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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1028

Filed: 3 April 2018

Gaston County, Nos. 16 CRS 50039-40, 50042-43

STATE OF NORTH CAROLINA

v.

JOSPEH MATTHEW ZINNA

Appeal by defendant from judgments entered 20 January 2017 by Judge Charles Malcolm Viser in Gaston County Superior Court. Heard in the Court of Appeals 7 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant.

ARROWOOD, Judge.

Jospeh Matthew Zinna (“defendant”) appeals from judgments entered upon his convictions for first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury (“AWDWIKISI”). For the following reasons, we find no error.

I. Background

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Defendant was arrested on 1 January 2016 and indicted by a Gaston County Grand Jury on 19 January 2016 on charges of first degree murder, attempted first degree murder, AWDWIKISI, discharging a weapon into an occupied dwelling, and discharging a weapon into an occupied vehicle. The charges were joined and tried before a jury in Gaston County Superior Court beginning on 10 January 2017, the Honorable Charles Malcolm Viser, Judge presiding.

The evidence at trial tended to show a contentious relationship between defendant and his neighbor and a deteriorating relationship between defendant and his wife, who he was separated from but still living with. On 1 January 2016, defendant and his wife got into an argument that ended with defendant grabbing a shotgun, following his wife out the front door, and shooting at the car in which his wife was attempting to leave. Defendant's wife was injured in the shooting. Defendant then went to his neighbor's house with the shotgun, knocked on the door, and shot and killed his neighbor when the neighbor answered the door. Defendant did not deny that he shot at his wife or that he shot and killed his neighbor. Instead, the defense argued that defendant did not premeditate or deliberate, but that defendant acted after becoming overwhelmed by rage when his wife told him that she had been having an affair with the neighbor. The defense further argued that defendant was inside his neighbor's house when he shot his neighbor. Therefore, the defense asserted defendant could not be guilty of first degree murder on the theory of

premeditation and deliberation or the theory of felony murder for discharging a firearm into an occupied dwelling.

After the jury had been instructed, the State voluntarily dismissed the discharging a weapon into an occupied vehicle charge because the instructions given to the jury added the element that the vehicle must be in operation, which is a greater offense not alleged in the indictment.

Following deliberations in which numerous notes were submitted by the jury to the court, the jury returned verdicts finding defendant guilty of first degree murder under the first degree felony murder rule, not guilty of attempted first degree murder, guilty of AWDWIKISI, and guilty of discharging a firearm into an occupied dwelling. The court entered judgments imposing consecutive sentences of life imprisonment without parole for the first degree murder conviction and 58 to 82 months imprisonment for the AWDWIKISI conviction. The trial court arrested judgment on defendant's conviction for discharging a firearm into an occupied dwelling. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues the trial court erred in denying two motions for a mistrial made during jury deliberations. "Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Glenn*, 221 N.C. App. 143, 153, 726 S.E.2d 185, 191 (2012) (internal quotation marks and citation

omitted). “An abuse of discretion occurs ‘only upon a showing that the judge’s ruling was so arbitrary that it could not have been the result of a reasoned decision.’” *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014) (quoting *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996)).

First Motion for a Mistrial

Defendant first argues the trial court abused its discretion in denying his motion for a mistrial after the jury’s repeated indications that it was unable to reach a unanimous verdict. Specifically, defendant contends the court “required the jury to deliberate for an unreasonable amount of time as prohibited by [N.C. Gen. Stat.] § 15A-1235(c)” when doing so “could only have served to coerce a verdict in violation of [defendant’s] right to a unanimous verdict under Article I, Section 24 of the North Carolina Constitution.” We disagree.

“It is well settled that Article I, Section 24 of the Constitution of North Carolina prohibits a trial court from coercing a jury to return a verdict.” *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992) (citing *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984)). To that end, “N.C. Gen. Stat. § 15A-1235 concerns jury deliberations and the matter of deadlocked juries, and provides trial judges with clear standards for instructions urging jury verdicts.” *State v. Baldwin*, 141 N.C. App. 596, 607, 540 S.E.2d 815, 823 (2000). “The purpose behind the enactment of [N.C. Gen.

Stat.] § 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision.” *State v. Evans*, 346 N.C. 221, 227, 485 S.E.2d 271, 274 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998).

In addition to codifying an *Allen* charge¹, see *Gettys*, 219 N.C. App. at 102, 724 S.E.2d at 586 (“Section 15A-1235(b) is the legislatively-approved version of the *Allen* charge.”), N.C. Gen. Stat. § 15A-1235 provides as follows:

- (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
- (d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C. Gen. Stat. § 15A-1235 (2017).

“In reviewing whether the trial court coerced the jury into its verdict, we must consider the totality of the circumstances.” *Baldwin*, 141 N.C. App. at 608, 540 S.E.2d at 823. Factors to consider in judging the totality of the circumstances include

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

¹ This Court has explained that “[t]he term ‘Allen charge’ is derived from the case of *Allen v. United States*, in which the United States Supreme Court approved the use of jury instructions that encouraged the jury to reach a verdict, if possible, after the jury requested additional instructions from the trial court.” *State v. Gettys*, 219 N.C. App. 93, 101 n.1, 724 S.E.2d 579, 585 n.1 (2012) (citing *Allen v. United States*, 164 U.S. 492, 501-02, 41 L. Ed. 528, 530-31 (1896)).

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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. Beaver, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988). “Our courts . . . 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.” *Baldwin*, 141 N.C. App. at 608, 540 S.E.2d at 823. Additionally, “the Court has upheld decisions by trial courts to continue deliberations despite jury indications that it was ‘at a standstill[]’ or ‘hopelessly deadlocked.’ ” *Id.* at 608, 540 S.E.2d at 824 (internal citations omitted).

In the present case, the jury began deliberating at 12:39 p.m. on Tuesday. Shortly thereafter, the jury sent a note to the court requesting to go to lunch. The court allowed the jury to go to lunch at 12:55 p.m. with instructions to be back by 2:30 p.m. to continue deliberations. After the jury returned from lunch, the court brought the jury back into the courtroom at 2:57 p.m. and addressed additional jury questions by providing the jury with a copy of the written instructions and pictures that were admitted into evidence. The jury returned to its deliberations at 3:01 p.m. and deliberated until the court called the jury back into the courtroom at 4:55 p.m. to dismiss it for the evening.

The jury was unable to continue deliberations on Wednesday because one of the jurors was unavailable due to a family medical emergency.

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The jury resumed deliberations at 9:40 a.m. on Thursday. At 10:09 a.m., the jury sent a note requesting that the court elaborate on the definitions of premeditation and deliberation. The court refused to elaborate and the jury continued deliberating. At 11:15 a.m., the court received the following note:

We are hung on one of the major charges. There seems to be no way to compromise. We are stuck at premeditation and deliberation, and the parties on both sides are not willing to budge. We have agreed on all the other charges.

In response to the note, the court indicated it would instruct the jury with a standard *Allen* charge. Neither party objected, the defense adding that the *Allen* charge was “the appropriate way to deal with the situation.” The court issued an *Allen* charge in keeping with the approved instructions in N.C. Gen. Stat. § 15A-1235(b).

The jury resumed deliberations following the *Allen* charge at 11:25 a.m. At 12:03 p.m., the court received another note from the jury indicating that “[o]ne of the jurors is agitated and getting angry. There seems to be no way to compromise.” In response to the note, the court allowed the jury to break for lunch. The jury returned from lunch and continued deliberations at 1:30 p.m. At 2:32 p.m., the jury sent a note asking to see defendant’s testimony. The court responded that a written transcript was not available.

Jury deliberations continued from 2:35 p.m. until the jury sent the following note to the court at 2:41 p.m.:

We are still not able to agree. We are working very hard. It is going nowhere. There is one party that will not budge

one way. There are others that won't budge the other way. Others are willing to consider alternatives, but nothing is unanimous.

In response to this third indication from the jury that it was unable to reach a unanimous verdict, the defense stated that "this might be an appropriate time to declare a mistrial." The trial court denied the motion.

As the parties discussed with the court how to handle the note, the defense suggested that "[i]f the [c]ourt is inclined to let [the jury] deliberate longer, . . . the only way to do that is *Allen* charge and send them back." After indicating the jury had "only been out about seven hours[.]" the court decided to give another *Allen* charge and allow the jury to continue deliberating. The court gave the *Allen* charge at 2:53 p.m. and deliberations resumed at 2:56 p.m.

Upon review of the above circumstances, we are not convinced the trial court erred in denying defendant's first motion for mistrial, or that the court coerced a verdict by the manner it addressed the jury's notes.

Although the jury had already sent various notes to the court and indicated on three occasions that it was unable to reach a unanimous verdict, at the time the trial court denied defendant's first motion for a mistrial, the jury had not deliberated for an excessive length of time. As detailed above, the trial court noted that the jury had "only been out for about seven hours." Our review of the record, however, indicates that the jury had actually deliberated for an even shorter length of time. Furthermore, there was less than three and a half hours between the court's receipt

of the jury's first note indicating it was unable to reach a unanimous verdict and the court's receipt of the jury's third note indicating it was unable to reach a unanimous verdict, and that period included an almost hour-and-a-half break from deliberations for lunch. Given the number and types of charges in this case, the most severe of which was first degree murder that carries a possible sentence of life imprisonment without parole, and the evidence presented at the hearing, the deliberations which were broken into much shorter periods by an evening recess and breaks were not unreasonable in length of time.

Additionally, there is no indication in the record that the trial court conveyed to the jury that it was irritated the jury had not reached a verdict or that a retrial would burden the court system. There is also no indication the court intimated that it would hold the jury until they reached a verdict.

Defendant contends the trial court "implicitly communicated to the jury that it would deliberate until it reached a verdict[]" by repeating the *Allen* charge after it denied the motion for mistrial. We are not persuaded. First, N.C. Gen. Stat. § 15A-1235(c) expressly provides that if the court requires the jury to continue deliberations, it may "repeat the instructions[.]" Second, after the trial court denied the motion for mistrial, the defense agreed that the repeated *Allen* charge was necessary to allow the jury to continue deliberating. Third, our courts have found no coercion where

Allen charges have been repeated in other cases. *See Patterson*, 332 N.C. at 416, 420 S.E.2d at 101.

In this case, the *Allen* charges given to the jury closely followed the instructions provided in N.C. Gen. Stat. § 15A-1235(b). In each charge, the court instructed the jury that they “should not surrender [their] honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.” Based upon the totality of the circumstances and the substance of the court’s instructions to the jury, we hold the trial court did not err in denying defendant’s first motion for a mistrial and did not coerce or force a verdict in this case.

We find it important to further note that even if the trial court had erred, it appears to have had no effect on the verdict. It is clear from the jury’s first note indicating an impasse that the issue the jury could not agree on was premeditation and deliberation. A subsequent note from the jury seeking clarification of the substantive instructions for first degree murder reiterated that the only issue the jury could not reach a unanimous decision on was premeditation and deliberation. That note was as follows:

We are trying to determine if it will suffice for us to vote on the felony murder charge which we have a unanimous decision, but not on the basis of malice/[premeditation and deliberation]. This is the one that we cannot decide unanimously. The verdict sheet is an “or” statement.

After the court repeated the instructions for first degree murder in response to the jury's question, it took the jury approximately ten minutes to return a unanimous verdict finding defendant guilty of first degree murder under the first degree felony murder rule. There is no indication in the record that there was ever any disagreement on the verdicts eventually rendered. The struggle to reach a unanimous verdict on first degree murder on the basis of malice, premeditation, and deliberation appears to have been avoidable.

Joint Motion for a Mistrial

Defendant also argues the trial court erred by not granting a mistrial after a juror informed the court that another juror told him that he knew defendant. Defendant contends that under these unusual circumstances, the court abused its discretion when it denied the parties' joint motion for a mistrial. We disagree.

The court and the parties learned of the issue with the jury at 3:44 p.m. on Thursday, shortly after denying defendant's first motion for a mistrial and issuing the second *Allen* charge. At that time, the court received a note from the jury asking, "[w]ould it matter if the juror knew the defendant?" The parties were surprised by the note and agreed that it needed to be addressed by an inquiry of the jurors.

The trial court first called the jury foreperson to inquire about note. The foreperson informed the court that juror number one ("Juror No. 1") wanted to ask the question. The foreperson was otherwise unaware of why Juror No. 1 raised the

question. The court sent the foreperson back to the jury room and summoned Juror No. 1. In response to questions by the court, Juror No. 1 explained that he did not know defendant, but that he posed the question in the note before the rest of the jury because juror number 7 (“Juror No. 7”) had told him that he knew defendant. Juror No. 1 indicated that Juror No. 7 had not told the rest of the jury.

The court proceeded to call each of the remaining jurors into the courtroom to question them individually. Each juror responded that they did not know defendant and that they were unaware that any of the other jurors knew defendant. All but two of the jurors stated that they were aware Juror No. 1 asked the question in the note received by the court. In addition to asserting he did not know defendant, Juror No. 7 clarified a statement he made during jury selection that indicated he might have been on a job with defendant at some point. Juror No. 7 explained that he was mistaken and it was someone that resembled defendant. Juror No. 7 was certain he did not know defendant.

Upon completion of the inquiries, the court indicated that it was satisfied that none of the jurors knew defendant. The State, however, was unsatisfied and wanted the court to question Juror No. 1 and Juror No. 7 further to resolve the confusion. The court dismissed the jury for the evening but held Juror No. 1 back for further questioning. Juror No. 1 explained to the court that Juror No. 7 told him that defendant looked familiar and stated that he used to work with him at a plant. Juror

No. 1 further stated that juror number two heard Juror No. 7 say that he knew defendant.

At that point, the defense requested that the trial court declare a mistrial. The State joined the defense's motion. Both the defense and the State claimed substantial and irreparable prejudice.

The following morning, Friday, 20 January 2017, the defense and the State filed a joint motion for mistrial. The motion alleged that because "[t]he ability to determine who is being truthful concerning the conflicting statements is impossible[.]" "any potential verdict of this jury is tainted and unreliable to the point that a mistrial of the above cases is the only appropriate remedy."

The court addressed the motion by further questioning Juror No. 1 and Juror No. 7 about their ability to be fair and impartial. Juror No. 1 told the court that he was certain nothing that occurred had affected his ability to be fair and impartial and stated that he could make a determination based solely on the evidence in the case. Juror No. 7 reiterated that he did not know defendant and indicated that he could still consider the evidence in the case and come to his own decision while being fair and impartial. Based on the responses of the jurors, the court determined "there has not been any defect in the proceeding that would result in substantial and irrevocable [sic] prejudice to the defendant's case nor is there any . . . manifest necessity to

declare a mistrial at this time in this case[.]” Noting defendant’s objection, the court denied the joint motion for a mistrial.

Defendant now asserts that under these circumstances, one of the jurors was lying to the court and, although it may have been impossible for the court to determine which juror was lying, the court should have attempted to resolve the issue through additional inquiry. Defendant contends “the only possible rationale for the trial court’s actions in this case was the desire to avoid the time and expense a new trial could entail[]”and “[b]ecause [defendant] cannot be assured that he received a fair trial before an impartial jury, this Court should order a new trial.”

Upon review, we are not convinced defendant was prejudiced or did not receive a fair trial. Defendant’s argument is that because there was an unresolved discrepancy between the jurors as to what was said between them, it is not guaranteed he received a fair trial and the trial court could not have made a reasoned decision. However, the ultimate objective of the trial court’s inquiry was not to reconcile the statements of Juror No. 1 and Juror No. 7, but to ensure that defendant could receive a fair trial by an impartial jury. The defense even acknowledged this when it explained to the trial court that the issue was not whether the juror knows defendant, “the issue is whether that is affecting [the juror’s] ability to be fair and impartial. If he knows the person, that’s not an issue.”

N.C. Gen. Stat. § 15A-1061 provides that “[t]he judge must declare a mistrial upon the defendant’s motion if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.” N.C. Gen. Stat. § 15A-1061 (2017). Similarly, N.C. Gen. Stat. § 15A-1062 provides that “[u]pon motion of the State, the judge may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct resulting in substantial and irreparable prejudice to the State’s case and the misconduct was by a juror” N.C. Gen. Stat. § 15A-1062 (2017). Our courts have long recognized that the trial court has discretion in how it handles misconduct.

When juror misconduct is alleged, it is the trial court’s responsibility “to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant.” *State v. Aldridge*, 139 N.C. App. 706, 712, 534 S.E.2d 629, 634, *appeal dismissed and disc. review denied*, 353 N.C. 269, 546 S.E.2d 114 (2000). “Misconduct is determined by the facts and circumstances in each case,” *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976), and this Court has held that “[n]ot every violation of a trial court’s instruction to jurors is such prejudicial misconduct as to require a mistrial.” *State v. Wood*, 168 N.C. App. 581, 584, 608 S.E.2d 368, 370 (citation omitted), *disc. review denied*, 359 N.C. 642, 614 S.E.2d 923 (2005). The trial court is vested with the “discretion to determine the procedure and scope of the inquiry.” *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996). On appeal, we give great weight to its determinations whether juror misconduct has occurred and, if so, whether to declare a mistrial. *State v. Boyd*, 207 N.C. App. 632, 640, 701 S.E.2d 255, 260 (2010). Its decision “should only be overturned

where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible.” *State v. Gurkin*, 243 N.C. App. 207, 211, 758 S.E.2d 450, 454 (2014) (quoting *Bonney*, 329 N.C. at 73, 405 S.E.2d at 152).

Salentine, 237 N.C. App. at 81, 763 S.E.2d at 804.

As detailed above, in response to the jury issue in this case, the trial court performed an inquiry of the entire jury and further questioned Juror No. 1 and Juror No. 7 to assess their credibility and their ability to be fair and impartial. Based on the responses of the jurors, the court was satisfied with the credibility of the jurors and determined the jury could be fair and impartial and there was not substantial and irreparable prejudice. The court’s decision appears well reasoned based on its inquiry. Therefore, we will not second guess the discretion of the trial court.

Defendant argues that “[t]he unanimity among the parties’ on the question of the jury’s ability to render a fair and impartial verdict should have weighed heavily in favor of granting the motion.” Upon review of the record, it appears to this Court that the joint motion did factor into the trial court’s decision. It was after the trial court received the joint motion that the court further inquired about Juror No. 1’s and Juror No. 7’s ability to be fair and impartial. The fact that the motion for mistrial was a joint motion by the defense and the State, however, should not overshadow the court’s discretion in determining the credibility, fairness, and impartiality of the jury. Given the totality of the trial court’s inquiry, we believe that the court properly

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exercised its discretion and that defendant has not met his burden of showing prejudice.

III. Conclusion

For the reasons discussed, we uphold the trial court's denial of the motions for mistrial and find no error in defendant's trial below.

NO ERROR.

Judge DAVIS concurs.

Judge STROUD concurs in result only.

Report per Rule 30(e).