NO. COA05-743

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v. Wake County
No. 02 CRS 2837

VERNON SEYMORE BULLOCK

Appeal by defendant from judgment entered 15 March 2004 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 15 May 2006.

Roy Cooper, Attorney General, by Christopher W. Brooks, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Charlesena Elliott Walker, Assistant Appellate Defender, for Defendant-Appellant.

MARTIN, Chief Judge.

Defendant, Vernon Seymore Bullock, appeals from judgments entered on jury verdicts finding him guilty of twenty counts of obtaining property by false pretenses and one count of attempting to obtain property by false pretenses. Defendant was sentenced to fifteen separate sentences of eleven to fourteen months imprisonment, fourteen of which were ordered to run consecutively. On appeal, defendant argues the trial court's rulings with respect to the indictments, and the admission of evidence of a statement made by him to law enforcement officers, violated certain of his constitutional rights. He also contends the trial court erred by

admitting an exhibit into evidence without proper foundation, by conducting an improper poll of the jury, and by denying his motion to set aside the jury's verdict. We have considered his arguments and find no error.

I.

Defendant contends Counts I through XIX of the superseding indictment were deficient and failed to give him adequate notice of the charges he faced, thereby violating his due process rights under the Fifth Amendment to the United States Constitution, as well as his right to notice under the Sixth Amendment to the United States Constitution. However, defendant made no such constitutional arguments to the trial court. "Appellate courts will not consider constitutional questions that were not raised and decided at trial." *State v. Youngs*, 141 N.C. App. 220, 229, 540 S.E.2d 794, 800 (2000) (citing *State v. Waddell*, 130 N.C. App. 488, 503, 504 S.E.2d 84, 93 (1998)), *disc. review denied*, 353 N.C. 397, 547 S.E.2d 430 (2001).

Defendant also contends his Fifth Amendment rights, articulated in *Miranda v. Arizona*, 384 U.S. 436, 16 L.E.2d 694 (1966), were violated when the police officer who took him into custody asked him his name before he received the customary *Miranda* warnings. No assignment of error pertains to this contention, even after this Court allowed defendant's motion to amend the record to include additional assignments of error. Thus, this argument is not properly before this Court. N.C.R. App. P. 10(a); *State v. Gaither*, 148 N.C. App. 534, 538, 559 S.E.2d 212, 215 (2002) ("[T]he

record contains only four assignments of error while defendant's brief sets forth five arguments, the fifth of which does not correspond in substance to any of defendant's assignments of error. For this reason, we will not address defendant's fifth argument.").

II.

At trial, defendant objected to the admission of State's Exhibit 9, a photostatic copy of one of the counterfeit checks allegedly passed by defendant. Defendant based his objection on the grounds that the exhibit was a copy, and not the original check, as he had previously understood, and that "[y]ou can't even see it." The State sought to establish the exhibit as a business record, laying a foundation for the exhibit through the testimony of an employee of Sam's Club, the company where defendant had allegedly passed the check. The trial court overruled defendant's objection.

On appeal, the defendant argues the exhibit was inadmissible as a business record because the State failed to lay a proper foundation for its admission. Defendant did not make this objection at trial, and we therefore review for plain error. N.C.R. App. R. 10(c)(4) (2006); *State v. Cummings*, 346 N.C. 291, 313, 488 S.E.2d 550, 563 (1997) ("Defendant alleges this error for the first time on appeal under the plain error rule, which holds that errors or defects affecting substantial rights may be addressed even though they were not brought to the attention of the trial court.") (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d

375, 378 (1983)), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

The business record exception is an exception to the general rule of evidence prohibiting hearsay. The exception provides:

> Records of Regularly Conducted Activity. — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2005). Our Supreme Court has noted business records are admissible "if they are authenticated by a witness who is familiar with them and the system under which they are made," and there is "no requirement that the records be authenticated by the person who made them." *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985).

To establish a foundation for admission of State's Exhibit 9, the State presented testimony of an employee of Sam's Club. Among the employee's primary duties were to process checks which had been returned by the bank, and he explained the check processing system used by Sam's Club. His testimony explained that the check in question, State's Exhibit 9, came into his possession at Sam's Club as a copy of a check returned from the company's bank, and that the copy of the check was handled similarly to other returned checks.

From his past experience, the employee testified that it was not unusual for banks to sometimes destroy a check in their processing and return a copy of the check to Sam's Club.

Testimony by the Sam's Club employee sufficed to lay the foundation for admission of State's Exhibit 9. The photostatic copy of the check was a "record" of a transaction that occurred at Sam's Club, and that record was "kept in the course of a regularly conducted business activity" by Sam's Club. The employee was familiar with the record and with the system employed by Sam's Club to handle returned checks, and he testified that the record in question here was handled similarly to other returned checks. His testimony established the photostatic copy as a business record of Sam's Club, and therefore State's Exhibit 9 was admissible as an exception to the hearsay rule. We find no error, plain or otherwise, in the admission of the exhibit.

Defendant also contends his rights under the Confrontation Clause of the United States Constitution were violated. Since defendant did not raise this constitutional argument to the trial court, we do not consider it. *Youngs*, 141 N.C. App. at 229, 540 S.E.2d at 800.

III.

After the jury returned its verdict, finding defendant guilty of twenty counts of obtaining property by false pretenses and one count of attempting to obtain property by false pretenses, the courtroom clerk announced the verdict on each count and asked the jury, "Is this your verdict so say you all?" The jury responded,

"Yes." The trial judge, on his own initiative, then asked the jury:

> Members of the jury, if the verdict just announced by the clerk as recorded by your foreperson, then each of the respective counts that the Defendant is guilty, that is, in counts 1 through 13, and count[s] 15 through 21, that the Defendant is guilty of obtaining property by false pretenses, and as to count 14, that the Defendant is guilty of attempting to obtain property by false pretenses, if those verdicts are your individual verdict, please indicate so by raising your hand. Thank you. Let the record reflect all 12 jurors raised their hands in response to the Court's inquiry.

The judge then inquired whether either the State or defendant had anything further to add while the jury was present:

> THE COURT: Anything else before the jury at this time from the State with regard to those verdicts?
>
> [STATE ATTORNEY]: Nothing.
>
> THE COURT: Mr. Bullock?
>
> MR. BULLOCK: No.
>
> THE COURT: The Court concludes that the verdict of the jury just announced by the clerk recorded by the foreperson as confirmed by each juror in this case, the Defendant is guilty . . . .

The jury was then dismissed from the courtroom.

Defendant argues the trial judge's question of the jury constituted an improper poll of the jury which violated Article I, Section 24 of the North Carolina Constitution, granting a criminal defendant a right to a unanimous verdict, and N.C.G.S. § 15A-1238, concerning the polling of the jury in criminal trials. We will not

consider the constitutional question because it was not raised at trial. *Youngs*, 141 N.C. App. at 229, 540 S.E.2d at 800.

Defendant did not object at trial to the trial judge's question of the jury, as violative of N.C.G.S § 15A-1238, but relies on *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988) in contending no objection was required because a defendant's failure to object at trial does not waive an error when a trial court acts contrary to a statutory mandate. We conclude, however, that the trial judge's question did not constitute a poll of the jury, and consequently the trial court did not act contrary to the statutory mandate of N.C.G.S. § 15A-1238.

In a criminal trial, the jury must be polled if any party makes a motion to do so, or the trial judge may, on his own motion, require the polling of the jury. N.C. Gen. Stat. § 15A-1238 (2004). If the jury is to be polled, each juror is asked individually whether the verdict announced is his or her verdict. *Id.* Polling the jury serves "to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered." *State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 402 (1991).

In *State v. Flowers*, 347 N.C. 1, 489 S.E.2d 391 (1997), a case with similar relevant facts to the case here, our Supreme Court considered whether a trial court's question of the jury constituted a poll of the jury pursuant to N.C.G.S. § 15A-1238. In *Flowers*,

> the courtroom clerk read each of the two verdicts in open court, and the jurors responded collectively to each that their verdict was guilty. After each verdict was read, the trial court asked the jurors to raise their hands if that was their verdict.

> The trial court accepted the verdicts after all twelve jurors raised their hands, and the trial court directed the record to so reflect.

347 N.C. at 21, 489 S.E.2d at 403. The defendant in *Flowers* contended the trial court "undertook on its own motion to poll the jury," and that "the trial court's directive to the jury as a whole, and the jury's collective response, was insufficient to protect defendant's rights." *Id.* Our Supreme Court disagreed with the defendant:

> There is nothing in the record suggesting that the trial court undertook on its own motion to poll the jurors individually. The trial court's questions were directed to the jury as a group and not individually. The procedure followed by the trial court merely served to insure that before the verdicts were accepted, the record reflected the fact that the written verdicts were returned in open court and were unanimous as required by N.C.G.S. § 15A-1237(b). Accordingly, we find no undertaking by the trial court to poll the jurors individually on its own motion.

Id. at 22, 489 S.E.2d at 403.

The trial court here, like the trial court in *Flowers*, did not undertake on its own motion to poll the jurors individually. As in *Flowers*, the trial court directed his question to the jurors as a group, seeking to insure that the written verdicts were unanimous on all twenty-one counts. We hold the trial court did not conduct an improper poll of the jury and did not violate N.C.G.S. § 15A-1238.

IV.

The jury deliberated for approximately thirty-six minutes before returning with its verdict on all counts. Defendant moved,

post trial, for a new trial based, in part, on the grounds that the jury could not have properly deliberated each of the twenty-one counts with which he was charged in thirty-six minutes.

"When there is merely matter of suspicion [of juror misconduct], it is purely a matter in the discretion of the presiding judge." *State v. Aldridge*, 139 N.C. App. 706, 713, 534 S.E.2d 629, 634 (2000) (quoting *State v. Johnson*, 295 N.C. 227, 234–35, 244 S.E.2d 391, 396 (1978)). "The trial court's ruling on the question of juror misconduct will not be disturbed on appeal unless it is clearly an abuse of discretion." *Id.*

Our Supreme Court has addressed whether a short deliberation by a jury constitutes grounds for setting aside a verdict:

> We conclude that shortness of time in deliberating a verdict in a criminal case, in and of itself, simply does not constitute grounds for setting aside a verdict. The brevity of deliberation should only be questioned if there is evidence of some misconduct on the part of the jury or the trial judge believes that the jury acted with a contemptuous or flagrant disregard of its duties in considering the matters submitted to it for decision.

State v. Spangler, 314 N.C. 374, 388, 333 S.E.2d 722, 731 (1985) (noting the "general rule applied in state and federal courts in criminal cases is that a jury is not required to deliberate for any particular period of time, and the mere fact that a jury deliberates for a short period of time is generally insufficient to indicate that the verdict was the result of passion, prejudice, or bias"); *see also Urquhart v. Durham and South Carolina R.R. Co.*, 156 N.C. 468, 472, 72 S.E. 630, 632 (1911) (a civil case stating

"[w]e know of no rule by which this Court can estimate the time, or lay down a rule, as to how long a jury shall remain in consultation before bringing in their verdict").

Defendant points to no evidence of misconduct by any juror, and we find no abuse of discretion in the trial court's ruling.

No error.

Judges LEVINSON and JACKSON concur.

Report per Rule 30(e).