Third District Court of Appeal

State of Florida

Opinion filed November 6, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-141
Lower Tribunal No. 14-24825 A

Benjamin Curry,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Miguel de la O, Judge.

Carlos J. Martinez, Public Defender, and Robert Kalter and Jonathan Greenberg, Assistant Public Defenders, for appellant.

Ashley Moody, Attorney General, and Jonathan Tanoos (Tampa), Assistant Attorney General, for appellee.

Before SALTER, LINDSEY, and HENDON, JJ.

HENDON, J.

Benjamin Curry ("the Defendant") appeals from his conviction and sentence for first degree murder. For the reasons that follow, we affirm.

The Defendant and his brother, Nathan Curry, were charged with the first degree murder of Lonnie Reese ("victim"). At the time of the homicide, the Defendant was sixteen years old and Nathan was fifteen years old. The Defendant and Nathan were tried separately, and during both trials, the State's position was that the Defendant actually discharged the firearm and Nathan aided and abetted the Defendant in committing the crime.[1] At the Defendant's trial, his defense was that Nathan was the actual shooter and he (the Defendant) did not assist Nathan.

During opening statement, defense counsel argued, in part, as follows:

> You will see there's no physical evidence, whether it was raining that day or sunny that day. There is no DNA of any type. There's no fingerprints of any type. There's no nothing of any type which connect Benjamin Curry to the shooting.
>
> No blood is ever found with Benjamin Curry. No firearm is found at all for that matter by the police. You'll see that the police investigation, especially early on, when the shooting took place is not really very good.
>
> You're going to see holes in the police investigation. You're going to see problem in the police investigation. You're going to see that after Mr. Reese passed away, the homicide people from Miami-Dade Police Department took over the case, and they went to begin their investigation. And it wasn't very good either.
>
> You're going to see the flaw in the police investigation for a shooting that took place in that Brownsville neighborhood is not very good, not very thorough, and that the police really didn't do a whole lot

[1] The jury found Nathan guilty of second degree murder. Nathan's conviction and sentence were affirmed on appeal. See Curry v. State, 236 So. 3d 1076 (Fla. 3d DCA 2017).

in order to solve this case.

The State presented evidence that showed, among other things, the Defendant's mother reported to the police that her vehicle had been broken into and her firearm was stolen from the vehicle. The vehicle was processed for fingerprints and nine latent fingerprints were retrieved. Of the nine fingerprints, six were of value. One fingerprint belonged to the Defendant's mother and the remaining five did not belong to the victim and could not be identified. A few days after the firearm was stolen from the vehicle, the Defendant and Nathan began to threaten the victim because they believed he stole their mother's firearm. Five days after the burglary of the vehicle, the Defendant and Nathan once again confronted the victim, and the Defendant shot the victim. The defendant passed away a few days later.

During its case-in-chief, the State called as a witness the fingerprint analyst who examined the nine fingerprints retrieved from the Defendant's mother's vehicle. The defense objected when the State asked the fingerprint analyst to review his report to refresh his recollection, arguing that the State had committed a discovery violation because it failed to disclose the fingerprint analyst's report. The defense counsel requested that, as a result of the discovery violation, the fingerprint analyst should not be permitted to testify. The trial court conducted a Richardson[2] hearing and determined that there was an inadvertent discovery violation.

[2] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

Thereafter, the trial court inquired as to whether the Defendant was prejudiced by the inadvertent discovery violation. Defense counsel argued, among other things, that during his opening statement, he stated that there was no forensic work in the case, and he would not have made that statement if he knew that the fingerprint analysist's report existed. The trial court noted, in part, that during opening statement, defense counsel "did take issue with the fact that there were no forensics done. But my impression of – of your opening, it was about the actual murder." Following further arguments, the trial court ruled that it was not striking the fingerprint analyst as a witness, but to ameliorate any prejudice to the defense, the trial court would allow defense counsel to speak to the fingerprint analyst in the hallway. The trial court also ruled "there can be no argument by the State in closing in rebuttal to any argument that [defense counsel] makes that there were no forensics done in this case. I do not want to hear a State argument that, yes, of course there were because [the fingerprint analyst] did compare [the victim's] prints." The State, however, could argue that the victim was not the person who broke into the Defendant's mother's vehicle because his prints were not found. Thereafter, defense counsel moved for a mistrial, which the trial court denied. The State complied with the trial court's ruling made during the Richardson hearing.

The jury found the Defendant guilty of first degree murder, specifically finding that during the commission of the crime, the Defendant did not actually

possess a firearm, discharge a firearm, or discharge a firearm causing death or great bodily harm, but he actually killed the victim, attempted to kill the victim, or intended to kill the victim. The defendant was sentenced, and this appeal followed.

The Defendant contends the trial court abused its discretion by failing to strike the State's witness—the fingerprint analyst—or, in the alternative, by denying defense counsel's motion for mistrial where the remedy applied by the trial court was insufficient to ameliorate the procedural prejudice suffered by the Defendant as a result of the inadvertent discovery violation. Under the circumstances of this case, we disagree.

"While a trial court has broad discretion to impose the sanctions it deems appropriate in order to resolve the prejudice caused by a discovery violation, see Fla. R. Crim. P. 3.220(n)(1), the decision to exclude a witness should only be made where no other sanction or remedy would suffice." Guillen v. State, 189 So. 3d 1004, 1011-12 (Fla. 3d DCA 2016). Rule 3.220(n)(1) provides as follows:

> If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or **enter such other order as it deems just under the circumstances**.

(emphasis added).

In the instant case, after the trial court determined that an inadvertent discovery violation occurred and questioned the parties as to the procedural prejudice suffered by the Defendant as a result of the discovery violation, the trial court fashioned a remedy to ameliorate any prejudice suffered by the Defendant as a result of the inadvertent discovery violation. Rule 3.220(n)(1) sets forth possible actions a trial court may take when discovering that a party committed a discovery violation, including prohibiting a witness from testifying, granting a mistrial, or "enter[ing] such other order as it deems just under the circumstances." We have considered the inadvertent discovery violation and the prejudice to the Defendant, and we conclude that the trial court did not abuse its discretion by denying the Defendant's request to strike the witness or the motion for mistrial in light of the remedy fashioned by the trial court to address the prejudice to the Defendant. As the trial court correctly noted, defense counsel's opening statement "did take issue with the fact that there were no forensics done. But my impression of – of your opening, it was about the actual murder." Accordingly, we affirm the Defendant's conviction and sentence.[3]

[3] Following an individualized sentencing hearing, the trial court sentenced the Defendant to forty-five years in prison followed by ten years of probation with a judicial review after twenty-five years. In sentencing the defendant to forty-five years in prison, the trial court considered its belief that the Defendant was the actual shooter despite the jury's factual finding to the contrary. While this appeal was pending, the Defendant filed in the lower tribunal a motion to correct illegal sentence pursuant to Florida Rule of Civil Procedure 3.800(b)(2). The trial court granted the

Affirmed.

motion, vacated the sentence, and set the matter for resentencing. At the resentencing hearing, the trial court sentenced the Defendant to the forty-year floor set forth in section 775.082(1)(b)(1), Florida Statutes, followed by ten years of probation, with a judicial review after twenty-five years. In doing so, however, the trial court noted that it would have considered a lesser sentence but could not because of the forty-year floor set forth in section 775.082(1)(b)(1). On appeal, the Defendant argues that section 775.082(1)(b)(1) improperly divests a trial court of the discretion to render a prison sentence under forty years, and that the statute violates Miller v. Alabama, 567 U.S. 460 (2012), and the Eighth Amendment. We find this argument to be without merit. See Bailey v. State, 277 So. 3d 173, 176-77 (Fla. 2d DCA 2019), jurisdictional review pending, No. SC19-1269 ("The Miller holding does not extend to Bailey's sentence imposed pursuant to section 775.082(1)(b)(1), where he received the individualized sentencing hearing required by Miller (codified in section 921.1401(1)) and where he will receive a review of his sentence after twenty-five years.").