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NO. COA10-841

NORTH CAROLINA COURT OF APPEALS

Filed: 1 March 2011

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 07 CRS 60435, 08 CRS 8912

SHAMAN RAMAR GRAHAM

Appeal by defendant from judgment entered 10 March 2010 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 11 January 2011.

Attorney General Roy Cooper, by Assistant Attorney General Teresa L. Townsend, for the State.

Charlotte Gail Blake for defendant-appellant.

BRYANT, Judge.

Where there was no error, let alone prejudicial error in witness testimony, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Facts

On 17 October 2007, Winston-Salem police officers executed a search warrant at the home where defendant Shaman Ramar Graham resided with his girlfriend, Kelia Brim, and her mother and children. Defendant was not at the home when the search was conducted, but officers arrested him on an unrelated warrant later that day when he returned home. Officers found nothing in the

home, but noticed a car in the yard which was identified by Ms. Brim as belonging to defendant. After his arrest, officers found keys to the car on his person. Officers then searched the car and found cocaine, clear bags, razor blades and a digital scale in the glove compartment.

Defendant was indicted for possession of cocaine with intent to sell or deliver, possession of marijuana, possession of drug paraphernalia and for having attained the status of habitual felon. The cases were tried at the 15 September 2008 criminal session of Forsyth County Superior Court. Trial began 17 September 2008, but defendant did not return for the second day of trial. As a result, after instructing the jury, the trial court ordered his arrest. At the close of the State's evidence, the trial court dismissed the possession of marijuana charge. In defendant's absence, the jury returned guilty verdicts on the possession of cocaine with intent to sell or deliver and possession of drug paraphernalia charges and, at a separate hearing, found defendant had attained the status of habitual felon. Defendant was arrested in February 2010 and brought before the trial court for sentencing on 10 March 2010. The trial court consolidated the convictions and sentenced defendant to 120 to 153 months in prison. Defendant appeals.

On appeal, defendant argues the trial court committed reversible error in denying his motion for a mistrial after the State referred to his invocation of his constitutional right to remain silent following his arrest. We disagree.

Analysis

The standard of review from denial of a motion for mistrial is well-established:

The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing by the defendant that the court abused its discretion. *See State v. Upchurch*, 332 N.C. 439, 453, 421 S.E.2d 577, 585 (1992); *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986). Such a showing is made only where the trial court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *Barts*, 316 N.C. at 682, 343 S.E.2d at 839. A trial court should grant a defendant's motion for mistrial only when there are improprieties in the trial so fundamental that they substantially and irreparably prejudice the defendant's case, making it impossible for the defendant to receive a fair and impartial verdict. *See State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991); *see also* N.C. Gen. Stat. § 15A-1061 (1999) (requiring a showing of "substantial and irreparable prejudice to the defendant's case" in order to grant a mistrial).

State v. Diehl, 147 N.C. App. 646, 650, 557 S.E.2d 152, 155 (2001).

Further,

[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(b) (2009).

A criminal defendant is entitled to remain silent under both the United States and North Carolina constitutions. *State v. Ward*, 354 N.C. 231, 250, 555 S.E.2d 251, 264 (2001), *cert. denied*, 359 N.C. 197, 605 S.E.2d 472 (2004).

[W]hen a defendant exercises his right to silence, it 'shall not create any presumption against him,' N.C.G.S. § 8-54 (1999), and any comment by counsel on a defendant's failure to testify is improper and is violative of his Fifth Amendment right Nevertheless, a comment implicating a defendant's right to remain silent, although erroneous, is not invariably prejudicial. Indeed, such error will not earn the defendant a new trial if, after examining the entire record, this Court determines that the error was harmless beyond a reasonable doubt.

Id. at 250-51, 555 S.E.2d at 264-65. In assessing possible error or prejudice, we note that, "[g]enerally, when a trial court properly instructs jurors to disregard incompetent or objectionable evidence, any error in the admission of the evidence is cured." *Diehl*, 147 N.C. App. at 650, 557 S.E.2d at 155.

Here, Detective Melly supervised the execution of the search warrant and testified at trial. The State asked her if she had spoken to defendant following his arrest. Defendant objected, but the court overruled the objection and allowed Det. Melly to answer. The detective stated that she had "attempted to [talk to defendant], I asked him, which is protocol really, if he wanted an opportunity to tell his side of the story, and he invoked his right" At this point, the trial court interrupted Det. Melly and sent the jury from the room. The trial court acknowledged that it was inappropriate for a witness to comment on a defendant's decision to remain silent or request counsel. Defendant moved for a mistrial. The trial court denied the motion, stating that it had stopped the witness's answer before she could finish her sentence and, thus, defendant had not been prejudiced. The trial court then

called the jury back into the courtroom and gave the following curative instruction:

All right, Ladies and Gentlemen, we are ready to continue. You can disregard any testimony about what happened down at the jail, as it doesn't appear that has anything to do with this. So we will move on. Go ahead.

We conclude there was no error, let alone prejudicial error, in Det. Melly's testimony because she did not actually comment on defendant's right to remain silent. The transcript reveals that Det. Melly did not utter the words "right to remain silent." Rather, she only mentioned that defendant "invoked his right . . ." before being cut off by the trial court. In addition, the trial court instructed the jury to disregard that portion of Det. Melly's testimony, which cures any error. *See Diehl*, 147 N.C. App. at 650, 557 S.E.2d at 155.

Even were we to construe Det. Melly's testimony as a comment implicating a defendant's right to remain silent, we see no prejudice to defendant. After examining the entire record, we believe that any error in the denial of defendant's motion for mistrial was harmless beyond a reasonable doubt. The evidence of defendant's guilt was overwhelming. Defendant was found guilty of possession of cocaine with intent to sell or deliver and possession of drug paraphernalia. The evidence tended to show that cocaine and paraphernalia associated with the sale of cocaine were found in the glove compartment of a car identified as belonging to defendant. At the time of his arrest, defendant had the keys to his car, as well as \$3,000.00 in cash, on his person, of which

\$100.00 was identified as money used in a controlled drug buy. Defendant's live-in girlfriend testified that defendant had sold drugs in the past. In light of this compelling evidence and in consideration of the entire record, we conclude that any error in the admission of the testimony of Det. Melly was harmless beyond a reasonable doubt. *Ward*, 354 N.C. at 251, 555 S.E.2d at 265 (citations omitted). In turn, because there was no error, much less prejudicial error in Det. Melly's testimony, the trial court did not abuse its discretion in denying defendant's motion for mistrial.

No error.

Judges MCGEE and BEASLEY concur.

Report per rule 30(e).