d 214, 217 (Colo. App. 1998). Plain error is "both obvious and substantial." *People v. Stewart*, 55 P.3d 107, 120 (Colo. 2002) (quoting *People v. Barker*, 180 Colo. 28, 32, 501 P.2d 1041, 1043 (1972)). In the context of jury instructions, plain error does not occur unless review of the entire record demonstrates that the error so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the conviction. *People v. Shepherd*, 43 P.3d 693, 696 (Colo. App. 2001).

B. Analysis

¶ 11 Crews asserts that the trial court should have instructed the jury on the choice of evils affirmative defense because "both parties addressed it" in argument, and "it was clearly an issue raised by the evidence." The People respond that defense counsel did not make the requisite offer of proof under the statute, and thus the court

was not required to provide the instruction sua sponte.[2] The People also argue that, in any event, the evidence adduced at trial did not support a choice of evils instruction.

¶ 12 Colorado's choice of evils defense is outlined in section 18-1-702, C.R.S. 2020. According to the statute, a choice of evils defense is only applicable if

(1) the criminal act at issue was "necessary as an emergency measure to avoid an imminent public or private injury which is about to occur";

(2) the imminent injury was "by reason of a situation occasioned or developed through no conduct of the actor"; and

(3) the situation was "of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh[ed] the desirability of avoiding the injury sought

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[2] The People suggest that, under the circumstances here, we may infer that defense counsel's failure to make a formal offer of proof amounted to a waiver of the choice of evils defense. Because we conclude that there was no plain error (i.e., that Crews's contention fails even if her argument was merely forfeited), we need not consider whether the affirmative defense was waived.

> to be prevented by the statute defining the offense in issue."

§ 18-1-702(1). Choice of evils is an affirmative defense, meaning that it must be supported by "some credible evidence" at trial. *People v. Brandyberry*, 812 P.2d 674, 677 (Colo. App. 1990). In addition, the statute requires the proffer to be made formally:

> A defendant wishing to invoke this defense must first make a proffer or presentation of evidence supporting the defense to the court outside the presence of the jury; and the court must determine whether, as a matter of law, the claimed facts and circumstances would, if established, constitute sufficient justification for the defendant's alleged conduct.

Shepherd, 43 P.3d at 696.

¶ 13 Crews concedes that defense counsel did not make a formal offer of proof but argues that the trial court should have inferred the need for a choice of evils instruction from the evidence and arguments at trial. In particular, she references statements that "indirectly urged the jury to apply a choice of evils defense," such as defense counsel's assertion in opening statement that, under the circumstances here, "it's not unlawful to keep driving 'cause you're that afraid." Crews also argues that the prosecutor "implicitly

argued against" the choice of evils defense by stating in closing that "[n]owhere in [the instructions] does it say, but if you're really afraid for your safety, it's okay to just go . . . . It doesn't say that. It says you have to go back."

¶ 14 We are unconvinced that these statements or the evidence they referenced should have made it obvious to the trial court that a choice of evils instruction was required. Indeed, even if the statements in question could have been understood as oblique references to the choice of evils defense, they were incomplete. Neither side explicitly argued — or made a factual showing — that Crews's decision to leave the scene of the collision was "by reason of a situation occasioned or developed through no conduct of the actor." Defense counsel's opening statement, for example, suggested only that Crews reasonably perceived that it was necessary for her to leave the scene in order to avoid further danger to herself. And the prosecutor's statements urged the jury to avoid the question altogether.

¶ 15 There was, to be sure, "some credible evidence" that Crews feared for her life. But there is nothing in the record before us demonstrating that Crews bore no responsibility for the situation,

which is also a necessary component of the choice of evils defense. Absent argument from defense counsel — supported by evidence or an offer of proof — that Crews's decision did not come about from her own doing, we cannot conclude that the trial court obviously erred by failing to instruct the jury sua sponte on the choice of evils affirmative defense.

III. Elements of the Crime

¶ 16 Next, Crews takes issue with the trial court's instruction on the elements of the crime of leaving the scene of an accident.

A. Standard of Review and Relevant Law

¶ 17 Section 42-4-1601, C.R.S. 2020, requires "[t]he driver of any vehicle directly involved in an accident resulting in injury to, serious bodily injury to, or death of any person" to stay at the scene of the accident and fulfill the requirements of section 42-4-1603(1), C.R.S. 2020, including providing information to the other party and, as practical, rendering assistance. According to subsection 1601(2), a person who violates this section commits

> (a) A class 1 misdemeanor traffic offense if the accident resulted in *injury* to any person;
>
> (b) A class 4 felony if the accident resulted in *serious bodily injury* to any person . . . .

(Emphasis added.) Despite this distinction in the statute, the elemental jury instruction given at trial told the jury that it should find Crews guilty of leaving the scene of an accident if, among other things, the collision resulted "in injury *or* serious bodily injury to any person." (Emphasis added.) The jury found Crews guilty of this count, which, according to the complaint, was a class 4 felony. The trial court then entered a conviction for a class 4 felony and sentenced Crews accordingly.

1. Nature of the Error

¶ 18 Crews asserts, the People concede, and we agree that the instruction was erroneous. According to Crews, the error was plain (or, as she argues in her reply brief, structural) and requires us to vacate her felony conviction and remand the case with instructions to enter a conviction for the misdemeanor version of the offense under section 42-4-1601(2)(a). Applying plain error review, we disagree with the suggestion that the instructional error could have impacted the jury's conclusion that Crews violated section 42-4-1601(1). Instead, the error only potentially affected the degree of the offense, and thus Crews's sentencing exposure.

2. *Apprendi/Blakely* Error

¶ 19 Because the instructional error affected the penalty for Crews's conduct, rather than the conviction itself, it implicates the rule that, in general, any fact which increases the penalty for a crime beyond the prescribed statutory maximum (other than prior criminality) must be submitted to a jury and proved beyond a reasonable doubt. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Lopez v. People*, 113 P.3d 713, 723 (Colo. 2005).

¶ 20 Here, although the jury found that Crews left the scene of the accident in violation of section 42-4-1601(1), it did not make any finding regarding the severity of the victim's injuries as contemplated by section 42-4-1601(2)(b). Nonetheless, the trial court imposed a sentence for a class 4 felony, which could only have been based on a finding that the crash resulted in serious bodily injury. Because the "statutory maximum" for *Apprendi/Blakely* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, this was error.

3. Structural or Plain Error Review

¶ 21 Crews urges us to conclude that this *Blakely* error was plain. And in her reply brief, she asserts that it was structural. Although we typically do not address arguments raised for the first time in a reply brief, we elect to do so here.

¶ 22 In support of her structural error argument, Crews relies in large part on *Medina v. People*, 163 P.3d 1136 (Colo. 2007). In *Medina*, the information purportedly charged the defendant with class 4 felony accessory, but the description of the charge omitted a necessary element of that crime. *Id.* at 1140. Then, at the beginning of trial the prosecution indicated that it was pursuing class 5 felony accessory by proffering a jury instruction for that offense, and the trial proceeded on the assumption that the defendant had been charged only with the class 5 felony. The jury found the defendant guilty under the instruction provided, but the sentencing court entered "its own conviction and sentence for a class 4 felony instead of determining the punishment warranted by the jury's guilty verdict for the class 5 felony." *Id.* The reason for this was unclear, but on review a division of this court affirmed the sentence and found that the jury instruction was merely a

"misdescription of an element of the class 4 offense." *Id.* at 1139. The supreme court reversed and remanded the case with instructions to enter a conviction on the class 5 felony alone. *Id.* at 1141.

¶ 23 A key aspect of the supreme court's decision in *Medina* was the fact that, because they have different mens rea requirements, class 5 felony accessory and class 4 felony accessory *are different crimes*. *See id.* at 1137, 1141 (citing § 18-8-105(3), (4), C.R.S. 2020). A court may not "enter[] a conviction for an offense other than that authorized by a jury's guilty verdict." *Id.* at 1140. Because "there was no jury verdict on the charge on which the trial court sentenced Medina . . . structural error analysis applie[d]." *Id.* at 1141.

¶ 24 *Medina* distinguished cases like *Griego v. People*, 19 P.3d 1, 8 (Colo. 2001), in which the supreme court held that "when a trial court [simply] misinstructs the jury on an element of an offense, either by omitting or misdescribing that element, that error is subject to constitutional harmless or plain error analysis and is not reviewable under structural error standards." *See also Tumentsereg*

v. People, 247 P.3d 1015, 1018 (Colo. 2011) (stating that the rule from *Griego* is now "well-settled").

¶ 25 Similarly, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Washington v. Recuenco*, 548 U.S. 212, 221-22 (2006). Our supreme court has approved of that rule from *Recuenco*. *See Tumentsereg*, 247 P.3d at 1018-19.

¶ 26 Thus, for example, in *Recuenco*, the trial court enhanced the defendant's sentence based on the finding that he had used a handgun during the commission of the crime, even though the jury had not made that specific finding. *See* 548 U.S. at 218-22. The Supreme Court concluded that the error was not structural and instead applied plain error review. *See id.*

¶ 27 Similarly, in *People v. Ewing*, 2017 COA 10, the jury found the defendant guilty of two counts of sexual assault on a child by one in a position of trust, and the trial court entered a judgment of conviction for those crimes. *See id.* at ¶¶ 4-8. The court entered the convictions as class 3 felonies based on findings that the victims were less than fifteen years of age at the time of the offenses, although the jury had not made particular findings about

the victims' ages. *See id.* A division of this court held that the error was not structural and instead applied plain error review. *See id.* at ¶¶ 13-24.

B. Analysis

¶ 28 The jury here found Crews guilty of the offense of leaving the scene of an accident. § 42-4-1601(1). As discussed above, the severity of the victim's injury controlled the seriousness of that offense, and thus Crews's sentencing exposure under section 42-4-1601(2)(a) and (2)(b). The conviction that the trial court entered was consistent with the original charges, and, in contrast to *Medina*, the instructional error here affected only the degree of the offense; it did not cause the trial court to enter a conviction for "a new and different crime" that was not presented to the jury. *Medina*, 163 P.3d at 1141. Thus, consistent with *Recuenco*, *Griego*, and *Ewing*, we conclude that plain error review applies under the circumstances of this case.

¶ 29 Plain error is "obvious and substantial" error that "so undermined the fundamental fairness of the trial itself so as to cast serious doubt on the reliability of the judgment of conviction." *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (citations omitted).

In order to warrant reversal under plain error review, the error "must impair the reliability of the judgement of conviction to a greater degree than under harmless error." *Hagos v. People*, 2012 CO 63, ¶ 14.

¶ 30 According to the complaint and information:

> On or about September 20, 2017, NNKEA L CREWS, the driver of a vehicle directly involved in an accident resulting in *serious bodily injury* to DEANGELO HOWARD, unlawfully and feloniously failed to immediately stop the vehicle at the scene of the accident . . . .

(Emphasis added.) This meant that in order for the jury to find Crews guilty on this count, it had to determine that the prosecution proved beyond a reasonable doubt that the accident resulted in "serious bodily injury," and not just "injury." However, as we have already noted, the jury was instructed to consider whether the accident resulted in "injury to *or* serious bodily injury to any person." (Emphasis added.) The jury was not asked to specify

which type of injury the prosecution proved beyond a reasonable doubt.[3]

¶ 31 The deficiency in the jury instruction and verdict form should have been obvious to the prosecution and the court. However, we conclude that the error did not so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction.

¶ 32 The undisputed evidence at trial was that the accident resulted in serious bodily injury to Howard. Howard's emergency room physician testified that Howard suffered a fractured spine, and severe lacerations to his elbow, head, and shoulders. Howard himself described the lasting nerve damage caused by the accident. The defense did not dispute that these injuries were at least "serious," and in fact agreed that they were, as evidenced by defense counsel's statement in closing that

> [n]o one here at any point in this trial from the defense has said that these injuries were not severe, that they were not incredibly harmful,

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[3] The Colorado model jury instruction for leaving the scene of an accident includes an interrogatory asking the jury to determine whether the accident resulted in injury or serious bodily injury. COLJI-Crim. 42:23.INT (2019). It is unclear why the trial court did not give this interrogatory to the jury here.

> that they were not incredibly lasting injuries that he's still dealing with. Those things did happen. But [Crews] is not responsible for those because she did not intend to cause those injuries.

¶ 33 Because the severity of Howard's injuries was never in doubt during the trial — and the evidence of those injuries went uncontroverted — there is no reasonable possibility that the jury would have found otherwise given proper jury instructions and verdict forms. We conclude that the *Blakely* error did not amount to plain error. *See People v. Lozano-Ruiz*, 2018 CO 86, ¶ 6 (an instructional error does not constitute plain error where the subject of the error in the instruction is not contested at trial); *Ewing*, ¶¶ 21-24 (*Blakely* error did not amount to plain error where the omitted sentencing factor — that the victims were less than fifteen years of age — was undisputed).

IV. Culpable Mental State

¶ 34 Crews contends that the trial court erred by instructing the jury that leaving the scene of an accident was a strict liability offense. We disagree.

¶ 35 In *People v. Manzo*, 144 P.3d 551 (Colo. 2006), which interpreted the statute at issue here, the supreme court held that

leaving the scene of an accident resulting in serious bodily injury is a strict liability offense because the "plain language of the statute does not require or imply a culpable mental state." *Id.* at 552; *see also People v. Hernandez*, 250 P.3d 568, 573 (Colo. 2011) (citing *Manzo* and describing the Colorado hit-and-run statute as a "strict liability offense"). Crews does not argue that *Manzo* is distinguishable; instead, she contends that it was incorrectly decided. Because we are bound by *Manzo* (as was the trial court), we do not address her argument further.

V. Conclusion

¶ 36 We affirm.

JUDGE DAILEY and JUDGE WELLING concur.