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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-191

Filed: 6 November 2018

Durham County, No. 15 CRS 57733

STATE OF NORTH CAROLINA

v.

JOSEPH GILL

Appeal by defendant from judgments entered 11 May 2017 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 20 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary Padget, for the State.

Thomas F. Loflin III for defendant.

DIETZ, Judge.

During Defendant Joseph Gill's trial on sex offense charges, a seated juror informed the trial court that he knew one of the State's witnesses and that they used to work together. The juror had inadvertently failed to disclose this during jury selection.

The trial court reopened jury examination and the parties questioned the juror. Gill had unused peremptory challenges from the jury selection process and requested to use a peremptory challenge to strike the juror. The trial court declined that request, explaining that "[t]he Court does not see any interference with his ability to remain fair and impartial; therefore, I will not remove him."

As explained below, we are constrained by precedent to vacate Gill's convictions and remand for a new trial. This case is indistinguishable from *State v. Thomas*, 230 N.C. App. 127, 748 S.E.2d 620 (2013). In *Thomas*, this Court, interpreting several Supreme Court cases, held that "because the trial court reopened voir dire after the jury was impaneled and because defendant had not exhausted all of his peremptory challenges, the trial court was required to allow defendant to exercise a peremptory challenge to excuse the juror." *Id.* at 133, 748 S.E.2d at 624. Accordingly, we vacate the trial court's judgments and remand for further proceedings.

Facts and Procedural History

In 2015, the State indicted Defendant Joseph Gill on charges of statutory rape and indecent liberties with a child. The case went to trial in May 2017. During jury selection, Gill used three of his six peremptory challenges to excuse potential jurors. As part of the jury examination, the trial court informed the jurors about the witnesses expected to be called to testify and the court and the parties questioned the

jurors about their knowledge of these potential witnesses. The trial court then seated the jury and the trial began.

During trial, a juror informed the court that he recognized one of the law enforcement officers who was scheduled to testify as a State's witness. The juror explained that they had worked together ten years ago. The juror had inadvertently failed to disclose this information during jury selection.

The trial court reopened jury examination and permitted the parties to question the juror about his relationship with the witness and whether it would impact his ability to impartially decide the case. The juror stated that his familiarity with the witness from ten years ago would not affect his ability to remain impartial. The trial court then stated that "the Court is satisfied that there's not any prejudice to the defendant or the State by continuing with the fact that – that [the juror] knows [the witness]."

Gill objected to the trial court's ruling in an unrecorded bench conference immediately following this ruling. Later that day, Gill put his objection on record. Gill's counsel made the following argument:

> Had that fact been known to me at the time during voir dire and jury selection, I believe I had a peremptory strike available, I would have struck him for cause at that time, but because it had—by the time we got that information, we were already here and—during hearing evidence. . . . *So I'm asking you to note my objection, and that actually I should—should be allowed to use a challenge to have him removed from the jury*.

The trial court overruled the objection, explaining that the juror "self-reported that at an appropriate time when he first saw [the witness]. The Court does not see any interference with his ability to remain fair and impartial; therefore, I will not remove him."

The jury found Gill guilty of all charges and the trial court sentenced him to 365 to 498 months in prison for the statutory rape charge and 25 to 39 months in prison for the indecent liberties charge. Gill timely appealed.

Analysis

Gill raises several arguments on appeal, but we need only address his argument concerning use of a peremptory challenge to remove a juror after the trial court reopened jury examination as that issue is dispositive.

For many years, our Supreme Court held that the decision to reopen jury examination during trial *and* the decision to allow a party to exercise an unused peremptory challenge were matters within the trial court's sound discretion. *See State v. Kirkman,* 293 N.C. 447, 453, 238 S.E.2d 456, 460 (1977); *State v. McLamb*, 313 N.C. 572, 576–77, 330 S.E.2d 476, 479 (1985). The Supreme Court reasoned that, although parties ordinarily waive their right to use any remaining peremptory challenges when the trial court impanels the jury, the trial court always has discretion to reopen the examination and permit the parties to use any remaining peremptory challenges. *Id.*

Our Supreme Court revisited this precedent in *State v. Holden*, 346 N.C. 404, 429, 488 S.E.2d 514, 527 (1997). In *Holden*, the Supreme Court reaffirmed "that the trial court may reopen the examination of a juror after the jury is impaneled and that this decision is within the sound discretion of the trial court." *Id.* But the Supreme Court then held that "[o]nce the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror." *Id.* Thus, *Holden* indicates that, unlike the decision to reopen jury examination, which is within the trial court's sound discretion, the ability to use a peremptory challenge to remove a juror upon re-examination is an "absolute right" that is not subject to the trial court's discretion.

In *State v. Thomas*, 230 N.C. App. 127, 132–33, 748 S.E.2d 620, 624 (2013), this Court examined the impact of *Holden* on the jurisprudence governing reopening jury examination during trial. We held that "[t]o the extent that granting a peremptory challenge after the reopening of examination of a juror was discretionary in *Kirkman,* our Supreme Court in *Holden* appears to have overruled *Kirkman*." *Id.* We therefore held that "because the trial court reopened voir dire after the jury was impaneled and because defendant had not exhausted all of his peremptory challenges, the trial court was required to allow defendant to exercise a peremptory challenge to excuse the juror." *Id.* at 133, 748 S.E.2d at 624.

This case is indistinguishable from *Thomas*. Here, as in *Thomas*, the trial court reopened jury examination after a juror disclosed knowledge about a witness that the juror inadvertently had omitted during the initial jury selection process. *Id.* at 131–32, 748 S.E.2d at 623–24. As in *Thomas*, the trial court permitted the parties to re-question the juror. *Id.* And, as in *Thomas*, the defendant had peremptory challenges remaining from the initial jury selection process and sought to use one of the remaining challenges to excuse the juror. *Id.* Thus, under *Thomas*, the trial court erred when it refused Gill's request to use a peremptory challenge to remove the juror. The remedy for this error under *Thomas* is to vacate the judgments and remand for a new trial. *Id.* at 133, 748 S.E.2d at 624. Because *Thomas* is controlling, indistinguishable authority, we must follow it here. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we vacate the trial court's judgments and remand this case for further proceedings.

Conclusion

We vacate the trial court's judgments and remand for further proceedings.

VACATED AND REMANDED.

Chief Judge McGEE and Judge CALABRIA concur.

Report per Rule 30(e).