NO. COA08-186

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

STATE OF NORTH CAROLINA

v. Macon County
Nos. 06 CRS 80
06 CRS 2122

MICHAEL RAY WEBB

Appeal by Defendant from judgments entered 5 April 2007 by Judge Ronald K. Payne in Macon County Superior Court. Heard in the Court of Appeals 21 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General Anita LeVeaux, for the State.

Paul F. Herzog for Defendant.

STEPHENS, Judge.

Defendant Michael Ray Webb appeals from his convictions of two counts of first-degree sexual offense with a child. Defendant argues the trial court (1) conducted an inadequate inquiry before granting Defendant's request to represent himself, (2) erred in admitting evidence that Defendant exercised his right to remain silent, (3) failed to inquire into three possible instances of juror misconduct, and (4) erred in denying the jury's request to review certain portions of the transcript. We conclude that Defendant received a fair trial, free of error.

Facts

The trial began on the afternoon of 2 April 2007. Defendant was represented by counsel. The State's first witness, "Cate,"[1] testified on direct examination that when she was eight years old she spent weekend nights at her mother's house. Defendant, Cate's mother's boyfriend, lived at the house. Cate testified that Defendant made her perform fellatio on him a "bunch[]" of times and that Defendant performed cunnilingus on Cate and made her rub his penis with her hand. The State did not conclude its direct examination before the end of the trial's first day.

The next morning, Defendant informed the trial court that he wanted to represent himself. The trial court conducted an inquiry, granted Defendant's request, and appointed Defendant's attorney as standby counsel. The State concluded its direct examination, and Defendant cross-examined Cate. Defendant represented himself through the remainder of the presentation of the State's evidence and called and examined four witnesses in his defense. Following his fourth witness, Defendant took the stand in his defense and began testifying about the events in question. In the middle of his testimony, but outside the presence of the jury, Defendant asked the trial court to "let [standby counsel] take back over[.]" The trial court appointed Defendant's standby counsel to represent Defendant, and Defendant was represented by counsel for the remainder of the trial. Other facts pertinent to the determination

[1]We use the pseudonym, "Cate," to protect the child's identity.

of the issues raised on appeal are set forth below in our discussion of those issues.

I

By his first argument, Defendant contends that the trial court conducted an inadequate inquiry before granting Defendant's request to represent himself. Our Supreme Court recently addressed an identical argument in *State v. Moore*, 362 N.C. 319, 661 S.E.2d 722 (2008). In *Moore*, the Court wrote that it

> has long recognized the state constitutional right of a criminal defendant "'to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.'" *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992) (quoting *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972)); *see also* N.C. Const. art. I, § 23. However, "[b]efore allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied." *Thomas*, 331 N.C. at 673, 417 S.E.2d at 475.
>
> "Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Id.* at 674, 417 S.E.2d at 476 (citations omitted).

Id. at 321-22, 661 S.E.2d at 724. *See also State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994) ("[T]he critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary."). "A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S.

§ 15A-1242." *Moore*, 362 N.C. at 322, 661 S.E.2d at 724 (citing *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476). Section 15A-1242 of our General Statutes provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2007).

In *Carter*, 338 N.C. 569, 451 S.E.2d 157, the defendant requested the right to proceed *pro se*, at which point the following discussion took place between the defendant and the trial court:

> THE COURT: Well, you can you have a right to proceed and represent yourself if you want to do that. I would not advise you to do that but I mean if you want to discharge them completely and proceed without a lawyer, I mean you are at liberty to do that. However, I would --
>
> MR. CARTER: Send them home then. If I got to do any time, if I got to get any kind of death penalty, I got to do it so send them home. I don't want them.
>
> THE COURT: Mr. Carter, I don't believe you want to do that.
>
> MR. CARTER: I do. Believe me, I do.

> THE COURT: Well, I can appoint them as standby counsel and I am going to do that if I allow you to discharge them.

Id. at 580-81, 451 S.E.2d at 163. The trial court ordered a recess to afford defendant additional time to reconsider his decision and then asked him the following questions:

> THE COURT: All right. Well, I am going to, I am going to if you want -- you are going to discharge them then? That's what you are going to do?
>
> MR. CARTER: Yes, sir.
>
> THE COURT: And you are going to proceed without a lawyer?
>
> MR. CARTER: Yes, I am.

Id. at 581, 451 S.E.2d at 163. The Supreme Court held that the trial court "follow[ed] the mandatory inquiry required by N.C.G.S. § 15A-1242[,]" *id.* at 582, 451 S.E.2d at 164, and that the trial court's "inquiry elicited the required information and was therefore sufficient for [the trial court] to determine that defendant's decision was both knowing and voluntary." *Id.* at 583, 451 S.E.2d at 164.

In the case at bar, Defendant contends that the trial court did not sufficiently inquire into whether Defendant understood and appreciated the consequences of his decision. Defendant contends in his brief that "[h]ad the trial judge conducted the thorough inquiry required by [the state and federal constitutions], he would have discovered that [Defendant] had received a diagnosis of Bi-Polar Disorder while awaiting trial and that he was taking prescription medicine for that disorder, to wit[:] Seroquel,

Lithium, and Klonopin." (Footnotes omitted).[2] Defendant argues that, as a result of his condition and medications, he was unable to make a voluntary and knowing waiver of his right to counsel. We disagree.

In this case, the trial court conducted the following inquiry:

> THE COURT: Anything else before we bring the jury in to start this morning?
>
> [ASSISTANT DISTRICT ATTORNEY]: No, Your Honor.
>
> [DEFENSE COUNSEL]: Yes, [Your] Honor, there is one other thing. This morning . . . my client . . . told us that he wishes to represent himself. He asked that we be able to stay nearby to advise him.
>
> . . . .
>
> THE COURT: . . . I've got to make some inquiry of him about the nature of this decision before I can pass on that.
>
> Mr. Webb?
>
> DEFENDANT: Yes, sir.

---

[2]In the footnotes omitted from this quotation and in the body of Defendant's appellate brief, Defendant repeatedly and extensively quotes Wikipedia, an online encyclopedia, to define "bi-polar disorder" and "mania," to discuss the side effects of Defendant's medications, and to argue that, had the trial court asked additional questions, there would have been a "serious doubt about [Defendant's] ability to make a voluntary and knowing waiver of his right to counsel . . . because of his mental condition and drugs prescribed to treat the condition." Defendant acknowledges that this argument is based on evidence outside the record, and Defendant's argument is, thus, improper. Additionally, we note that Wikipedia, the source of the "evidence" presented, is a resource which "*anyone* can edit." Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/Main_Page (last visited Oct. 29, 2008) (emphasis added). We strongly caution against citing Wikipedia as an authority in an appellate brief, especially when there are other, more demonstrably reliable sources of authority available.

THE COURT: Mr. Phillips says you now want to represent yourself. Is that right?

DEFENDANT: Yes, sir.

THE COURT: Do you understand, sir, that the charges -- these are B-1 [felonies], is that right?

[DEFENSE COUNSEL]: Correct, Your Honor.

THE COURT: That each one of these carries a maximum punishment of up to life without parole in prison. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Any one of them, and that if you are convicted of more than one, that sentencing would be left in the discretion of the Court. I'm not saying I would, because I haven't heard the case, don't know what the evidence might prove, persuade me, but it would also mean that you could have consecutive sentences, do you understand that?

DEFENDANT: What was the last part, sir?

THE COURT: These sentences could be made to run consecutive. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: You also understand that if you elect to represent yourself, which is your absolute right, that I cannot give you any assistance or advice on how to proceed. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: If you elect to represent yourself, you also have to go by the same rules of evidence that govern trial procedures. The fact that you are a lay person does not mean that you can do things in a way that are [sic] not admissible under the Rules of Evidence. You have to ask the question, present evidence the same way that an attorney is required to do that. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Okay.

DEFENDANT: Your Honor, if I might address you?

THE COURT: Yes, sir.

DEFENDANT: In no way I'm saying that I'm unhappy with Mr. Phillips's representation, but unfortunately this case goes back some years ago. As you can see this is the case at hand. I lived this. Mr. Phillips didn't. It's been very hard for me to make him understand or, you know, to get them to grasp the whole issue at hand, especially when the time line is so long. But I did live this. I just feel that the line of questioning and such, you would have to know, almost have been there, to understand that, the day-to-day activity in this home and what did and did not happen in this home. It's very complicated, and it is the rest of my life.

I understand that if convicted of what [Cate] says that I will never be out of prison again. I understand that.

THE COURT: I'm not saying you won't be. . . . [W]e're going to get to a point in the proceedings where at some point if the case gets to the jury that there will have to be arguments made to the jury. I'll try to explain to you at that point what you can argue and what you can't argue insofar as a closing argument, if we get to that point.

But a person who undertakes to represent himself or herself, while that's their absolute right, sometimes find[s] that they regret that decision later on.

Are you wanting to represent yourself because you just feel like you can ask questions better than your lawyer?

DEFENDANT: Not just because I think I can -- it's not to the point of whether I can ask them better than Mr. Phillips, Your Honor, it's just that I know the case better than Mr. Phillips. This is a heck of a [time line].

What the State has asked me to do is give them an account for every day of my life for thirteen months. That's almost impossible, Your Honor. It's almost impossible. But I can give a good [time line] of that thirteen months.

THE COURT: I'm not arguing with you and I'm certainly not trying to persuade you one way or the other. Can you not do that if you're represented by counsel?

DEFENDANT: I don't believe to the fullest extent, Your Honor.

. . . .

THE COURT: I want to make sure you understand one other thing. If you do elect to represent yourself, and I'm not implying that there would be a claim of ineffective assistance of counsel, but if you do represent yourself, you will not be able -- you probably cannot assert on a post conviction motion ineffective assistance of counsel because you're your own counselor. You can't complain of that. Do you understand that?

DEFENDANT: Yes, sir, and that is why I have encouraged [sic] to leave Mr. Phillips at my side, because I don't know courtroom procedure.

THE COURT: I'll appoint him as [standby] counsel if that's what you want. Let me explain to you how it works. If he is standby counsel and you say I'm going to represent myself, he's not going to be allowed to ask questions. You will ask the questions. You will conduct examination of witnesses. You will call your own witnesses. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: If you elect -- if I do that and you elect at any time you want Mr. Phillips to step back in, I'll let him step back in the case. Is that what you want to do?

DEFENDANT: Yes, sir.

We hold that this inquiry elicited the information required by Section 15A-1242 and was, therefore, sufficient for the trial court to determine that Defendant's decision to represent himself was "both knowing and voluntary." *Carter*, 338 N.C. at 583, 451 S.E.2d at 164. We reject Defendant's argument.

II

Defendant also argues that the trial court committed plain error in allowing into evidence the following testimony elicited by the State during its direct examination of Franklin Police Department Officer Tracy Chastain:

> Q. These matters with [Cate], did you ever make any attempt to talk to [Defendant] about these matters?
>
> A. Yes, I did.
>
> . . . .
>
> Q. Did you make inquiry of [Defendant] as to whether he would speak to you about these matters?
>
> A. Yes, I did.
>
> Q. Who else was there?
>
> A. His attorney . . . .
>
> Q. What was the response you received?
>
> A. I was told they would not be making any statement to me.

Our Supreme Court has "consistently held that the State may not introduce evidence that a defendant exercised his fifth amendment right to remain silent." *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983) (citation omitted). *See also State v. Boston*, ___ N.C. App. ___, ___, 663 S.E.2d 886, 896 (2008) ("[A]

proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest.") (footnote and citation omitted). Defendant concedes that, because he did not object at trial to the proffered testimony, he must now demonstrate plain error by the trial court in order to obtain relief from this Court. *See* N.C. R. App. P. 10(c)(4) ("In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error."). The plain error rule applies only in the exceptional case where, upon reviewing the entire record, it can be said that the claimed error was a "*fundamental* error," or was an error which "resulted in a miscarriage of justice or in the denial to appellant of a fair trial[.]" *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983) (quotation marks and citation omitted). We conclude that Defendant has not demonstrated plain error.

In *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994), the defendant assigned error to the following testimony elicited by the State at trial:

> [Prosecutor]: Who did you attempt to speak to?
>
> [Officer Hunt]: I attempted to speak to [the defendant] first.
>
> . . . .

> Q: To your knowledge, had he been advised of his rights prior to that time?
>
> A: He had been, sir.
>
> . . . .
>
> Q: And did [the defendant] speak to you or talk to you at all?
>
> A: No, sir. If it was, it was to indicate that he wished not to talk to me.

Id. at 194, 446 S.E.2d at 90. The defendant argued that the admission of such testimony was an impermissible violation of his right to remain silent, and as such, constituted plain error by the trial court. In rejecting the defendant's argument, our Supreme Court stated that the "comments [of the witness] were relatively benign" and "that the prosecutor made no attempt to emphasize the fact that defendants did not speak with [law enforcement] after having been arrested." *Id.* at 196, 446 S.E.2d at 91. The Court concluded that the impropriety of the testimony "was not sufficient to warrant a new trial[.]" *Id.*

As in *Alexander*, we conclude that the admission of the challenged testimony in the instant case was not sufficient to warrant a new trial. Even assuming that Officer Chastain's testimony was improperly admitted, the testimony consisted of a single brief mention by one witness, unlikely to be interpreted and accorded special weight by the average juror. *See State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976). Moreover, the State made no attempt to emphasize the fact that defendant did not speak with law enforcement officers. We also note that there was substantial evidence of Defendant's guilt before the jury. As such, we

determine that the admission of Officer Chastain's testimony did not constitute a fundamental error or result in a miscarriage of justice. *Black*, *supra*. We therefore overrule Defendant's assignment of error.

III

Next, Defendant argues that the trial court erred by failing to inquire into three instances of possible juror misconduct. The first instance was brought to the trial court's attention during a break in the presentation of Defendant's evidence:

> THE COURT: Anything before the jury comes in?
>
> [ASSISTANT DISTRICT ATTORNEY]: I was notified by Officer Chastain as he was coming back from lunch one of the jurors did try to talk to him. He turned his back to that juror, but I wanted to make the Court aware of that.
>
> THE COURT: Okay. Bring [the jury] in.

The second and third instances were brought to the trial court's attention following the charge conference:

> [ASSISTANT DISTRICT ATTORNEY]: Also, Your Honor, as I was leaving the courtroom for lunch, probably about thirty minutes ago, a juror approached me and asked if she could get in the courtroom. I stated, "Ma'am, we're not allowed to talk to you," and I walked away.
>
> [DEFENSE COUNSEL]: Your Honor, I have one. This was reported to me by family that one of the jurors had winked at the victim in this case. I did not see it. I just thought I would make the Court aware of that.
>
> THE COURT: They can wink, they can wave, do whatever they want to.
>
> Bring [the jury] in.

Defendant did not make a motion for a mistrial or ask the trial court to take any other action as to any of these instances. Defendant has therefore "waived his right to raise this issue on appeal." *State v. Hill*, 179 N.C. App. 1, 25, 632 S.E.2d 777, 792 (2006) (citing N.C. R. App. P. 10; *State v. Gainey*, 355 N.C. 73, 96, 558 S.E.2d 463, 478, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002)). *See also State v. Steen*, 352 N.C. 227, 536 S.E.2d 1 (2000) (declining to apply the plain error rule to issues which fall within the realm of the trial court's discretion, such as determinations of the existence and effect of juror misconduct), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). This assignment of error is dismissed.

IV

Finally, Defendant argues that the trial court erred when it denied the jury's request to review a transcript of Cate's and Defendant's testimony.

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.

N.C. Gen. Stat. § 15A-1233(a) (2007).

> This statute imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury

> together with other evidence relating to the same factual issue.

State v. Ashe, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985).

In *Ashe*, upon which Defendant relies, the trial judge "apparently felt that he *could not* grant the request" to view the transcript, because the transcript did not exist. *Id.* at 35, 331 S.E.2d at 656 (emphasis added). In the case at bar, the trial court first conducted all jurors to the courtroom and then exercised its discretion in not permitting the jury to examine the requested portions of the transcript. The court stated:

> Folks, your note says the following: "Is it possible to have a copy of the transcript of [Cate] and [Defendant's] testimony." The answer to your question is yes, it's possible, but in my discretion I'm not going to do it for this reason; when we started the trial I told . . . each one of you to pay close attention to this to be able to recall the testimony for yourself. This is a court of record, but the transcript, if I were to order the court reporter to do one, probably wouldn't be ready until next Tuesday. It's not just a matter of typing; it's a matter of typing, proofing, editing, correcting because she has to certify it. So, I'm going to, in my discretion, deny the request, if that's what it is and have -- and remind you that it's your duty to recall the testimony of not only these but all the other witnesses as you deliberate on this matter.

It is clear from this statement that the trial court understood that it *could* grant the jury's request and that the trial court, in its discretion, was denying the jury's request. *Ashe* is inapposite. Because the trial court conducted the jurors to the courtroom and properly exercised its discretion in denying the jury's request, Defendant's assignment of error is overruled.

NO ERROR.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).