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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-195

Filed: 17 March 2020

Iredell County, Nos. 17 CRS 2317, 56584

STATE OF NORTH CAROLINA

v.

DEMETRIUS ANTWAN JERRY

Appeal by defendant from judgment entered 5 July 2018 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 17 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

James R. Parish for defendant-appellant.

BRYANT, Judge.

Where defendant failed to present evidence of personal bias against him on the part of the trial court, there was no error in the trial court's ruling to deny defendant's motion to disqualify the trial judge. Where defense counsel waived defendant's closing argument during the sentencing phase of defendant's trial, we overrule

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defendant's argument that he received ineffective assistance of counsel per se. Accordingly, we hold there was no error in defendant's trial.

On 11 September 2017, defendant Demetrius Antwan Jerry was indicted by an Iredell County grand jury for assault inflicting physical injury on a law enforcement officer. On 12 February 2018, defendant was indicted for obtaining habitual felon status. On 2 July 2018, following the entry of a court order entered by the Honorable Julia Gullett, Superior Court Judge, which addressed clerical errors in the indictment, defendant filed a motion asking the judge to disqualify herself from presiding over the trial on defendant's charge for assault on a law enforcement officer. Per his motion for disqualification, defendant averred that Judge Gullett—who previously worked as an assistant district attorney in the Iredell County District Attorney's Office—represented the State against defendant in a case for which he was convicted in 2011. The conviction entered was the third conviction listed on defendant's habitual felon indictment. Defendant asserted that in 2011, then prosecutor Gullett worked in the same office as the prosecutor currently representing the State in defendant's case. Also, as the charges against defendant included allegations of assault on an Iredell County Detention Officer, defendant asserted that Judge Gullett's marriage to a former detention officer for the Iredell County Jail may affect her ability to be an impartial tribunal.

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A trial on the charges against defendant commenced during the 2 July 2018 session of Iredell County Superior Court, Judge Gullett presiding. During a pre-trial hearing, the trial court denied defendant's motion to disqualify her as the presiding judge. The court stated that she did not remember defendant from her time working in the District Attorney's Office, that her husband had not worked in the Iredell County Jail for several years, and that she nor her spouse discussed cases in which they may have been individually involved. "I don't have any personal bias against you at all"

Following his trial before a jury, defendant was found guilty of assault on a law enforcement officer resulting in physical injury and during the sentencing phase found guilty of attaining habitual felon status. The court entered judgment in accordance with the jury verdicts and sentenced defendant to a term of 50 to 72 months. Defendant appeals.

On appeal, defendant presents the following two issues: (I) whether the trial court's failure to disqualify herself unfairly prejudiced defendant; and (II) whether defense counsel's waiver of defendant's closing argument on the issue of attaining habitual felon status amounted to ineffective assistance of counsel.

I

Defendant argues that the Judge Gullett erred by failing to disqualify herself from presiding over defendant's trial where, prior to serving as a judge, Judge Gullett, while working as an assistant district attorney in the Iredell County District Attorney's Office, prosecuted defendant for an offense that now serves as a conviction supporting defendant's habitual felon indictment. We disagree.

Pursuant to our General Statutes, "[a] judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is . . . [p]rejudiced against the moving party or in favor of the adverse party" N.C. Gen. Stat. § 15A-1223(b)(1) (2019). "It is not enough for a judge to be just in his judgment; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds." *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 775 (1987) (citation omitted).

When a party requests . . . a recusal by the trial court, the party must demonstrate objectively that grounds for disqualification actually exist. The requesting party has the burden of showing through substantial evidence that the judge has such a personal bias, prejudice or interest that he would be unable to rule impartially. If there is sufficient force to the allegations contained in a recusal motion to proceed to find facts, or if a reasonable man knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, the trial judge should either recuse himself or refer the recusal motion to another judge.

In re Faircloth, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002) (citations omitted).

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On appeal, defendant points to the allegations in defendant's motion to disqualify Judge Gullett from presiding over his trial, as filed in the trial court. While serving as a prosecutor in the Office of the District Attorney, Judge Gullett represented the State against defendant, and the conviction that resulted from that proceeding was used to support defendant's habitual felon indictment in the current proceeding. Defendant's current substantive offense involved the assault and physical injury upon an Iredell County detention officer—a job title which Judge Gullett's spouse previously held. And the prosecutor who represented the State before the trial court in defendant's current proceeding served in the Office of the District Attorney at the same time as Judge Gullett.

We note that before the trial court, the State drew the court's attention to the following opinions from our appellate courts on the issue of judicial recusal: *State v. Scott*, 343 N.C. 313, 471 S.E.2d 605 (1996) (reasoning that the burden on a party seeking to disqualify a judge requires substantial evidence of personal bias, prejudice or interest on the part of the judge, either favorable or unfavorable toward a party in the action, such that the judge would be unable to rule impartially); *State v. Pemberton*, No. COA11-1555, 2012 N.C. App. LEXIS 850, at *10 (N.C. Ct. App. July 17, 2012) (unpublished) ("We are not prepared to hold that having served as a district attorney automatically disqualifies a judge from hearing any case that might have had some remote connection to the office of the district attorney at the time the judge

was serving as district attorney.”); and *State v. Hatfield*, No. COA03-1384, 2004 N.C. App. LEXIS 1280, at *3–4 (N.C. Ct. App. July 20, 2004) (unpublished) (holding that the defendant failed to meet her burden of proof to evidence a “personal disposition or mental attitude of the trial judge, either favorable or unfavorable” as to the defendant, where the evidence indicated only that the court recognized the defendant’s name as someone whom the court had prosecuted when serving as an assistant district attorney).

Defendant’s assertions, as set forth in his motion to disqualify Judge Gullett and repeated before this Court, fail to meet his “burden of showing through substantial evidence that the judge has such a personal bias, prejudice or interest that [s]he would be unable to rule impartially.” *Faircloth*, 153 N.C. App. at 570, 571 S.E.2d at 69 (citations omitted); *see also Scott*, 343 N.C. 313, 471 S.E.2d 605. Accordingly, defendant’s argument is overruled.

II

Next, defendant argues that he received ineffective assistance of counsel when his trial counsel waived defendant’s closing argument during the sentencing phase of defendant’s trial (addressing defendant’s habitual felon status). We disagree.

“In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674, (1984).”

State v. Warren, 244 N.C. App. 134, 142, 780 S.E.2d 835, 841 (2015). Our Supreme Court adopted this test for state constitutional purposes in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). *Warren*, 244 N.C. App. at 142–43, 780 S.E.2d at 841.

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (citation omitted).

We first consider the second prong of the *Strickland* test, “the defendant must show . . . that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

As to this prong, defendant does not argue that the evidence supporting defendant’s status as a habitual felon was in dispute. In effect, defendant argues that his counsel’s decision to waive closing argument during the sentencing hearing on defendant’s habitual felon status amounted to prejudicial error per se. In support of his argument, defendant cites *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986).

In *Eury*, our Supreme Court considered whether a trial court violated a defendant’s statutory rights by limiting to one the number of counselors who could present a closing argument before the jury during the guilt/innocence phase of a

capital trial and whether such a violation amounted to prejudicial error. The Court held that a trial court violated General Statutes, section 84-14, as construed in *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673 (1986), which held that in a capital case, “the number of counsel on each side who may address the jury, . . . three (or however many actually argue)[,] may argue for as long as they wish and each may address the jury as many times as he desires.” *Eury*, 317 N.C. at 515, 346 S.E.2d at 449 (quoting *Gladden*, 315 N.C. at 421, 340 S.E.2d at 688). The *Eury* Court went on to note that “[t]he right to closing argument is a substantial legal right of which a defendant may not be deprived by the exercise of a judge’s discretion.” *Id.* at 517, 346 S.E.2d at 450 (citations omitted). On the facts, “there was strong evidence of [the] defendant’s guilt. However, one can only speculate as to how the jury would have reacted had [the] defendant not been deprived of her substantial right to have both counsel making closing argument.” *Id.* at 517, 346 S.E.2d at 450.

While the right to closing argument is a substantial legal right, the scenario at issue before our Supreme Court in *Eury* is materially distinguishable from the scenario currently before this Court.

In *Eury*, the trial court erroneously overruled the defendant’s request to allow both of her defense counselors to give a final closing argument during the guilt/innocence phase of a capital trial as a matter of law per the relevant statute. Here, defense counsel *waived* defendant’s closing argument during the sentencing

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phase of a non-capital trial. This is not ineffective assistance of counsel per se. *Cf. id.* As defendant's sole argument regarding this issue was based on ineffective assistance of counsel per se, defendant's argument is overruled.

Accordingly, we hold defendant received a trial with

NO ERROR.

Judges COLLINS and YOUNG concur.

Report per Rule 30(e).