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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-183

Filed: 15 December 2015

Mecklenburg County, Nos. 13 CRS 230909, 230911

STATE OF NORTH CAROLINA

v.

JOSE GILBERTO MENDEZ-LEMUS

Appeal by Defendant from judgment entered 18 July 2014 by Judge Lindsay R. Davis in Superior Court, Mecklenburg County. Heard in the Court of Appeals 3 December 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Adrian W. Dellinger, for the State.*

*Anne Bleyman for Defendant–Appellant.*

McGEE, Chief Judge.

Jose Gilberto Mendez-Lemus (“Defendant”) appeals from a judgment entered upon jury verdicts finding him guilty of common law robbery and conspiracy to commit common law robbery. We find no error.

The State’s evidence tended to show that, on the evening of 30 July 2013, Angel Roberto Erazo-Portillo (“Mr. Erazo-Portillo”) was standing outside his residence at Oak Park Apartments in Charlotte, North Carolina, talking on his cell phone when

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he was approached by Hector Orlando Salinas-Munguia (“Salinas-Munguia”) and Defendant. Salinas-Munguia asked to use Mr. Erazo-Portillo’s phone. When Mr. Erazo-Portillo refused, Defendant pointed a black handgun at Mr. Erazo-Portillo and “stuck it into [his] right side.” Salinas-Munguia then asked Mr. Erazo-Portillo for his car keys and took his key chain. Defendant then ordered Mr. Erazo-Portillo to go into his apartment. Before entering his apartment, Mr. Erazo-Portillo observed “some people across the way, watching.”

Charlotte–Mecklenburg Police Officers J.V. Helms (“Officer Helms”) and Joseph Dollar (“Officer Dollar”) were conducting a “zone check” of the Oak Park Apartments at approximately 9:00 p.m. on 30 July 2013. As they pulled their patrol car into the parking lot, Officer Helms “saw a silver vehicle pass by . . . occupied by two Hispanic males.” To his right, he saw “a group of roughly eight to ten people standing on the sidewalk in front of the apartments” who were “yelling and pointing at the vehicle as it was pulling out of the little parking area where they were.” As Officer Helms exited his patrol car, the group “started pointing across the parking lot to a gentleman [who] was standing up on the steps.” Officer Helms radioed to Officer Charles Bolduc (“Officer Bolduc”), who was near the entrance to the apartments, and asked him to “be on the lookout for a silver Honda that had just pulled out, that everybody was pointing at.” Officer Helms “heard some tires squeal near the entrance to the complex, and . . . was advised that the [silver] vehicle had pulled out

onto Nations Ford Road.”

Officers Helms and Dollar proceeded upstairs to Mr. Erazo-Portillo’s apartment to ask him what had happened. Speaking in Spanish, Mr. Erazo-Portillo made his hand into the shape of a gun and “start[ed] pointing it at his stomach.” Since the officers did not speak or understand Spanish, a bystander came upstairs to translate for the officers. Officer Helms then “notified Officer Bolduc over the radio that a robbery had just occurred” and that the suspects had left the scene in the silver Honda. An officer fluent in Spanish arrived at the apartments to assist Officer Helms.

Officer Bolduc observed the silver Honda (“the vehicle”) make a hard left turn out of Oak Park Apartments, “squealing [its] tires” and “coming at a high rate of speed out of the complex.” He followed the vehicle onto Arrowood Road, maintaining visual contact as he awaited further information from Officer Helms. Officer Bolduc initiated a vehicle stop as the vehicle turned into the parking lot of Arborgate Apartments, approximately three-quarters of a mile from Oak Park Apartments. The vehicle accelerated, made a left turn, and pulled into a parking space “abruptly.”

As he parked his patrol car behind the vehicle, Officer Bolduc “saw a hand reach out [of] the window and throw a firearm,” which “landed on the sidewalk to the front left of the [vehicle], about ten feet away from the [vehicle].” The driver, Salinas-Munguia, exited the vehicle and walked towards Officer Bolduc as the officer ordered

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him “to get on the ground.” Defendant remained inside the vehicle with his hands in his lap. Additional officers arrived at the scene, took the two suspects into custody, and secured the black .40 caliber semi-automatic handgun that had been thrown from the vehicle.

At approximately 9:45 p.m. on the same evening, Mr. Erazo-Portillo was transported by an officer to Arborgate Apartments to view the two suspects. Mr. Erazo-Portillo identified Defendant as the man who stuck the gun into his side and Salinas-Munguia as the man who took his car keys. The police returned Mr. Erazo-Portillo’s keys, which were found in Salinas-Munguia’s left front pocket. Mr. Erazo-Portillo gave a written statement to a detective on the night of the robbery, which was admitted as corroborative evidence at trial. Mr. Erazo-Portillo also identified Defendant in open court as the gunman.

Defendant was tried on charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The jury found Defendant guilty of common law robbery and conspiracy to commit common law robbery. The trial court consolidated the offenses for judgment and sentenced Defendant to an active prison term of thirteen to twenty-five months. Defendant gave notice of appeal in open court.

In his sole argument on appeal, Defendant contends the trial court erred by denying his request for a mistrial made during jury selection.

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The trial court “must declare a mistrial upon [a] defendant’s motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.” N.C. Gen. Stat. § 15A-1061 (2013). However, “[a] mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant’s case and make it impossible for the defendant to receive a fair and impartial verdict.” *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990) (internal quotation marks omitted). “It is well settled that a motion for a mistrial and the determination of whether [a] defendant’s case has been irreparably and substantially prejudiced is within the trial court’s sound discretion.” *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). “The trial court’s decision in this regard is to be afforded great deference since the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable.” *Id.*

In the present case, Defendant sought a mistrial after a member of the venire alerted the trial court that the venire may have overheard a discussion indicating that Defendant was in custody. The trial court addressed the exchange with the parties as follows:

THE COURT: On the record, one of the members of the venire . . . has written a notation. “I am a practicing attorney in N.C. for fourteen years. This morning the lady was explaining to us about the sheriff’s deputy, or

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something to the effect of the logistics of getting the Defendant into or situated in the courtroom. If everyone saw him in plain clothes yesterday, they now have a strong inclination that he is in custody. I don't mean to cause a scene, but my understanding is they're not supposed to know that." I suppose it would affect the Defendant more than the State, so I would inquire of [defense counsel] if you see any issue with that.

[DEFENSE COUNSEL]: I do see an issue with that, Your Honor. I think that since they now have that knowledge — I think they will be prejudicial to my client. After they get that image in their head that he's in custody, they may draw the conclusion that he's already guilty. I think it would be very prejudicial to my client, Your Honor, and I would ask for a new jury pool, either that or a mistrial, Your Honor.

THE COURT: What says the State?

[PROSECUTOR]: Your Honor, any remedy should be limited to a fresh jury pool given this early stage of the proceeding. I don't believe a mistrial would serve any purpose at this point that a new jury pool would not already accomplish.

After considering counsels' respective arguments, the trial court inquired into the venire's exposure to the exchange that had been recounted in the venireman's message and provided the following instruction to the members of the venire:

Let me address the entire jury venire if I may before we go any further. It came to my attention — we're a little late getting started this morning, by about forty-two or forty-three minutes, and it may have been explained to some or all of you that that delay had to do with getting the Defendant to or situated in the courtroom. How many of you heard that explanation or words similar to that?

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All right. Do you all understand that that circumstance, just as I instructed yesterday, the fact that one has been charged with a crime is no evidence of his guilt of that crime. Do you all understand that the circumstances regarding the Defendant's getting into court are not — have nothing to do with his guilt or innocence, that his presumption of innocence remains with him throughout the trial of the case, and those circumstances have no bearing on it.

Does anyone feel that you could not adhere to the principle set out in that instruction? In other words, would anyone hold against the Defendant the fact that we've been delayed by that circumstance? Anyone? All right.

When asked whether he objected to the trial court's instruction, defense counsel responded: "I guess not." In the course of selecting the jury, defense counsel also had the opportunity to question the individual members of the venire about their ability to remain fair and impartial toward Defendant.

After reviewing the record before us, we conclude that the trial court did not abuse its discretion by denying Defendant's request for a mistrial. Here, the jury venire did not observe Defendant in shackles in the courtroom. *See State v. Tolley*, 290 N.C. 349, 365–69, 226 S.E.2d 353, 366–68 (1976) (recognizing "the general rule that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances," that such a decision "must remain with the trial judge," and "that in any case where the trial judge, in the exercise of sound discretion, determines that the defendant must be handcuffed or shackled, it is of the essence that he instruct the jury in the clearest and most emphatic terms that it give

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such restraint no consideration whatever is assessing the proofs and determining guilt” (internal quotation marks omitted)). Nor did members of the venire see Defendant in restraints outside the courtroom. *See State v. Montgomery*, 291 N.C. 235, 251–52, 229 S.E.2d 904, 913–14 (1976) (providing that a “[d]efendant’s right to be free of shackles during trial need not be extended to the right to be free of shackles while being taken back and forth between the courthouse and the jail,” that “[i]t is within the sound discretion of an officer charged with the custody of a person to place handcuffs or shackles on him to prevent escape and to protect public safety while the prisoner is being transported,” and concluding that a mistrial was not required where “some of the jurors may have momentarily viewed defendant in handcuffs while he was being escorted from the separate jail building to the courthouse” (internal quotation marks omitted)). Rather, in the present case, the venire members were made aware that Defendant was in pre-trial custody in order to “simply explain[] to the jury the cause for the delay in the proceedings.” *See State v. Fowler*, 157 N.C. App. 564, 566, 579 S.E.2d 499, 501 (2003). Such statements “d[id] not create the same prejudice to the defendant as that raised when a defendant appears in court in shackles or prison garb,” *see id.*, since “there was no constant reminder of [D]efendant’s detention” after this single incident at the beginning of jury selection. *See id.* at 566–67, 579 S.E.2d at 501 (internal quotation marks omitted). Finally, the trial court gave a curative instruction to the venire that Defendant was presumed to

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be innocent, repeated this instruction, and explained the State's burden of proof beyond a reasonable doubt in its final charge to the jury. Accordingly, we overrule this issue.

NO ERROR.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).