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NO. COA12-433
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 10 CRS 211443

CATRELL GEROME HOLLOWAY

Appeal by defendant from judgment entered 22 September 2011 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for the State.

Ryan McKaig, for defendant-appellant.

CALABRIA, Judge.

Gerome Holloway ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of attempted robbery with a firearm. We find no error.

I. Background

The State presented evidence that on 11 March 2010, at approximately 9:30 p.m. Felix Lopez ("Lopez") arrived at his

girlfriend's apartment complex. Two men approached him and told him to "give us what you have." Lopez threw a bag containing his work clothes and wallet at the men. When they demanded that he also empty his pockets, Lopez informed the men that he had no back pockets. Subsequently, defendant pointed a handgun at Lopez and Lopez fired his gun twice at defendant. Lopez called 911 and defendant was transported to the hospital for treatment of injuries he sustained to his left eye and the back of his neck.

Lopez identified defendant as the man who pointed a gun. Defendant was charged with and indicted for attempted robbery with a dangerous weapon. Although a transcript of his trial in Mecklenburg County Superior Court was prepared, jury selection was not recorded. However, during jury selection, after the trial court had excused the prospective jurors, defendant objected to the State's peremptory challenges. Defendant claimed that the State struck four jurors on the basis of race. On the record, defendant explained why he believed that the State did not have legitimate reasons to excuse the jurors. The trial court required the State to provide the reasons for excusing the four minorities. After the State's explanations,

the trial court determined that the State properly excused the jurors and overruled defendant's objection.

The jury returned a verdict finding defendant guilty of attempted robbery with a dangerous weapon. The trial court sentenced defendant to a minimum of 72 and a maximum of 96 months in the North Carolina Department of Correction. Defendant appeals.

Defendant argues that the trial court erred in determining that the State's peremptory challenges were justified by race-neutral reasons, and since they were not justified, they violated the equal protection rights of the defendant and the excluded jurors. We disagree.

II. Preserving a *Batson* Challenge

As an initial matter, the State argues that defendant never mentioned *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986) or the relevant legal standards required to sustain a *Batson* challenge. The State also argues that defendant simply asserted that the State struck jurors on the basis of race and then characterized the State's challenges but failed to offer a comparative analysis between jurors who were challenged and those who were not challenged. At trial, after the trial court excused the jurors and listened to defendant's challenges and

the State's responses, *Batson* was never mentioned. The trial court stated its decision, "All right. Court finds reasons articulated by the State with regard to race minorities, the challenge is non-sustained." Defendant contends that the context of the objections he presented at trial show "that a *Batson* challenge was the only possible challenge that could have been raised" and thus his *Batson* challenge was properly preserved, pursuant to N.C. R. App. P. 10(a)(1). For the purposes of defendant's appeal, we assume, *arguendo*, that he properly preserved a *Batson* challenge.

III. Recording Jury Selection

"Racial discrimination in the exercise of peremptory challenges is barred both by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and by Art. I, § 26 of the Constitution of North Carolina." *State v. Shelman*, 159 N.C. App. 300, 309, 584 S.E.2d 88, 95 (2003). To evaluate whether a prosecutor has violated the Equal Protection Clause by using a peremptory challenge we apply the Supreme Court's three-step process:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for

> striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Id. (citation omitted); *see Batson*, 476 U.S. at 96–98, 90 L.Ed.2d at 87–89. After the defendant makes a ***prima facie*** showing that jurors were excluded on grounds of race, the burden shifts to the State to "articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988). Once the State makes its showing, "the trial court must determine if the defendant has established purposeful discrimination. Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference." *Id.* at 254-55, 368 S.E.2d at 840.

In the instant case, after the prospective jurors left the courtroom the following took place:

> THE COURT: All right.
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> [DEFENSE COUNSEL]: Your Honor, the State of North Carolina has used five of its preemptory (sic) challenges at this time. Three of those were African-American. One was white, and then the other one was Hispanic. The African-Americans that have now been struck were: Ms. Kincaid. She was

asked a variety of questions in regards to whether she can be fair and follow the law, whether she can be impartial, whether there was any relationship she had with defense attorneys or anybody else that would tend to make her not be able to be fair and impartial, whether -- Mr. Graham asked Ms. Kincaid -- she expressed that she had, I believe, a 98-year-old mother, that there were some care concerns. Mr. Graham asked during the break that she call. She came back and reported that she did have somebody to look after her, and there wasn't [sic] any other questions asked with respect to that.

Ms. Kincaid was struck along with Mr. Morse (phonetic), the only white juror. That was during the first round of strikes. During the second round of strikes, Mr. Graham struck -- Mr. White wasn't asked any questions other than if he had -- before he was placed in the pool, whether or not he had had a cigarette with Mr. Holloway. Mr. White, in fact, during one of the breaks that he had prior to being placed on the jury or even being placed, said that he had done that. There weren't any questions asked of Mr. White about whether or not -- what was the substance of the conversation, whether or not he knew him at all, whether or not he would contend because he shared a cigarette with Mr. Holloway that -- and he was struck during that round.

Mr. Hosy (phonetic) was just struck. He was the sole juror struck from this particular panel. He did not – he was asked a variety of questions. He did not express any reservations about following the law, about being fair and impartial, about not being able to sit in judgment of Mr. Holloway or anybody else.

Now, at this time, Your Honor, there are

five strikes by the State in this case, over half of which have been African-American or which have been minorities. The fourth person the State struck was a Hispanic lady. There was not a degree of difficulty concerning language. She had a command of the English language, did not have any sort of conflicts at all.

As far as minority strikes, four out of five, but expressly with respect to African-Americans, three of the five, over half of the State's strikes have been African-American. I think the State has shown a pattern of using preemptory (sic) strikes on the basis of race. Thank you.

THE COURT: All right. Tell me why three African-Americans and one Hispanic lady weren't -- you will need to tell me the reasons that you excused the four minorities.

[THE STATE]: Your Honor, the Hispanic lady, Ms. Sorto (phonetic) was excused by the Court for cause.

THE COURT: That's correct. All right.

[DEFENSE COUNSEL]: It wasn't Ms. Sorto. It was Juror No. 9 which was excused. And that was –

THE CLERK: Susan Marsh.

[THE STATE]: Your Honor, the only Juror No. 9 that we have removed was Ms. Marsh.

THE COURT: Well, how about the three African-Americans?

[THE STATE]: In regard to –

[DEFENSE COUNSEL]: Your Honor, I apologize.

It was Julia Rodriguez which was the Hispanic juror that was struck.

THE COURT: What seat was she in?

THE CLERK: One.

THE COURT: One.

[THE STATE]: Your Honor, in regard to Ms. Rodriguez, who had occupied seat number one at one time, the State excused her because she had a 99-year-old mother with Alzheimer's, and she actually asked to be released.

In regard to Mr. White, who was also at one time Juror No. 1, the bailiffs had informed us over a break that Mr. White had advised the bailiff that he had a -- there was nothing mentioned about a cigarette. Mr. White had told the bailiff that he had a conversation with the defendant prior to court this morning outside of the courtroom. When Mr. White was called to the witness box and I asked him if there were any questions or areas that he felt like he needed to respond to or share with us at that time, his response was no. He did not volunteer that information to us on voir dire. But later on, upon my questioning him, he did admit that he had talked with the defendant prior to court. And that's why he was struck. He had also answered -- well, we have additional reasons if Your Honor needs to hear them.

In regard to Ms. Kincaid, she had also asked to be released in order to care for her mother. When I asked the group as a whole questions about the burden of proof and whether or not they understood that the State's burden was not proof beyond all doubt and whether or not they understood

> that this was not a fingerprint case and that it was not a scientific-evidence case, Ms. Kincaid did not respond at all. The other reason was that the defendant has had his grandmother here in the courtroom the entire time during jury selection. And we were concerned that Ms. Kincaid might be overly sympathetic in regard to her own mother's situation.
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> In regard to Mr. Hosy, of the two jurors that I've just been questioning, Ms. Hutton looked at me directly in the eye. Mr. Hosy did not have that same eye contact with me. He is, according to his questionnaire, a member of the clergy. He has advised us in his answer that one of his sons was the victim of a criminal assault. We know from his questionnaire that he has at least one child in the approximate age range as this defendant. We were concerned that he would be overly sympathetic in that regard. And we'd ask Your Honor to note that we have kept Ms. Morgan on the jury, who is also African-American.
>
> THE COURT: All right. Court finds reasons articulated by the State with regard to race minorities, the challenge is non-sustained.

At trial, the State responded to defendant's challenges and provided race-neutral reasons to the trial court. Since defendant appealed because he does not agree with the trial court, the issue for this Court to determine is whether we have enough information to assess the allegations of impropriety in the jury selection since jury selection was not recorded. According to *Shelman*, we do not. *Shelman*, 159 N.C. App. at 311,

584 S.E.2d at 96.

In North Carolina, a party "alleg[ing] impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury ***voir dire***" or any other documents that could reconstruct the relevant details of jury selection. ***Id***. The ***Shelman*** Court provided examples of relevant details of jury selection that are required: "the total number of potential jurors questioned by the prosecutor; their race or gender; the number or percent accepted; whether similarly situated prospective jurors received disparate treatment on the basis of race or gender; [or] whether the remarks to prospective jurors suggested any bias." 159 N.C. App. at 310, 584 S.E.2d at 96. Although there was a transcript of the trial court's discussion with defense counsel regarding the defendant's ***Batson*** claim, the ***Shelman*** Court determined that the transcript of a discussion was not "an adequate substitute for [the missing] factual details." ***Id***. at 310-11, 584 S.E.2d at 96. ***See also Jackson v. Housing Authority of High Point***, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988) ("[Counsel's statement] cannot serve as a substitute for record proof.... We hold that as a rule of practice, counsel who seek to rely upon an alleged impropriety in the jury selection process must

provide the reviewing court with the relevant portions of the transcript of the jury voir dire.").

Defendant contends that *Shelman* does not apply. In *Shelman*, the issue was whether the defendant made a *prima facie* showing that the prosecutor exercised peremptory challenges in a discriminatory manner by excusing black female jurors. 159 N.C. App. at 309, 584 S.E.2d at 95. However, in the instant case, since the trial court asked the State to provide race-neutral reasons for excusing four minorities prior to ruling on the initial matter of whether defendant met his *prima facie* showing, the question of whether defendant made his *prima facie* showing is moot. *State v. Wright*, 189 N.C. App. 346, 351, 658 S.E.2d 60, 63-64 (2008) (citation omitted) (When "the trial court requires the prosecutor to give his reasons without ruling on the question of a prima facie showing, the question of whether the defendant has made a prima facie showing becomes moot.").

In the instant case, the issue of whether or not defendant established a *prima facie* case is moot and we find the principles of *Shelman* do apply. *See id.* Without the details of the jury selection from a recording or any other documents in the record that could reconstruct the relevant details of jury selection, we cannot assess defendant's claim. Just as the

Court in *Shelman* was unable to review the details of jury selection, the instant case presents the same limitation because of the lack of a transcript of the jury *voir dire* and the absence of any other documents that could reconstruct the relevant details of jury selection.

Since this Court lacks adequate factual details that are necessary when defendant presents a *Batson* challenge, we cannot evaluate whether the State had legitimate reasons to strike the jurors in *this particular case*. *See Jackson*, 322 N.C. at 254, 368 S.E.2d at 840 (emphasis added) (The State is required to "articulate legitimate reasons which are clear and reasonably *specific and related to the particular case to be tried* which give a neutral explanation for challenging jurors of the cognizable group."). Although it appears that one African-American woman remained on the jury when it was impaneled, we have no information regarding the total number of potential jurors questioned by the prosecutor, the race of other jurors, whether other African-American jurors received disparate treatment on the basis of race, or whether the State made any remarks to prospective jurors that suggested bias. *See Shelman*, 159 N.C. App. at 310, 584 S.E.2d at 96. In addition, we have inadequate information to determine whether similarly situated

Caucasians were accepted as jurors. *State v. Smith*, 328 N.C. 99, 126, 40 S.E.2d 712, 727 (1991). The transcript of the trial court's discussion with defense counsel regarding defendant's *Batson* challenge is not an adequate substitute for these factual details. *Id*. Consequently, it is impossible to know whether the State's response to defendant's challenges were legitimate reasons to dismiss the jurors in this particular case.

Defendant relies on *Snyder v. Louisiana* to support his contention that juror Kincaid was improperly struck. 552 U.S. 472, 170 L. Ed. 2d 175 (2008). In *Snyder,* the Court determined that the prosecution's justification of a peremptory strike of an African-American juror based on his outside obligations failed the *Batson* test and indicated the State's discriminatory intent. *Id*. at 479-85, 170 L. Ed. 2d at ___. In evaluating the case, the *Snyder* Court considered the fact that the State failed to strike two Caucasian jurors who also expressed work or family obligations that could potentially affect their jury service. *Id*. at 484, 170 L. Ed. 2d __.

In the instant case, defendant contends that the State's reasons for dismissing juror Kincaid on the basis of family obligations are analogous to the situation in *Snyder*. Defendant asserts the State's reasons for dismissing Kincaid were not

justified and Kincaid should not have been excused because she articulated her responsibility and also confirmed that she could find alternative care for her mother during the trial. Contrasting the instant case to *Snyder*, we do not have any information regarding whether other jurors may have had similar family obligations, but were not struck by the State. Without a transcript including the details of jury selection, it is impossible to properly evaluate the jury selection and determine if juror Kincaid was struck for race-related reasons. *See Shelman*, 159 N.C. App. at 310, 584 S.E.2d at 96.

IV. Conclusion

Since the record fails to provide sufficiently detailed information to allow this Court to determine whether the potential jurors were peremptorily excluded for a racially discriminatory purpose, we are unable to effectively evaluate defendant's argument on appeal. We find no error.

No error.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).