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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1106

Filed: 6 August 2019

Forsyth County, No. 14CR050227

STATE OF NORTH CAROLINA

v.

AMANDA LILLY SIMMONS, Defendant.

Appeal by Defendant from Judgment entered 22 July 2015 by Judge Stanley L. Allen in Forsyth County Superior Court. Heard in the Court of Appeals 7 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General William Walton, for the State.

Daniel J. Dolan for Defendant-Appellant.

INMAN, Judge.

Amanda Lilly Simmons (“Defendant”) appeals from judgment entered following a jury verdict finding her guilty of driving while her license was revoked and of felony fleeing or eluding arrest with a motor vehicle. Defendant argues that (1) her constitutional right to a jury trial was violated when a juror slept through portions of the State’s evidence; (2) the trial court erred in denying her motion for

mistrial when an alternate juror was present in the jury room while the jury selected their foreperson; and (3) the trial court erred in ordering her to pay attorney's fees without affording her an opportunity to be heard. After careful review of the record and applicable law, we conclude Defendant has failed to demonstrate error regarding the jury verdict, but we remand for further proceedings on the issue of attorney's fees.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant was arrested, and later indicted, for driving with a revoked license and for felony fleeing or eluding arrest with a motor vehicle. On 20 July 2015, Defendant's case went to jury trial in Forsyth County Superior Court. Trial testimony tended to show the following:

On 7 January 2014, Forsyth County Sheriff's Deputy Preston Stringer ("Deputy Stringer") pulled over a blue SUV for a traffic violation. He approached the SUV and made contact with the driver, a white woman. Before he was able to ask for her identification and vehicle registration the driver "took off." Deputy Stringer and another officer pursued the vehicle, but they lost sight of it and found it abandoned in a ditch. A few hours later, Deputy Stringer traveled to the address of the registered owner of the SUV, where he encountered Defendant, whom he identified as the driver of the SUV. Defendant initially denied that she was the driver, but then began to cry and, when Deputy Stringer asked why she ran,

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responded that she “really didn’t have an excuse, she didn’t want to go back to jail.”

Deputy Stringer then arrested Defendant.

During Deputy Stringer’s testimony the State presented as evidence in-car video footage of the initial stop of the SUV and its subsequent flight.

After Deputy Stringer’s testimony the jury was excused and defense counsel told the court that “juror number nine . . . appear[ed] to be having tremendous trouble staying awake. It appeared she was nodding off through parts of the testimony and videotape.” Defense counsel added that he was “just concerned that [juror nine] be in a position to deliberate and recall all the evidence.” The court instructed the State to “[l]iven this up a little bit,” and the trial judge said he would “try to keep an eye on” juror nine. Defendant did not object to the trial court’s response to the juror issue or request that the court perform further inquiry.

At the close of evidence, the court excused jurors to retire to the jury room to select a foreperson. The court instructed them, “As soon as you do that let the bailiff know then we’ll take our morning recess and then you can come back and begin your deliberations. Do not begin your deliberations until you get the verdict forms.” At approximately 10:55 am, the jury returned to the courtroom. The trial court then excused the alternate juror and reminded the remaining jurors not to discuss the case until after the recess and after they had received the verdict form. The court recessed until 11:16 am, and the verdict form was delivered to the jury at 11:27 am.

Defendant moved for a mistrial because the alternate juror had been present in the jury room during deliberations. The court found that the alternate had been dismissed before the jury had begun deliberations and denied the motion.

The jury found Defendant guilty of driving with her license revoked and of felony fleeing or eluding arrest with a motor vehicle. The court asked defense counsel how much time had been spent on the case and ordered Defendant to pay attorney's fees in the amount of \$2,040. Defendant appeals.¹

II. ANALYSIS

A. Sleeping Juror

Defendant argues that a juror fell asleep during the presentation of critical evidence in her trial, thereby depriving her of her constitutional right to be tried before a jury. Because Defendant did not object to juror misconduct at trial and we find no violation of Defendant's right to trial by jury that would grant automatic right of appeal, this issue was not properly preserved for our review.

¹ Defendant has petitioned this court for a writ of certiorari. Defendant timely entered oral notice of appeal and requested the Appellate Defender be assigned to her appeal following the trial court's entry of judgment on 22 July 2015. The record on appeal was filed with this court on 30 October 2018, and Defendant filed her petition on 11 January 2019. However, notations on the superior court docket included in the record indicate that, due to an oversight, court documents were not sent to the office of the Appellate Defender until sometime in 2018. The State opposes Defendant's petition, but does not otherwise contest this Court's jurisdiction in its brief or by motion. In cases where a defendant has lost the right to appeal through no fault of their own and failure to issue a writ of certiorari would be manifestly unjust, we have exercised our discretion pursuant to Rule 21 of the Rules of Appellate Procedure to issue the writ and hear the defendant's case on its merits. *State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012). Likewise, to the extent that Defendant has failed to preserve her right to appeal, in the interest of justice we exercise our discretion to allow Defendant's petition and reach the merits of her case.

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Generally, a defendant's failure to object to an alleged error by the trial court precludes raising that issue on appeal. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). However, when the error violates a defendant's right to a trial by a jury of twelve persons, the issue is automatically maintained regardless of whether or not the defendant objected to it. *Id.*

Criminal defendants have a constitutional right to trial by jury. U.S. Const. Amend. VI & XIV; N.C. Const. Art. I, §§ 19 & 24; N.C. Gen. Stat. § 15A-1201(a) (2017) ("In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous."). In situations where fewer than twelve jurors are present for portions of a trial, the verdict is a nullity, automatically maintained for appellate review and constituting *per se* error requiring reversal.² See, e.g., *State v. Hudson* 280 N.C. 74, 78-79, 185 S.E.2d 189, 192 (1971) (examining *ex mero motu* the "fatal defect" of a court excusing an ill juror and defendant's waiver of trial by twelve). By contrast, assignments of error involving juror misconduct must be made before the trial court in order to be maintained for appeal. *State v. Najewicz*, 112 N.C. App. 280, 291, 436 S.E.2d 132, 139 (1993).

The question before us, then, is whether the fact that juror nine appeared to be "nodding off" during Deputy Stringer's testimony resulted in an improperly

² Pursuant to an amendment to our Constitution in 2014, Section 15A-1201 of our General Statutes now provides procedures by which a noncapital criminal defendant may waive his or her right to a jury trial in superior court. Once a jury trial has begun, however, a defendant is still guaranteed the right to be tried by a jury of twelve.

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constituted jury. This Court has previously held that a sleeping juror does not render a jury improperly constituted, meaning that objections thereto must be made at trial in order to preserve the issue for appeal.

In *State v. Williams*, during cross-examination of one of the State's witnesses, the transcript indicated the following exchange:

THE COURT: Will all the Jurors just stand up a minute, please? You can't go to sleep. (One juror had fallen asleep on the back row of the Jury Box.)

33 N.C. App. 397, 398, 235 S.E.2d 86, 87 (1977). The defendant did not object at trial to the court's handling of the sleeping juror, and we held the trial court's failure to order a mistrial on its own motion was not error. *Id.* We held that the jury was not improperly constituted because "[t]he 'sleeping juror' had been duly impaneled along with the other eleven and the twelve duly returned a verdict of guilty in open court. [The d]efendant, therefore, was convicted by a jury of twelve as required by law." *Id.*

Likewise, in *State v. Lee* the defendant argued that the trial court should have investigated and removed a sleeping juror *ex mero motu*. 189 N.C. App. 474, 481, 658 S.E.2d 294, 299 (2008). The trial court in that case received a note from a juror informing the court that "'Juror Number 12 has been asleep the whole trial almost.'" *Id.* at 481, 658 S.E.2d at 300. Through counsel, the defendant informed the court that

he wished to keep the juror and continue with the trial.³ *Id.* We held in that case that the defendant had waived his right to assign error on appeal. *Id.*

Allegations of error based on a sleeping juror, then, do not *per se* implicate a defendant's right to be tried before a jury of twelve and are not preserved automatically for appeal. As in *Williams*, a jury of twelve was duly impaneled, and the same jury of twelve returned a verdict of guilty and convicted Defendant in open court. 33 N.C. App. at 398, 235 S.E.2d at 87. Defendant did not object at trial to the sleeping juror, did not object based on juror misconduct or any other theory, and has therefore failed to maintain the issue for appeal.

B. Alternate Juror

Defendant also argues that the trial court erred by denying his motion for a mistrial when an alternate juror was present in the jury room while the jury selected their foreperson. We disagree.

Just as a jury composed of fewer than twelve persons is invalid, "the presence of an alternate juror in the jury room after a criminal case has been submitted to the regular panel of twelve is always error." *State v. Bindyke*, 288 N.C. 608, 623, 220 S.E.2d 521, 531 (1975). In *Bindyke*, our Supreme Court held that the mere presence

³ Unlike in *Lee*, Defendant in this case did not affirmatively state that he would like to keep the juror and continue with the trial. However, at no point did Defendant request an inquiry or otherwise object to how the trial court addressed the issue. Rule 10(a)(1) of our Rules of Appellate Procedure provides that a timely objection must be made to the trial court to preserve a question for appellate review, including questions of juror misconduct. *Najewicz*, 112 N.C. App. at 291, 436 S.E.2d at 139.

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of an alternate during jury discussions is a constitutional violation that requires a new trial. *Id.* at 627, 220 S.E.2d at 533. However, if the alternate's presence is inadvertent and momentary such that the trial judge believes it probable that the jury has not begun its consideration of the evidence, the court may recall the jury and inquire whether there has been any discussion of the case. *Id.* at 628-29, 220 S.E.2d at 534. If there has been no discussion, the alternate can be excused and the jury allowed to return to consider its verdict. *Id.* If there has been any discussion, the court must declare a mistrial. *Id.*

Unlike in *Bindyke*, in this case the jury was not excused with the alternate juror in order to begin deliberations. Instead the jury and alternate were excused for the express limited purpose of selecting a foreperson, and they were explicitly instructed not to begin deliberations. The jury returned to the courtroom after selecting a foreperson, the alternate juror was released, and the jury was again instructed by the trial court not to discuss the case until after a recess and after they had received the verdict form. Approximately thirty minutes after the alternate was released, the jury received the verdict sheet from the bailiff. After the verdict sheet was given to the jury, Defendant moved for a mistrial based upon the alternate juror having been in the jury room earlier. The trial court denied this motion, and made oral findings that jurors had been instructed "not to begin any deliberations until the

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foreperson was chosen” and that “deliberations did not begin until after the morning recess and after the alternate . . . had been excused.”

These facts are nearly identical to those in *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995).⁴ In *Jernigan* the trial court excused the jury, including an alternate juror, following jury instructions, telling them, “During this time I recommend you select a foreman but do not talk about the case itself.” 118 N.C. App. at 246, 455 S.E.2d at 167. The trial court then heard counsel regarding portions of the jury charge, called the jury back to the courtroom, and reinstructed them on a charge. *Id.* We held that *Bindyke*’s requirement that the court inquire as to whether deliberations had begun was inapplicable because the court had instructed the jury not to begin deliberations and, in the absence of any indication to the contrary, we must presume that jurors follow the instructions of the court. *Id.* at 247, 455 S.E.2d at 167-68 (citing *State v. Shrader*, 290 N.C. 253, 265, 225 S.E.2d 522, 530 (1976)).

We follow *Jernigan*’s holding that the presence of an alternate juror when jurors select a foreperson, and during a time when jurors are instructed not to begin deliberations, does not constitute error *per se*. *Id.* at 246-47, 455 S.E.2d at 167. In this context, the trial court is not required to perform the inquiry process outlined in

⁴ A procedural difference between *Jernigan* and this case is that in *Jernigan* the defendant did not move for a mistrial. However, the presence of an alternate juror during deliberations is an error affecting the defendant’s right to trial by jury and such errors are, as discussed *supra*, automatically preserved for appellate review. This distinction does not affect our analysis.

Bindyke. Accordingly, we hold that the trial court did not err in denying Defendant's motion for a mistrial.

C. Attorney's Fees

Defendant finally argues that the trial court erred by ordering her to pay attorney's fees and costs without giving her an opportunity to be heard. Before entering a civil judgment against an indigent defendant for fees incurred by court-appointed counsel, the trial court must afford the defendant notice and an opportunity to be heard. *State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902, 907 (2018) (citing N.C. Gen. Stat. § 7A-455 (2017)). Because defendants' and their attorneys' interests may not be aligned on this issue, notice must be given personally to the defendant, and lack of objection by counsel does not waive this issue. *Id.*

The State concedes that Defendant was not informed that she had the right to be heard on the issue of attorney's fees, and, as in *Friend*, "nothing in the record indicates that [she] understood [she] had that right." *Id.* Accordingly, we vacate the civil judgment and order for payment of attorney's fees, and we remand this case to the trial court for further proceedings on this issue.

III. CONCLUSION

We hold that Defendant has failed to demonstrate error with regard to the jury verdict. We vacate the trial court's civil judgment for attorney's fees and remand for further proceedings on that issue.

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NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).