IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 18-1068

Filed: 1 October 2019

Mecklenburg County, No. 16 CRS 244177

STATE OF NORTH CAROLINA

v.

DANTE MARQUIS MASSEY

Appeal by defendant from order entered 10 January 2018 by Judge W. Robert Bell in Mecklenburg County Superior Court and judgment entered 29 January 2018 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for the State.

Dylan J.C. Buffum for defendant-appellant.

TYSON, Judge.

Dante Marquis Massey ("Defendant") appeals from a judgment entered after a jury found him guilty of robbery with a dangerous weapon. We find no prejudicial error.

I. Background

A Bojangles Famous Chicken 'n Biscuits restaurant ("Bojangles") located in Charlotte was robbed on the evening of 27 November 2016. The cashier, Tanisha Sherrill ("Ms. Sherrill"), reported a black male, approximately 6 foot tall, 150 to 160 pounds with dreadlocked hair, placed an order. While Ms. Sherrill was waiting for the man to pay for his order, she noticed he was holding a silver-colored handgun. Immediately, the robber demanded for her to "[j]ust open the register and give me all the money." Ms. Sherrill fumbled while removing the money from the cash register. The robber became impatient, grabbed the contents from the register and fled, taking approximately $100.00 of U.S. currency from the cash drawer.

Charlotte-Mecklenburg Police Officer Theodore Devlin ("Officer Devlin") responded to the scene. Officer Devlin took a statement from Ms. Sherrill and spoke with the other witnesses in the restaurant at the time. Ms. Sherrill reported the robber was wearing "a gray sweat jacket with a hoodie. There was writing on the front of the jacket. His pants were a dark color sweat pant."

Charlotte-Mecklenburg Police Department Detective Zackery Hagler ("Detective Hagler") retrieved video footage from the restaurant's security cameras. The recorded video images of the robbery he obtained included multiple angles of the perpetrator's face. Detective Hagler isolated photographs from the videos, which depicted the individual committing the robbery. These photographs were included in

a Be On The Lookout ("BOLO") email to other law enforcement officers in an attempt to identify the suspect.

North Carolina Probation Officer Tara McClendon ("Officer McClendon") recognized Defendant as the individual depicted in the photographs in the BOLO email. She had previously supervised him for three to four months while he was on probation for a prior offense, and recognized Defendant's face. Officer McClendon interacted with Defendant during this period three times a month and was "one hundred percent sure" the individual depicted in the BOLO photographs was Defendant. A warrant was issued and Defendant was arrested in a traffic stop and subsequently indicted.

Following an unfavorable bond hearing on 3 January 2018, Defendant called his attorney and indicated he did not maintain confidence in him, did not want his continued representation, and did not want him "to be the one to try his case."

Defendant's attorney moved to withdraw and his motion was heard on 10 January 2018. Defendant asserted his counsel had not filed motions to dismiss and suppress evidence, he "had alibis and people that can vouch for my whereabouts," and counsel was biased towards his own opinion, which violated Defendant's Sixth and Fourteenth Amendment rights. The trial court heard and denied the motion to withdraw.

At trial, the State presented Ms. Sherrill's testimony and statements to Officer Devlin. She was asked if the "person that is seen in the video [is] the person who robbed her. Ms. Sherrill answered and acknowledged the person depicted in the video was, in fact, the person who had robbed her and the restaurant. Ms. Sherrill was not asked and did not identify the Defendant in court as the robber. Officer McClendon testified and identified Defendant as the person depicted in the surveillance video.

The jury found Defendant guilty of robbery with a dangerous weapon. Defendant was sentenced to an active term of 97-129 months. Defendant appeals.

II. Jurisdiction

This court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court erred by: (1) conducting an ineffective inquiry into his request for substitute counsel to protect his constitutional right to counsel; (2) sustaining the State's hearsay objection when his counsel inquired to Officer Devlin about other people in the Bojangles seeing the Defendant during the robbery; (3) allowing the State to address issues raised by the defense during the State's closing argument.

IV. Motion to Withdraw

A. Standard of Review

"This Court uses an abuse of discretion standard to determine whether the trial court erred in denying a motion to have defense counsel removed." *State v. Jones*, 357 N.C. 409, 413, 584 S.E.2d 751, 754 (2003). A trial court abuses its discretion only where its ruling was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007), *cert. denied*, 552 U.S. 1271, 128 S. Ct. 1682, 170 L. Ed. 2d 377 (2008).

B. Analysis

1. Defense Counsel's Motion to Withdraw

Defendant asserts the trial court's inquiry into his request for substitute counsel was insufficient and argues it violates his constitutional right to counsel. We disagree.

"The right to counsel in a serious criminal prosecution is guaranteed by the [S]ixth [A]mendment." *State v. Ali*, 329 N.C. 394, 403, 407 S.E.2d 183, 189 (1991). "A trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). "[T]he trial judge must satisfy himself only that the 'present counsel is able to render competent assistance and that the nature or

degree of the conflict is not such as to render that assistance ineffective.'" *State v. Poole*, 305 N.C. 308, 311, 289 S.E.2d 335, 338 (1982) (citing: *Thacker*, 301 N.C. at 353, 271 S.E.2d at 256).

An attorney is not merely the "'mouthpiece' of his client. He is in charge of and has the responsibility for the conduct of the trial, including the selection of witnesses to be called to the stand on behalf of his client and the interrogation of them." *State v. Prevatte*, 356 N.C. 178, 216, 570 S.E.2d 440, 461 (2002) (citation omitted). "[T]he obligation of the court [is] to inquire into defendant's reasons for wanting to discharge his attorneys and to determine whether those reasons were legally sufficient to require the discharge of counsel." *Poole*, 305 N.C. at 311, 289 S.E.2d at 338.

The Supreme Court of North Carolina has also stated the constitutional right to assistance of counsel does not "guarantee the best available counsel, errorless counsel[,] or satisfactory results for the accused." *State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974). The defendant's right to counsel does not include the "right to have the attorney of his choice appointed to represent him." *State v. Robinson*, 290 N.C. 56, 65, 224 S.E.2d 174 (1976). The Sixth Amendment right to counsel also "does not include the right to insist that competent counsel . . . be removed and replaced with other counsel merely because the defendant has become dissatisfied with his services." *Id.* at 66, 224 S.E.2d at 179.

Our Supreme Court further stated: "A mere disagreement between the defendant and his court-appointed counsel as to trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney." *Id.* In order to be granted a new counsel, a "defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict." *State v. Sweezy*, 291 N.C. 366, 372, 230 S.E.2d 524 , 528-29 (1976).

In December, 2016, counsel was appointed and had worked since that time with Defendant to prepare for trial. Defendant did not raise any concerns or dissatisfaction with appointed counsel's representation for over a year. Not until an unfavorable result after Defendant's 3 January 2018 bond hearing, did Defendant assert he did not want appointed counsel to represent him. As in *Sneed*, Defendant was not entitled to the "best available counsel, errorless counsel, or satisfactory results for the accused." *Sneed*, 284 N.C. at 612, 201 S.E.2d at 871.

The court provided Defendant the opportunity to explain his issues with appointed counsel and asked Defendant questions regarding each of these issues. The trial court conducted the following inquiry with Defendant:

> [DEFENDANT]: I asked my lawyer to file motions on my behalf, and he hasn't.
>
> THE COURT: What motions have you asked him to file?
>
> [DEFENDANT]: I've asked him to file a motion for a

> dismissal. I've also asked him to file a motion of- it's the case law that pertains to the case.
>
> THE COURT: What's the motion?
>
> [DEFENDANT]: It's Davey Thompson (phonetic) versus the State of North Carolina.
>
> THE COURT: That's the caption of the case. What kind of motion is it?
>
> [DEFENDANT]: I've asked to file a motion to dismissal, (inaudible) suppress evidence. We've had conversations, and he always leans towards his own (inaudible) opinion. No I'm not a lawyer. I don't know a lot about the law, but I feel that he has been biased in this case.

The exchange between the Court and Defendant continued:

> [DEFENDANT]: No disrespect, Your Honor. It's just to the point where it has been over a year. He has never asked me- asked me anything (sic).
>
> THE COURT: I found that hard to believe. He's never asked you anything about this case?
>
> [DEFENDANT]: Oh, no. He hasn't asked me my alibi or ways I can prove my innocence. He hasn't.
>
> THE COURT: And you've never told him.
>
> [DEFENDANT]: He keeps urging me----
>
> THE COURT: You've never told him.
>
> [DEFENDANT]: It's a failure to communicate, Your Honor.
>
> THE COURT: Well, it sounds like it might go both ways.

Defendant only raised disagreements about trial tactics and what he perceived as communication issues. This disagreement was not a "complete breakdown in communication" or "irreconcilable conflict" leading to a unjust verdict. *Id*.

Defendant argues a more in-depth inquiry was required into whether the actions taken by his appointed counsel were "reasonable trial decisions." In *Poole*, our Supreme Court stated "the trial judge must satisfy himself only that the present counsel is able to render competent assistance and that the nature or degree of the conflict is not such as to render that assistance ineffective." *Poole*, 305 N.C. at 311-12, 289 S.E.2d at 338 (citations and internal quotation marks omitted). "Once it becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict." *Id.*

Defendant asserts his appointed counsel neglected to explore or present alibi witnesses. The transcript indicates Defendant did not inform counsel of potential alibi witnesses until 10 January 2018. Less than a week later on 16 January 2018, Defendant's appointed counsel filed a Notice of Alibi Defense and had the purported alibi witnesses present and available to testify.

However, these witnesses were not called to the stand at Defendant's specific request. In response to the State's pre-trial motion to sequester witnesses, Defendant apparently decided not to call the alibi witnesses:

> My client has just informed me that, because of the sequestration that would occur, if I were to call his alibi

> witnesses, *he would prefer that I do not call them and thus we won't be presenting those witnesses. The reason being is he would like them to be in the courtroom during proceedings*. (emphasis supplied)

In light of the sequestration of purported alibi witnesses, this decision appears to be an appropriate strategic decision made by defense counsel after consultation with Defendant.

Presuming, *arguendo,* the Defendant's assertion the trial court somehow erred, "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2017). "A defendant who invites error has waived his right to all appellate review concerning the invited error." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001).

Defendant's counsel provided proper notice of Defendant's purported alibi defense, and ensured the witnesses were present in court and available to testify. Apparently due to the State's motion for sequestration of these witnesses, Defendant himself requested his counsel to not call any of them to testify. Defendant cannot show prejudice. His arguments are without merit and are overruled.

2. Pro-se Representation

Defendant asserts the trial court erred by failing to inquire into whether he wanted to proceed *pro se*. A defendant may be permitted to continue *pro se* if defendant: "(1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when his are so entitled; (2)

Understands and appreciates the consequences of this decision; and (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242 (2019). This "waiver of the right to counsel and election to proceed *pro se* must be expressed 'clearly and unequivocally.'" *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992). "Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court, to satisfy constitutional standards, must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Id.* (citations omitted)

Our Supreme Court has stated: "Statements of desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). At no point in the record does Defendant state a desire to represent himself. Defendant mentions disagreements he has with appointed trial counsel. Antithetical to Defendant's argument on appeal, and despite his criticisms of his attorney's strategy, Defendant acknowledged "I'm not a lawyer. I don't know a lot about the law."

Like the defendant in *Hutchins*, Defendant's assertion was merely a "[s]tatement of desire not to be represented by court-appointed counsel" and was not a request to represent himself and proceed *pro se*. Defendant did not "clearly and unequivocally" waive his right to counsel. Defendant has failed to show the trial

judge was required to further inquire into the Constitutional standards dictating a "knowing[], intelligent[], and voluntary[]" waiver of the right to counsel and for Defendant to proceed *pro se*. *See Thomas*, 331 N.C. at 674, 417 S.E.2d at 476. Defendant's arguments are overruled.

V. State's Hearsay Motion

Defendant next contends the trial court erred in granting the State's objection to Officer Devlin's testimony and argues the excluded testimony was not hearsay. In the alternative, Defendant asserts the State had opened the door for its admission.

A. Standard of Review

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011).

B. Analysis

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801. Hearsay is inadmissible except as provided by the statutes of by the rules of evidence. N.C. Gen. Stat. § 8C-1, Rule 802.

On direct examination, the prosecutor asked Officer Devlin:

> [PROSECUTOR]: Did you talk to the other witnesses who were in the store?
>
> [OFFICER DEVLIN]: I mainly spoke with Ms. Sherrill and

> then the manager, Mr. Gordon.
>
> [PROSECUTOR]: Did any of the other people you spoke with have a first-hand account of the robbery?
>
> [OFFICER DEVLIN]: No, sir.

On cross-examination of Officer Devlin, Defendant's counsel asked:

> [DEFENSE COUNSEL]: Now, while you were there, you talked to two other employees, Mr. Gordon and Ms. Abernathy, correct?
>
> [OFFICER DEVLIN]: Yes, sir.
>
> [DEFENSE COUNSEL]: The district attorney asked you if anyone else had a first-hand account of the robbery that was there and you answered no. Do you recall that just now?
>
> [OFFICER DEVLIN]: Yes, that is fair to say.
>
> [DEFENSE COUNSEL]: But it is fair to say that two other people in the Bojangles did see the suspect?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

The State argues the purported impeachment of a witness is not a basis for an exception or exemption to the hearsay rule. Officer Devlin was not present in the restaurant during the robbery. When a witness has no personal knowledge of an event, allowing that witness to testify to what someone else told them constitutes hearsay. *See State v. Fountain*, 282 N.C. 58, 66, 191 S.E.2d 674, 680 (1972).

Defendant argues that the State opened the door during direct examination of Officer Devlin. Defendant cites *State v. Anthony* for the proposition: "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it be offered initially." *State* v. *Anthony*, 354 N.C. 372, 415, 555 S.E.2d 557, 585 (2001) (citing *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)).

Our Supreme Court has stated "[t]he law permits declarations of one person to be admitted into evidence for the purpose of showing that another person has knowledge or notice of the declared facts and to demonstrate his particular state of mind." *State v. Swift*, 290 N.C. 383, 393, 226 S.E.2d 652, 661 (1976). Additionally, a statement is not hearsay if it is being used for the non-hearsay purpose of explaining an officer's investigative actions. *See State v. Holden*, 321 N.C. 125, 142-43, 362 S.E.2d 513, 525 (1987).

Presuming, without deciding, alleged statements of Mr. Gordon or Mr. Abernathy to Officer Devlin could have been admitted as hearsay exceptions tending to show that Officer Devlin was either on notice, and/or had knowledge that other witnesses saw the suspect, or could be used to explain and provide context to, and possibly to impeach his testimony about the scope of his investigation, Defendant cannot demonstrate any prejudice. Also presuming, without deciding, the State

"opened the door" on direct examination for Defendant to elicit inadmissible hearsay testimony, sustaining the State's objection is not prejudicial error. The source of Defendant's identification as the robber was Ms. Sherrill's testimony and the BOLO photo distributed from the store's security system and his probation officer recognizing him from the BOLO photo. Defendant has pointed to no evidence tending to show anyone else at the Bojangles saw the actual robbery other than Ms. Sherrill to call Officer Delvin's credibility into question.

Other properly admitted evidence presented to the jury, including the admitted surveillance video, showed the alleged suspect during the commission of the robbery, from which the jury could draw its own conclusions to reach a unanimous verdict of the robber's identity and guilt. Defendant's arguments are overruled.

VI. State's Closing Argument

Defendant next contends the trial court abused its discretion when it allowed the State to argue Defendant bore the burden of proving the identification of eyewitnesses was unreliable.

A. Standard of Review

"Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984).

This Court will "not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976).

B. Analysis

Our Supreme Court has stated: "The prosecuting attorney should use every honorable means to secure a conviction, but it is his duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of the accused." *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978). The Supreme Court has also held prosecutors' arguments must be devoid of appeals to passion or prejudice. *State v. Jones*, 355 N.C. 117, 135, 558 S.E.2d 97, 108 (2002).

Reversible error did not occur here. The prosecutor told the jury the State's case on identification of Defendant as the robber could be questioned by Defendant presenting Ms. Sherrill, the State's witness, with a photo lineup.

N.C. Gen. Stat. § 15A-1230(a) (2017) provides that during closing arguments:

> an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

In *State v. Degraffenreid*, the prosecutor commented in a condescending manner during closing arguments on the defendant exercising his constitutional right

to a trial by jury. *State v. Degraffenreid*, ____ N.C. App. ___, ____, 821 S.E.2d 887, 889 (2018). Here, the prosecutor was shoring up a point elicited during cross examination and which would probably come up on Defendant's closing argument. This comment was a direct argument supporting the facts and evidence brought forward during the State's case-in-chief.

Defendant cites *State v. Parker*, where the prosecutor's language was deemed "close to the line" when a prosecutor called on the defendant to prove " those weren't his fingerprints," "that he wasn't at" the address where the crime occurred, and "he didn't have anything [to do] with the murders." *State v. Parker*, 350 N.C. 411, 430-31, 516 S.E.2d 106,120 (1999).

Defendant's counsel cross-examined the investigating detective regarding his alleged failure to present a photo lineup to the eye witness victim to the crime. During closing argument, the State sought to counter Defendant's argument by stating that Ms. Sherrill was available on the stand to view a photo lineup to challenge the State's arguments in the case. This refutation did not arise or approach near the State's argument in *Parker*, which our Supreme Court deemed only "close to the line." *Id.*

No possible burden for Defendant to carry was mentioned or alluded to by the prosecutor. *See Id.* The State's argument did not place any burden upon Defendant and merely refuted Defendant's contention, brought up on cross examination and

argued in summation by Defendant's counsel. Defendant's argument is without merit and is overruled.

VII. Conclusion

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the trial court's denial of substitute appointed counsel, lack of further inquiry into Defendant's *pro se* representation, or failure to intervene in the State's closing argument.

We find no prejudicial error to award a new trial as a result of the trial court's sustaining the State's objection to whatever a non-testifying witnesses may have observed as inadmissible hearsay, presuming, without deciding, the State opened the door to the subject matter of the cross examination. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e)