

REL: 12/20/2013

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2013-2014

CR-12-0041

Suzanne Carol Bennison

v.

State of Alabama

Appeal from Limestone Circuit Court
(CC-10-462)

On Return to Remand

BURKE, Judge.

Suzanne Carol Bennison was convicted of the sexual abuse of a child less than 12 years old, her daughter, in violation of § 13A-6-69.1, Ala. Code 1975, and the sexual torture of her daughter, in violation of § 13A-6-65.1, Ala. Code 1975. She

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was sentenced to life imprisonment as a habitual offender for each conviction; the sentences were ordered to run concurrently.

Following her trial, Bennison filed a motion for a new trial. No response was filed by the State, and the motion was denied by operation of law. Rule 24, Ala. R. Crim. P. Bennison appealed, and this Court remanded the case to the trial court to conduct a hearing on one of Bennison's claims of error. Bennison v. State, [Ms. CR-12-0041, March 29, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013). The appeal is now before this Court on return to remand.

On appeal, Bennison argues that the trial court erred by denying her motion for a new trial because of alleged juror misconduct, because of an alleged conflict of interest of the prosecutor,¹ and because of the trial court's alleged improper conduct in threatening Bennison's medical experts with contempt and refusing to grant a continuance.

I.

¹A special prosecutor was appointed from Franklin County for Bennison's trial due to a conflict of interest on the part of the district attorney of Limestone County.

Bennison argues that the trial court erred in denying her motion for a new trial based on alleged juror misconduct. Specifically, she alleged in her motion that one of the jurors gave false information during the voir dire examination concerning whether he had ever been charged with a felony or certain misdemeanors involving alcohol or drugs. During subsequent individual examination of the jurors who had responded affirmatively, to the line of questioning the juror in question stated that he had been charged and fined for illegal possession of prohibited liquor. However, Bennison attached to her motion documents from the Alacourt Web site showing that the juror had pending criminal charges for speeding, for failure to display insurance, for committing an open-container violation, for driving under the influence of drugs or alcohol ("DUI"), and for promoting prison contraband. Trial on these charges had been continued to a date that was eight days following the date of the commencement of Bennison's trial. The prosecutor for the juror's cases, who was from Limestone County, was present in the courtroom during Bennison's trial, although the prosecutor in Bennison's trial, appearing as a special prosecutor, was from Franklin County.

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See supra note 1. Pursuant to Ex parte Dixon, 55 So. 3d 1257 (Ala. 2010), this Court initially remanded this case to the trial court to hold a hearing on this claim because the motion for a new trial had been denied by operation of law and the State had not refuted the claim. Bennison v. State, ___ So. 3d at ___.

On return to remand, the trial court filed the transcript of the hearing on remand, which contained the testimony of the juror, who indicated that he had had charges for DUI, for possession of marijuana, and for other offenses pending at the time of Bennison's trial, but he stated that he did not remember when his trial on these charges had been set in relation to Bennison's trial. He testified that he saw the prosecutor from Limestone County, where he was to be prosecuted, seated in the courtroom during Bennison's trial. He also testified that, in January 2013, following his trial in June 2012, his counsel negotiated an agreement in which he received "diversion" of his sentence.

The juror testified that he had not disclosed the pending charges when he had been called into chambers after voir dire, stating, "I had not been to court over it yet or anything. I

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was thinking convicted because that charge and convicted, to me, were the same thing, that I was thinking." (Record on return to remand, R. 9.) When asked if his answers had been intended to deceive, he responded: "No, sir, I was not trying to mislead anybody." Id. He testified: "I don't know why anybody would falsify to try to get on a jury anyways." (Record on return to remand, R. 10.) He acknowledged that he had informed the judge of his one conviction. He informed the court that that conviction had been "for illegal possession of a prohibited liquor, and I had to spend the night in jail and it was just a fine actually." (Record on return to remand, R. 5.)

Defense counsel, during the hearing on remand, gave his own sworn testimony, stating that he would have challenged the juror for cause if he had known of the pending charges. Defense counsel further testified that if such a challenge for cause had not been granted, he would have used one of his peremptory strikes to remove the juror from the venire.

The trial court's order filed on return to remand states:

"In this hearing, [the juror] admitted that he had a pending charge for driving under the influence in Limestone County at the time of his voir dire response, and that he failed to disclose that. [The

juror] testified this oversight was not intentional but a mistake. He indicated that he understood the question to relate to a 'conviction' and not a pending 'charge.'

"This Court finds that [the juror] mistakenly overlooked this disclosure. This Court finds that his service in the case as a juror was not prejudicial to the Defendant. This Court has further heard all evidence presented herein and finds no evidence or basis to support the claim that juror misconduct adversely affected the trial or rights of this Defendant."

(Record on return to remand, C. 3.)

In McWhorter v. State, [Ms. CR-09-1129, September 30, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011), Casey McWhorter claimed that he had been denied his free exercise of peremptory strikes, as well as his rights to due process and a fair trial, due to juror misconduct. McWhorter argued that a juror's failure to disclose material information about herself during jury selection prejudiced him. McWhorter relied on Ex parte Dixon, as does Bennison, to support his claim. In McWhorter, a capital-murder case, the juror failed to disclose, either on the questionnaire or during voir dire, that her father had been murdered. At an evidentiary hearing, the juror disclosed that the memories of her father's death were traumatic and that, because she had been a child at the

time, she had been uncertain as to whether her father had drowned or had been murdered. The juror appeared to waver in her answers and to be confused. This Court determined that the circuit court was in a better position to assess the testimony of the juror and held that "there is no indication that the circuit court abused its discretion in denying McWhorter relief on his claim related to Juror['s] answers on her juror questionnaire and during voir dire examination." McWhorter, ___ So. 3d at ___. This Court further found that the circuit court could have properly denied relief on this claim because McWhorter failed to establish prejudice and stated:

"To prevail on a claim of juror misconduct, the petitioner must establish that he 'might have been prejudiced' by the jurors' failure to respond truthfully to a question posed on voir dire. See Ex parte Stewart, 659 So. 2d 122, 124 (Ala. 1993).

"'We are mindful of the heavy responsibility placed on the trial court to maintain the statutory right which parties have to a full and truthful disclosure by jurors on voir dire. However, we must also be aware of inadvertent concealment and failure to recollect on the part of prospective jurors."

"'Freeman v. Hall, 286 Ala. 161, 167, 238 So. 2d 330, 336 (1970).'

"Albarran [v. State], 96 So. 3d [131] at 196 [(Ala. Crim. App. 2011)]."

McWhorter, ___ So. 3d at ___. Moreover, this Court noted the large number of jurors who fail to disclose material information and stated that the courts must balance possible prejudice against the interest of finality of judgments. This Court stated:

""[T]he problem of jurors failing to disclose material information during voir dire is neither a recent development nor an unusual occurrence. In 1965 Dale Broeder published his seminal study on juror dishonesty during voir dire. The article included many case studies detailing why jurors fail to respond honestly during voir dire. For some jurors, the questions seemed too trivial to merit an honest response. Other jurors were simply too nervous to volunteer information during voir dire. For still others, the desire to serve outweighed the desire to tell the truth. One particular juror viewed selection as an honor and intended to use his jury experiences as a subject of barroom conversation. More recent research indicates that approximately twenty-five percent of jurors fail to reveal material information during voir dire.

""Given the high frequency with which jurors fail to disclose material information, it should come as no surprise that a showing of juror dishonesty, made after the trial, does not necessarily lead to the granting of a new trial. As Professor David Crump has noted, courts

must balance two strong and competing interests: fairness and finality. In the criminal context, fairness means the right to impartial jurors, the right to the intelligent use of peremptory strikes, and the right to be free from juror misconduct. Courts will consider some combination of these rights in deciding whether to grant a new trial."

"'When Jurors Lie: Differing Standards for New Trials, 22 Am. J. Crim. L. 733, 734-35 (1995) (footnotes omitted).'"

McWhorter, ___ So. 3d at ___, quoting Smith v. State, 838 So. 2d 413, 439 (Ala. Crim. App. 2002).

In determining whether a juror's misconduct requires a new trial, the court must determine whether the conduct might have prejudiced the defendant.

"It is true that the parties in a case are entitled to true and honest answers to their questions on voir dire, so that they may exercise their peremptory strikes wisely.... However, not every failure to respond properly to questions propounded during voir dire 'automatically entitles [the defendant] to a new trial or reversal of the cause on appeal.' Freeman v. Hall, 286 Ala. 161, 166, 238 So. 2d 330, 335 (1970).... As stated previously, the proper standard to apply in determining whether a party is entitled to a new trial in this circumstance is 'whether the defendant might have been prejudiced by a veniremember's failure to make a proper response.' Ex parte Stewart, 659 So. 2d [122] at 124 [(Ala. Crim. App. 1993)]. Further, the determination of whether a party might have been prejudiced, i.e., whether there was probable prejudice, is a matter within the

trial court's discretion. Eaton v. Horton, 565 So. 2d 183 (Ala. 1990); Land & Assocs., Inc. v. Simmons, 562 So. 2d 140 (Ala. 1989) (Houston, J., concurring specially).

"The determination of whether the complaining party was prejudiced by a juror's failure to answer voir dire questions is a matter within the discretion of the trial court and will not be reversed unless the court has abused its discretion. Some of the factors that this Court has approved for using to determine whether there was probable prejudice include: 'temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about.'"

Ex parte Dobyne, 805 So. 2d 763, 771-72 (Ala. 2001) (footnote omitted).

In this case, the trial court held an evidentiary hearing and the juror testified that he had misunderstood the question propounded on voir dire. In fact, during the hearing on remand, the question was framed interchangeably by the parties in terms of whether he had ever been charged with a crime or whether he had ever been convicted of a crime. He had answered the question honestly as to his prior conviction during voir dire, although the question during voir dire had actually related to prior charges. He testified that he had not intended to mislead either party. The court heard his

testimony and determined that Bennison was not prejudiced by his failure to respond. Moreover, unlike the juror in Ex parte Dixon, although charges were pending against the juror, he was not to be prosecuted by the same prosecutor or the same county district attorney's office that was prosecuting Bennison's trial. Further, in Ex parte Dixon, "[a]t the time of Dixon's trial, [the juror] personally was engaged in discussing the disposition of the charges [against the juror] with the district attorney." 55 So. 3d at 1259. At the time of Bennison's trial, the juror in this case was not involved in any negotiations regarding the charges pending against him, and he testified that he was unaware of whether his attorney had spoken to the prosecutor at the time of Bennison's trial.

There is no indication that the trial court abused its discretion in determining that Bennison was not prejudiced by the juror's failure to respond during voir dire regarding his pending charges. Therefore, we find no error as to this issue.

II.

Bennison argues that the prosecutor from Limestone County was improperly allowed to actively participate in the case, although defense counsel had apparently filed a motion

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alleging conflict of interest against the Limestone County district attorney. The record fails to indicate the specific grounds of the motion, but Bennison alleged in her motion for a new trial that the Limestone County district attorney had previously been her defense counsel. The trial court acknowledged, before voir dire, that the motion had been made and was due to be granted. The trial court admonished the prosecutor from Limestone County, who was present in the courtroom, that he was not to participate in the proceedings, and both the prosecutor from Limestone County and the acting prosecutor from Franklin County, who had filed a notice of appearance as a special prosecutor, assured the court that he would not. There is no evidence in the record indicating that the prosecutor from Limestone County participated in the trial. Bennison did not object to the trial court's admonition, nor did she raise this issue or object on this basis at trial. Because Bennison failed to object at trial, her attempt to raise the issue in her motion for a new trial was untimely. See Harris v. State, 794 So. 2d 1214, 1223 (Ala. Crim. App. 2000) (failure to object and receive an adverse

ruling concerning a constitutional issue will not be preserved by subsequently raising it in a motion for a new trial).

Moreover, in her motion for a new trial, Bennison makes a bare allegation that the prosecutor from Limestone County actively participated in the trial and attached an alleged Alacourt Web site document showing a notice of appearance with a code that Bennison alleges signifies the prosecutor from Limestone County.² This is insufficient to show that the Limestone County prosecutor participated in the trial, and the record reveals no indication of his participation. This Court will not find error from a silent record. "'Where the record is silent on appeal, it will be presumed that what ought to

²We note that during the hearing on the motion for a new trial, defense counsel attempted to admit the alleged Alacourt document to illustrate the Limestone County prosecutor's involvement, and the court responded: "All I know is [the Limestone County prosecutor] took no active part in this case. I witnessed the questions. I tried the case. He wasn't involved, but if you're needing to make some inference that because his name is on a print screen that he's involved with the case, I'll certainly take that in consideration when I'm ruling if that's where we are." (Record on return to remand, R. 40-41.) The court also stated: "If I put [the prosecutor from Franklin County] in the case and I excused [the prosecutor from Limestone County] from the case, the fact that his name appears on Alacourt records has nothing to do with the fact that he's attorney of record." (Record on return to remand, R. 50.)

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have been done was not only done, but rightly done."'" Williams v. State, 55 So. 3d 366, 370 (Ala. Crim. App. 2010), quoting Owens v. State, 597 So. 2d 734, 736 (Ala. Crim. App. 1992), quoting in turn Jolly v. State, 405 So. 2d 76, 77 (Ala. Crim. App. 1981).

Moreover, on appeal, Bennison fails to satisfy Rule 28(a)(10), Ala. R. App. P., because, although her argument contains one citation to authority, she fails to assert how that authority supports her claim.

In L.J.K. v. State, 942 So. 2d 854 (Ala. Crim. App. 2005), this Court stated:

"This argument fails to comply with Rule 28(a)(10), Ala. R. App. P. Although [the Appellant] cites legal authority in support of [her] claim, [she] fails to provide any argument whatsoever as to how that authority is relevant to and supportive of [her] allegation.... As noted above, '[m]erely citing a case with no discussion as to its relevance is insufficient to satisfy Rule 28(a)(10).' Hodges v. State, 926 So. 2d [1060] at 1075 [(Ala. Crim. App. 2005)]. See also Water Works & Sewer Bd. of Selma v. Randolph, 833 So. 2d 604, 608 (Ala. 2002) (opinion on application for rehearing) ('Merely quoting a statute and emphasizing certain parts with bold type does not constitute a properly stated and supported contention. '), and Spradlin v. Spradlin, 601 So. 2d 76, 78-79 (Ala. 1992) (holding that citation to a single case with no argument as to how that case supports the appellant's contention on appeal was insufficient to satisfy Rule 28(a)(5) (now Rule 28(a)(10)), Ala. R. App. P.)."

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942 So. 2d at 864-65. Thus, Bennison is due no relief on this issue.

III.

Bennison also contends that the trial court erroneously denied her motion for a new trial because the court improperly threatened her expert medical witnesses with contempt and refused to grant a continuance to allow their testimony. It appears that Bennison argues that she had scheduled the witnesses' testimony for a certain time but the State's case ended earlier than she had anticipated.

In her brief, Bennison fails to cite any authority to support her argument. Nor does she cite to the record, other than to her motion for a new trial and to references indicating that the court ended a trial day at 4:00 p.m. on one occasion and that the court ended the trial day at 4:30 p.m. on another occasion when one of the State's witness's testimony had concluded. Bennison's argument in her brief fails to satisfy Rule 28(a)(10) (providing that an appellate brief shall contain "[a]n argument containing the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the

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cases, statutes, other authorities, and parts of the record relied on"). The failure to comply with Rule 28 constitutes a waiver of this argument. See C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011) ("Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented."). Accordingly, Bennison is entitled to no relief based on this claim of error.

For the reasons expressed above, the trial court's judgment is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Kellum, and Joiner, JJ., concur.