NO. COA09-20

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v. Gaston County
No. 05 CRS 57404

MARK EDWARD JONES

Appeal by defendant from judgment entered 25 April 2008 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 16 June 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Tiare B. Smiley, for the State.

Charlotte Gail Blake for defendant-appellant.

BRYANT, Judge.

Defendant Mark Jones appeals from a judgment entered against him for second-degree murder in Gaston County Superior Court. For the reasons stated herein, we find no error in the judgment of the trial court.

Facts

On 2 May 2005, the Gaston County grand jury returned an indictment against defendant for the first-degree murder of Johnny Boone. The case came on for trial on 14 April 2008.

During the examination of the State's first witness, the trial court noted that one of the jurors appeared to be inattentive and

responded by instructing the entire jury on its duty to pay attention to the evidence. Before defendant began his cross-examination of the State's second witness, the trial court again addressed its concern by interviewing the juror while the remaining members of the jury had been excused. In response to questions about whether he was impaired by medication, the juror responded, "I think I'm all right. I've been taking notes and keeping up with this testimony, what's going on." In response to more questions about his ability to concentrate, the juror said, "I don't think it's going to bother me, no. I'm doing the best I can." Defendant requested that the trial court replace the juror with the alternate, but the trial court declined to do so.

The State's evidence tended to show that two of defendant's employees, Mark Carter and Anthony Horton, spent the evening of 16 April 2005 doing cocaine and drinking with defendant, defendant's wife — Mrs. Jones, and the victim. Horton testified that sometime that evening, without the victim being aware of it, defendant held a .38 to the back of the victim's head and said, "two years ago I'd have done it." Defendant believed that the victim had stolen cocaine from him.

Early in the morning of 17 April 2005, police responded to a breaking and entering call at defendant's home. Defendant and Mrs. Jones believed that an intruder was in the attic. Two officers searched the entire house, including the attic, and did not find anyone. Officers also found no sign of forced entry.

On 18 April 2005, Mrs. Jones called police a second time to report an intruder in the home. When officers responded, they heard sporadic gun fire inside the home. Officers surrounded the home for nearly an hour before defendant dropped his gun and officers took him into custody. Defendant again claimed that there was an intruder in the house, but officers searched the home a second time and found no one.

Officers did find a trash can in the living room that contained sheetrock that had fallen from the ceiling. There were also bleached white marks on the floors, and a cleaning bucket. In a back bedroom, officers found shell casings from .38 caliber bullets, a bulletproof vest, and a mirror with a white substance on it.

After officers took defendant to the jail, he waived his *Miranda* rights and made a statement. Defendant initially claimed that he was having difficulties with a couple of his employees, and that two men, including the victim, broke into his house and spent the night in the attic. Later, defendant claimed to have heard noises coming from his attic. When he went to investigate, defendant shot the victim after the victim jumped toward him. Defendant claimed the victim fell through the ceiling from the attic and the two men then ran out of the house.

The Tuesday following the incident, defendant told Mr. Carter that they, "wouldn't have to worry about [the victim] no more because [I] killed him and got rid of the body." A hunter found the victim's body on private property in South Carolina. The body

had been decapitated, dismembered, disemboweled, and partially burned.

At the close of the evidence, the trial court denied defendant's motion to dismiss the first-degree murder charge. The jury found defendant guilty of second-degree murder. Defendant did not present any evidence at sentencing, but requested the trial court to find several mitigating factors and sentence him in the mitigated range. The trial court did not make findings in mitigation and imposed a sentence in the presumptive range of 157 to 198 months in the custody of the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant contends (I) the trial court abused its discretion when it denied his request to remove an allegedly inattentive juror after the jury had been impaneled, and (II) the trial court abused its discretion when it imposed a sentence in the presumptive range in spite of his request for a sentence in the mitigated range.

I

Defendant first contends the trial court abused its discretion in denying his request to remove a juror based on an allegation that the juror was inattentive. We disagree.

"[A]fter a jury has been impaneled, further challenge of a juror is a matter within the trial judge's discretion." *State v. McLamb*, 313 N.C. 572, 576, 330 S.E.2d 476, 479 (1985). "A ruling committed to a trial court's discretion is to be upset only upon a

showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Here, after the initial allegation that the juror was inattentive, the trial court re-instructed the jury on its duty to pay close attention to all the evidence. A short time later, the trial court conducted an examination of the juror individually.

> Court: Have you – I don't want to put you on the spot and embarrass you, but I need to find out if you've been paying attention to the testimony, or --
>
> Juror: You want to check my notes?
>
> Court: No, sir. I don't want to do that.
>
> Juror: I'm not being sarcastic, but I do have notes of what is going on, and my eyes don't open very wide.
>
> . . .
>
> I think I'm all right. I've been taking notes and keeping up with this testimony, what's going on.

Based on the juror's responses, the trial court determined that he was paying attention. We hold that the trial court acted properly in investigating its concern about an inattentive juror and that it properly exercised its discretion in allowing the juror to remain on the jury. Accordingly, this assignment of error is overruled.

II

Defendant's second contention is that the trial court abused its discretion in sentencing defendant in the presumptive range despite his request that it make findings of facts in mitigation. We disagree.

"Although the trial court must consider evidence of aggravating or mitigating factors, it is within the court's discretion whether to depart from the presumptive range." *State v. Brown*, 146 N.C. App. 590, 594, 553 S.E.2d 428, 430 (2001); *see also* N.C. Gen. Stat. § 15A-1340.16(a) and (b) (2007). "Additionally, the court is required to make findings of mitigating factors only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." *Streeter*, 146 N.C. App. at 594, 553 S.E.2d at 431 (citation and internal quotations omitted).

Here, the trial court properly sentenced defendant to a term within the presumptive range for his prior record level and class of offense without making any findings of aggravating or mitigating factors. Defendant did not offer any evidence at sentencing, beyond the contentions of counsel, to support his request for findings in mitigation. *See State v. Jones*, 309 N.C. 214, 221, 306 S.E.2d 451, 456 (1983)(arguments of counsel at sentencing are not evidence). Accordingly, we decline to find that the trial court abused its discretion by imposing a term in the presumptive range.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).