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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-818

Filed: 6 February 2018

Mecklenburg County, No. 17 CRS 000015

STATE OF NORTH CAROLINA

v.

ROBERT GREGORY BROWN

Appeal by defendant from judgment entered 9 March 2017 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Stuart M. (Jeb) Saunders, for the State.

Irons & Irons, P.A., by Ben G. Irons II, for defendant-appellant.

CALABRIA, Judge.

Where defendant did not meet his *prima facie* burden of showing a *Batson* violation, the trial court did not err in declining to require the State to give a race-neutral explanation for its peremptory strikes of two jurors. Where the State offered a legitimate race-neutral justification for its peremptory strike of a third juror, the trial court did not err in overruling defendant's *Batson* objection. Where the State's

witness established a sufficient foundation for the introduction of surveillance footage, the trial court did not err in admitting it. Where the trial court sustained defendant's objection to inadmissible testimony, and promptly issued a curative instruction, the trial court did not err in denying defendant's subsequent motion for mistrial. We find no substantive error, but remand to the trial court to correct a clerical error in its judgment and commitment.

I. Factual and Procedural Background

Robert Brown ("defendant") was indicted for one count of felony larceny, two counts of larceny from merchant, and for attaining habitual felon status. Defendant stipulated to four prior larceny convictions. The State dismissed one of the counts of larceny from merchant. The jury returned verdicts finding defendant guilty of felony larceny, larceny from merchant, and attaining habitual felon status. The trial court arrested judgment on the felony larceny charge, and sentenced defendant to a minimum of 112 months and a maximum of 147 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. *Batson* Objections

In his first argument, defendant contends that the trial court erred in overruling defendant's *Batson* objections, and in not requiring the State to offer race-

neutral justifications for its peremptory strikes of African-American jurors. We disagree.

A. Standard of Review

> In *Batson v. Kentucky,* the United States Supreme Court set out a three-part test for determining whether the state impermissibly excluded a juror on the basis of race, and this Court subsequently adopted that same test. First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, 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) (citations omitted).

> To allow for appellate review, the trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches. This Court must uphold the trial court's findings unless they are clearly erroneous. Under this standard, the fact finder's choice between two permissible views of the evidence cannot be considered clearly erroneous. We reverse only when, after reviewing the entire record, we are left with the definite and firm conviction that a mistake ha[s] been committed.

State v. Headen, 206 N.C. App. 109, 114-15, 697 S.E.2d 407, 412 (2010) (citations and quotation marks omitted).

"In cases in which the trial court explicitly rules that defendant failed to make out a *prima facie* case of racial discrimination, our review is limited to whether this

finding by the trial court was error." *State v. White*, 349 N.C. 535, 548, 508 S.E.2d 253, 262 (1998).

B. Analysis

During the jury selection process, the State moved to strike prospective jurors Zerick Wiggins ("Wiggins") and Rashawna Varela ("Varela"), both of whom were African-American. Defense counsel immediately challenged these strikes, arguing that they were racially-motivated and violated the United States and North Carolina Constitutions. After defense counsel made its arguments, the State asked if that constituted a *prima facie* showing, required by *Batson v. Kentucky*. The State argued that there must be a "prima facie showing that there has been some pattern" of unconstitutional striking of jurors "before I gave [sic] my race-neutral reasons." The trial court offered its thoughts, and noted that while two African-American jurors had been struck, four more remained on the jury, with an additional seat left to fill. The trial court concluded that "I don't believe that there's evidence of prima facie showing at this stage of discrimination. So I'm not going to actually respond whether race-neutral reasons for your dismissal of these two." The trial court preserved defendant's objection, but held that no pattern had been established, and thus no showing was required by the State at that time.

Subsequently, the State moved to strike prospective juror Toni Jones ("Jones"), another African-American woman. Once again, defendant raised a *Batson* challenge.

The trial court determined that this third juror struck constituted a pattern, and requested the State offer its race-neutral basis for striking the jurors. In response, the State offered Jones' statements that she had close family relationships with people who had been incarcerated for drug offenses, and that she was concerned that they were treated unfairly. The trial court held that this was an acceptable race-neutral justification. The trial court further noted that, even absent Jones, the composition of the jury was five African-American, seven Caucasian. The State did not offer, nor did the trial court request, any arguments with respect to Wiggins or Varela, nor did defendant renew those issues.

On appeal, defendant contends that the trial court did not request race-neutral reasons from the State with respect to Wiggins or Varela, and that the State's reason with respect to Jones was pretextual.

With respect to Wiggins and Varela, the trial court did not hold that defendant had made a *prima facie* showing. In fact, when asked whether defendant's burden under *Batson* was satisfied, the trial court responded "[n]ot yet." Subsequently, the trial court clarified, "I don't believe that there's evidence of prima facie showing at this stage[.]" Our Supreme Court has held that, where the trial court holds that a party has failed to make a *prima facie* showing under *Batson*, our review is limited to whether this decision – the decision that no *prima facie* showing was made – was erroneous.

During the initial *Batson* objection, defendant argued:

> We would contend, Your Honor, that certainly -- I think -- a lot of legal scholars or lawyers think that you have to show a pattern of practice to violate Batson. We would contend that if it is shown that the State has used race [i]mpermissibly then Batson is violated with the first juror that has been excused. And therefore, Your Honor, we would ask the Court to find that we have established a prima facie case of impermissibly race discrimination in jury selection and ask that those two jurors, No. 10 and No. 12, return to the jury box to be considered by [defendant] and myself. Thank you very much.

In essence, defendant argued that two jurors, both African-American, were struck, and that this alone established a *Batson* violation. The trial court responded, noting that the removal of these two jurors left four African-American jurors on the jury. The trial court further observed:

> Looking at the relevant circumstances that Batson and the other following case law has ascribed for me to -- that I may consider, since it's obviously circumstantial in nature, including intentional and regular and repeated peremptories against minorities, disproportionate peremptories against minorities, questions and remarks by State during jury selection that might give rise to an inference of discrimination, manner in which the jurors were questioned; obviously the race of all of those involved in the trial, type of case that it is, whether it's susceptible to racial discrimination on its face; habit of systematically excluding minorities, whether the State accepted the minorities on the jury and what percentage of the jury's racial composition as it stands now, I don't believe that there's evidence of prima facie showing at this stage of discrimination.

Defendant contends that, to establish a *prima facie Batson* violation, a defendant need merely demonstrate that he is "a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988). But this is an incomplete picture of the law. That same case goes on to observe that "[t]he trial court must consider this fact *as well as all relevant circumstances* in determining whether a prima facie case of discrimination has been created." *Id.* (emphasis added). These relevant factors may include "defendant's race, the victim's race, the race of key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, a pattern of strikes against minorities, or the State's acceptance rate of prospective minority jurors." *White*, 349 N.C. at 548, 508 S.E.2d at 262.

It is clear, based upon the trial court's response, that the trial court examined the *Batson* factors before reaching a decision. It is also clear that, of those factors considered by the trial court, the only ones relied upon by defendant were (1) that the jurors struck were both African-American, and (2) that the State's only peremptory challenges thus far were used against African-American jurors. The trial court correctly noted that a significant number of jurors were still African-American, and that these two jurors alone did not necessarily constitute a "pattern of practice to violate *Batson*." The trial court clearly considered "all relevant circumstances" in

reaching its determination. Accordingly, we hold that the trial court did not err in determining that, with respect to Wiggins and Varela, defendant did not establish a *prima facie Batson* objection.

With respect to Jones, the trial court ruled that the State's peremptory strike of a third juror established a *prima facie Batson* showing. The question is whether the State then made a sufficient showing of race-neutral reason to strike Jones as a juror.

The State offered as its reason for striking Jones:

> My race-neutral reason for excusing -- for asking to excuse Ms. Jones is that she has very close familial relationship with several people who have been involved with and prosecuted for and incarcerated for drug offenses and that she was concerned about the way that they were treated in prison and things that might not be fair. That relationship. And her consideration of what happened after is concerning to me. And I think that it would be something that would create bias and would be on her mind throughout the process.

The trial court, in ruling that this was a race-neutral reason to strike Jones, observed:

> I think the circumstances may have been a little different if the connection with someone in a family who had an apparently substantial criminal history or at least one of some note nationally -- although I don't watch or know a lot about -- I think she mentioned a TV series that it was based on. Outside my area of expertise. And that -- and along with -- coupled with the fact that she indicated she was very close to her cousin and had spoken with him in great detail about his experiences, I believe would -- would, in my opinion, give the State a valid nonracial reason to remove No. 12.

The State's proffered reason for striking Jones – that her family member had some criminal history – is a legitimate reason to strike a prospective juror. Our Supreme Court has noted that "[c]ourts commonly allow prosecutors to challenge venirepersons who have criminal records or relatives with criminal records, and similarly prospective jurors who know the defendant, counsel or the family of either." *State v. Porter*, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990) (citation omitted). We are reluctant to find that the trial court's decision to strike a juror for proper purpose, namely due to family criminal history, is "clearly erroneous." Accordingly, we hold that the trial court did not err in overruling defendant's *Batson* objection with respect to Jones.

III. Video Evidence

In his second argument, defendant contends that the trial court erred in admitting video surveillance footage into evidence, due to the State's alleged failure to establish a foundation. We disagree.

A. Standard of Review

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law." *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011).

B. Analysis

At trial, the State called Lewis Daniel Caskey ("Caskey"), a loss prevention manager at Target, as a witness. During his testimony, the State engaged in the following exchange with Caskey:

> Q. Were many of the events that you testified today captured on surveillance video?
>
> A. Yes, ma'am.
>
> Q. Did you have a chance to review that footage?
>
> A. Yes, ma'am.
>
> Q. And have you had a chance to review it again recently?
>
> A. About last week. Yes, ma'am. I did.
>
> Q. Had it been altered in any way?
>
> A. No, ma'am.
>
> [THE STATE]: May I approach, Your Honor?
>
> THE COURT: You may.
>
> BY [THE STATE]:
>
> Q. Mr. Caskey, what is this?
>
> A. That is a writable DVD.
>
> Q. And do you recognize it?
>
> A. Yes, ma'am.
>
> Q. How do you recognize it?

A. Because I'm the one who burnt the copy of the video.

Q. When you reviewed it recently, did you do anything to mark it for yourself?

A. No, ma'am. Yes, ma'am. I signed and dated it.

Q. And do you see that there?

A. Yes, ma'am.

Q. Has that been altered in any way?

A. No, ma'am.

Q. And when you burned it, was that a fair and accurate representation of what you saw when you were following him with the cameras and when you reviewed it later?

A. Yes, ma'am.

Q. And were the cameras in working order?

A. Yes, ma'am.

Q. Is that a typical type of camera system security system that you use at Target?

A. Yes, ma'am.

[THE STATE]: Your Honor at this time the State would tender State's Exhibit 5, the security footage, into evidence for both substantive and illustrative purposes.

Defendant contends that there was no evidence to ensure that the video shown in court was the same video that was recorded in the store. Defendant relies upon *State*

v. Snead, 368 N.C. 811, 783 S.E.2d 733 (2016), for his position. However, *Snead* does not, in fact, support defendant's argument.

In *Snead*, our Supreme Court held that "[e]vidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process is sufficient to authenticate the video and lay a proper foundation for its admission as substantive evidence." *Id.* at 814, 783 S.E.2d at 736. The Court further noted that a detailed chain of custody was not necessary where a witness testified that a recording was what it purported to be and no allegation was raised that the video was altered, and that any weak links in a chain of custody went to the weight to be given evidence, not its admissibility. *Id.* at 815, 783 S.E.2d at 737. The Court went on to hold that:

> Regardless, Steckler's testimony was sufficient to authenticate the video under Rule 901. Steckler established that the recording process was reliable by testifying that he was familiar with how Belk's video surveillance system worked, that the recording equipment was "industry standard," that the equipment was "in working order" on 1 February 2013, and that the videos produced by the surveillance system contain safeguards to prevent tampering. Moreover, Steckler established that the video introduced at trial was the same video produced by the recording process by stating that the State's exhibit at trial contained exactly the same video that he saw on the digital video recorder. Because defendant made no argument that the video had been altered, the State was not required to offer further evidence of chain of custody. Steckler's testimony, therefore, satisfied Rule 901, and the trial court did not err in admitting the video into evidence.

Id. at 815-16, 783 S.E.2d at 737. In the instant case, as in *Snead*, defendant did not allege that the video had been altered. Caskey testified that he recorded the video, that the cameras were in working order and typical of Target, and that the video reflected events which he had personally seen while observing defendant. As in *Snead*, therefore, we hold that Caskey's testimony was sufficient to authenticate the video, and that the trial court did not err in admitting it.

IV. Motion for Mistrial

"Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008).

A. Standard of Review

In his third argument, defendant contends that the trial court erred in denying his motion to declare a mistrial. We disagree.

B. Analysis

Later in the trial, the State called Sergeant Fred Vaneekhoven ("Sgt. Vaneekhoven"), a patrol sergeant with the Matthews Police Department. Sgt. Vaneekhoven testified regarding the day he arrested defendant. When asked why defendant was arrested, Sgt. Vaneekhoven observed, "[l]arceny. And he also had two outstanding warrants." Defendant promptly objected, and the trial court sustained the objection, and granted the motion to strike Sgt. Vaneekhoven's response. The

trial court further instructed the jury, "you're not to consider the last response of which witness to that question, not evidence in this case." Defendant then moved for mistrial, arguing that the jury could not completely ignore the statement, which was improper. In response, the State argued that the curative instruction was sufficient. After some consideration, the trial court denied the motion for mistrial, noting that "in considering the totality of what was said and the curative instruction in relation to this particular charge, that that instruction will suffice."

On appeal, defendant contends that the trial court erred in denying the motion for mistrial. However, our courts have examined similar circumstances and found that the denial of a mistrial was not error. For example, in *State v. Thomas*, 350 N.C. 315, 514 S.E.2d 486 (1999), a police officer testified to an unrelated robbery charge. The defendant made timely objection, and the trial court sustained the objection and issued a curative instruction. On appeal, our Supreme Court held that, "[b]ecause the trial court cured any error by its action in sustaining the objection and giving the curative instruction, we find no prejudice to defendant warranting a mistrial." *Id.* at 341, 514 S.E.2d at 503.

Defendant argues, essentially, that the curative instruction was insufficient, simply because Sgt. Vaneekhoven's testimony was prejudicial. However, we find this situation parallel to that in *Thomas*, in which our Supreme Court held that a promptly-issued curative instruction precluded the need for a mistrial. As our

Supreme Court did, we hold that the trial court's action in sustaining defendant's objection and issuing a curative instruction resulted in no prejudice to defendant warranting a mistrial.

V. Clerical Error

Although we have found no error with the trial court's judgment or rulings, we note that a clerical error exists in the judgment and commitment. Specifically, we note that the judgment and commitment lists the date of defendant's offense as 10 February 2014. However, both the indictment and the transcript note that the offense occurred on 8 March 2014. As such, although we find no substantive error, we remand this matter to the trial court to correct the clerical error in its judgment and commitment.

NO ERROR IN PART, REMANDED IN PART.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).