NO. COA06-314

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v. Forsyth County
No. 04 CRS 58781

TONY SANTINIA FARLEY,
Defendant.

Appeal by defendant from judgment entered 28 September 2005 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Jon W. Myers for defendant-appellant.

GEER, Judge.

Defendant Tony Santinia Farley appeals from his conviction for felony possession of cocaine and subsequent guilty plea as to having attained habitual felon status. On appeal, defendant first argues that the trial court erred by failing to allow defense counsel to question a juror on her family's relationship with a police officer, an issue that arose after the jury was empaneled. Based upon our review of the record, we hold defendant has failed to demonstrate an abuse of discretion. As for defendant's second contention on appeal — that the trial court erred in prohibiting him from questioning a forensic drug chemist with the SBI about

alleged problems within the DNA Section of the SBI laboratory — defendant failed to properly preserve this issue for appellate review.

Facts

The State's evidence tended to show the following facts. At approximately 3:00 p.m. on 16 July 2004, several vice and narcotics officers with the Winston-Salem Police Department executed a search warrant at a house located on East 24th Street. As the officers approached the house, they observed defendant and three other individuals on the front porch. Upon seeing the officers, one individual jumped over the porch railing and others either dropped or threw items from the porch.

Officers found a small bag containing a white rock-like substance "lying on the front porch next to [defendant]" and another small bag nearby. Based on preliminary field tests indicating the substance in the bags was cocaine, the officers arrested defendant for drug possession. Subsequent SBI analysis of both bags confirmed they contained crack cocaine. While in police custody, defendant provided a written statement admitting to possessing at least some of the seized drugs.

On 2 May 2005, defendant was indicted for possession with intent to sell and deliver cocaine and conspiracy to traffic in cocaine. On the first day of trial, following empanelment of the jury, the trial judge notified counsel that Juror Eight had previously failed to disclose that she was friends with a police officer. When the jury arrived in the courtroom, the trial judge

questioned Juror Eight about that friendship. She explained that a police officer had "befriended" her father about three years earlier and would come into their restaurant. The judge then asked her whether knowing that police officer would prevent her from "being a fair and impartial juror" and whether she would be "able to weigh the testimony of law enforcement persons and laypersons just the same." Juror Eight responded that she could be fair and impartial, and she would weigh police and lay testimony equally. Although the trial judge summarily denied defense counsel's apparent effort to ask Juror Eight additional questions, the judge offered defense counsel the opportunity to challenge Juror Eight for cause. Defense counsel declined to do so, and the case proceeded to trial.

The jury returned a verdict of guilty on the charge of felony possession of cocaine, and defendant later pled guilty to having attained the status of a habitual felon.[1] The trial court imposed a sentence in the mitigated range of 60 to 81 months imprisonment. Defendant timely appealed to this Court.

I

Defendant first contends that the trial court erred with respect to Juror Eight. There is no statutory provision in North Carolina dealing with challenges to a juror after the jury has been empaneled. *State v. Richardson*, 341 N.C. 658, 672, 462 S.E.2d 492,

[1]The conspiracy charge was dismissed before the case was submitted to the jury. We also note that, although defendant's habitual felon guilty plea is in the record, his habitual felon indictment is not, in violation of N.C.R. App. P. 9(a)(3)(c).

502 (1995). Nevertheless, trial courts have the discretion to supervise the jury after jury selection and may excuse a juror and substitute an alternate when necessary. *State v. Lovin*, 339 N.C. 695, 715-16, 454 S.E.2d 229, 241 (1995). *See also* N.C. Gen. Stat. § 15A-1215(a) (2005) (allowing trial court to replace serving juror with an alternate should the serving juror become disqualified or be discharged).

When a judge learns, after the jury has been empaneled, of information relating to the ability of a juror to be fair and impartial, "[i]t is within the discretion of the trial judge as to what inquiry to make." *State v. Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992). A trial court's ruling as to whether to discharge a juror following that inquiry is also reviewed for an abuse of discretion, with this Court reversing only if the ruling was so arbitrary that it could not have been the result of a reasoned decision. *Richardson*, 341 N.C. at 673, 462 S.E.2d at 502. "The test is whether the challenged juror is 'unable to render a fair and impartial verdict.'" *Id.* (quoting N.C. Gen. Stat. § 15A-1212(9) (1988)).

As an initial matter, we note that defendant was provided with the opportunity to challenge Juror Eight for cause, but declined to do so. Defendant, therefore, failed to properly preserve this issue for appellate review. *See State v. Bates*, 172 N.C. App. 27, 34, 616 S.E.2d 280, 285 (2005) ("Defendant failed to challenge Juror Three upon her disclosure at trial; therefore, he has not preserved this assignment of error for review."), *cert. granted,*

disc. review denied, and remanded on other grounds, 360 N.C. 537, 634 S.E.2d 218 (2006).

Nevertheless, even assuming, *arguendo*, that defendant's failure to challenge Juror Eight did not waive review of this issue, we find nothing in the record or the transcript to indicate that the trial court abused its discretion in precluding further questioning by counsel. The trial court's inquiries revealed the basis for the juror's friendship with a police officer and suggested that the juror's familiarity with the officer would not affect her ability to be fair and impartial. Given the circumstances of this case, we cannot conclude the trial court abused its discretion by failing to allow counsel to engage in further inquiry. *See, e.g.*, *Richardson*, 341 N.C. at 673-74, 462 S.E.2d at 501-02 (concluding trial court did not abuse its discretion when, after making inquiries similar to instant case, trial court denied defendant's challenge for cause alleging that prosecutor had dismissed minor traffic citation against juror in defendant's trial); *Bates*, 172 N.C. App. at 34, 616 S.E.2d at 286 (concluding trial court did not abuse its discretion when, after also making similar inquiries, trial court failed to discharge juror who "stated she believed she could continue to be fair and impartial to both parties"). This assignment of error is, therefore, overruled.

II

Defendant next argues that the trial court erred by granting the State's motion in limine and preventing defendant from

questioning Special Agent Carroll Brazemore, a forensic drug chemist with the SBI, about alleged problems within the DNA Section of the SBI laboratory. An objection to an order denying or allowing a motion in limine is insufficient to preserve the issue for appellate review. *State v. Dorton*, 172 N.C. App. 759, 768, 617 S.E.2d 97, 103, *disc. review denied*, 360 N.C. 69, 623 S.E.2d 775 (2005). Rather, in order to preserve the issue when a motion in limine has been allowed, the appellant must attempt to offer the excluded evidence during the course of the trial. *State v. Locklear*, 145 N.C. App. 447, 452, 551 S.E.2d 196, 199 (2001). As defendant did not attempt to offer the excluded evidence at trial, he has failed to preserve this issue for appellate review.

Moreover, although defendant has assigned plain error to the trial court's ruling on the motion, defendant has not argued plain error in his brief. "[B]ecause Defendant has not specifically and distinctly addressed the issue of plain error in his brief to this Court, we will not review whether the alleged error rises to the level of plain error." *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998). *See also* N.C.R. App. P. 10(c)(4). This assignment of error is, therefore, overruled.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).