NO. COA08-658

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v. Johnston County
No. 04 CRS 55808

JOSHUA NELSON HARVEY

On writ of *certiorari* to review judgment entered 19 April 2006 by Judge Stafford G. Bullock in Johnston County Superior Court. Heard in the Court of Appeals 8 December 2008

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart.

M. Alexander Charns, for Defendant.

ARROWOOD, Judge.

On 19 July 2004, the Johnston County Grand Jury returned an indictment charging Joshua Nelson Harvey (Defendant) with accessory after the fact to first degree murder. The jury found Defendant guilty of accessory after the fact to second degree murder. The trial court entered judgment consistent with the jury's verdict, sentencing Defendant in the mitigated range to 38 to 55 months imprisonment. This Court allowed Defendant's petition for writ of *certiorari* to review the judgment on 21 November 2007.

At trial, the facts tended to show Sean Nichols (the victim) disappeared in early November 2003. During their investigation

into the victim's disappearance, police learned he was last seen with Defendant and Sean Castorina, both of whom worked for Defendant in his siding business. On 19 November 2003, Detective Ryan Benson of the Johnston County Sheriff's Department, interviewed Defendant regarding the disappearance and Defendant stated he had not seen the victim for a couple of months and denied being with the victim on 6 November 2003.

On 25, 26 and 28 November 2003, Detective Bengie Gaddis of the Johnston County Sheriff's Department interviewed Defendant. During this second set of interviews Defendant stated that he, the victim and, Sean Castorina went hunting in early November. While out hunting, Defendant was separated from the other two men when he heard two shots. Acting on instructions given to him earlier by Castorina, Defendant returned to their truck and waited. Shortly thereafter, Castorina returned alone, holding his shotgun and the victim's binoculars. Castorina told Defendant to go get the victim's rifle, which was just down a path. Defendant retrieved the rifle and returned to the truck. Castorina and Defendant drove to Castorina's house and Castorina told Defendant that he had "better not tell anybody." The next day Castorina and Defendant drove to Norfolk Virginia and left the victim's rifle and Castorina's shotgun with Castorina's grandfather. Defendant further stated that Castorina had said he was going to shoot the victim if the victim did not pay him $1,200 he was owed.

Acting on Defendant's statement, officers searched the area where Defendant said he went hunting with the victim and Castorina.

Officers located the victim's body, partially covered with pine boughs, in a nearby clearing. Defendant had been shot in the back of his head with a shotgun.

Defendant now argues the trial court abused its discretion in sentencing him by not considering whether extraordinary mitigating circumstances were present in his case. Where the trial court finds the existence of extraordinary mitigating factors in a case, the court, in its discretion, may impose an intermediate punishment rather than a required active punishment. N.C. Gen. Stat. § 15A-1340.13(g) (2007). To do so, the trial court must find:

> (1) That extraordinary mitigating factors of a kind significantly greater than in the normal case are present.
>
> (2) Those factors substantially outweigh any factors in aggravation.
>
> (3) It would be a manifest injustice to impose an active punishment in the case.

N.C. Gen. Stat. § 15A-1340.13. We review the decisions of the trial court regarding extraordinary mitigating factors for an abuse of discretion. *State v. Melvin*, ___ N.C. App. ___, ___, 656 S.E.2d 701, 703 (2008). "An abuse of discretion occurs only when the trial court's ruling is 'manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)). However, "there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion

reconsidered and passed upon as a discretionary matter." *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980).

Defendant argues the trial court's failure to refer to extraordinary mitigation or make any findings about extraordinary mitigation shows that the trial court did not consider that he had the discretion to suspend the otherwise mandatory term of imprisonment. We disagree. The mere fact that the trial court did not address extraordinary mitigation when sentencing Defendant does not indicate the trial court refused to exercise its discretion in the belief that it had no discretion as to the question presented.

Defendant's trial counsel clearly argued for the finding of extraordinary mitigating factors, asking the trial court to find "extraordinary circumstances; rather than sentence [defendant] to an active sentence in prison[.]" The trial court found the four mitigating factors requested by Defendant and sentenced Defendant to the shortest sentence possible in the mitigated range for a defendant convicted of a Class D felony with a prior record level of I. N.C. Gen. Stat. § 15A 1340.17 (2007). While we may not disagree with Defendant that the trial court *could* have found the existence of extraordinary mitigating factors, Defendant has not shown the trial court failed to exercise its discretion in considering whether extraordinary mitigating factors were present, or abused its discretion in not finding their existence. These assignments of error are overruled.

Defendant also contends he received ineffective assistance of counsel when his trial counsel failed to request recordation of the

jury selection, bench conferences, and opening and closing statements. "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674 (1984)); *see also State v. Thomas*, ___ N.C. App. ___, ___, 651 S.E.2d 924, 928 (2007) (holding "a defendant cannot establish ineffective assistance of counsel for failure to request recordation of the jury selection . . . where no specific allegations of error were made and no attempts were made to reconstruct the transcript."). Defendant has not made any specific allegation that error occurred during the unrecorded portions of the trial and concedes that at this time he cannot show prejudice resulting from his trial counsel's failure to record the entire trial. Accordingly, we overrule this assignment of error.

No Error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).