IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-84

Filed: 1 November 2016

Forsyth County, No. 12 CRS 55796

STATE OF NORTH CAROLINA

v.

CALVIN DENARD BROWN

Appeal by defendant from judgment entered 25 July 2014 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 23 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Nancy A. Vecchia, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

BRYANT, Judge.

Where the trial court did not err by failing to declare a mistrial after the jury indicated it was deadlocked and the trial court's *Allen* instruction was requested by defendant, we find no error. As to the requirement that defendant enroll in lifetime satellite-based monitoring, we remand for a hearing on reasonableness as mandated by the U.S. Supreme Court in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 459 (2015) (per curiam).

Defendant Calvin Denard Brown lived in Winston-Salem, North Carolina and was married. He did not live with his wife, but, three to four nights a week, defendant would stay with his wife, his stepdaughter Denise[1], and their two other children. Denise was eight years old when she met defendant and shortly thereafter began calling him "daddy" because he was like a father to her.

On 31 May 2012, Denise was fourteen years old and defendant was forty-one or forty-two years old when he confronted her about having pornography on her computer. She admitted that she had been watching it. Defendant said to her "so it seem like you ready to become a woman now." Denise denied this, and defendant said "okay let's go across the street to the church." Defendant told her mother they were going to the church to get her radio.

Defendant was the pastor of the church. He and Denise went into the pastor's study. Defendant said to her, "so you watching porn, it seems like you ready to become a woman now. . . . If anybody is going to f**k you it's going to be me." At the same time, defendant was kissing Denise's neck, rubbing her butt and vaginal area outside her clothing, and trying to unbuckle her belt. Denise kept moving his hand and asking him to stop. Defendant said, "[d]on't look at me as your dad. Look at me as a man," and "if you want a sexual experience, I'll give you a sexual experience." He also warned her about the dangers of having sex, including STDs and pregnancy. This

[1] A pseudonym will be used throughout for ease of reading and to protect the identity of the juvenile victim.

continued for about ten or fifteen minutes until defendant stopped when Denise's little brother entered the church.

On the walk back to the house, defendant warned Denise not to tell her mother what had happened and also told her not to lock her bedroom door that night. Denise's mother had Denise lock her bedroom door at night because previously defendant walked in on Denise while she was getting dressed. Once home, Denise's mother repeatedly asked her what was wrong the rest of the day, but Denise told her nothing as she was afraid.

The next morning, Denise told her mother about the pornography and defendant's response. When her mother confronted defendant, he admitted that he rubbed on Denise and kissed her on the neck, but that "he was just trying to scare her." When defendant realized the police had been called, he said "no, no," and ran out of the house.

On 8 October 2012, defendant was indicted on one count of taking indecent liberties with a child. The matter was called for trial at the 21 July 2014 session of Forsyth County Superior Court before the Honorable Susan Bray, Judge presiding. Two prior trials in September 2013 and April 2014 ended in mistrials.

After the close of all the evidence, the jury was given instructions that included the substantive charge of taking indecent liberties with a child. The jury retired to the jury room at 11:29 a.m. The trial court was alerted that the jury had a note at

12:32 p.m., which was marked as Court's Exhibit #1 and stated as follows: "Given the multiple components of the charge, what should we the jury find if we think the defendant touched [Denise] for purposes of discipline rather than arousal? We are a bit confused about our options." After discussions with the attorneys, the trial court reinstructed the jury on the charge of taking indecent liberties with a child, with no objection from defendant.

Thereafter, the jury deliberated for nearly three more hours. At 4:52 p.m., a second note was sent to the court saying, "We are deadlocked 7 to 5." After a brief inquiry by the trial court, which was limited to the jury's progress in reaching a verdict, the foreperson reported this had been the vote since 2:00 p.m. The trial court discussed with trial counsel its decision to give the jury an *Allen* charge and to ask the jury to resume deliberations in the morning. Defendant's counsel did not object to this decision, affirmatively stating that the decision was in the discretion of the court, nor did counsel make a motion for a mistrial.

The following morning, outside the presence of the jury, defendant's counsel requested that the trial court give a revised *Allen* charge, stating that the older version was too harsh. The trial court read the proposed instruction into the record, and defendant did not object. At 9:37 a.m., the court charged the jury as follows:

> Good morning, Members of the Jury. As we know, yesterday your foreperson . . . informed me that you had so far been unable to reach -- or to agree upon a verdict. You are reminded that it is your duty to do whatever you can to

> reach a verdict. You should reason the matter over together as reasonable men and women in an effort to reconcile your differences, if you can, without the surrender of conscientious conviction; but no juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict. I'll ask you now to resume your deliberations and continue your efforts to reach a verdict.

After receiving the revised *Allen* charge, the jury returned to the jury room to continue deliberations. At 11:43 a.m., the jury indicated they had reached a verdict. The jury found defendant guilty of one count of indecent liberties with a child.

The court found defendant to be a prior record level III for sentencing purposes and further found that the factors presented in aggravation outweighed the factors in mitigation. Defendant was sentenced to twenty-seven to forty-two months in prison. Following his conviction, the trial court conducted a hearing on the issue of satellite-based monitoring ("SBM"). The trial court found defendant was convicted of a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4). Defendant was ordered to enroll in lifetime SBM, and defendant's counsel made no objection.

On 1 August 2014, defendant filed a written notice of appeal. Defendant failed to serve the written notice of appeal upon the State and did not separately appeal the SBM order. On 4 March 2016, defendant filed concurrently his brief and a petition for writ of certiorari.

Petition for Writ of Certiorari

As defendant's notice of appeal did not include a certificate of service, and notice of appeal was not served on the State by trial counsel, we first address whether to issue a writ of certiorari to allow the appeal and permit review of both the judgment and the SBM order in Forsyth County case number 12 CRS 55796.

Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure provides that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1) (2015). Certiorari should be allowed "on a reasonable show of merits and that the ends of justice will be . . . promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E.2d 751, 751 (1924) (citations omitted); *see also Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (acknowledging this Court's authority to issue its writ of certiorari to cure a defective notice of appeal).

Here, trial counsel filed written notice of appeal on behalf of defendant; however, he inadvertently failed to serve the State with the notice of appeal as required by Rule 4(a)(2) of the N.C. Rules of Appellate Procedure. However, "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal . . . ." *Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993). "[T]he proper course of action to contest lack of service is for the

appellee to raise the issue of lack of service at the *trial court level*." *Hale v. Afro-Am. Arts Int'l, Inc.*, 110 N.C. App. 621, 625, 430 S.E.2d 457, 459 (Wynn, J., dissenting), *rev'd for reasons stated in dissenting opinion by* 335 N.C. 231, 436 S.E.2d 588 (1993).

In the instant case, the trial court determined that defendant had invoked appellate jurisdiction, and the State was subsequently served with numerous motions and orders extending time to prepare the transcript. The State also received additional notice of defendant's appeal when the proposed record was served. Thus, the State had an opportunity to object to the notice of appeal, but failed to do so. The State has also suffered no apparent prejudice by not being served with the original notice of appeal.

"[A] defect in a notice of appeal 'should not result in loss of the appeal as long as the intent to appeal . . . can be fairly inferred from the notice and the appellee is not misled by the mistake.' " *State v. Springle*, ___ N.C. App. ___, ___, 781 S.E.2d 518, 521 (2016) (quoting *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011)). As there is no indication that the State was misled by the defective notice, and as defendant's notice of appeal was defective "through no fault of his own," *see State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012), we grant certiorari to permit review of the judgment entered against defendant.

Defendant has submitted three issues for our review on his petition for writ of certiorari: (I) whether the trial court erred in failing to declare a mistrial; (II) whether, under the totality of the circumstances, the trial court's *Allen* charge coerced the jury to reach a unanimous verdict; and (III) whether this case requires a remand for a hearing on the reasonableness of imposing lifetime satellite-based monitoring on defendant. We address issues I and II together.

I & II

Defendant first argues the trial court erred in failing to declare a mistrial, instead giving the jury an *Allen* charge and requiring the jury to continue deliberations after it indicated it had been deadlocked at a vote of 7-5 for three hours. Specifically, defendant contends the *Allen* charge was unconstitutionally coercive. We disagree.

The decision to declare a mistrial for a deadlocked jury is reviewed for abuse of discretion. *See State v. Nobles*, 350 N.C. 483, 511, 515 S.E.2d 885, 902 (1999). "Abuse of discretion occurs only where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Gray*, 337 N.C. 772, 776, 448 S.E.2d 794, 797 (1994) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 526 (1988)). Further, "[w]here a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal." *State v. White*, 349 N.C. 535, 570, 508

S.E.2d 253, 275 (1998) (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)).

"In determining whether a trial court's actions are coercive . . . , we must analyze the trial court's actions in light of the totality of the circumstances facing the trial court at the time if acted." *State v. Patterson*, 332 N.C. 409, 415–16, 420 S.E.2d 98, 101 (1992) (citation omitted). Factors to be considered include the amount of time the jury has deliberated; the complexity of the evidence; the number of charges involved; the nature and content of questions by the court and responses by the jury; the numerical split of the vote; the passage of time since any juror changed stance; and the content and tone of the court's instructions to the jury. *See id.*; *see also State v. Beaver,* 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988) ("Some of the factors to be considered . . . in judging the totality of the circumstances are whether the court conveyed an impression to the jury that it was irritated with them for not reaching a verdict, whether the court intimated to the jury that it would hold them until they reached a verdict, and whether the court told the jury a retrial would burden the court system if the jury did not reach a verdict."); *State v. Summey*, 228 N.C. App. 730, 739–42, 746 S.E.2d 403, 410–12 (2013) (holding trial court's responses to jury's questions about whether they had to continue deliberations despite appearing to be deadlocked did not amount to improper coercion to return a verdict). A judge may declare a mistrial if "[i]t appears there is no reasonable probability of the jury's

agreement upon a verdict." N.C. Gen. Stat. § 15A-1063(2) (2015). "Our courts, however, have not adopted a bright-line rule setting an outside time-limit on jury deliberations, or a rule that deliberations for a certain length of time, in relation to the length of time spent by the State presenting its evidence, is too long." *State v. Baldwin*, 141 N.C. App. 596, 608, 540 S.E.2d 815, 823 (2000).

In *Baldwin*, the jury began its deliberations on one felony count of second-degree kidnapping at 12:29 p.m. *Id.* at 608, 540 S.E.2d at 824. At 4:05 p.m., the court received a note that the jury was at an impasse. *Id.* The trial court returned the jury to deliberate without further instruction. *Id.* The jury sent a second note of impasse at 8:40 p.m., after which the trial court gave them a break and, when they returned, gave an additional instruction, emphasizing that the jurors "should not surrender [their] honest convictions as to the weight or effect of the evidence solely because of the opinion of [their] fellow jurors or for the mere purpose of returning a verdict." *Id.* at 608–09, 540 S.E. 2d at 824. The jury finally reached a verdict at 11:04 p.m. *Id.* at 609, 540 S.E.2d at 924. In reviewing the trial court's statements and *Allen* instruction to the jury, this Court concluded in *Baldwin* that the trial court had not abused its discretion in failing to declare a mistrial. *Id.* Specifically, this Court found that "[t]he fact that jury was required to deliberate late on a Friday night was not dispositive on the issue of coercion[,]"the trial court's inquiry with the foreperson was limited to the

jury's progress, and the trial court never expressed frustration with the jury for failing to reach a unanimous verdict. *Id.* (citation omitted).

Similarly to the jury in *Baldwin*, here the jury became "deadlocked 7 to 5." Following further deliberations and a brief inquiry by the trial court, which, like the inquiry in *Baldwin*, was limited to the jury's progress in reaching a verdict, the foreperson indicated they had been at an impasse for almost three hours. Unlike the jury in *Baldwin*, however, which was held until 11:04 p.m., here, the jury was released at 5:06 p.m. and told to return the next morning. At that time they were given a revised *Allen* charge, practically identical to the one given in *Baldwin*. Furthermore, defendant did not object to the trial court's proposed *Allen* instruction, but rather defendant's attorney requested the revised *Allen* charge in the first place, stating the older version was too harsh and affirmatively approved the charge as proposed and given:

> THE COURT: All right, We're back, and I plan to send the jury in and then give them the Allen charge as we discussed yesterday.
>
> [Attorney for the State]: Yes, your Honor.
>
> THE COURT: Is there anything else we need to do before they come in?
>
> [Attorney for defendant]: I would like to ask one question just to be clear.
>
> THE COURT: Yes.

> [Attorney for defendant]: Is this the revised Allen Charge from several years ago? The old Allen charge was really harsh, and they revised it, and I just wanted to make sure we have the right one.
>
> THE COURT: Let me read the one that I have in my materials.
>
> [The trial court read the proposed *Allen* charge into the record].
>
> [Attorney for defendant]: That's it.

The jury returned to the courtroom at 9:37 a.m., and the trial court charged the jury with the revised *Allen* charge that had been proposed and approved by defendant's counsel. Neither counsel objected to the instruction. At 11:43 a.m., the jury indicated they had reached a verdict. Where, as here, defendant's counsel proposed the instruction to which defendant now objects on appeal, defendant's complaint will not be heard and the trial court did not abuse its discretion in giving the revised *Allen* charge. *See White*, 349 N.C. at 570, 508 S.E.2d at 275.

Defendant further argues that the trial court erred by requiring the jury to continue deliberations in the morning after deliberating for an afternoon while deadlocked. An alleged constitutional violation regarding a unanimous jury verdict to which there is no objection is reviewed for plain error. *State v. May*, 368 N.C. 112, 118–19, 772 S.E.2d 458, 462–63 (2015). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations omitted). "Under

the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

As stated previously, our Courts have specifically declined to adopt a bright-line rule as to how long a jury should be allowed to deliberate. *See Baldwin*, 141 N.C. App. at 608, 540 S.E.2d at 823. Thus, this Court's review must take into account the totality of the circumstances in order to determine if the trial court impermissibly coerced the jury into reaching a verdict and abused its discretion. *See Patterson*, 332 N.C. at 415–16, 420 S.E.2d at 101.

This Court has repeatedly upheld action by the trial court requiring continued deliberation even if the jury indicated it was having trouble reaching a verdict. *See State v. Blackwell*, 228 N.C. App. 439, 443–44, 747 S.E.2d 137, 141–42 (2013); *Baldwin*, 141 N.C. App. at 609, 540 S.E.2d at 824; *Patterson*, 332 N.C. at 416, 420 S.E.2d at 101. As the record reveals the trial court was respectful and courteous to the jury, expressed no irritation or frustration, did not require or threaten to require the jury to deliberate for an unreasonable length of time, the trial court did not intimidate or coerce the jury into reaching a verdict and requiring the jury to continue its deliberations did not constitute an abuse of discretion. Further, where defendant has not shown that the alleged error was "so prejudicial, so lacking in its elements that justice cannot have been done," *see Odom*, 307 N.C. at 660, 300 S.E.2d at 378,

we find no plain error. Therefore, defendant's argument that the jury verdict was the result of the trial court's coercion is without merit.

III

Lastly, defendant argues his case requires a remand for a hearing on the reasonableness of imposing lifetime SBM. We agree.

Generally, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). However, this rule does not apply where a constitutional challenge that did not exist under controlling North Carolina law at the time of a defendant's hearing becomes available due to a change in the law during the pendency of the direct appeal. *State v. Johnson*, 204 N.C. App. 259, 266, 693 S.E.2d 711, 716–17 (2010). "[N]ew rules of criminal procedure must be applied retroactively to 'all cases, state or federal, pending on direct review or not yet final.' " *State v. Zuniga*, 336 N.C. 508, 511, 444 S.E.2d 443, 445 (1994) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987)). North Carolina statutory law requires the same: "[W]here a retroactive application of a new standard is required, errors based upon that new standard 'may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.' " *Johnson*, 204 N.C. App. at 266, 693 S.E.2d at 717 (quoting N.C. Gen. Stat. § 15A-1446(d)(19)).

Defendant was sentenced on 24 July 2014, and at the time of the sentencing hearing, binding precedent held that SBM was a civil penalty beyond the reach of the Fourth Amendment. *See State v. Jones*, 231 N.C. App. 123, 127–28, 750 S.E.2d 883, 885–86 (2013); *State v. Martin*, 223 N.C. App. 507, 507–09, 735 S.E.2d 238, 238–39 (2012). However, on 30 March 2015, while defendant's case was still on direct appeal, the U.S. Supreme Court overturned controlling North Carolina precedent, holding that SBM "effects a Fourth Amendment search[]" and is subject to the Fourth Amendment's requirement of reasonableness. *See Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 462. *Grady* thus presented a stark change in constitutional law as North Carolina courts had previously interpreted it, and any Fourth Amendment objection at the time of defendant's sentencing would have been futile. *See State v. Hooker*, No. COA15-1175, 2016 WL 3584277, at *8 (N.C. Ct. App. July 5, 2016) (unpublished) (remanding for "new hearing in which the trial court shall determine if SBM is reasonable, based on the totality of the circumstances, as mandated by the Supreme Court of the United States in *Grady v. North Carolina*"); *see also State v. Whitley*, No. COA15-1246, 2016 WL 3584375, at *4 (N.C. Ct. App. July 5, 2016) (unpublished) (vacating trial court's imposition of SBM and remanding for further proceedings).

Accordingly, defendant is entitled to raise a constitutional challenge to the order subjecting him to lifetime satellite-based monitoring, despite his failure to raise the issue at the trial level below.

AFFIRMED IN PART; REMANDED IN PART.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).