NO. COA13-282
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Rutherford County
No. 11 CRS 50720, 50730

FLOYD LYNBIRD NORRIS JR.

Appeal by defendant from judgment entered 18 September 2012 by Judge James U. Downs in Rutherford County Superior Court. Heard in the Court of Appeals 27 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Law Offices of John R. Mills NPC, by John R. Mills, for defendant-appellant.

STEELMAN, Judge.

Where a witness' answer to a question posed by defense counsel was non-responsive, the trial court correctly sustained the State's objection. Where the same evidence was ultimately elicited in separate testimony, there was no prejudice to defendant. Where defendant did not make a *prima facie* showing of improper racial motivation in the State's excusal of a juror,

the trial court did not err in overruling defendant's objection. The temporary absence of the trial court during jury selection did not constitute structural error.

I. Factual and Procedural History

On 10 March 2011, Brian Adkins, a Rutherford County Deputy Sheriff, pulled over a vehicle occupied by Floyd Norris (defendant) and three other persons. When Adkins approached the vehicle, one of the passengers shot at him. Defendant was arrested and charged with attempted first-degree murder, conspiracy to commit murder, and assault on a law enforcement officer.

At jury selection, the State used a peremptory challenge to excuse prospective juror Rankins, the only African-American prospective juror under the age of twenty-five. The trial judge was not in the courtroom during the State's *voir dire* of Mr. Rankins. Defendant challenged the State's exercise of a peremptory challenge directed to juror Rankins pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986). The trial court found that defendant had not made out a *prima facie* case of discrimination under *Batson*, and overruled defendant's objection.

On 18 September 2012, defendant was convicted of attempted first-degree murder, conspiracy to commit murder, and assault on a law enforcement officer. The convictions were consolidated for judgment, and defendant was sentenced to an active term of imprisonment of 157 to 198 months.

Defendant appeals.

II. Cross-Examination

In his first argument, defendant contends that the trial court erred by precluding defendant from cross-examining a witness for the State concerning his status as a probationer at the time of the shooting. We disagree.

A. Standard of Review

"Because the manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, his control of the case will not be disturbed absent a manifest abuse of discretion." *State v. Demos*, 148 N.C. App. 343, 351, 559 S.E.2d 17, 22 (2002) (quoting *State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986)).

B. Analysis

During the trial, one of the other passengers in the vehicle, Latitus Corry, testified for the State. On cross-examination, defendant sought to impeach Corry with his prior

criminal record, pursuant to Rule 609 of the North Carolina Rules of Evidence. Defense counsel asked Corry:

> Q What, if anything, in the state of North Carolina have you been tried and convicted of that's a Class 2 misdemeanor or higher within the last ten years?
>
> A I was on juvenile probation before –
>
> MR. GREENWAY [Prosecutor]: Objection, Your Honor.
>
> THE COURT: Sustained.

Defendant contends that he was entitled to cross-examine Corry regarding his status as a probationer at the time of the shooting, for the purpose of impeaching his testimony.

Rule 609 of the North Carolina Rules of Evidence provides that, for the purpose of impeaching a witness, evidence that the witness committed a Class 2 misdemeanor or higher-level offense is admissible, provided that (1) no more than ten years has elapsed since the date of conviction or release, whichever is later; (2) evidence of a conviction is not admissible where the defendant has been pardoned; and (3) evidence of juvenile convictions is generally not admissible, except to attack the credibility of an adult who is not the defendant. N.C. R. Evid. 609. In the instant case, the question posed by defense counsel

was properly framed to elicit testimony concerning convictions which fell within the first part of Rule 609.

We first note that defense counsel never asked Corry about being on probation. Second, Corry's answer was non-responsive to the question asked. Corry was asked what he had "been tried and convicted of[.]" Corry responded with a statement that he had been "on juvenile probation before[.]" The State did not object to the question posed by defense counsel, but rather to an unresponsive answer by the witness. The trial court properly sustained the objection.

Even assuming *arguendo* that Corry's answer was somehow responsive to the question, defendant's argument still fails. Defendant contends that he was prejudiced by not being able to cross-examine Corry about his probationary status and his plea bargain. Even though the trial court sustained the State's objection, Corry testified that he was on juvenile probation. Corry further testified that, in exchange for an unsecured bond and dismissal of his charges, he had agreed to testify for the State against defendant.

The substance of the testimony that defendant contends was excluded was admitted. "It is well established that the admission of evidence without objection waives prior or

subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979); *see also State v. Augustine*, 359 N.C. 709, 720, 616 S.E.2d 515, 525 (2005).

The trial court did not abuse its discretion by sustaining the objection to a non-responsive answer.

This argument is without merit.

III. State's Exercise of Peremptory Challenge

In his second argument, defendant contends that the trial court erred by failing to hold a proper *Batson* hearing at the time that the State exercised a peremptory challenge directed to juror Rankins. We disagree.

A. Standard of Review

In reviewing a ruling relating to a *Batson* challenge, "the trial court's determination is given great deference because it is based primarily on evaluations of credibility. Such determinations will be upheld as long as the decision is not clearly erroneous." *State v. Fair,* 354 N.C. 131, 140, 557 S.E.2d 500, 509-510 (2001) (citations omitted). "When the trial court explicitly rules that a defendant failed to make out a *prima facie* case, review by this Court is limited to whether the trial

court's finding was error." *State v. Golphin*, 352 N.C. 364, 426, 533 S.E.2d 168, 211 (2000)

B. Analysis

When a defendant challenges the State's exercise of a peremptory challenge, and asserts that the basis for the challenge is an improper racial motivation, the trial court must conduct a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986).

> Our Supreme Court has construed *Batson* as outlining a "three-part test for determining whether the state impermissibly excluded a juror on the basis of race": (1) "the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge"; (2) "[i]f the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge[]"; and (3) "the trial court must decide whether the defendant has proved purposeful discrimination." *State v. Taylor*, 362 N.C. 514, 527, 669 S.E.2d 239, 254 (2008), *cert. denied*, --- U.S. ---, 175 L.Ed.2d 84, 130 S. Ct. 129 (2009).

State v. Headen, 206 N.C. App. 109, 114, 697 S.E.2d 407, 412 (2010).

After the jury was selected, defendant brought to the attention of the trial court that the State had excused juror

Rankins, who defendant contended was "the only African-American gentleman that was -- I would say under age 25[.]" The trial court noted first it was absent during the State's examination of juror Rankins. The trial court then stated that it understood the basis for the State's exercise of a peremptory challenge as to Rankins was Rankins' answer to a question "about whether or not he had some -- whether he was a fan of the police shows on television -- investigation shows. He said -- as I recall, he said he looked at a few of them but not many." The trial court concluded that this seemed to be a racially neutral basis for a challenge, and the State further remarked that "I have excused every other juror who gave that same exact answer[.]" The trial court further observed that "there is another African-American gentleman who is a member of the jury. So there has been no systematic inclusion of anybody because of their ethnic background."[1] The trial court overruled defendant's objection to the State's excusal of juror Rankins.

In the first step required in addressing a *Batson* challenge, the burden rests upon the defendant to make a *prima facie* showing that the exclusion of a juror was based upon race. In the instant case, defendant offered no evidence of racial

[1] It would appear that the trial court intended to say "systematic exclusion," rather than "systematic inclusion."

bias in jury selection, apart from the statement that Rankins was "the only African-American gentleman that was -- I would say under age 25[.]" But the trial court correctly observed that "there is another African-American gentleman who is a member of the jury." While discrimination on the basis of race is a proper basis for a *Batson* challenge, discrimination on the basis of age is not. *See Golphin*, 352 N.C. at 431-32, 533 S.E.2d at 214 (holding that the trial court did not err in concluding that exclusion of potential jurors due to age was race-neutral). In the absence of any other evidence of racial bias in the jury selection, we hold that the trial court correctly ruled that defendant failed to meet his burden of showing *prima facie* racial motivation in the State's exercise of a peremptory challenge as to juror Rankins. As defendant failed to make his required *prima facie* showing, the trial court was not required to consider the remaining elements of *Batson*, and properly overruled defendant's objection.

This argument is without merit.

IV. Trial Judge's Absence

In his third argument, defendant contends that the trial judge's absence from the courtroom during jury selection constituted structural error. We disagree.

In the instant case, the jury selection was not recorded. The burden of providing us with all necessary records to conduct meaningful appellate review falls upon the appellant. *See* N.C. R. App. P. 9. The only record we have of the trial court's absence is its own statement that "I was not present in the courtroom -- because I had to make a phone call to my office[.]"

We further note that defendant fails to cite substantial precedent for his argument that the judge's absence was "structural error." Defendant correctly cites to N.C. Gen. Stat. § 15A-1211(b), which requires judicial determination of "all challenges to the panel and all questions concerning the competency of jurors." This statute, however, merely requires a judicial resolution of challenges and questions, not active oversight of the entire juror selection process.

Defendant cites to our decision in *State v. Levya*, 181 N.C. App. 491, 640 S.E.2d 394 (2007), for the premise that it is error for the judge to excuse himself from jury selection. Defendant's reliance on this case is misplaced.

In *Levya*, the trial judge excused himself from the courtroom during jury selection, and authorized the parties to excuse jurors by stipulation, in violation of N.C. Gen. Stat. § 15A-1211. We held that defendant failed to show prejudice as a

result of this conduct. 181 N.C. App. at 495-96, 640 S.E.2d at 396-97.

Levya, unlike the instant case, concerned the trial court's abdication of its statutory responsibility to control the excusal of jurors. This duty, under N.C. Gen. Stat. § 15A-1211, rests exclusively with the trial court, and the parties may not excuse jurors by stipulation. The instant case does not concern the stipulated excusal of jurors, but merely the physical absence of the judge during a portion of the jury selection. *Levya* is not controlling or relevant to the instant case.

Defendant has offered no substantial precedent or authority to support his argument that the trial court erred in its absence for a portion of the jury selection.

This argument is without merit.

NO ERROR.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).