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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-619

Filed: 21 February 2017

Stanly County, No. 13 CRS 51641

STATE OF NORTH CAROLINA

v.

BRANDON KEITH BYRD

Appeal by defendant from judgments entered 8 January 2016 by Judge Kevin M. Bridges in Stanly County Superior Court. Heard in the Court of Appeals 10 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant.

DIETZ, Judge.

Defendant Brandon Keith Byrd appeals his convictions for selling and possessing with intent to sell marijuana near a childcare center. These charges required the State to prove that Byrd was 21 years of age or older at the time of the alleged offenses. Byrd argues that the State violated his Fifth Amendment rights by introducing his affidavit of indigency, used to secure court-appointed counsel, to show his age. We hold that any error in admitting the affidavit was harmless beyond a

reasonable doubt because Byrd testified during the trial and his testimony established that he was older than 21 years of age when he committed the alleged offenses. Accordingly, we find no prejudicial error in the trial court's judgments.

Facts and Procedural History

On 16 August 2013, two Albemarle police officers, who were not in uniform but wore t-shirts with "Police" written in white letters on the back and had police badges, firearms, and radios attached to their belts, approached Defendant Brandon Keith Byrd, whom they suspected was selling marijuana. The officers soon realized that Byrd did not recognize them as police. They asked him for some "green," slang for marijuana.

Byrd agreed to sell the officers six bags of marijuana for fifty dollars and took them to the rear of a business where he said he kept his marijuana hidden "so the cops can't find it." He sold the officers six small plastic baggies containing marijuana.

The officers later arrested Byrd and charged him with selling and delivering marijuana near a childcare center and possession with intent to sell or deliver marijuana near a childcare center. These offenses apply to "[a]ny person 21 years of age or older" who commits certain drug offenses "on property used for a child care center, or for an elementary or secondary school or within 1,000 feet of the boundary of real property used for a child care center, or for an elementary or secondary school." N.C. Gen. Stat. § 90–95(e)(8).

At trial roughly a year after his arrest, the State introduced Byrd's affidavit of indigency into evidence. That affidavit contained Byrd's sworn statement that his date of birth is 6 July 1983, making Byrd older than 21 years of age at the time of the alleged offenses. The State required Byrd to complete that affidavit of indigency in order to obtain court-appointed counsel, which Byrd required because he could not afford to retain an attorney.

Byrd objected to the admission of the affidavit on the ground that he was required to complete it to exercise his Sixth Amendment right to counsel and, therefore, using statements from that affidavit at his trial violated his Fifth Amendment right against self-incrimination. The trial court overruled his objection.

Byrd later testified in his own defense. During cross-examination, Byrd testified as follows:

Q. All right. And you also have been convicted of – how many driving while license revokeds [*sic*] over the last ten years?

A. Oh, wow. I would say maybe three or four, something like that.

Q. How many simple worthless checks in the last ten years?

A. Oh, in the last ten years – actually, no worthless checks. That was within about ten years ago. I would say they carried on after I did my time. They carried on. There was a lot.

Q. When did you get out from doing time?

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A. I had just turned 21. I served six months in Stanly. I had just turned 21. So that would be what? Ten years ago?

Q. Within ten years or over –

A. I had just got out.

Q. Within the last ten years?

A. Within the last ten years. I got out like a week or so after my birthday.

The jury found Byrd guilty on both charges and the trial court sentenced him to two consecutive terms of 29 to 47 months in prison. Byrd timely appealed.

Analysis

Byrd argues that the trial court erred by admitting his affidavit of indigency into evidence over his objection that it violated his constitutional right against compelled self-incrimination. Byrd acknowledges that this Court must uphold his conviction if the State shows that the admission of the self-incriminating testimony was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A–1443(b). Although this is an exceedingly high burden, we hold that the State met that burden here.

The offenses at issue here required the State to prove that Byrd was “21 years of age or older” at the time of the offenses. *See* N.C. Gen. Stat. § 90–95(e)(8). During Byrd’s own testimony—given after the trial court reminded him of his right against

self-incrimination—Byrd testified that he was older than 21 years of age at the time of the alleged offenses in a manner that no reasonable juror would find confusing:

Q. How many simple worthless checks in the last ten years?

A. Oh, in the last ten years – actually, no worthless checks. That was within about ten years ago. I would say they carried on after I did my time. They carried on. There was a lot.

Q. When did you get out from doing time?

A. I had just turned 21. I served six months in Stanly. I had just turned 21. So that would be what? Ten years ago?

Byrd argues that his testimony was equivocal enough that the jury might have concluded that Byrd’s “six months in Stanly” as he turned 21 years of age took place during “the year and approximately ten days” between his arrest on 16 August 2013 and his trial on 27 August 2014.

We cannot agree that this is a reasonable interpretation of Byrd’s testimony. It would require the jury to conclude that when Byrd testified that “I had just turned 21. So that would be what? Ten years ago?” he did not mean ten years ago, he meant less than one year ago. No reasonable juror could draw that inference from his testimony. Thus, we hold that the State met its burden to show that any constitutional violation resulting from admission of his date of birth in his affidavit of indigency was harmless beyond a reasonable doubt because Byrd’s own testimony

established that he was 21 years of age or older at the time he committed the charged offenses.

Conclusion

For the reasons discussed above, we find no prejudicial error in the trial court's judgments.

NO PREJUDICIAL ERROR.

Judge BRYANT concurs.

Judge HUNTER, JR. concurs with separate opinion.

Report per Rule 30(e).

HUNTER, JR., Robert N., Judge, concurring in separate opinion.

I concur in not granting Defendant a new trial, but write separately because I would hold Defendant waived his right against self-incrimination by testifying.

As stated by our Supreme Court in *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (1995):

A defendant cannot be required to surrender one constitutional right in order to assert another. *Simmons v. United States*, 390 U.S. 377, 394, 19 L. Ed. 2d 1247, 1259 (1968). A criminal defendant has a constitutional privilege against compulsory self-incrimination. U.S. Const. amend[s]. V, XIV; N.C. Const. art. I, § 23. A criminal defendant further has a constitutional right to testify on her own behalf at trial if she so chooses. U.S. Const. amend[s]. V, VI, XIV; N.C. Const. art. I, § 23.

Id. at 274, 457 S.E.2d at 847. Thus, the State cannot condition the right to counsel on filing an affidavit of indigency and use the affidavit against Defendant, violating his constitutional right against self-incrimination.

However, “[i]t is well settled that ‘[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.’” *State v. Frogge*, 351 N.C. 576, 582-83, 528 S.E.2d 893, 898 (2000) (quoting *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984)). This waiver applies to the right against self-incrimination. *See Frogge*, 351 N.C. at 582-83, 528 S.E.2d at 898. *See also State v. Hunt*, 339 N.C. 622, 457 S.E.2d 276 (1995).

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While the majority focuses on whether the admission of the affidavit was harmless beyond a reasonable doubt, I believe Defendant waived this issue.

In its case in chief, the State introduced Defendant's affidavit of indigency for the purpose of admitting Defendant's date of birth into evidence. Defendant objected and argued the affidavit violated his right against self-incrimination.

After the State rested, Defendant chose to present evidence and testify. The trial court engaged in the following colloquy with Defendant:

[THE COURT]: Do you understand that you have a privilege against self-incrimination?

[DEFENDANT]: Yes sir.

...

[THE COURT]: All right. I have allowed you to confer with your lawyer about this issue. But, of course, the ultimate decision is yours. So I'm asking you: Do you intent to present evidence in this case?

[DEFENDANT]: Testimony is the only thing I'm doing, sir.

[THE COURT]: All right. So that is evidence.

[DEFENDANT]: Yes.

[THE COURT]: And do you intend to testify?

[DEFENDANT]: Yes, sir.

Had Defendant not testified and waived his right against self-incrimination, the analysis and conclusion may be different, as a Defendant should not be required

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to sign away his right against self-incrimination in order to obtain counsel. Although Defendant objected to the admission of evidence regarding his age in the State's case in chief, Defendant lost the benefit of his objection by waiving his right against self-incrimination and testifying.

I concur in not granting Defendant a new trial, but my conclusion is based on Defendant's knowing waiver of this issue below, after conferring with his counsel.