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NO. COA10-81

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

Durham County
No. 04 CRS 48779

MARIO PIER FORTUNE

Appeal by Defendant from judgment entered 3 February 2009 by Judge Orlando F. Hudson in Superior Court, Durham County. Heard in the Court of Appeals 1 September 2010.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant-Appellant.

McGEE, Judge.

Mario Pier Fortune (Defendant) was indicted on 16 August 2004 for the murder of Reginald Johnson. Defendant was convicted on 3 February 2009 and sentenced to life imprisonment without parole. Defendant was given credit for 1,716 days spent in confinement prior to his date of conviction.

I. Factual Background

Reginald Johnson was shot by multiple attackers on 6 May 2004 while standing in a driveway between two apartment buildings in Durham. Reginald Johnson died as a result of the multiple shots.

The area where the shooting occurred was considered by two rival street gangs to be neutral territory. At the scene, Officers recovered shell casings from at least three different guns.

Officers of the Durham Police Department were investigating an unrelated crime on 19 May 2004. The officers detained Defendant, Tyrone Dean (Mr. Dean), Phillipe Parker (Mr. Parker), and Joshua Johnson. Durham Police Sergeant Jack Cates (Sgt. Cates) interviewed Mr. Parker, who told Sgt. Cates that he and several others had been present when Reginald Johnson was shot. Mr. Parker described the kinds of weapons involved in the shooting, named the persons who carried the weapons, and said where the persons were located during the shooting. Defendant, Mr. Dean, Joshua Johnson, and Deshaun Mitchell (Mr. Mitchell), were charged with the murder of Reginald Johnson.

A warrant for the arrest of Defendant for the murder of Reginald Johnson was issued on 24 May 2004 and Defendant was indicted for the murder on 16 August 2004. The record next shows that the State filed a motion on 24 May 2006 to join for trial the cases of Joshua Johnson, Mr. Mitchell, Mr. Dean, and Defendant. In a response filed 21 August 2006, Defendant opposed the State's motion and requested an order denying the State's motion to join his trial with that of the other defendants. The record does not reflect a ruling on the State's motion nor on Defendant's response. On 15 September 2006, Defendant filed a motion for continuance of his case, which had been calendared for trial on 18 September 2006. The record also does not reflect a ruling on Defendant's motion to

continue.

The record includes a letter from Defendant's counsel, Rosemary Godwin (Ms. Godwin) to Assistant District Attorney David Saacks (Mr. Saacks), dated 19 October 2006 [R42] in which, Ms. Godwin stated that she had been informed that "we are looking at either a February 12th or 19th, 2007 trial date for my client and his co-defendants." Ms. Godwin then informed Mr. Saacks that she would be in a homicide trial scheduled to last three to four weeks, starting 8 January 2007, followed by a capital trial scheduled to last six weeks, starting 19 February 2007. Ms. Godwin ended the letter by expressing a desire to resolve the calendaring issues. Again, the record does not reflect the resolution of this matter.

The trial of Mr. Dean for the first-degree murder of Reginald Johnson began 21 October 2006. In pre-trial motions at the beginning of Mr. Dean's trial, Mr. Saacks announced that "[w]e originally had a motion for joinder. . . ., the State is withdrawing that motion. . . . We're just going to try these one at a time." The jury could not reach a decision in Mr. Dean's trial, and he was re-tried and convicted of first-degree murder in July 2007.

The record next shows an order filed 9 January 2008 allowing Ms. Godwin to withdraw as counsel for Defendant. In an order filed 5 February 2008, Defendant was appointed new counsel.

The trial of Joshua Johnson for the first-degree murder of Reginald Johnson was scheduled for 13 October 2008, and he pled guilty to second-degree murder on 14 October 2008. Defendant filed

a motion to dismiss on 7 October 2008, based on a violation of his Sixth Amendment right to a speedy trial. The State filed a response to Defendant's motion on 27 October 2008. The trial court conducted a hearing on Defendant's motion on 13 January 2009. An order was entered on 4 February 2009, after Defendant's conviction, denying Defendant's motion to dismiss. Defendant's trial for the first-degree murder of Reginald Johnson began 27 January 2009, and Defendant was found guilty of first-degree murder. Defendant appeals.

II. Defendant's Speedy Trial Motion

Defendant first argues that the trial court erred in denying his motion to dismiss for violation of his state and federal constitutional right to a speedy trial. Defendant contends that the "more than four and a half year delay between charge and trial date was inordinately long, [and] presumptively prejudicial." The State counters that the length of time was due in part to calendaring conflicts, as well as Defendant's own actions.

In *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), the United States Supreme Court established a four-part test for determining whether a defendant's right to a speedy trial had been denied. The *Barker* test involves an analysis of the following four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Id.* at 530, 33 L. Ed. 2d at 117. Our Court also applies the *Barker* test to determine whether there has been a violation of a defendant's rights under the North

Carolina constitution. *State v. Bare*, 77 N.C. App. 516, 519, 335 S.E.2d 748, 750 (1985).

A. Length of Delay

Defendant was arrested in May 2004 and his trial began on 27 January 2009. By the time the trial court entered judgment against Defendant on 3 February 2009, he had been in custody for 1,716 days. Thus, the period of time elapsing between Defendant's arrest and his trial was over 1,700 days, or approximately four-and-a-half years. "Although we do not approve of such a long delay, we do not determine the right to a speedy trial by the calendar alone, but must weigh the length of the delay in relation to the three remaining factors." *State v. Wright*, 290 N.C. 45, 51, 224 S.E.2d 624, 628 (1976). In *Doggett v. United States*, 505 U.S. 647, 120 L. Ed. 2d 520 (1992), the United States Supreme Court noted that there is no clear amount of time which becomes prejudicial, but that as the length of the delay approaches one year, an inquiry into the remaining factors of the *Barker* test becomes appropriate. *Id.* at 652, n.1, 120 L. Ed. 2d at 528, n.1. Thus, in the present case, the four-and-a-half year time period is well over the one-year limit required to trigger an examination of the remaining factors in the *Barker* test. *Id.*

B. Reason for Delay

"The defendant has the burden of showing that the reason for the delay was the neglect or willfulness of the prosecution." *State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994); see also *State v. Lundy*, 135 N.C. App. 13, 20, 519 S.E.2d 73, 79-80

(1999) (explaining the defendant's burden to show neglect or willfulness causing delay of 1,332 days between arrest and trial). In the present case, Defendant did not present evidence concerning the reasons for the delay. Rather, Defendant simply asserted in his motion to dismiss that "all of the scheduling and docket control rests with the State[,] " and argued that the delay was caused by the State rather than by Defendant. The State presented the following evidence concerning the reason for the delay in Defendant's trial. The State moved to join the cases against all co-defendants on 24 May 2006. However, Defendant filed a motion in opposition to joinder for trial. The State also presented a motion filed by Defendant on 15 September 2006, stating that the case was "calendared for Court on Monday, September 18, 2006[,] " and requesting a continuance for an unspecified time due to conflicts in the defense counsel's schedule. The State also produced a letter from Defendant's former attorney, Ms. Godwin, dated 19 October 2006, stating that she had been informed that "we are looking at a February 12th or 19th, 2007 trial date for my client and his co-defendants." Ms. Godwin stated in her letter that she had a trial scheduled to last three to four weeks starting 8 January 2007, and another trial starting 19 February 2007, scheduled to last six weeks. The record does not reveal the resolution to this scheduling conflict. The trial court entered an order dated 9 January 2008, allowing Ms. Godwin to withdraw as counsel of record. Attorney Chris Shella was appointed as Defendant's trial counsel on 5 February 2008. Defendant's trial began three months

after Defendant filed his 7 October 2008 speedy trial motion to dismiss.

The record shows that Mr. Dean, the first of Defendant's co-defendants to be tried, was tried on 21 October 2006, but the jury could not reach a decision. Mr. Dean was re-tried in July 2007 and was convicted of the first-degree murder of Reginald Johnson. Josuha Johnson was scheduled for trial on 13 October 2008, and he pled guilty to second-degree murder on 14 October 2008. Defendant has failed to show that the delay was caused by the State's willfulness or neglect in prosecuting Defendant. The State also presented evidence indicating that the delay resulted, at least in some part, from Defendant's actions opposing joinder and seeking continuances.

C. Defendant's Assertion of His Right

Defendant first filed a motion to dismiss asserting his right to a speedy trial on 7 October 2008. Further, Defendant opposed joinder of his case with that of the other co-defendants, and such joinder would have hastened Defendant's trial. While a "[d]efendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, [it] does weigh against his contention that he has been denied his constitutional right to a speedy trial." *State v. Flowers*, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997). In *Barker*, the United States Supreme Court discussed a defendant's assertion of his right to a speedy trial as follows:

We have already discussed the third factor, the defendant's responsibility to assert his

right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531-32, 33 L. Ed. 2d at 117-18.

D. Prejudice

According to the United States Supreme Court in *Barker*, the right to a speedy trial is designed

(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id. at 532, 33 L. Ed. 2d at 118. Our "Supreme Court has nonetheless stated that evidence of an oppressive pretrial incarceration is an important consideration in our analysis." *State v. Washington*, 192 N.C. App. 277, 292, 665 S.E.2d 799, 809 (2008) (citing *Webster*, 337 N.C. at 681, 447 S.E.2d at 352). "[T]ime spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118.

Defendant spent more than four and a half years in jail awaiting trial, clearly an oppressive length of time to await a trial. However, "evidence of a lengthy pretrial incarceration, standing alone, may be insufficient to establish that a defendant's right to a speedy trial has been violated." *Washington*, 192 N.C. App. at 292, 655 S.E.2d at 809. We must consider all of the *Barker* factors together.

Defendant contends that he suffered particularized prejudice from the delay in his case. Specifically, Defendant points to the testimony of two witnesses and contends that their statements at trial reflected "changed memories." Defendant contends that the testimony of one witness at his trial differed from the testimony that same witness gave at the trial of Mr. Dean. Defendant asserts that changed memories are "[e]ven more prejudicial than faded memories[.]" Defendant cites no authority for this contention and, given that our review of the transcript reveals that Defendant was able to cross-examine these witnesses thoroughly on this very subject, we find Defendant's argument to be without merit.

E. Analysis

We must therefore balance the following factors: (1) the four and a half years of Defendant's pre-trial incarceration; (2) Defendant's failure to prove that the delay was caused by the State's willful or negligent prosecution; (3) Defendant's filing of a request for a speedy trial only three months before his trial began; (4) Defendant's opposition to the State's motion to consolidate his trial with the trials of his former co-defendants,

which led to the requirement that his co-defendants be tried sequentially; (5) Defendant's motion to continue his trial and the scheduling conflicts experienced by his first attorney; and (6) Defendant's failure to show that his defense was impaired as a result of the delay. Although a period of four and one half years between arrest and trial is excessively lengthy, in light of the remaining factors of the *Barker* test, we hold that Defendant's right to a speedy trial was not violated.

III. Hearsay

Defendant next argues that the trial court erred by admitting the pre-trial statement of Anthony Douglas (Mr. Douglas) without redacting portions of the statement, which Defendant contends were hearsay. Defendant argues he preserved this issue for review by objecting to the admission of the statement of Mr. Douglas, offered as State's Exhibit 9, which shall be referred to herein as "Exhibit 9." The State contends that Defendant failed to preserve his objection to Exhibit 9 by failing to object to its publication to the jury. We note that Defendant's argument before the trial court focused on a portion of Exhibit 9 that recounted a statement made by a person identified as "Trina." On appeal, Defendant's argument focuses on portions of Exhibit 9 recounting statements made by a person identified as "Little Rick."

"Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Further,

" '[i]n a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant must specifically object to the incompetent portions.'" *State v. Benson*, 331 N.C. 537, 548, 417 S.E.2d 756, 763 (1992) (citation omitted).

When the State moved to admit Exhibit 9 into evidence, Defendant objected as follows:

Your Honor, my objection to the statement is the same as my objection to the prior statement. They are statements of another party, a Trina who's not going to be testifying who we cannot confront who's being offered - - it's one page of a statement. It's simply everything that she said to him.

The State countered that "this was part of [Mr. Douglas'] statement in the investigation. It shows corroboration, and it also . . . corroborates his testimony here." The trial court overruled Defendant's objection.

The State continued its direct examination of Mr. Douglas, which elicited no statements regarding "Trina" or "Little Rick." Likewise, Defendant's cross-examination of Mr. Douglas elicited no testimony regarding "Trina," her statements to Mr. Douglas, or "Little Rick." Upon conclusion of the examination of Mr. Douglas, the State moved to publish Exhibit 9 to the jury, along with two other exhibits. Defendant again objected, arguing

[t]he problem is, Judge, that the copies of one of the documents is the same that I objected to on best evidence. It's not copies of what's in evidence. It's a copy of the one that was not admitted. I want them to put a copy of the one that was admitted in evidence.

Defendant stated: "Actually, on one of the other documents, Exhibit

9. Actually, I have the original here, Judge. It's his statement, but it's basically him recanting [sic] what a third party said." After further discussion, the State clarified that it intended to make photocopies of one of the exhibits, but requested to publish "the other two copies . . . [Exhibits] One and 9." However, Defendant continued,

at this point, Judge, now that I've questioned him about that - - I questioned him, I don't have the same objection. So I have no problem with this one being shown to the jury. My only problem is the copy of this actually needs to be the one actually in evidence.

Thus, Defendant did object to the admissibility of Exhibit 9 on the grounds that the statements of "Trina" were hearsay. However, later, when the State moved to publish Exhibit 9 to the jury, Defendant clearly stated, "I have no problem with this one being shown to the jury." Defendant did not renew his previous objection, nor did he argue that Exhibit 9 should be redacted. Likewise, Defendant did not argue that the direct and cross-examinations of Mr. Douglas did not elicit testimony which was corroborated by the challenged portions of Exhibit 9, because Mr. Douglas never testified about what "Trina" or "Little Rick" told him. Thus, because Exhibit 9 was "admitted over objection, and the same evidence . . . [was] later admitted without objection, the benefit of the objection is lost." *Whitley*, 311 N.C. at 661, 319 S.E.2d at 588.

Further, Defendant's objection at trial was directed to statements by "Trina" who did not testify and could not be confronted by Defendant. On appeal, Defendant challenges a portion

of Exhibit 9 detailing statements made to Mr. Douglas by "Little Rick." Defendant argues that the statements of "Little Rick" were not corroborative of any of Mr. Douglas' testimony. However, "[i]n a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant must specifically object to the incompetent portions." *Benson*, 331 N.C. at 548, 417 S.E.2d at 763 (citation omitted). Though Defendant did object to the portion of Exhibit 9 concerning "Trina" and assuming *arguendo* he did not waive this objection, his argument on appeal is focused on the portions of Exhibit 9 concerning "Little Rick." There was no motion before the trial court to redact Exhibit 9 regarding the statements of "Little Rick." Because Defendant did not object to the publication of Exhibit 9 to the jury, despite the fact that certain portions of Exhibit 9 did not corroborate Mr. Douglas' testimony and because Defendant's argument on appeal concerns a separate portion of Exhibit 9 than was the focus of Defendant's one objection made at trial, we hold that Defendant did not preserve this issue for appeal.

Defendant has failed to properly preserve for appeal his challenge to the admission of Exhibit 9. Defendant has not argued plain error, and we therefore decline to consider this argument. *See State v. Martin*, 191 N.C. App. 462, 471, 665 S.E.2d 471, 477 (2008) ("[The] defendant failed to object at trial and has not specifically argued that the trial court committed plain error. Under such circumstances, this Court will not review whether the

alleged error rises to the level of plain error.").

No error.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).