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NO. COA02-72

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

Guilford County
No. 01 CRS 77735

TIMOTHY BERNARD HARVEY

Appeal by defendant from judgment entered 13 July 2001 by Judge Melzer A. Morgan, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General John F. Maddrey, for the State.

J. Clark Fischer, for defendant-appellant.

THOMAS, Judge.

Defendant, Timothy Bernard Harvey, appeals a conviction of first-degree burglary. He was sentenced to a minimum term of 62 months and a maximum term of 84 months. For the reasons discussed herein, we find no error.

The State presented evidence that between 9:30 p.m. and 10:30 p.m. on 24 January 2001, defendant entered a dwelling occupied by his daughter-in-law and grandson by breaking through plastic covering a broken window. Defendant ran to the back bedroom, grabbed the purse of his daughter-in-law and fled. After the police apprehended him later that evening, defendant told where the

stolen purse could be located. The police found the purse where he had indicated.

Defendant presented evidence that he only went to visit his grandson. As he stood outside, he heard his grandson crying inside the dwelling, so he broke through the plastic to check on him. He claimed he "[didn't] know what possessed" him to grab the purse and flee.

By defendant's first argument, he contends the trial court erred by denying his motion for a mistrial when, during cross examination by defendant of a police officer, the police officer testified: "When I arrived, sir, he was - he wasn't saying anything. He refused to answer any questions. He initially wouldn't tell us his name, wouldn't tell us where he lived." The court sustained defendant's objection and allowed defendant's motion to strike but denied his motion for a mistrial.

When a defendant moves for a mistrial, the trial judge must allow the motion if an error or legal defect in the proceedings occurs resulting in substantial and irreparable prejudice to the defendant's case. N.C. Gen. Stat. § 15A-1061 (1999). The determination of whether a defendant's case has been substantially and irreparably prejudiced is within the discretion of the trial judge. *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). The ruling of the judge will not be disturbed unless it is so arbitrary that it could not have been the product of a reasoned decision. *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986).

Here, the court immediately sustained defendant's objection and allowed defendant's motion to strike the testimony. Ordinarily when the court sustains an objection and instructs the jury to disregard the testimony, the court does not abuse its discretion by refusing to declare a mistrial. *State v. Hogan*, 321 N.C. 719, 722-23, 365 S.E.2d 289, 290-91 (1988). Although the court did not give a curative instruction at the time it sustained the objection and allowed the motion to strike, the court did instruct the jury at the outset of trial that any time the court sustained an objection to a question or allowed a motion to strike an answer, the jury was to disregard the question or answer. Our Supreme Court has held that when curative instructions to disregard testimony are given at the beginning of trial, the court's failure to repeat the instructions immediately after allowing a motion to strike is not prejudicial error. *State v. Franks*, 300 N.C. 1, 13, 265 S.E.2d 177, 184 (1980). In addition, our Supreme Court has held that the court does not err by failing to give a curative instruction after sustaining an objection when the instruction is not requested. *State v. Williams*, 350 N.C. 1, 24, 510 S.E.2d 626, 641, cert. denied, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). Defendant did not request a curative instruction. Under these circumstances, the court did not abuse its discretion by denying the motion for a mistrial and we reject defendant's argument.

By his second argument, defendant contends the trial court erred in allowing the following cross-examination of defendant:

Q. Do you remember going down to the police station with Officer Chambliss?

A. Yes, I went down there.
Q. Did he ask you questions to get your personal information to book you?
A. Yes, sir.
MR. LIND: Objection.
THE COURT: Overruled.
Q. And, isn't it true, sir, that you refused to answer those questions.
MR. LIND: Objection.
THE COURT: Overruled.
A. For a period. But I did answer them. I did answer them.
Q. But you refused at first, correct?
A. Yes.
Q. What else did you tell Officer Chambliss?
A. Pardon me?
Q. What other statements did you make to Officer Chambliss when you were at the police station?
A. I didn't make any more.

We disagree.

Following the cross-examination, the prosecutor proceeded to ask defendant whether he told Officer Chambliss that he took the purse from his daughter-in-law because he believed she owed him money.

The use of a defendant's post-arrest exercise of his right to remain silent for impeachment purposes is considered a violation of due process under the Fourteenth Amendment. *Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 98 (1976). However, the violation may not be reversible error if it can be determined, under the facts and circumstances of the particular case, that the violation was harmless beyond a reasonable doubt. *State v. Freeland*, 316 N.C. 13, 19, 340 S.E.2d 35, 38 (1986). Assuming, *arguendo*, the prosecutor's cross-examination in the case at bar constituted improper inquiry into defendant's exercise of his right to remain silent, we conclude the error was harmless beyond a reasonable

doubt given the overwhelming evidence of defendant's guilt, including defendant's own testimony admitting that he broke into the dwelling and took the purse.

We therefore hold defendant received a fair trial, free of prejudicial error.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).