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NO. COA09-1596

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

TARRANCE KAVON WILLIAMS

Guilford County
No. 06 CRS 24690
08 CRS 110130-31

Appeal by defendant from judgment entered 21 April 2009 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STEELMAN, Judge.

Defendant's right to be present in person at every stage of trial was waived by his counsel's failure to object when the trial court made its intention to address the jury outside of defendant's presence clear. Even if this waiver had not occurred, the trial court's actions constituted harmless error.

I. Factual and Procedural Background

At approximately 8:30 p.m. on 7 December 2008 Tyrone Cobb (Cobb), Lawrence Watkins (Watkins), and Katina Allen (Allen) were working at the Sav-A-Lot store. Cobb heard a rustling sound at a back door, the door opened and three men entered, one carrying a

knife. The men announced that they were robbing the store. Cobb fled the store, and drove his car around the parking lot while calling the police on his cell phone. Watkins briefly fought with one of the intruders before they exited the store. The man who entered the store with a knife came towards Allen, and pointed the knife towards her stomach and told her not to move. While Allen was being held at knife-point, Watkins approached and told the man not to hurt anyone. The man with the knife ran to the front of the store and exited with the other two men. Shortly after the robbery Tarrance Williams (defendant) was arrested at a nearby park. Defendant was identified as being one of the men involved in the attempted robbery.

On 20 January 2009, a bill of indictment was returned by the Guilford County Grand Jury against defendant for attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. On 21 April 2009, a jury found defendant guilty of both felonies. The trial court consolidated the two offenses for judgment and sentenced defendant to an active term of 84 to 110 months imprisonment. This sentence was to run consecutively to a sentence of 29 to 44 months imposed when defendant admitted violating the terms and conditions of his probation arising out of prior convictions for conspiracy to commit robbery with a dangerous weapon and felonious larceny.

Defendant appealed the judgment based upon the two jury verdicts.

II. Trial Judge's Entry in Jury Room During Deliberations

In his only argument brought forward in his brief, defendant contends that the trial judge committed reversible error by entering the jury room during deliberations to release them for a lunch recess, collecting the verdict sheets, and giving the jurors instructions concerning their conduct during the recess without the defendant being present. We disagree.

At lunchtime on 21 April 2009, both counsel were present in the courtroom, but defendant was not present. The court announced:

THE COURT: I'm just going to step into the jury room and take the verdict sheet and send them to lunch unless you want me to bring them back in the courtroom.

MR. WOOD: No, Your Honor.
(Prosecutor)

THE COURT: All right. We're going to be in recess until two o'clock.

Let the record reflect that the Court has excused the jurors and admonished them on the instructions to abide by and not to discuss the case or enter into any type deliberations.

"Under both the federal and North Carolina constitutions a criminal defendant has the right to be confronted by the witnesses against him and to be present in person at every stage of the trial." *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (citation omitted). It was error for the trial court to go to the jury room and give instructions to the jury outside of the presence of the defendant. *State v. Payne*, 320 N.C. 138, 357

S.E.2d 612 (1987). "In a non-capital case counsel may waive defendant's right to be present through failure to assert it just as he may waive defendant's right to exclude inadmissible evidence by failing to object." *Braswell*, 312 N.C. at 559, 324 S.E.2d at 246. Defendant's counsel was present when the trial court made its intention to instruct the jury outside of the presence of defendant and defendant's counsel clear; however, defendant's counsel did not object and thereby waived defendant's right to be present at every stage of trial.

In *State v. Braswell*, the North Carolina Supreme Court held that the defendant waived his right to be present at every stage of trial when his counsel was present for the *voir dire* of a witness and failed to object to the defendant's absence. 312 N.C. at 558-559, 324 S.E.2d at 245-246. In *State v. Christian*, the defendant was held to have waived his right to be present at every stage of the trial when neither the defendant nor his counsel objected to the defendant's removal from the courtroom when a juror had requested the defendant's removal prior to discussing her request to be dismissed. 150 N.C. App. 77, 80-81, 562 S.E.2d 568, 571 (2002), *cert. denied*, 356 N.C. 168, 568 S.E.2d 618 (2002). Defendant's counsel in the instant case similarly waived defendant's right to be present when the trial judge instructed the jury in the jury room.

Even assuming *arguendo* that no waiver occurred, the error by the trial court was harmless beyond a reasonable doubt. "Every violation of a constitutional right is not prejudicial. Some

constitutional errors are deemed harmless in the setting of the particular case, . . . where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." *Payne*, 320 N.C. at 140, 357 S.E.2d at 612-613 (1987) (quotation and citation omitted). In *State v. Gay* the North Carolina Supreme Court found harmless error where the trial judge informed the parties that he was going to instruct the prospective jurors they were on break under his prior instructions. 334 N.C. 467, 482, 434 S.E.2d 840, 848 (1993). The Court emphasized the fact that "the record affirmatively reveal[ed] exactly what the trial court intended to say to the prospective jurors." *Id.* In the instant case, the trial court stated on the record "the Court has excused the jurors and admonished them on the instructions to abide by and not to discuss the case or enter into any type of deliberations." This clear statement on the record of what occurred in defendant's absence allows this "appellate court [to] declare a belief that [the trial court's actions were] harmless beyond a reasonable doubt." *Payne*, 320 N.C. at 140, 357 S.E.2d at 613.

Defendant does not argue his remaining assignments of error and they are deemed abandoned. N.C.R. App. P. 28(b)(6).

NO ERROR.

Judges STEPHENS and HUNTER, JR., ROBERT N. concur.

Report per rule 30(e).