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NO. COA08-66

NORTH CAROLINA COURT OF APPEALS

Filed: 2 September 2008

STATE OF NORTH CAROLINA

v.

DOMINIQUE JAMIL BUTLER

Iredell County
Nos. 05 CRS 61528,
05 CRS 14401-14402

Appeal by defendant from judgments entered 27 July 2007 by Judge Michael E. Beale in Iredell County Superior Court. Heard in the Court of Appeals 20 August 2008.

*Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.
Reita P. Pendley, for defendant-appellant.*

TYSON, Judge.

Dominique Jamil Butler ("defendant") appeals from judgments entered after a jury found him to be guilty of: (1) first-degree murder; (2) possession of a firearm by a convicted felon; (3) conspiracy to commit robbery with a firearm; and (4) attempted robbery with a firearm. We affirm in part and find no error in part.

I. Background

On 29 November 2005, Betty Jo Richards ("Ms. Richards") delivered newspapers to the Quick Pick convenience store between 5:30 and 6:00 a.m. Ms. Richards entered the store, noticed blood

splatter near the door, and observed Hoan Nguyen ("the victim") lying on the floor motionless, but still breathing. Ms. Richards flagged down a passing vehicle and told the driver to contact the victim's wife. Ms. Richards subsequently called the police. The victim was pronounced dead at the scene.

After some investigation, officers asked Tin Huu Nguyen, the victim's brother-in-law, if the convenience store was equipped with surveillance cameras. Tin answered in the affirmative. Two cameras were focused on the gas pumps, a third on "whoever come[s] in the door," and a fourth camera was focused on the back of the store.

The security video recording taken the morning of the shooting showed two people standing outside at the time the store was opened. The victim unlocked the store's door, the perpetrator entered the store, shot the victim, and exited the store. The surveillance videotapes were subsequently released to the media.

During the evening after the shooting, Barbara Waugh ("Ms. Waugh") and Sheri Crowell ("Ms. Crowell") watched the news together and viewed the surveillance video footage. Both women identified defendant as the perpetrator of the crime and reported this information to the Mecklenburg County Sheriff's Department. On 30 November 2005, an arrest warrant was issued against defendant for first-degree murder.

On 6 December 2005, defendant surrendered himself to the Mecklenburg County Sheriff's Office and was transferred to the Iredell County Sheriff's Office. Upon his arrival, defendant met

with Iredell County Sheriff's Lieutenant Ron Wyatt ("Lieutenant Wyatt"), waived his *Miranda* rights, and was interviewed for approximately two hours.

After the interrogation ended, defendant was transported to the Iredell County jail. Numerous media outlets had learned defendant had turned himself in and assembled outside the Sheriff's Office. Lieutenant Wyatt did not desire to be filmed and encouraged defendant to keep walking and to be quiet. Defendant failed to comply with Lieutenant Wyatt's request and stopped to answer several questions posed by the media.

Defendant filed two pre-trial motions to suppress: (1) his statement given to Lieutenant Wyatt and (2) the news "interview" he had given to the media assembled outside the jail. The trial court denied both motions.

During jury selection, defendant challenged the prosecutor's use of peremptory challenges to strike all three black potential jurors called to the jury box. These peremptory strikes resulted in an all white jury being empaneled. Defendant's motion was again denied.

Defendant took the stand in his own defense and testified that he had shot the victim in self-defense. The defense called no other witnesses. After a five-day trial, the jury found defendant to be guilty of: (1) first-degree murder in the perpetration of a felony; (2) possession of a firearm by a convicted felon; (3) conspiracy to commit robbery with a firearm; and (4) attempted robbery with a firearm.

The trial court sentenced defendant to life imprisonment without parole for his first-degree murder conviction, a minimum of fifteen to a maximum of eighteen months imprisonment for possession of a firearm by a convicted felon, and a minimum of twenty-nine to a maximum of forty-four months imprisonment for conspiracy to commit robbery with a firearm. All sentences were ordered to be served consecutively. The trial court arrested judgment on defendant's attempted robbery with a firearm conviction. Defendant appeals.

II. Issues

Defendant argues the trial court erred by denying his two motions to suppress because: (1) defendant did not waive his *Miranda* rights and (2) defendant's invocation of his constitutional right to remain silent was used against him at trial. Defendant also argues the trial court erred by denying his *Batson* challenge during the jury selection process.

III. Motions to Suppress

A. Standard of Review

The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. This Court determines if the trial court's findings of fact support its conclusions of law. Our review of a trial court's conclusions of law on a motion to suppress is *de novo*.

State v. Edwards, ___ N.C. App. ___, ___, 649 S.E.2d 646, 648 (internal citations and quotations omitted), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

B. First Motion to Suppress

Defendant argues the trial court erred by denying his first motion to suppress and admitting his statement to Lieutenant Wyatt into evidence because defendant did not waive his right to remain silent and to counsel. We disagree.

Defendant has not assigned error to any of the trial court's findings of fact in its order denying defendant's motion to suppress. "Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d 274, 280 (1994) (citation and quotation omitted), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995). The issue before this Court becomes whether the trial court's conclusions of law are supported by its findings of fact.

The United States Supreme Court has held that when a person is subjected to a custodial interrogation:

[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

Miranda v. Arizona, 384 U.S. 436, 444-445, 16 L. Ed. 2d 694, 706-707 (1966); see also *State v. Wall*, 342 N.C. 1, 28, 463 S.E.2d 738, 750 (1995) ("[C]ustodial interrogation must cease when a suspect indicates he wishes to remain silent." (Citation omitted)), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

However, *Miranda* is not applicable to "volunteered statements of any kind [which] are not barred by the Fifth Amendment." *Wall*, 342 N.C. at 28, 463 S.E.2d at 750 (citation and quotation omitted). In determining whether a statement was voluntary, our Supreme Court has stated:

[t]he test for voluntariness in North Carolina is the same as the federal test. If, looking to the totality of the circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, then he has willed to confess [and] it may be used against him; where, however, his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Factors to be considered in this inquiry are whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hardy, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (internal citations and quotations omitted).

Here, the trial court conducted a motion to suppress hearing on 21 May 2007. The evidence presented at the hearing tended to show the "General Adult Rights Form" was presented to defendant and informed him of his right to remain silent and that anything he said could be used against him in court. The record indicates that Lieutenant Wyatt read each of these rights to defendant and defendant initialed his answer to each question as the rights/questions were being read. Defendant placed his initials in the column marked "yes" indicating that he understood these rights.

Defendant then placed his initials in the column marked "no" indicating he did not wish to talk to Lieutenant Wyatt.

Lieutenant Wyatt immediately told defendant that the interview was over and that they "were done." Defendant inquired into why the interview was over and indicated that he did, in fact, want to talk to Lieutenant Wyatt. Defendant ultimately scratched out his initials over the column marked "no" and initialed the column marked "yes." Lieutenant Wyatt then proceeded to inform defendant of his right to: (1) "talk to a lawyer and to have one present during questioning" and (2) if defendant wanted a lawyer to be present but could not afford one, a lawyer would be appointed to represent him. After being read these rights, defendant indicated he still wished to speak to Lieutenant Wyatt. Lieutenant Wyatt subsequently interviewed defendant.

The trial court specifically found defendant was properly informed of and waived his *Miranda* rights. The trial court rendered further findings that: (1) law enforcement did not exhibit any threats of force or violence against defendant; (2) law enforcement did not make any promises to defendant in an effort to induce defendant to give a statement; (3) defendant had an "extensive criminal history with the State of North Carolina;" and (4) defendant had been informed of his *Miranda* rights on multiple occasions in the past. Based upon these findings, the trial court concluded that defendant's statement was voluntary, properly taken, and admissible at trial.

In light of the unchallenged findings of fact, the trial court properly concluded defendant's statement was voluntarily given after a complete and legally sufficient notification and waiver of his *Miranda* rights. The trial court did not err by admitting defendant's statement into the evidence at trial. This assignment of error is overruled.

C. Second Motion to Suppress

Defendant argues the trial court erred by denying his motion to suppress a videotape of an "interview" defendant had given to the media while being transported from the Iredell County Sheriff's Office to the jail.

In the course of the media "interview," defendant responded "no comment" when asked "whether or not the defendant was attempting to commit a robbery when the alleged victim was shot." Defendant's main contention is that "his no comment statement to the television news reporter was effectively an assertion of his constitutional right to remain silent under the Fifth and Fourteenth Amendments of the United States Constitution" and that this assertion could not be used against him at trial. We disagree.

Our rejection of defendant's contention is two-fold in that defendant's statement was: (1) voluntary given to the news media and (2) not a result of a custodial interrogation. In *Doyle v. Ohio*, the United State Supreme Court stated:

[s]ilence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous

because of what the State is required to advise the person arrested. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. *In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.*

426 U.S. 610, 617-18, 49 L. Ed. 2d 91, 97-98 (1976) (emphasis supplied) (internal citations omitted). However, "[w]hen the defendant chooses to speak *voluntarily* after receiving *Miranda* warnings, . . . the rule in *Doyle* is not triggered. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." *State v. Fair*, 354 N.C. 131, 156, 557 S.E.2d 500, 518-19 (2001) (internal citations and quotation omitted) (emphasis original), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Defendant's constitutional rights were not violated when he "chose not to exercise his right to remain silent, but instead spoke voluntarily to the press, in the presence of the police, after he was arrested." *Id.* at 158, 557 S.E.2d at 519 (citations omitted).

It is also well established that:

the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions *on the part of the police* . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.

State v. Young, 65 N.C. App. 346, 348, 309 S.E.2d 268, 269-70 (1983) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 64 L. Ed. 2d 297, 307-08 (1980)) (emphasis supplied).

Here, defendant's "no comment" answer was voluntarily given in response to a question posed by a member of the news media. The news media were not present and the questions they asked were not at the request of the Sheriff's Office. Even though defendant was handcuffed and in the custody of a Sheriff's Deputy at the time of his statement, his answer to media questions cannot be construed as a custodial interrogation to invoke the protections afforded by *Miranda*. Defendant was not responding to "questioning initiated by law enforcement officers[.]" *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706. This assignment of error is overruled.

IV. Batson Challenge

Defendant argues the trial court erred by denying defendant's *Batson* challenge on the grounds that all potential black jurors called from the venire were peremptorily stricken by the prosecutor and an all white jury was empaneled. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). We disagree.

A. Standard of Review

In reviewing a ruling on a *Batson* challenge, "the trial court's determination is given great deference because it is based primarily on evaluations of credibility. Such determinations will be upheld as long as the decision is not clearly erroneous." *Fair*, 354 N.C. at 140, 557 S.E.2d at 509-510 (internal citations omitted).

B. Analysis

In *Batson*, the Supreme Court of the United States established a three-step process to determine whether a criminal defendant's equal protection rights under the Fourteenth Amendment are violated when the State uses its peremptory challenges to strike potential jurors of the same race as the defendant. 476 U.S. at 82, 90 L. Ed. 2d at 77. Our Supreme Court articulated the three-step process in *State v. Jackson*:

In *Batson v. Kentucky*, . . . the United States Supreme Court overruled *Swain v. Alabama*, 380 U.S. 202, 13 L. Ed. 2d 759 (1965), and held a prima facie case of purposeful discrimination in the selection of a petit jury may be established on evidence concerning the prosecutor's exercise of peremptory challenges at the trial. In order to establish such a prima facie case the defendant must be a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race. The trial court must consider this fact as well as all relevant circumstances in determining whether a prima facie case of discrimination has been created. When the trial court determines that a prima facie case has been made, the prosecution must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group. The prosecutor's explanation need not rise to the level of justifying a challenge for cause. At this point the trial court must determine if the defendant has established purposeful discrimination.

322 N.C. 251, 254, 368 S.E.2d 838, 839-840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989).

In the present case, defendant made a timely objection and attempted to establish a *prima facie* case of purposeful

discrimination under *Batson*. In response, the prosecutor asserted that defendant had not established its *prima facie* showing, but proceeded to provide race-neutral reasons for his use of the peremptory strikes.

The trial court concluded that the prosecutor's peremptory strikes were proper and did not violate defendant's Constitutional rights. Defendant renewed his *Batson* challenge at the completion of the jury selection, but the trial court found no further error in the process. The three jurors challenged were Irvis, Seme, and Jones.

After a thorough review of the record on appeal and the transcript of the jury selection process, it appears that Juror Irvis gave inconsistent answers regarding whether she could render a fair and impartial verdict in light of what she had seen and heard about the case from the news. Juror Jones initially expressed some hesitancy at being able to "sit in judgment of another person."

Further, Jurors Irvis and Seme both failed to respond when the prosecutor asked the panel whether "anyone [had] been to court either as a plaintiff or a defendant in a civil case or in a criminal case . . . ?" Juror Irvis had been to court on several occasions for different criminal charges and Juror Seme was a defendant in a pending impaired driving case calendared for the following week. Juror Seme, a Haitian immigrant for whom French is a first language, was also challenged on his ability to "follow

along with the intricacies of what [the prosecutor] anticipate[d would] be a lengthy jury charge."

The trial court occupied a much better position than this Court, on review of the transcript, to see, observe, and gauge the words, reactions, and other "non-verbals" of Jurors Irvis, Jones, and Seme when they answered the questions propounded by the court and the prosecutor. "Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference." *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840. Our Supreme Court has held that an equivocal response of hesitancy in answering a question is a valid race-neutral ground to justify a peremptory challenge. *State v. Robinson*, 346 N.C. 586, 598, 488 S.E.2d 174, 182 (1997). Further, "a prospective juror's difficulty in understanding instructions, and oral responses which differ from responses written on the jury questionnaire, are race-neutral." *Id.* (citation omitted).

Defendant asserts purposeful discrimination was established based upon the prosecutor's acceptance of a white juror, Juror Staton, who had a three-year-old DWI conviction. The United States Supreme Court has stated that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v. Dretke*, 545 U.S. 231, 241, 162 L. Ed. 2d 196, 214 (2005).

However, the distinguishing factor between Juror Staton's three-year old DWI conviction and Juror Seme's pending DWI charge is that Juror Staton responded affirmatively when asked whether he had been to court either as a plaintiff or a defendant in a civil or criminal case and provided all of the details of his conviction. Jurors Irvis and Seme failed to respond when asked and the information only came to the court's attention when the prosecutor presented the information from other criminal court files. The prosecutor's race-neutral basis for striking Jurors Irvis and Seme was not solely due to their criminal records, but also on their failure to disclose their records when specifically asked.

The State provided sufficient race-neutral grounds to justify the peremptory striking of the potential black jurors. Defendant has failed to show the trial court was "clearly erroneous" in its ruling. *Fair*, 354 N.C. at 140, 557 S.E.2d at 509-10. Defendant's *Batson* challenge was properly denied. This assignment of error is overruled. Defendant's remaining sixteen assignments of error not briefed or argued are deemed abandoned. See N.C.R. App. P. 28(b)(6) (2008).

V. Conclusion

The trial court's findings of fact supported its conclusion of law that defendant's Fifth Amendment rights had not been violated. The trial court properly denied defendant's two motions to suppress.

Because the State provided sufficient race-neutral grounds to justify the use of peremptory challenges to strike three potential

black jurors from the venire, the trial court properly denied defendant's *Batson* challenge. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued. We affirm the trial court's denial of defendant's motions to suppress and find no error in the jury selection process, the jury's verdict, or the judgment entered thereon.

Affirmed in Part and No Error in Part.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).