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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1157

Filed: 19 June 2018

Catawba County, Nos. 11 CRS 51398, 51400, 51401, 3822, 3823, 4077, 4078

STATE OF NORTH CAROLINA

v.

EVERETTE PORSHAU HEWITT

Appeal by defendant from judgments entered 18 May 2016 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

CALABRIA, Judge.

Where the State offered a facially-valid, race-neutral explanation for its peremptory challenge to a black juror, the trial court did not err in determining that defendant failed to show purposeful discrimination. Where the trial court, in an

unchallenged order, found no juror misconduct, the trial court did not err in denying defendant's motion for mistrial.

I. Factual and Procedural Background

Everette Hewitt ("defendant") was indicted for three counts of murder, and one count each of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first-degree burglary, and robbery with a dangerous weapon, all arising from the events of 15 March 2011. Allegedly, on that date, defendant drove with a friend to a trailer and, wielding the friend's gun, shot four individuals, three lethally, and took their money.

The matter proceeded to jury selection, at which time the State exercised its peremptory challenges to strike multiple prospective jurors, including Corey M., a black man. Defendant objected to these challenges, alleging a *Batson* violation. The trial court conducted a hearing on defendant's *Batson* objection in open court, permitting defendant to offer arguments and the State to express racially-neutral reasons for its peremptory challenges, after which the trial court made several findings. Specifically, the trial court found that "defendant has made out a prima facie case of discrimination by the State in the jury selection process." However, with respect to Corey M., the trial court found that the State offered "sufficient racially-neutral reasons and bases for the exercise of peremptory challenges as to" Corey M. The trial court therefore overruled defendant's *Batson* objection.

The matter then proceeded to trial. The jury returned verdicts finding defendant guilty of all charges except for robbery with a firearm. With respect to the murder charges, the jury specifically found defendant guilty of first-degree murder, on the bases of both malice, premeditation and deliberation, and the felony murder rule. After the jury returned its verdicts, but before the sentencing phase of trial, defendant argued that the jury foreperson, Julie R., should be removed because she knew one of the State's witnesses but failed to disclose that fact. The trial court brought Julie R. into the courtroom, and asked her whether she knew the witness; she responded that she knew her from school, some years prior, but had no subsequent contact with her, did not recognize her name, and only recognized her once she saw her in the courtroom. Ultimately, after some discussion, the trial court agreed to remove Julie R. as a juror, and replace her with an alternate.

The trial court then gave its sentencing instructions, and the jury commenced deliberations. Subsequently, defendant moved for a mistrial, citing Julie R. as the reason. Counsel alleged that it did not know whether Julie R. had spoken with any jurors or otherwise influenced them, but contended that her role as jury foreperson during the guilt-innocence phase of the trial constituted a constitutional violation meriting a mistrial. Defense counsel also argued that Julie R. was biased by the fact that her father had been murdered, something defendant allegedly learned while in

jail. The trial court declined to call Julie R. back into the courtroom to ask her about her biases, and denied defendant's motion for mistrial.

Defendant renewed the motion for mistrial, alleging additional information had come to light about the purported murder of Julie R.'s father. The trial court engaged in additional discussion on the subject, before observing that "[i]t sounds like [defendant] is trying to game the system[,]" by declining to question Julie R. when she was first selected, waiting until the jury returned a guilty verdict, and then taking issue with Julie R.'s presence. After some additional discussion, the trial court once more denied the motion.

The jury then returned its punishment forms, finding the existence of aggravating and mitigating factors with respect to each murder victim. For all three offenses, the jury recommended life imprisonment. The trial court sentenced defendant to three life sentences, one for each murder, a minimum of 238 months and a maximum of 295 months for attempted first-degree murder, a minimum of 38 months and a maximum of 55 months for assault with a deadly weapon, and a minimum of 97 months and a maximum of 126 months for first-degree burglary, to be served consecutively in the custody of the North Carolina Department of Adult Correction. Contemporaneously with the entry of its judgment, the trial court, on its own motion, entered an order with respect to the allegations of juror misconduct

regarding Julie R., stating in writing its findings and barring defendant from contacting her without court approval.

Defendant appeals.

II. Peremptory Challenge of a Juror

In his first argument, defendant contends that the trial court erred in permitting the State to strike a prospective juror. 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).

B. Analysis

The trial court entered a written order in response to defendant's *Batson* objection. The trial court found, "based upon the low showing required for a prima facie showing that the Defendant has made out a prima facie case of discrimination by the State in the jury selection process." Upon its determination that defendant had established a *prima facie Batson* case, the trial court turned to the reasons offered by the State, specifically:

> (a) Mr. McGinnis set forth that [Corey M.] failed to answer a significant number of questions on the [juror] questionnaire, specifically questions 26 through 34, 36, 40 through 50, 53, 55, 56(b) and 57 through 60.
>
> (b) [Corey M.] made comments that he "hoped we got it right," and he hoped that we could "get the right person," the insinuation being that [Corey M.] had already formed an opinion about the evidence in the case, or the lack thereof.
>
> (c) [Corey M.] hesitated several times upon being asked questions from Mr. McGinnis and expressed some hesitancy in answering questions.
>
> (d) Mr. McGinnis expressed concern about [Corey M.]'s demeanor changing in court when talking about the death penalty and capital punishment.
>
> (e) Mr. McGinnis expressed concern about [Corey M.]'s statement that he would not have any problem being on this jury for a three-month period, notwithstanding that he

would receive no income from his employer.

(f) [Corey M.] is single.

The trial court noted that defendant was then offered an opportunity to rebut these reasons, and that defendant argued "that the State has passed on other jurors who have criminal records, but who are white, namely [Thomas L.], Juror No. 5." The trial court also noted defendant's argument that the State "asked no other jurors about being sympathetic to victims" and that Corey M. was not the only juror to leave questions blank on his questionnaire. The trial court ultimately found that the State was "credible in stating the racially neutral reasons for the exercise of the peremptory challenge[,]" and that defendant "has not shown that the prosecutor's explanations are pretextual." The trial court therefore overruled defendant's *Batson* objection and allowed the State's peremptory challenge of Corey M.

Notwithstanding the State's arguments at trial and on appeal, the trial court explicitly found that defendant made a *prima facie Batson* showing. Therefore, the only issues before us are whether the State demonstrated a racially-neutral basis or bases for its peremptory challenge, and whether the trial court's determination that defendant failed to prove purposeful discrimination was "clearly erroneous."

On appeal, defendant raises many of the same arguments he raised at trial. He continues to assert that the peremptory challenge was race-based, not racially-neutral, and that the justifications offered by the State were pretextual.

With the exception of reasons (e) and (f), above, the State's reasons for dismissing Corey M., as found by the trial court, concerned the juror's potential willingness to sentence defendant to the death penalty if found guilty. On the questionnaire, for example, question 57 asked jurors to briefly describe any "belief or position regarding capital punishment in general[;]" question 58 asked jurors about affiliation with "any religion or group that takes a position regarding the death penalty[;]" and question 59 asks jurors if they feel they could not serve on a jury "in a case where the death penalty may be considered[.]" Corey M. answered none of these questions. Similarly, when called as a juror, Corey M. was asked by the State whether he had previously formed an opinion on the death penalty; he answered in the negative. However, the State went on to ask:

> MR. McGINNIS: What do you think about capital punishment after being here Wednesday, Thursday, and Friday, you know, Monday morning, today?
>
> [Corey M.]: It's a --
>
> MR. McGINNIS: What do you personally think about it?
>
> [Corey M.]: It's a tough decision on somebody's life. It is. To judge somebody, it's a tough decision. It's something new, so. . . . And it's hard to make a decision. It's going to take a long time to examine it and --
>
> MR. McGINNIS: Sure. I don't think there's anyone in this courtroom that would disagree with anything you just said.
>
> [Corey M.]: Yeah. It's hard. You have to take your

> time and examine it.

Later, the State asked:

> MR. McGINNIS: Does the nature of the charges in this case present a concern for you as we're speaking this afternoon, the fact that this is a triple homicide case?
>
> [Corey M.]: There's hope that everything is right, that we got the right man or the right woman -- it could be a woman -- you know, who murdered these people. Make sure we get the right one. Because if we get the wrong person, it's terrible.
>
> MR. McGINNIS: Yes, sir.
>
> [Corey M.]: I hear that some of them in jail and they're innocent. They got the wrong person, like that. Spent 30 years -- I heard 30 years in jail and he was innocent. And finally the other person admit that he was guilty and got the wrong person. Make sure you get the right person.
>
> . . .
>
> MR. McGINNIS: . . . Knowing that the punishment for first degree murder is either life imprisonment without parole or the death penalty, if you were selected to be a member of this jury, would you be able to vote for first degree murder if you were convinced beyond a reasonable doubt by the State that he was in fact guilty of first degree murder?
>
> [Corey M.]: I think -- Before I make that answer --
>
> MR. McGINNIS: Yes, sir.
>
> [Corey M.]: -- I think, like, a person in their mind wants to kill somebody, wants to get them out of their way, I think that's the death penalty. But if he against this

> other person, the other person wants to kill him too, get into that, two sides --
>
> MR. McGINNIS: Uh-huh.
>
> [Corey M.]: -- if that person want to kill that person too and they get into a fight shooting or whatever and we can prove that, then if one of them is living and one of them is dead, should get life without parole. But if it's just the only person that want to try to kill somebody, attack somebody like that by himself, should get the death penalty. That's what I think.

Our Supreme Court has held that "[a] prosecutor may properly exercise a peremptory challenge to excuse a juror due to his hesitancy over the death penalty." *State v. Basden*, 339 N.C. 288, 297, 451 S.E.2d 238, 242-43 (1994). Corey M.'s non-responsiveness on the questionnaire, and his rambling, drawn-out answers during the jury hearing, suggest hesitancy. The State was well within its rights to challenge Corey M. for that hesitancy.

Moreover, this Court has held that

> Hesitancy can be manifested by demeanor as well as words. The trial judge was in the best position to resolve this issue, having heard and seen the responses of the prospective juror, including her facial expressions, tone of voice, reactions, and other nuances that are not subject to translation when reviewing a cold record on appeal.

State v. McClain, 169 N.C. App. 657, 669, 610 S.E.2d 783, 791 (2005). In the instant case, we note that the trial judge, in recognizing Corey M.'s hesitancy, "was in the

best position" to consider Corey M.'s "facial expressions, tone of voice, reactions, and other nuances[.]"

We hold that the State, in citing Corey M.'s hesitancy concerning the death penalty in both his written and oral responses, offered "a facially valid, race-neutral explanation for the peremptory challenge." We further hold that, based upon this showing by the State and the evidence in support thereof, the trial court's determination was not "clearly erroneous." We therefore hold that the trial court did not err in its determination that defendant failed to prove purposeful discrimination.

III. Motion for Mistrial

In his second argument, defendant contends that the trial court erred in denying his motion for mistrial, which was based upon the removal of the jury foreperson after the guilt phase of trial. We disagree.

A. Standard of Review

"We review the trial court's denial of Defendant's motion for a mistrial for abuse of discretion." *State v. Sistler*, 218 N.C. App. 60, 70, 720 S.E.2d 809, 816 (2012). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

Defendant contends that Julie R. was disqualified "for misconduct that occurred during the guilt phase." He contends that, because her misconduct required her removal, that misconduct retroactively tainted the guilty verdicts found by the jury while she was its foreperson.

In support of his position, defendant cites *State v. Poindexter*, 353 N.C. 440, 545 S.E.2d 414 (2001). In *Poindexter*, after the jury returned a verdict finding the defendant guilty, but prior to sentencing, one juror was removed for suggesting that other jurors would be "dealt with" or "taken care of" if the defendant was found guilty. *Id*. at 441-42, 545 S.E.2d at 415. The defendant filed a motion for a mistrial, but the trial court denied the motion and seated an alternate juror. *Id*. at 442-43, 545 S.E.2d at 415-16. On appeal, our Supreme Court held that "the requirement of trial by a jury of twelve is violated where, as here, a juror becomes disqualified during deliberations as a result of juror misconduct." *Id*. at 443, 545 S.E.2d at 416.

Notwithstanding defendant's contentions, however, *Poindexter* is easily distinguished from the instant case. In *Poindexter*, the juror's comments constituted clear misconduct, and the court removed him for that explicit reason. Indeed, the Court noted that "the basis [for removal] was clearly juror misconduct during deliberations." *Id*. at 444, 545 S.E.2d at 416.

In the instant case, however, Julie R. was not removed for juror misconduct. In its order as to juror misconduct, from which defendant does not appeal and which defendant does not challenge, the trial court found:

> The Defendant named above, by and through his counsel, made allegations against [Julie R.] near the conclusion of this trial and after [Julie R.] had participated in the guilt-innocence phase of the trial. These allegations were unsubstantiated at the time, but in the interest of justice, and at the request of Defendant, [Julie R.] was excused by the court and did not participate in the jury deliberations during the sentencing phase of this trial.

The trial court further noted that, "[s]ubsequent to the evidentiary hearing, the court found that the allegations of juror misconduct were totally without merit and unfounded and denied [defendant's] motion for a mistrial."

Poindexter was a case where a juror's clear misconduct was grounds for removal, and the same misconduct was grounds for a new trial. In the instant case, however, the trial court did not remove Julie R. for misconduct. The court explicitly found that the allegations against her were unsubstantiated when made, and ultimately baseless. Again, defendant does not appeal from or challenge the order containing those findings. Rather, the trial court removed Julie R. "at the request of Defendant," in the court's discretion. *Poindexter* is premised upon the idea that a juror's misconduct during deliberations precludes his impartial participation in the jury verdict; it says nothing about the instant case, where no misconduct was found.

The trial court, in its discretion, found no misconduct by Julie R. We hold that the trial court did not abuse that discretion. In the absence of jury misconduct, we can see justification for the trial court granting defendant's motion for a new trial. We therefore hold that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

NO ERROR.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).