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NO. COA08-646

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

STATE OF NORTH CAROLINA

v.

Brunswick County
Nos. 05 CRS 56226-27
07 CRS 2061

ADOLPH G HOLMES

Appeal by Defendant from judgment and commitment dated 20 August 2007¹ by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 17 November 2008.

Attorney General Roy Cooper, by Associate Attorney General Amanda Ray and Assistant Attorney General Harriet F. Worley, for the State.

Sofie W. Hosford for Defendant.

STEPHENS, Judge.

On 12 December 2005, Defendant was indicted on one count of possession with intent to sell and deliver a controlled substance, one count of feloniously keeping and maintaining a dwelling place used for keeping and selling a controlled substance, one count of possessing a firearm after having been convicted of a felony, and one count of possession of drug paraphernalia. On 9 April 2007, Defendant was indicted as an habitual felon.

¹ Although the trial in this matter was held from 20 August to 24 August 2007, and the jury returned its verdicts on 24 August 2007, the judgment and commitment errantly indicates that it was signed by the trial judge on 20 August 2007.

Defendant was tried at the 20 August 2007 Criminal Session of Brunswick County Superior Court, Judge Ola M. Lewis presiding. The State dismissed the charge of possession of drug paraphernalia, and the jury convicted Defendant of possession of cocaine, misdemeanor keeping and maintaining a dwelling place used for keeping and selling a controlled substance, and possession of a firearm by a felon. Defendant then pled guilty to being an habitual felon, and the trial court imposed a prison term of 85 to 111 months. From this judgment and commitment, Defendant appeals.

I. Facts

Defendant Adolph Garfield Holmes, Sr., his wife, and his son, Steven Holmes ("Steven"), were in Defendant's home on 27 October 2005 when a Brunswick County S.W.A.T. team executed a "No Knock Search Warrant" by entering through the front door of the residence with a battering ram. A S.W.A.T. team member testified that Defendant was holding a slice of apple pie in one hand and a bag in the other, both of which he threw toward the couch as the officers entered. Another S.W.A.T. team member testified that Steven was sitting at a computer desk, and that he grabbed a handful of cash from the desk and ran down the hall when the officers entered. Defendant's wife sat at the kitchen table.

Detectives testified that they searched the home and found a bag of crack cocaine behind the couch, a bag of crack cocaine at the computer desk where Steven was sitting, and a small amount of crack cocaine on a digital scale on the kitchen counter. The

officers also found surveillance equipment and several firearms. Defendant and Steven were both arrested.

II. Jury Polling

Defendant first alleges the trial court erred in denying his motion for a mistrial. Specifically, Defendant argues he was denied his constitutional right to polling of the jury because the State announced its intention to proceed with the habitual felon phase of Defendant's trial after the jury had returned its verdicts but before the jury was polled.

"The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2007). "The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion." *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988). "A trial court's actions constitute abuse of discretion upon a showing that [the] actions are manifestly unsupported by reason and so arbitrary that [they] could not have been the result of a reasoned decision." *State v. Williams*, 361 N.C. 78, 81, 637 S.E.2d 523, 525 (2006) (quotation marks and citations omitted).

The right to a poll of the jury in criminal actions is established by Article I, Section 24 of the Constitution of North Carolina and by North Carolina statute which provides:

Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

N.C. Gen. Stat. § 15A-1238 (2007). "The purpose of polling the jury is 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).

North Carolina law mandates a bifurcated trial in habitual felon cases.

When an indictment charges an habitual felon with a felony . . . and an indictment also charges that said person is an habitual felon . . . the defendant shall be tried for the principal felony as provided by law. The indictment that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony or other felony with which he is charged.

N.C. Gen. Stat. § 14-7.5 (2007). The purpose of bifurcating the trial is to avoid prejudice to the defendant and confusion of the jury during the proceeding on the principal offense. *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985).

In *Lipscomb v. Cox*, 195 N.C. 502, 142 S.E. 779 (1928), after the jury returned its verdict but before it was polled, the plaintiff's attorney had a discussion with the judge in the presence of the jury about whether the jury had understood the jury instructions. A new trial was ordered because

the poll of the jury must be had immediately upon the return of the verdict in open court and before debate or discussion thereof, or debate or discussion of the merits of the case upon motion to set aside the verdict or otherwise. Unless this procedure is strictly observed by trial judges, it is quite evident that a poll of a jury, after spirited discussion of the verdict, or of the merits of the case, in the presence of a jury, would result in confusion and uncertainty, and thus retard and impair the due administration of the law.

Id. at 506, 142 S.E. at 781.

In this case, after the jury returned its verdicts but before it was polled, the prosecutor stated that he "mov[ed] the court for a bifurcated proceeding, in which the defendant has been charged as an habitual felon." Defense counsel immediately moved to poll the jury and asked to be heard outside the presence of the jury. Defense counsel then moved for a mistrial on the ground that the prosecutor's mention of the phrase "habitual felon" before the jury was polled caused "excessive" and "irreparable prejudice" to his client because "if anybody was even close to, even borderline to being close to needing more deliberation[,] " they were denied that opportunity. Defendant's motion was denied, and the jury was polled. During the poll, in addition to asking whether each juror assented to the verdict, the trial court asked each juror if "any statement made by the State of North Carolina to the court [] influenced your answer . . . with regard to your verdict and/or having been polled by the jury?" Each juror answered in the negative.

Unlike in *Lipscomb*, here there was no debate or discussion of the merits of the case in the presence of the jury before the jury

was polled. Although before the jury was polled, the State mentioned that "[D]efendant has been charged as an habitual felon[,]” the judge addressed the possibility of improper influence from the prosecutor’s statement by asking the jurors if they had been influenced by the statement. As the jurors each individually indicated that they had not been influenced by the statement, the trial court did not abuse its discretion in denying Defendant’s motion for a mistrial. This assignment of error is overruled.

III. Mistrial

Defendant next argues that the trial court erred in failing to declare a mistrial after the jury announced that it was at an impasse, and instead gave an *Allen* charge and required the jury to continue to deliberate.

Defendant failed to move for a mistrial after the jury announced that it was deadlocked or after the *Allen* charge was given. Although Defendant argues that this error is preserved as it implicates Defendant’s constitutional right to a trial by a jury, “[c]onstitutional questions not raised and passed upon at trial will not be considered on appeal.” *State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 477, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Moreover, although Defendant also argues that this assignment of error should be reviewed under the plain error standard, plain error review is unavailable for the issue of whether a mistrial should have been declared. *State v. Replogle*, 181 N.C. App. 579, 582, 640 S.E.2d 757, 760 (2007). Accordingly, as Defendant has failed to preserve this question for appellate

review, Defendant's assignment of error is dismissed. N.C. R. App. P. 10(b)(1).

IV. Testimony of Steven Holmes

Defendant next argues that the trial court abused its discretion in denying his motion for a mistrial after Steven invoked his Fifth Amendment privilege against self-incrimination. Defendant claims that he was denied the opportunity to present a defense when the trial judge "threatened to revoke" Steven's deferred conviction plea agreement as Steven was Defendant's sole witness.

"The decision whether to grant a motion for a mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion." *Boyd*, 321 N.C. at 579, 364 S.E.2d at 120. A presiding judge has broad discretionary power over how to conduct the trial. *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976). "[A] trial judge may, if the necessity exists because of some statement or action of the witness, excuse the jurors and, in a judicious manner, caution the witness to testify truthfully, pointing out to him generally the consequences of perjury." *Id.* at 23, 224 S.E.2d at 636. "[A] warning to a witness made judiciously under circumstances that reasonably indicate a need for it and which has the effect of merely preventing testimony that otherwise would likely have been perjured does not violate a defendant's right to due process." *State v. Melvin*, 326 N.C. 173, 188, 388

S.E.2d 72, 80 (1990). "Defendants have no due process or other constitutional right to present perjured testimony." *Id.*

_____In *Rhodes*, the North Carolina Supreme Court recognized four possible hazards that may result from a trial court's intimating that a witness has committed perjury: (1) the judge will invade the province of the jury, which is to assess the credibility of the witnesses and determine the facts from the evidence adduced; (2) the witness may change his testimony to fit the judge's interpretation of the facts or refuse to testify at all; (3) the defendant's attorney may be intimidated or discouraged from eliciting essential testimony from the witness; and (4) the judge will interfere with defendant's due process right to trial before an impartial tribunal. *Rhodes*, 290 N.C. at 24-27, 224 S.E.2d at 636-38. Accordingly, a trial court must balance the necessity of preventing perjured testimony as discussed in *Melvin* against the hazards of intimating that testimony is perjured as recognized in *Rhodes*.

Steven, the only witness called by the defense, had already pled guilty to charges stemming from the same incident and had been granted a deferred prosecution pursuant to N.C. Gen. Stat. § 90-96. At Steven's deferred prosecution hearing, the State presented evidence, without objection, that Steven's girlfriend had dropped Steven off at Defendant's house to work on his resume and that he was sitting at the computer desk when the S.W.A.T. team entered. At an interview the day before Defendant's trial, Steven also stated that he was sitting at the computer desk when the S.W.A.T.

team arrived. However, at Defendant's trial, Steven testified that he was at Defendant's house to return Defendant's truck and that he was not sitting at the computer desk when the S.W.A.T. team arrived.

The trial judge, who had also presided over Steven's deferred prosecution hearing, interrupted Steven's testimony and sent the jury out of the courtroom. The judge pointed out that "what [Steven] is saying today is not what he told me under oath, with his attorney" at his deferred prosecution hearing. The judge then addressed Steven's attorney, who was in the courtroom:

You had better have some conversation with [Steven] about perjury and the effect of that deferred prosecution, because I'm telling you, that is not the story that I heard the day that we entered that judgment. And if my name is signed to something that is not the truth, I'm going to fix it.

After consulting with his attorney, Steven declined to continue to testify, invoking his Fifth Amendment right against self-incrimination. Steven's attorney stated to the trial court that he was "concerned with [Steven] committing perjury unknowingly."

In this case, the trial judge was in a unique position to recognize that material discrepancies existed between the version of events that was the factual basis of Steven's plea at his deferred prosecution hearing and the version of events that emerged during Steven's testimony at Defendant's trial. Because of these differences, one of the versions was not true and, as a result, Steven might have had to face the consequences of committing perjury. While the trial court's actions did result in Steven's invoking his Fifth Amendment right and refusing to continue

testifying, one of the hazards the Court in *Rhodes* warned against, the circumstances in this case indicated a need to warn Steven of the possibility of perjuring himself. The judge's warning "merely prevent[ed] testimony that otherwise would likely have been perjured[.]" *Melvin*, 326 N.C. at 188, 388 S.E.2d at 80. The trial judge's actions were handled outside the presence of the jury and rather than directly addressing Steven, causing him to feel threatened or pressured, the judge addressed her comments to Steven's attorney who could provide Steven with legal counsel. Under these circumstances, we cannot say that the trial court abused its discretion in denying Defendant's motion for a mistrial after Steven invoked his privilege against self-incrimination as Defendant has no right to present perjured testimony. This assignment of error is thus overruled.

V. Jury instructions

Defendant also claims the trial court erred by failing to give a jury instruction regarding the jury's consideration of Steven's testimony "because the jury had no guidance on their use of this defense evidence."

"Because [D]efendant failed to object to the jury instruction at trial, his challenge is subject to plain error review." *State v. Maready*, 362 N.C. 614, 621, 669 S.E.2d 564, 568 (2008). Plain error has been defined as "'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002

(4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79.

Steven testified for approximately five to ten minutes before invoking his privilege against self-incrimination. The trial court then instructed the jury that it would not be hearing further from Steven as "[u]pon the advice of his legal counsel, he has invoked his Fifth Amendment right not to testify in these proceedings."

At the close of the charge conference, Defendant moved for a mistrial on the ground that the jury might place "excessive weight on the fact that [Steven] was about to testify and then all of a sudden stopped because counsel advised him it would probably [] be in his best interest not to testify." The judge denied the motion and gave defense counsel the opportunity to offer an additional instruction for the jury. However, Defendant did not offer an additional instruction and did not object to the final jury instructions.

While Defendant argues that "[n]one of the court's final jury instructions addressed [the jury's] consideration of Steven Holmes' testimony[,]" the trial court instructed the jurors that they were the "sole judges of the credibility - that is the believability - of each witness[,]" and that they "must decide for [themselves] whether to believe the testimony of any witness." The trial court expressly made these instructions applicable to "each" and "any"

witness, which included Steven. The trial court further instructed the jury as follows:

You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

By this instruction, the trial court directly instructed the jury as to the weight to be given "any" evidence, including Steven's testimony. Thus, contrary to Defendant's assertion, the trial court's instruction gave the jury adequate guidance on their use of Steven's testimony.

Moreover, assuming *arguendo* that the trial court erred in omitting a specific jury instruction regarding Steven's testimony, given the strength of the evidence against Defendant, we cannot conclude that any such error amounts to plain error as it had no "probable impact on the jury's finding of guilt." *Id.*

Accordingly, reviewing the jury instruction "contextually and in its entirety[,]'" *State v. Blizzard*, 169 N.C. App. 285, 296, 610 S.E.2d 245, 253 (2005) (quotation marks and citation omitted), we conclude the trial court did not err, much less commit plain error, "by failing to provide a jury instruction regarding [the jury's] consideration of Steven Holmes' testimony[.]" This assignment of error is overruled.

VI. Batson Claim

Finally, Defendant argues the trial court erred in determining that the State's striking of prospective jurors Harold Hankins and

William McKenzie was not purposeful discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution forbid the use of peremptory challenges for a racially discriminatory purpose.

"A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. *Id.* Second, if such a showing is made, the burden shifts to the prosecutor to offer a race-neutral explanation to rebut defendant's *prima facie* case. *Id.* Third, the trial court must determine whether the defendant has proven purposeful discrimination. *Id.*"

State v. Williams, 355 N.C. 501, 550, 565 S.E.2d 609, 638 (2002) (quoting *State v. Lemons*, 348 N.C. 335, 360-61, 501 S.E.2d 309, 324-25 (1998), *sentence vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

"The trial court's findings as to race neutrality and purposeful discrimination depend in large measure on the trial judge's evaluation of credibility; hence, these findings should be given great deference." *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563, 575 (1998). "An examination of the actual explanations given by the district attorney for challenging [African-American] veniremen is a crucial part of testing [a] defendant's *Batson* claim." *State v. Smith*, 328 N.C. 99, 125, 400 S.E.2d 712, 726

(1991). Other factors which this Court has considered in determining the presence or absence of intentional discrimination include the

susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors.

State v. White, 349 N.C. 535, 548-49, 508 S.E.2d 253, 262 (1998). This Court employs "clear error" review in determining whether the trial court's ruling on a *Batson* inquiry constitutes reversible error. *State v. Wright*, ___ N.C. App. ___, ___, 658 S.E.2d 60, 63, *disc. review denied*, ___ N.C. ___, ___ S.E.2d. ___ (2008).

Here, Defendant claims that the striking of prospective jurors Hankins and McKenzie showed purposeful discrimination, the third prong of the test. We disagree.

First, the prosecutor's reasons for excusing Hankins and McKenzie established wholly adequate bases for the trial court's determination that the prosecutor's face-neutral explanations for the peremptory challenges were valid. Hankins was excused by the State because the prosecutor had convicted two of his relatives as habitual felons and was currently prosecuting a third relative, who had two prior felonies. McKenzie was excused because officers testifying at Defendant's trial indicated that they had chased McKenzie from a drug-infested area. Additionally, there is nothing in the record to suggest that this particular case is susceptible

to racial discrimination nor does the record indicate that the State asked any discriminatory questions or made any discriminatory inferences. In fact, the prosecutor preemptively asked "to lay a brief record with respect to *Batson*" regarding the challenges of Hankins and McKenzie. At that time, Defendant made no attempt to oppose the State's explanations or to argue that there was purposeful discrimination. Although the State used its allotted peremptory challenges, it is not clear from the record how many African-American jurors were challenged or seated. When considering all of the relevant circumstances, and the deference due the trial court's evaluation of credibility, we conclude the trial court did not commit clear error in determining that it "did not find any issues of *Batson*." Defendant's argument is thus without merit and this assignment of error is overruled.

We hold Defendant received a fair trial, free of error.

NO ERROR.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).