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NO. COA11-70
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 09 CRS 202619, 051554

TAWAUNN GRADY JACKSON

Appeal by defendant from judgments entered 19 January 2010 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 26 May 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Kimberly P. Hoppin for defendant.

ELMORE, Judge.

A jury found Tawaunn Grady Jackson (defendant) guilty of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and habitual felon. Defendant appeals the denial of his motion for a new jury. We conclude that the trial court properly denied the motion and that defendant received a trial free from error.

I. Background

After the guilt-innocence phase of defendant's trial, the trial judge sent the jury to the jury room and asked counsel to meet with him in chambers to discuss the sentencing procedure. Defendant remained in the courtroom with the court officers. While at the defense table, defendant lunged at the victim and attempted to strike him. Instead, he struck a Raleigh police officer who was attempting to intervene. Several other officers subdued defendant and attempted to handcuff him. Defendant resisted and "hurled profanity-laced epithets at the officers[.]" The trial judge heard the commotion, and, when he returned to the courtroom, he saw that both defense counsel tables were turned over, pitchers of water were thrown about the courtroom, and defendant was on the floor with four to six officers on top of him. Eventually, the officers subdued defendant using a taser, and he was handcuffed, shackled, and placed in a chair in the courtroom. While sitting in the chair, restrained, defendant "hocked and spat" on at least three Raleigh police officers without provocation.

The jury did not see any of this, but it could hear some of the commotion. However, the jury was not told about what transpired in the courtroom. The trial court did acknowledge

the disturbance, saying, "I guess you probably heard there was some disturbance in the courtroom while you were back in the jury room[.] I apologize for you having, while that occurred. However, I think like that happens sometimes in the court." One juror commented, "To hear everybody on the ground room back there is very frightening. I know to you guys it happens every once in awhile, but to us it hasn't[.]" The judge reassured the jurors about their safety, but he did have police escort them to their cars, though this was prompted at least in part by it being nighttime.

When defendant returned to court after the weekend, he wore an orange and white striped jumpsuit with handcuffs, shackles, and a spit guard. Outside the jury's presence, defendant objected to his restraints and jumpsuit, which objection the trial court overruled. When the jury returned, the trial court instructed the jurors not to hold defendant's appearance against him and not to consider his appearance during their deliberations. The trial court then asked the jurors about their ability and willingness to follow the instruction, and all twelve jurors responded that they understood and would not hold defendant's restraint or appearance against him or otherwise consider it in their deliberations.

Defendant asked the trial court to impanel a new jury to hear the habitual felon phase of the trial because the jurors' knowledge of defendant's outburst could affect their ability to act impartially. The trial court denied the motion. The State then presented its evidence for the habitual felon and aggravating factor portion of defendant's trial. The jury found defendant guilty of habitual felon and also found that the State had proven the aggravating factor - that he had willfully violated the conditions of his parole within the previous ten years - beyond a reasonable doubt. However, before this phase of the trial ended, defendant asked to leave the courtroom because of his appearance, which request the trial court granted.

The trial court determined that defendant had a prior record level of IV and sentenced him to a term of 167 to 210 months for conspiracy to commit robbery with a dangerous weapon and a term of 167 to 210 months for robbery with a dangerous weapon. The trial court ordered the sentences to run consecutively and gave defendant credit for 149 days spent in confinement.

II. Arguments

A. Request to Impanel a New Jury

Defendant first argues that the trial court erred by denying his request to impanel a new jury. We disagree.

"If defendant was prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain." *State v. Marino*, 96 N.C. App. 506, 507, 386 S.E.2d 72, 73 (1989). Furthermore, "[i]t is well established that arguments for a mistrial do not carry great weight when the grounds relied upon arise from a defendant's own misconduct." *State v. Perkins*, 181 N.C. App. 209, 223, 638 S.E.2d 591, 600 (2007). For example, in *Marino*, the trial court denied the defendant's motion for a mistrial after he had an "intemperate and profane outburst" while his mother was testifying for the defense. *Marino*, 96 N.C. App. at 507, 386 S.E.2d at 73. During this misconduct, the trial court excused the jury, but the jury did witness a portion of the misconduct. *Id.* Because any prejudice was the result of his own misconduct, we found no error. *Id.*

Here, the jury did not even witness defendant's outburst; the jury only heard it. Given that the jury in *Marino* witnessed the defendant's outburst and still he did not receive a new trial, we conclude that the trial court here properly denied

defendant's request for a new jury. Defendant cannot show prejudice because any prejudice was the result of his own misconduct.

B. Request for Substitute Counsel

Defendant argues that the trial court erred by denying his request for substitute counsel. Defendant argues that there was a complete breakdown in communication between himself and his trial counsel because of insufficient communication, possible disagreements in trial tactics, and defendant's request to leave the courtroom. We disagree.

We review a denial to have defense counsel removed for an abuse of discretion. *State v. Jones*, 357 N.C. 409, 413, 584 S.E.2d 751, 754 (2003) (citation omitted). "To obtain substitute counsel, a defendant must show 'good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict.'" *State v. Covington*, ___ N.C. App. ___, ___, 696 S.E.2d 183, 185 (2010) (quoting *State v. Sweezy*, 291 N.C. 366, 372, 230 S.E.2d 524, 529 (1976)).

Here, defendant cannot show the complete breakdown in communication that he alleges occurred. When expressing his

concern over the lack of communication between his attorney and himself, defendant stated, "He ain't really explained to me, I feel like I'm supposed to be explained, he ain't really explained to me." He also stated, "I can't make my decision because he like, he coming, he doing his job but at the same time he's like telling me so much." These statements, even when taken with defendant's request to leave the courtroom because he did not want to appear in court restrained and wearing an orange jumpsuit, do not demonstrate a complete breakdown of communication. In addition, defendant's apparent satisfaction with trial counsel's performance during the guilt-innocence phase of the trial and the low probability that any change in trial tactics would have wrought a different result in the habitual felon and sentencing phase of the trial, we hold that the trial court did not abuse its discretion by denying defendant's motion for substitute counsel.

C. Jury Instructions Referring to Co-Defendants

Defendant argues that the trial court erred by giving the following instruction regarding his co-defendants, who had both pled guilty to robbery with a dangerous weapon and conspiracy to

commit robbery with a dangerous weapon during the course of the trial:

The matters of the State of North Carolina versus Marcus Tyree Reed and Dashon Lamont McCullers are no longer for your consideration. You will not be required to decide those case[s].

You will not allow these developments to affect your deliberations in any way. Neither should it affect your decision in the case between the State of North Carolina and [defendant].

Defendant contends that the trial court should have permitted him, in closing argument, to consider the fact that "the parties who had committed these offenses pled guilty to the charges." We disagree.

Because defendant did not object to this instruction at trial we review it for plain error. See N.C.R. App. R. 10(a)(4) (2011). For this Court to find plain error, the error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

The clear rule is that neither a conviction, nor a guilty plea, nor a plea of *nolo contendere* by one defendant is competent as evidence of the guilt of a codefendant on the same charges. A defendant's guilt must be determined solely on the basis of the evidence presented against him, and it is improper to make reference to the

disposition of charges against a
codefendant.

State v. Campbell, 296 N.C. 394, 399, 250 S.E.2d 228, 230 (1979) (citation omitted). Here, defendant sought to have his guilt determined on the basis of his co-defendants' admitted guilt, not solely on the basis of the evidence presented against him. Under *Campbell*, no such inference is permitted. Accordingly, we conclude that the trial court did not commit error, plain or otherwise, by issuing the instruction in question.

D. Prior Record Level at Sentencing

Defendant argues that the trial court committed reversible error by sentencing defendant as a prior record level IV offender when the State did not present sufficient evidence to prove the existence of defendant's prior record points or level. We disagree.

We review this issue *de novo*. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2009). The State can prove a prior conviction using a copy of the court

record of the prior conviction. *Id.* § 1340.14(f)(2) (2009). However, “[i]n determining the prior record level, convictions used to establish a person’s status as an habitual felon shall not be used.” N.C. Gen. Stat. § 14-7.6 (2009).

Here, an assistant clerk with the Wake County Superior Court testified during the habitual felon phase of defendant’s trial. During the assistant clerk’s testimony, three sealed and certified copies of judgments bearing defendant’s name and birth date were admitted into evidence. The first judgment contained two convictions: (1) assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and (2) attempted armed robbery. The second judgment contained only one conviction, for possession with intent to sell or deliver marijuana. The third judgment contained three convictions: (1) common law robbery, (2) conspiracy to commit assault inflicting serious bodily injury, and (3) possession of a controlled substance in prison or jail.

Defendant’s sentencing sheet showed that the trial court found that defendant had a prior record level of IV by using one B2, C, or D felony conviction (6 points); one Class E, F, or G felony conviction (4 points); and one Class A1 or 1 misdemeanor conviction (1 point). The list of prior convictions on the

sentencing sheet shows one Class C felony (AWDWIKISI), one Class D felony (attempted robbery with a dangerous weapon), two Class G felonies (common law robbery and conspiracy to commit assault inflicting serious bodily injury), two Class I felonies (possession with intent to sell or deliver marijuana and possession of a controlled substance in jail), two Class A1 misdemeanors (two assaults on a female), and one Class 1 misdemeanor (possession of drug paraphernalia).

During the habitual felon sentencing charge, the trial court used three felonies: attempted robbery with a dangerous weapon, possession with intent to sell and deliver marijuana, and common law robbery. Because the trial court cannot use the same convictions to support a defendant's prior record level and habitual felon status, see N.C. Gen. Stat. § 14-7.6 (2009), the trial court could not have used those three felonies to calculate defendant's prior record level.

Thus, we can deduce that the trial court used the AWDWIKISI and conspiracy to commit assault inflicting serious injury

convictions to calculate defendant's prior record level.¹ Both of these convictions were proven by the assistant clerk's verification of the certified copies of the judgments. However, the State did not prove any of the misdemeanors because it offered no evidence as to any of defendant's prior misdemeanor convictions. Thus, the State proved only ten of the eleven prior record points awarded to defendant. However, this error would not change defendant's prior record level because a defendant with ten prior record level points is still considered a Level IV offender.

No error.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).

¹ The State, in its brief, observed that the trial court may have used the same felonies to determine habitual felon as to determine defendant's prior record level. Contrary to the State's assertion, we can discern which convictions the trial court used to support the habitual felon conviction and which convictions the trial court used to support the prior record level.