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NO. COA10-547

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v.

Durham County
No. 05 CRS 058018

RODERICK JEROME WOOTEN,
Defendant.

Appeal by defendant from judgment entered 29 September 2009 by Judge Paul Gessner in Durham County Superior Court. Heard in the Court of Appeals 28 October 2010.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State.

Parish & Cooke, by *James R. Parish for defendant-appellant.*

THIGPEN, Judge.

A jury found Roderick Jerome Wooten ("defendant") guilty of first degree murder on 29 September 2009. On appeal, defendant raises two issues: (1) whether the trial court committed plain error by failing to intervene when the prosecution asked a witness if they had offered to take a polygraph test; and (2) whether the trial court abused its discretion by denying defendant's motion for a mistrial. After careful review, we hold that there was no error in the jury's verdict.

BACKGROUND

The State's evidence at trial tended to show the following. In late November 2005, Jason Harrington and Erika Daniels drove to a store to use a phone to order some pizza. Erika, five and a half months pregnant at the time, stayed in the car while Jason went inside to use the phone. From inside the car, Erika heard "a lot of commotion" from inside the store; and a few seconds later, Jason ran out as defendant chased him with a knife. Defendant shouted repeatedly that he "was going to kill" Jason. Erika got out of the car and tried to intervene as defendant continued to chase Jason in the vicinity of the parked car. Defendant eventually re-entered the store, and Erika and Jason quickly walked toward Erika's house nearby.

Defendant exited the store and began to follow Erika and Jason, but he eventually took a different route away from the couple. Jason and Erika arrived at her home, and they stood outside talking about the incident. As the couple spoke, they noticed defendant walking up the street toward them with a gun in his hand. Erika immediately ran toward defendant to stop him, and Jason fled from the scene. Erika pleaded with defendant to leave Jason alone. After a few moments of discussion, defendant said, "The only reason why I don't kill him is because you here, I know this is your apartment." Even though defendant agreed to abandon his current threat, he warned Erika, "[Y]ou better stay the f**k away from him, because the next time I see him I'm going to kill him." Erika's mother came out of the house to see what was happening, and Erika told her to call the police. As Erika's

mother left to go find a phone, one of defendant's friends approached the house in a car, and defendant jumped in the car and left. During the incident, defendant told Erika that the reason he wanted to harm Jason was because defendant did not like Jason's cousin, Tony.

Approximately two weeks later, on the morning of 9 December 2005, Jason accompanied Erika on the bus as she was going to work. Jason got off the bus at a stop on University Drive in Durham, North Carolina. Later the same afternoon, Jason was seen by Harry Royster on Scout Drive, not far from the University Drive bus stop. Harry was parked on Scout Drive cleaning out his car and preparing to offer rides to residents in the neighborhood for cash; Harry had known Jason for several years. At trial, Harry offered the following testimony:

> A[:] As I was straighte[n]ing up my car, someone -- I found out later to be Jason, opened up my rear passenger door, and when I turned around, he yelled out, "Hurry up, drive off, someone is trying to shoot me."
>
> When I turned around, there was someone in front of my car with a gun. He walked to the side of my car and fired three shots at Jason. Jason pulled himself up, the shots knocked him down, and Jason pulled himself up saying that, "You got me, you got me." The guy said nothing, but fired two more shots, and then walked away.

Harry testified the shooter appeared calm and collected, and after shooting Jason, the shooter continued walking toward Piedmont Street. Harry described the shooter as wearing a black-hooded sweatshirt with black pants and dreadlocked hair. Shortly after

Jason was shot, Harry flagged down a police officer passing by on the street.

The shooting was witnessed by Phyllis Jennings. On the day Jason was shot, Phyllis was in the area of Scout Drive behind a house on Enterprise Street. From Phyllis's vantage point, she could clearly see Harry's car:

> A[:] I saw [defendant] walking down -- down Piedmont. It's a little -- you can see straight through to the next street, and he walked down Piedmont. He made a left onto Scout Drive, came upon a vehicle, started shooting inside of the vehicle through the driver's side of the car. Then he approached -- [defendant] approached the front of the car and started shooting Jason Harrington.
>
> Q[:] Now, were you able to clearly see that it was this person, [defendant], as he got closer to that vehicle?
>
> A[:] Yes.
>
> . . . .
>
> Q[:] What happened after you saw the defendant shoot the window out of the car?
>
> A[:] He left. He started walking. It's a house that blocks -- once you pass this house, I couldn't see which way that he went, but he walked back up the street.
>
> Q[:] Up what street?
>
> A[:] Back up Piedmont.

Defendant fled to New York following the shooting. After he was apprehended on 29 June 2006, he was transported to North Carolina to await trial for first degree murder. From May 2008 to July 2008, defendant was incarcerated with Brandon Parker. At trial, Brandon recounted the following conversation with defendant:

> Q[:] What did [defendant] say to you about what he did?
>
> A[:] He asked me from that point was I going to tell on him, you know what I'm saying, and from that point I didn't say anything, so I just --
>
> Q[:] Did he say anything to you about what he had done, about who he shot? What did he say?
>
> A[:] That -- well, it started when he told me that he was accused of killing somebody name Jason, which I knew of, didn't know him personally, just knew of him. Supposedly he supposed to had -- somebody supposed to set him up to get robbed.
>
> Q[:] Did he indicate to you that he had killed Jason?
>
> A[:] Yeah, he said it.
>
> Q[:] Did he tell you how?
>
> A[:] He actually admitted. He just said -- what he told me if he ever saw him in a situation or a place he would kill him. He didn't say I -- I mean he didn't tell me the street or the place, I mean he actually admitted to me he killed the boy.

Defendant also asked Brandon if he would be willing to kill the district attorney in charge of defendant's prosecution. Brandon declined, and after he left defendant in his room, he wrote a letter to the district attorney's office warning them of the threat:

> Q[:] Okay. And what did you say in the letter?
>
> A[:] . . . I told her that she was being threatened to be killed. . . . From that point they had brought me to the D.A.'s office, and from that point I was investigated by Jeremiah Davis.

. . . .

> Q[:] Did you offer to take a polygraph test based on what you were told?
>
> A[:] Yes, ma'am, I did.

The jury convicted defendant of first degree murder on 29 September 2009, and judgment was entered the same day sentencing defendant to life in prison without parole. Defendant gave notice of appeal in open court, and raises two issues for this Court: (1) whether the trial court committed plain error by allowing the prosecutor to ask if Brandon had offered to take a polygraph test; and (2) whether the trial court erred by denying defendant's motion for a mistrial during the State's closing argument.

ANALYSIS

I.

Defendant argues the trial court committed plain error by allowing the State to ask, during direct examination, whether Brandon had offered to take a polygraph test. We do not agree.

A. Standard of Review

As a general rule, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned

is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

Under plain error review, a defendant must prove "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (quotations and citation omitted), *cert. denied*, __ U.S. __, 175 L. Ed. 2d 362 (2009). "Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.'" *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (2004) (citation omitted). "In determining whether the error rises to plain error, the appellate court examines the entire record and decides whether the 'error had a probable impact on the jury's finding of guilt.'" *State v. McLean*, __ N.C. App. __, __, 695 S.E.2d 813, 815 (2010) (citation omitted).

B. Polygraph Tests

It is well-established that "in North Carolina, polygraph evidence is no longer admissible in any trial. This is so even though the parties stipulate to its admissibility." *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). However, "[w]hile the results of a polygraph test are inadmissible in North Carolina, not every reference to a polygraph test necessarily results in prejudicial error." *State v. Hutchings*, 139 N.C. App. 184, 189, 533 S.E.2d 258, 261 (2000). "[T]he mere mention of

polygraph testing does not necessitate appellate relief." *State v. Mitchell*, 328 N.C. 705, 711, 403 S.E.2d 287, 291 (1991).

In this case, defendant claims our Supreme Court's decisions in *State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988) and *State v. Mitchell* are distinguishable. In *Harris*, the prosecutor elicited the following testimony from an investigator:

> Q. Did you have any further conversation with [defendant] or Neil that night?
>
> A. Yes, sir. I asked both of them if they would agree to take a – polygraph test.
>
> MR. ASHTON: Objection.
>
> COURT: Sustained.

Id. at 125, 371 S.E.2d at 697. In holding that this inquiry regarding a potential polygraph test did not require reversal, our Supreme Court noted that the question appeared to be "neutral" and that the trial court properly instructed the jury "not to attach any significance" to the line of questioning. *Id.* at 125-26, 371 S.E.2d at 697-98. In *Mitchell*, our Supreme Court held that the prosecutor's line of questioning regarding a polygraph test performed during the investigation was not plain error:

> In the instant case, there was no mention of the results of Karen Jones' polygraph test, which was done for investigative purposes. Also, the trial court's inquiry of Karen Jones seems to have been an attempt by the trial judge to establish a time frame as to when certain acts occurred. This Court held in *Grier* that polygraph evidence is no longer admissible in any trial; however, the rule does not affect the use of the polygraph for investigatory purposes. The limited testimony concerning the investigatory polygraph of Karen Jones, even if erroneously admitted, did not affect the jury verdict.

Mitchell, 328 N.C. at 711, 403 S.E.2d at 291 (citation omitted).

Contrary to defendant's characterization of the line of questioning at issue in this case, the record shows that the testimony offered by Brandon at trial regarding whether he offered to take a polygraph test is similar to the testimony held to be non-prejudicial in *Harris* and *Mitchell*:

> Q[:] Jeremiah Davis interrogated you?
>
> A[:] Yes, ma'am.
>
> Q[:] And asked you about it?
>
> A[:] Yes, ma'am.
>
> Q[:] Did you offer to take a polygraph test based on what you were told?
>
> A[:] Yes, ma'am, I did.

Like the line of questioning in *Harris* and *Mitchell*, it is apparent these questions were neutral in nature and no test results were offered. Moreover, this line of questioning was completely unrelated to defendant's jailhouse confession. Rather, Brandon offered to take a polygraph test with respect to his allegations that defendant had threatened the district attorney. In light of the other overwhelming, unchallenged evidence in the record that defendant indeed shot Jason Harrington, it is unlikely the jury would have reached a different result absent this testimony under our standard of review. This assignment of error is overruled.

II.

Defendant contends the trial court erred by denying defendant's motion for a mistrial in response to the prosecutor's

comments that defendant did not have to testify, put on evidence, or call any witnesses. We do not agree.

A. Standard of Review

"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 mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict." *Harris*, 323 N.C. at 125, 371 S.E.2d at 697. "Abuse of discretion exists when the challenged actions are manifestly unsupported by reason." *Barnes v. Wells*, 165 N.C. App. 575, 580, 599 S.E.2d 585, 589 (2004) (citation and quotation marks omitted).

B. Motion for Mistrial

"Ordinarily a prosecutor's reference to the failure of the defendant to testify or to offer evidence in his defense is cured by the trial court's promptly instructing the jury not to consider it." *State v. Williams*, 305 N.C. 656, 675, 292 S.E.2d 243, 255 (1982). "A mistrial should be granted 'only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict[.]'" *State v. Suggs*, 117 N.C. App. 654, 660, 453 S.E.2d 211, 215 (1995) (citation omitted). Where the trial court provides a curative instruction in the face of improper conduct by counsel, the denial of a motion for mistrial is prejudicial error only where the "transgression [was] so gross and

[its] effect so highly prejudicial that no curative instruction [would] suffice to remove the adverse impression from the minds of the jurors." *State v. Britt*, 288 N.C. 699, 713, 220 S.E.2d 283, 292 (1975).

During the prosecution's closing argument to the jury, the prosecutor made the following statement: "The defense, they don't have to testify, they don't have to put on any evidence, they don't have to call any witnesses, but it's important for you to know that they can." Defense counsel immediately moved for a mistrial, and the trial court dismissed the jury from the courtroom to hear the motion. In denying defense counsel's motion for a mistrial, the trial court gave detailed curative instructions to the jury. The trial court informed the jury that "[i]t is improper for the State to argue or make any kind of reference or inference with respect to whether evidence is offered by the defense. . . . I'm going to order that you are to disregard any argument made to you by the State as I have just described. . . . I'm ordering that you disregard those improper statements and not allow it to affect your decision in any way." The trial court then had all the jury members raise their hands to show that they understood and could follow the trial court's curative instruction.

"Jurors are presumed to follow the trial court's instructions." *State v. McNeil*, 350 N.C. 657, 689, 518 S.E.2d 486, 506 (1999). In this case, the trial court's curative instruction in response to an isolated improper statement was sufficient to ensure defendant received a fair and impartial verdict. The jury

indicated their ability to follow the trial court's instruction by a show of hands, and defendant adduces no other evidence from the record showing that the jury was improperly influenced. Thus, the trial court did not abuse its discretion by denying defendant's motion for a mistrial. This assignment of error is overruled.

No error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).