IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

TROY A. WHITE,
Defendant-Appellant.

Supreme Court Case No.: CRA18-014
Superior Court Case No.: CM0745-17

OPINION

Cite as: 2020 Guam 6

Appeal from the Superior Court of Guam
Argued and submitted on May 10, 2019
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and ROBERT J. TORRES, Associate Justice.[1]

MARAMAN, C.J.:

[1] Defendant-Appellant Troy A. White appeals from a final judgment of conviction finding him guilty of Driving While Under the Influence of Alcohol (as a Misdemeanor) and Reckless Driving (as a Petty Misdemeanor). For the following reasons, we affirm White's Judgment of Conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] A sedan, driven by White, collided with a semi-trailer truck attempting a right-hand turn from the left lane on Route 8 into Tiyan. The responding police officer observed White stagger across the street from a restaurant toward the crash scene. The officer noticed a strong intoxicating smell emitting from the vehicle, the keys still in the sedan's ignition, and cold beer bottles underneath the trailer truck next to the sedan's driver's side door.

[3] The officer administered three field sobriety tests, and White failed them all. During the officer's interaction with White, he also observed White ranting incoherently and being disoriented. Based on the field sobriety tests and his observations, the officer effectuated an arrest for driving under the influence. The People of Guam ("People") charged White with Driving While Under the Influence of Alcohol (as a misdemeanor) and Reckless Driving (as a petty misdemeanor). A jury convicted White of both charges.

[4] After polling the jury, the People asked if they could speak with the jurors outside the courtroom. The court indicated the jury could speak with the attorneys voluntarily. During the time both parties could speak with the jurors, defense counsel asked "whether it would have been

[1] The signatures in this opinion reflect the titles of the justices at the time this matter was argued and submitted.

better if Mr. White had testified in his defense." Record on Appeal ("RA"), tab 58 (Decl. Roden, Mar. 30, 2018); RA. tab 59 (Decl. Espiritu, Mar. 30, 2018). Juror No. 5 responded orally in the affirmative, and Juror No. 2 nodded in agreement.

[5] On the basis of this interaction, White moved for a new trial due to juror misconduct. White also moved for a judgment of acquittal on the reckless driving charge, arguing that there was insufficient evidence to support a finding that he acted with intentional or reckless disregard for the safety of others. The trial judge denied both motions. The trial court issued a judgment sentencing White to three days of incarceration, a $2,000 fine, 180-day license suspension, and two years of supervised probation. White timely appealed.

II. JURISDICTION

[6] This court has jurisdiction over appeals from a final judgment of conviction entered by the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-138 (2020)); 8 GCA § 130.15(a) (2005); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[7] When there is no objection at trial, we review jury instructions for plain error. *People v. Felder*, 2012 Guam 8 ¶ 8. To establish plain error, the defendant must show: "(1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.* ¶ 19 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11). Absent plain error, we will not reverse a conviction. *People v. Diego*, 2013 Guam 15 ¶ 23.

[8] "Issues of statutory interpretation are reviewed *de novo*." *People v. Diaz*, 2007 Guam 3 ¶ 55. "A denial of a motion for a new trial is reviewed for an abuse of discretion." *People v. Flores*, 2009 Guam 22 ¶ 9.

IV. ANALYSIS

[9] White alleges three principal errors that, in his view, warrant reversal. First, he alleges plain error occurred when the Superior Court failed to instruct the jury on a requisite mental state for Driving While Under the Influence. Second, he argues that it was plainly erroneous to not define the phrase "willful or wanton disregard for the safety of person or property." Finally, he alleges that the Superior Court abused its discretion in denying his motion for a new trial based on juror misconduct. He argues that a juror's post-trial comment that White should have testified—with which another juror nodded in agreement—violates his Fifth and Sixth Amendment rights.

A. The Jury Instruction for Driving While Under the Influence Was Not Plainly Erroneous

[10] We first note that White's conviction for Driving While Under the Influence is from the now-repealed Safe Streets Act. *See* 16 GCA §§ 18101, 18102 (2005) (repealed by Guam Pub. L. 34-107:3 (June 5, 2018)). The "drunk driving" statutes—as they are colloquially known—have been reenacted in 9 GCA §§ 92101-92126 (as enacted by P.L. 34-107:6 (June 5, 2018)). However, we must analyze this case under the statutes in force "at the time this dispute arose." *See Univ. of Guam v. Guam Civil Serv. Comm'n (Foley)*, 2002 Guam 4 ¶¶ 15-18. In this case, that is the drunk driving statutes under which White was convicted.

[11] On the first charge of Driving While Under the Influence of Alcohol, the trial court instructed: "The People must prove beyond a reasonable doubt that [White]: 1. On or about the 28th day of December, 2017; 2. In Guam; 3. Did operate or was in physical control of a vehicle; 4. While under the influence of alcohol." RA, tab 54 at 6A (Jury Instrs., Mar. 23, 2018). The court defined driving while under the influence as:

> any person driving a vehicle upon the influence of an alcoholic beverage, when as a result of consuming such alcoholic beverage, his physical or mental abilities are impaired to such a degree that he no longer has the ability to drive a vehicle with the caution characteristics of a sober person of ordinary prudence, under the same or similar circumstance.

Tr. at 63 (Jury Trial Day 5, Mar. 23, 2018); *see also* RA, tab 54 at 5C (Jury Instrs.). White argues this jury instruction was erroneous because it did not include a requisite mental state as required by 9 GCA § 4.40.

[12] Many criminal statutes in Guam explicitly contain a *mens rea* or mental state requirement. However, some do not. For these statutes, the Legislature has enacted a catch-all provision. *See* 9 GCA § 4.40 (2005). Title 9 GCA § 4.40 states: "Except as provided in § 4.45, if the definition of a crime does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established only if a person acts intentionally, knowingly or recklessly." *Id.* Under 9 GCA § 4.45, a mental state is not required "if the offense is a violation or if the law defining the offense clearly indicates a purpose to dispense with any culpable mental state requirement." *Id.* § 4.45. As a misdemeanor conviction is not a violation, *see* 9 GCA § 1.18(f) (2005), the relevant question is whether the old drunk driving statute requires proof of a culpable mental state or clearly indicates a purpose to dispense with any culpable mental state requirement. White seeks reversal of the conviction for this charge because the jury was not instructed on a culpable mental state. However, even if the statute requires a culpable mental state, White must prove that any instructional error was clear or obvious under existing law. *Felder*, 2012 Guam 8 ¶ 8. We ultimately conclude that White fails on the second prong of plain error. Even were we to conclude that the instruction was erroneous, there is no prior case from this court regarding the mental state requirement for driving while under the influence, and the cases from other jurisdictions have reached mixed results.

[13] This court has recognized that driving under the influence statutes generally fall under one of two types. *See People v. Cox*, 2018 Guam 16 ¶ 25; *People v. Kintaro*, 1999 Guam 15 ¶ 25. First, there is driving under the influence by actually being "under the influence." Next, there is *per se* driving under the influence based on having a blood alcohol content (BAC) over a certain level. It is almost universally agreed that the government need not prove a mental state for crimes based on driving with an excessive BAC. *See, e.g.*, *State v. Nesmith*, 276 P.3d 617, 627-30 (Haw. 2012); *English v. State*, 603 N.E.2d 161, 164-65 (Ind. Ct. App. 1992); *People v. Thorson*, 496 N.E.2d 304, 306 (Ill. App. Ct. 1986); *State v. Sorensen*, 110 A.3d 97, 111 (N.J. Super. Ct. App. Div. 2015); *City of Defiance v. Kretz*, 573 N.E.2d 32, 34 (Ohio 1991); *Robertson v. State*, 604 So. 2d 783, 792 n.14 (Fla. 1992); *In re Kearns*, 991 P.2d 824, 827 (Colo. 1999) (en banc). However, other jurisdictions employ a variety of approaches for when a person is convicted of drunk driving based on an "impairment" theory.

[14] In *Nesmith*, for example, the Hawaii Supreme Court determined that while no mental state is required for a BAC crime, one is required when a person is charged as impaired compared to an ordinary driver. 276 P.3d at 627-30. The New Hampshire Supreme Court has also stated that a "knowing" *mens rea* is required for the statute governing driving while suspended and driving under the influence. *See State v. Curran*, 669 A.2d 798, 799-800 (N.H. 1995). The Wyoming Supreme Court has also stated that a voluntary act must be "knowingly" performed—essentially reading a *mens rea* requirement into the statute. *Hopkins v. State*, 2019 WY 77, ¶¶ 11-12, 445 P.3d 582.

[15] Washington State takes a slightly different approach. The Washington Court of Appeals has stated that the state need only prove that the defendant was "under the influence," and not that he was also "negligent." *State v. Burch*, 389 P.3d 685, 692-93 (Wash. Ct. App. 2016). In

Burch, the appellate court treated the "under the influence" language as the *mens rea* the prosecution needs to prove. In some states, the statutes specifically state that drunk driving does not require proof of a mental state. In Colorado, the drunk driving statute states that the offense is "strict liability." *See People v. Rostad*¸ 669 P.2d 126, 128-30 (Colo. 1983) (en banc). Arizona's statutes also do not require proof of a mental state for drunk driving offenses because the default statute specifies that no mental state is required if the statute does not include one. *See State v. Gomez*, 437 P.3d 896 (Ariz. Ct. App. 2019). And, in New Mexico, no mental state is required because the statute prohibits a person from driving who is "impaired to the slightest degree." *State v. Gurule*, 252 P.3d 823, 827-28 (N.M Ct. App. 2011).

[16] Finally, in other jurisdictions, the courts interpret the drunk driving statutes as dispensing of a mental state requirement. Georgia courts, for example, define the crime as a "general intent" crime, which does not require proof of a specific intent element. *See Jones v. State*, 802 S.E.2d 234, 238-39 (Ga. 2017); *Prine v. State*, 515 S.E.2d 425, 427 (Ga. Ct. App. 1999). Both Oregon and Tennessee interpret their statutes as clearly dispensing of a mental state requirement. *See State v. Miller*, 788 P.2d 974, 975-78 (Or. 1990); *State v. Turner*, 953 S.W.2d 213, 215-16 (Tenn. Crim. App. 1996).

[17] Based on the lack of consensus in other jurisdictions and the fact that we have not previously opined on the issue, even if error occurred, we cannot conclude that it was clear or obvious under existing law. White's allegation of error fails on the second prong of the plain error analysis.

B. The Jury Instruction for Reckless Driving Was Not Plainly Erroneous

[18] By tracking the statutory language, the trial court instructed the jury on Reckless Driving: "Every person who drives any vehicle upon a highway in a willful or wanton disregard for the

safety of persons or property is guilty of reckless driving." Tr. at 62-65 (Jury Trial Day 5); 16 GCA § 9107(a) (as amended by P.L. 31-208:3 (May 9, 2012)); *see also People v. Maysho*, 2005 Guam 4 ¶ 9. At a hearing to discuss the jury instructions, the People asked whether the culpability definitions of intentionally, recklessly, and knowingly were necessary as Reckless Driving includes its own state of culpability, which is "driving in a willful or wanton disregard." Tr. at 10-11 (Jury Trial Day 4, Mar. 22, 2018). Defense counsel made no objections and deferred to the court. *Id.* No definitions were provided. *Id.* On appeal, White argues that plain error occurred because the court did not instruct the jury on the culpability definitions. Appellant's Br. at 11-26 (Feb. 7, 2019). The People argue the requisite mental state of Reckless Driving is "willful or wanton disregard for the safety of persons or property." Appellee's Br. at 12-14 (Mar. 25, 2019). White replies that the definitions of "willful" and "wanton" are necessary for a jury to understand the elements of the offense. Reply Br. at 1-4 (Apr. 8, 2019).

[19] Generally, "the trial court 'need not define common terms that are readily understandable by the jury.'" *Diego*, 2013 Guam 15 ¶ 27 (quoting *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000)). However, we have also stated: "A comprehensive formulation of jury instructions will reduce the likelihood of error and thereby conserve judicial resources." *People v. Jones*, 2006 Guam 13 ¶ 33. Regarding White's argument about "willful or wanton disregard for the safety of persons or property," we recognize that we previously interpreted the term "willful" to mean intentional and "wanton" to mean reckless. *Maysho*, 2005 Guam 4 ¶¶ 12-13. However, we are not persuaded that even if the trial court should have given the *Maysho* definitions that the error is clear and obvious under existing law.

[20] In *Maysho*, we provided further definitions of the words "willful" and "wanton" where the defendant challenged the sufficiency of the evidence regarding his mental state. *Id.* ¶ 9. We

did not address whether these terms were ambiguous or uncommon. The term "wanton" is not a frequently used word; however, we do not read jury instructions in isolation, *Jones*, 2006 Guam 13 ¶ 28. When evaluating an instruction for claims of non-constitutional error, the focus is on whether the instruction accurately tracked the statutory language so it is sufficient for the jury to understand the elements and what needs to be proven. *Cox*, 2018 Guam 16 ¶ 20. The phrase "wanton" is used to define "reckless driving." 16 GCA § 9107. The term "wanton" is then defined as "recklessness." *Maysho*, 2005 Guam 4 ¶ 13. We are not convinced that a clear and obvious error occurred when the trial court failed to define the word "wanton" with the word "reckless"—the precise word "wanton" is being used to define. Including the definition does not appear to help the jury understand the elements.

[21] Further, in evaluating jury instructions on reckless driving, the focus of the statute is not on the adjectives "reckless" or "willful and wanton." *W.E.B. v. State*, 553 So. 2d 323, 325-26 (Fla. Dist. Ct. App. 1989). The real focus is on the object of the adjectives—i.e., the phrases the words modify and the acts they proscribe. *Id.* The terms modified in this case are "driving" and "disregard for the safety of persons or property." In examining the statutory definition of "reckless," 9 GCA § 4.30 states:

> A person acts recklessly, or is reckless, with respect to attendant circumstances or the result of his conduct when he acts in awareness of a substantial risk that the circumstances exist or that his conduct will cause the result and his disregard is unjustifiable and constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.

9 GCA § 4.30(c) (2005). This provision contains a similar statement about "disregard" as contained in the reckless driving statute. As the act proscribed by both the general recklessness statute and the reckless driving statute are similar, we are not convinced that giving the *Maysho* definitions was a clear and obvious requirement for the trial court.

[22] Finally, unlike our prior cases involving instructional errors, this case does not involve a missing statutory element. *See, e.g.*, *Jones*, 2006 Guam 13 ¶¶ 41-50. The jury was instructed on the elements of the crime, but these elements were not further defined in the instructions. In most prior cases alleging jury confusion over missing definitions, we have declined to find plain error. *See, e.g.*, *Diego*, 2013 Guam 15 ¶ 28; *People v. Demapan*, 2004 Guam 24 ¶ 16. While defendants in future cases may request the *Maysho* definitions of "willful or wanton," we cannot say it is plainly erroneous for the trial court to have not given unrequested definitional instructions.

[23] Moreover, White has failed to adequately demonstrate how he was prejudiced by any potential error. In *People v. Felder*, we analyzed the third prong of plain error review and discussed the defendant's burden in proving prejudice. 2012 Guam 8 ¶¶ 22-34. To prove prejudice, a defendant must show how the alleged error "affected the outcome of the case." *Id.* ¶ 22. Like in *Felder*, White lists several constitutional rights he believes were violated by the alleged instructional error. However, when discussing how this was outcome determinative, White states that "it would be unfairly speculative to assess whether the jury's verdict would have been the same absent the errors." Appellant's Br. at 22. We declined in *Felder* to find plain error because the defendant made no "attempt to demonstrate how he was prejudiced by the erroneous jury instruction." *Id.* ¶ 32. For the same reasons, we conclude White failed to meet his burden of showing how the alleged error affected the outcome.

[24] Even if we engaged the prejudice analysis further, White could still not show that the jury found reckless driving on an improper basis. The only improper basis in this case would be if the jury convicted White for reckless driving solely because he was driving while intoxicated. *See People v. Song*, 2012 Guam 21 ¶ 9 n.4; *see also W.E.B.*, 553 So. 2d at 326-27. Intoxication

is merely one factor the jury may consider in assessing reckless driving; it alone cannot sustain a reckless driving conviction. *See People v. Clenney*, 331 P.2d 696, 701 (Cal. Dist. Ct. App. 1958). However, unlike the cases where defendants were convicted of reckless driving solely based on intoxication, *see W.E.B.*, 553 So. 2d at 326-27; *Clenney*, 331 P.2d at 701, there was other evidence to support that White acted recklessly. The record contains evidence that, besides drinking, White collided his sedan with a flatbed semi-truck. After the accident, White fled the immediate scene, indicating a possible awareness of his recklessness and intoxication. Finally, White told a responding officer that the truck "came out of nowhere," indicating a lack of awareness of his surroundings. Based on these facts, a jury could conclude that White was driving with disregard for persons or property. Therefore, he cannot demonstrate prejudice.

[25] In sum, White has failed to establish plain error occurred when the trial court did not instruct the jury on the definitions of "willful" and "wanton" in the reckless driving statute.

C. In Moving for a New Trial, White Failed to Establish Jury Misconduct

[26] The trial court may grant a defendant's motion for a new trial based on juror misconduct. *People v. Castro*, 2002 Guam 23 ¶ 8. A new trial may be warranted because juror misconduct may affect a defendant's Sixth Amendment right to a fair and impartial jury. *Id.* ¶ 12. One form of juror misconduct—recognized elsewhere—which requires reversal, is when jurors consider and discuss during deliberations a defendant's failure to testify. *See People v. Solorio*, 225 Cal. Rptr. 3d 579, 586-88 (Ct. App. 2017). However, "'[t]ransitory comments of wonderment and curiosity' about a defendant's failure to testify, although technically misconduct, 'are normally innocuous, particularly when a comment stands alone without any further discussion.'" *People v. Avila*, 208 P.3d 634, 673 (Cal. 2009) (quoting *People v. Hord*, 19 Cal. Rptr. 2d 55, 65 (Ct. App. 1993)).

[27] In both *Solorio* and *Avila*, the California courts concluded that juror misconduct occurred because there was evidence that the jury discussed during deliberations the defendant's failure to testify. The *Solorio* court reversed the conviction because the jury continued to circle back to the defendant's failure to testify even after being admonished by the foreperson to not consider or discuss the topic. 225 Cal. Rptr. 3d at 586-87. The *Avila* court refused to reverse a conviction, because although misconduct occurred before the jury's discharge, the comments on the defendant's failure to testify were recalled by only two jurors, and the offending juror ceased discussion of the topic when reminded that he could not consider the fact. 208 P.3d at 673. Here, according to an affidavit from defense counsel, one juror indicated in a discussion after being discharged that it may have been better if White testified, and another juror nodded in agreement. There is no evidence in the record, however, to suggest that while the jury was impaneled that any juror considered or discussed White's failure to testify. Therefore, White has failed to establish that juror misconduct occurred. Additionally, the comment appears to be at most "wonderment and curiosity." The trial court did not err in denying White's motion for a new trial based on juror misconduct.

V. CONCLUSION

[28] We **AFFIRM** the Judgment of Conviction.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice