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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-863

Filed: 19 May 2020

Cleveland County, Nos. 14 CRS 52168, 14 CRS 52171

STATE OF NORTH CAROLINA

v.

AARON RASHAUN BYERS, Defendant.

Appeal by Defendant from amended judgment entered 20 September 2017 by Judge Robert T. Sumner in Superior Court, Cleveland County. Heard in the Court of Appeals 3 December 2019.

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

Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.

McGEE, Chief Judge.

Aaron Rashaun Byers (“Defendant”) challenges jury selection in his case following the entry of judgment upon his convictions for first-degree murder and possession of a firearm by a felon. We find no prejudicial error.

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Defendant was indicted on 12 May 2014 on charges of first-degree murder, two counts of robbery with a dangerous weapon, and possession of a firearm by a felon. The case was tried in Superior Court, Cleveland County beginning on 12 September 2017. The State presented evidence at trial tending to show that Defendant was a passenger in the front seat of a two-door vehicle, and the driver was shot during Defendant's attempted robbery of two passengers seated in the rear seat of the vehicle. Based on the evidence presented, the trial court instructed the jury on two counts of attempted robbery with a dangerous weapon, possession of a firearm by a felon, and first-degree murder in the perpetration of a felony. The jury found Defendant guilty of each offense.

The trial court entered a judgment on 19 September 2017, consolidating the first-degree murder and possession of a firearm by a felon offenses and sentenced Defendant to a term of life imprisonment without parole. The trial court arrested judgment on the attempted robbery with a dangerous weapon convictions. An amended judgment awarding Defendant credit for time spent in confinement prior to the entry of judgment was entered on 20 September 2017. Defendant appeals.

The sole issue raised by Defendant on appeal is whether the trial court erred during jury selection by allowing the State's motion to reopen *voir dire* of a juror (the "Juror") already accepted by the State and the defense, that ultimately resulted in the State's use of a peremptory challenge to excuse the Juror.

“A trial judge has broad discretion to regulate jury *voir dire*. In order for a defendant to show reversible error in the trial court’s regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby.” *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559 (1994) (citations omitted).

The jury selection process is governed by N.C.G.S. § 15A-1214. Pertinent to this appeal, the statute provides:

(d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.

(e) Each defendant must then conduct his examination of the jurors tendered him, making his challenges for cause and his peremptory challenges. If a juror is excused, no replacement may be called until all defendants have indicated satisfaction with those remaining, at which time the clerk must call replacements for the jurors excused. . . .

(f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant. Only replacement jurors may be examined and challenged. This procedure is repeated until all parties have accepted 12 jurors.

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(g) If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:

(1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.

(2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.

(3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

N.C.G.S. § 15A-1214 (2017).

As with the trial court's regulation of jury selection in general, "[t]he decision whether to reopen the examination of a passed juror is within the sound discretion of the trial court." *State v. Womble*, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996). "If [a] judge at any point allows the attorneys to question the juror directly, *voir dire* has necessarily been reopened and the procedures set out in N.C.G.S. § 15A-1214(g)(1)-(3) are triggered." *State v. Boggess*, 358 N.C. 676, 683, 600 S.E.2d 453, 457 (2004). "[O]nce the examination of a juror has been reopened, 'the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror.'" *State v. Rogers*, 316 N.C. 203, 216, 341 S.E.2d 713, 721 (1986) (quoting *State v. Freeman*, 314 N.C. 432, 438, 333 S.E.2d 743, 747 (1985)), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). "Thus, absent a showing of abuse

of discretion, the trial court's decision to reopen the examination of [a] prospective juror . . . will not be disturbed." *State v. Bond*, 345 N.C. 1, 19, 478 S.E.2d 163, 172 (1996).

In this case, the trial court followed the procedure set forth in N.C.G.S. § 15A-1214(a)-(f) through two rounds of jury selection, at which point the State and the defense had approved ten jurors, eight in the first round and two more in the second round. Through the two rounds, the State used three peremptory challenges, and the defense used five peremptory challenges. At the end of the second round, the trial court recessed for lunch. Upon reconvening, the State moved pursuant to N.C.G.S. § 15A-1214(g) to reopen *voir dire* of the Juror, whom the State and the defense approved in the first round of jury selection. Over the defense's objection, the court allowed the State's motion indicating the State and the defense would both have an opportunity to further question the Juror. The defense then requested that the trial court grant Defendant an additional peremptory challenge if the reopening of *voir dire* resulted in the State's removal of the Juror, either for cause or by peremptory challenge. The defense asserted that it exercised five peremptory challenges based on the fact that there were only two seats left to fill. The court indicated it would consider the defense's request. Jury selection continued with the State further questioning the Juror about a response he gave to a defense question during *voir dire*. Ultimately, the State used a peremptory challenge to remove the Juror.

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Defendant now argues the trial court abused its discretion in granting the State's motion to reopen *voir dire* of the Juror because there were no grounds for reopening *voir dire* under N.C.G.S. § 15A-1214. Specifically, Defendant asserts "[n]o claim was made, or could have been made, that [the] Juror . . . made any incorrect statement during voir dire[.]" and "[n]o good reason was tendered, or existed, suggesting any possibility that [the] Juror . . . might be challenged for cause." Defendant contends the alleged error was prejudicial and requires a new trial. We are not persuaded by the arguments.

In arguing the trial court abused its discretion, Defendant asserts that "[i]t is quite clear from the language of N.C.G.S. § 15A-1214(g) that the authority to reopen voir dire of a juror previous[ly] found acceptable by a party is to deal with situations where there is some newly discovered reason to suggest that the juror harbors some bias or has some personal experience or belief that would be the basis for a challenge for cause." Defendant maintains there were no such circumstances in the present case and distinguishes this case from cases in which our Courts have found there was cause to reopen *voir dire* due to a prospective juror's inconsistent statements during *voir dire* or a party's discovery of information that conflicts with a prospective juror's response during *voir dire*. See *State v. Holden*, 346 N.C. 404, 428-29, 488 S.E.2d 514, 527 (1997); *Bond*, 345 N.C. at 18-20, 478 S.E.2d at 171-72; *Womble*, 343 N.C. at 677-78, 473 S.E.2d at 297; *Rogers*, 316 N.C. at 215-16, 341 S.E.2d at 720-21. Defendant

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contends the reviewing court in those cases carefully examined the record to determine whether there was a basis for the trial court to reopen *voir dire* for examination of whether a prospective juror may be challenged *for cause*. Notably, Defendant has not cited a single case in which our appellate courts found the trial court abused its discretion in reopening *voir dire*.

Defendant distinguishes this case from those cases in which our Courts have found no error on the grounds that the Juror did not make any inconsistent statements and no information was discovered to raise concern as to his candor with the court. Based on the prosecutor's request to reopen *voir dire* of the Juror, in which the prosecutor stated, "I would ask for the chance to readdress him if I felt like I needed to use a preemptory [sic] regarding that issue[.]" Defendant asserts there was no basis to reexamine the Juror for a challenge for cause and argues the trial court abused its discretion by reopening *voir dire* so the prosecutor could determine if she would use a preemptory challenge.

Defendant is correct that the reopening of *voir dire* of the Juror was not justified based on inconsistent responses or information obtained by the prosecutor that called the Juror's candor into question. The statute, however, does not limit reopening of *voir dire* to those circumstances. The statute is broad, providing for the reopening of *voir dire* if "it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists[.]" N.C.G.S. § 15A-

1214(g) (emphasis added). Upon review of the record, we find good reason existed for the trial court to reopen *voir dire* to allow further examination of whether a challenge for cause existed. Thus, the trial court did not abuse its discretion.

Notwithstanding the prosecutor's statement that she wanted to reopen *voir dire* because she may use a peremptory challenge, it is clear from the transcript that the prosecutor was specifically concerned with the Juror's response to the defense's question about whether any juror "ha[d] any philosophical or moral or religious objection to sitting in judgment of another person[.]" The Juror, who was not asked a similar question up to that point, responded equivocally:

I wouldn't quite say philosophical or religious for that matter, but I do think that -- how do I word this properly? Based off the evidence that we get, we're going to end up making a decision of whether he's innocent or guilty of the things he's accused of and me being a person -- because what I say holds, it has to be a -- what I say holds just as much weight as what anyone says, I don't particularly believe that way. It's hard for me to articulate how I'm feeling, exactly, but I don't personally feel comfortable saying, you know, that it's as dry as it is.

Due to nature of the Juror's response, the defense inquired further:

[DEFENSE]: I guess the big question . . . is if you do sit on this jury, you're, obviously, going to hear all the evidence. You're going to be right in the front row for all of it, and at the end of that, Judge Sumner will read you a very thorough explanation of what the law is, and you'll be asked to apply that law to the evidence you just saw. I mean, are you going to be able to do that?

[THE JUROR]: That's not a question of whether or not I can do that. I can do that. My thing is personally thinking

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about it after the trial, like, if I say this man deserves whatever punishment he may or may not get, I don't want anything on my conscience one way or the other.

[DEFENSE]: I mean, that's the whole intent of the jury process is to put the evidence before you and if it convinces you beyond a reasonable doubt, you make a decision one way and if it doesn't -- I mean, that's the -- you're okay with that?

[THE JUROR]: With the process?

[DEFENSE]: Yes, sir.

[THE JUROR]: Yes.

Before the defense moved on, the trial court clarified that the jury would only be tasked with deciding guilt or innocence, and the court would decide the sentence.

When the prosecutor subsequently moved to reopen *voir dire* pursuant to N.C.G.S. § 15A-1214(g), the prosecutor referenced the Juror's ambiguous response concerning objections to sitting in judgment. Out of an abundance of caution, the trial court overruled the defense's objection and granted the State's motion, allowing "a few questions just to make sure." Explaining its decision, the trial court expressed its dissatisfaction with questions to prospective jurors about sitting in judgment, because such questions are often misinterpreted and raise additional questions. The prosecutor's additional questions to the Juror focused exclusively on his prior response that suggested he may have an objection to sitting in judgment. The Juror continued to express concern that his verdict may weigh on him personally afterwards, but he assured the court he had no issue listening to the evidence and

rendering a verdict based on the evidence. Despite his assurances, the Juror, again, expressed that “it’s hard for [him] to articulate what [he] was thinking and what [he] was feeling[.]”

The trial court has broad discretion in regulating jury selection to ensure a fair and impartial jury is impaneled. *See State v. Johnson*, 161 N.C. App. 68, 76, 587 S.E.2d 445, 450 (2003) (“A trial court has the discretion . . . to reopen examination of a juror and excuse that juror upon challenge, whether for cause or peremptory as a product of its power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State may receive a fair trial before an impartial jury.”) quotation marks and citations omitted)). The trial court’s reopening of *voir dire* to assuage lingering concerns raised by the Juror’s response did not amount to an abuse of discretion. *See Boggess*, 358 N.C. at 683, 600 S.E.2d at 457 (explaining that “[b]ecause the jury has not been impaneled and other potential jurors are still available, minimal disruption occurs if the judge resolves any doubts in favor of reopening *voir dire* and accords counsel the right to exercise any remaining peremptory challenges”). The Juror’s response to the defense’s question regarding objections to sitting in judgment was unclear and indicated the Juror was concerned about the impact his verdict would have on him, leaving open the possibility that it could impact his impartiality and decision in the case. Not only was the Juror’s initial response unclear, his responses to the defense’s additional questions provided little

clarity. Just as in *Bond*, we hold the Juror's equivocation itself qualified as good reason to reopen *voir dire*. See *Bond*, 345 N.C. at 20, 478 S.E.2d at 172 (concluding that even if a juror's equivocal statements were not inaccurate, the equivocation itself qualified as good reason to reopen *voir dire*). Thus, the trial court did not abuse its discretion in reopening *voir dire*.

Furthermore, the prosecutor's indication that she wanted to reopen *voir dire* to determine whether she would use a peremptory challenge to excuse the Juror did not foreclose the possibility that the Juror could be challenged for cause and did not negate the fact that good reason existed for reopening *voir dire* in this case. Indeed, the defense seemed to acknowledge that there was a possibility the Juror may be challenged for cause upon the reopening of *voir dire* when defense counsel requested an additional peremptory challenge "if this does end up with the juror being removed, *either for cause* or [if] the State exercises a preemptory [sic] challenge[.]" (Emphasis added). In the present case, the Juror's equivocal response provided good reason to reopen *voir dire* for further examination.

Ultimately, the prosecutor's supplementary examination of the Juror did not result in a challenge for cause. The prosecutor instead used a peremptory challenge to excuse the Juror, which was her "absolute right" upon the reopening of *voir dire*. *Freeman*, 314 N.C. at 438, 333 S.E.2d at 747 (holding parties have an absolute right to exercise remaining peremptory challenges upon the reopening of *voir dire*).

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Assuming, *arguendo*, the trial court erred in reopening *voir dire* of the Juror, Defendant has not shown he was prejudiced. First, the trial court took action to ensure Defendant was not prejudiced by the State's out-of-order removal of the Juror by peremptory challenge by allowing Defendant's request for an additional peremptory challenge. Second, we are not convinced by Defendant's argument that the removal of the Juror "altered the make-up of the jury in a manner which reasonably could have affected the outcome of the trial." Based on the Juror's responses during *voir dire*, Defendant asserts that the "Juror . . . recognized the gravely serious responsibility of a juror and would have considered the evidence with great care and caution" and essentially argues the Juror may have viewed the evidence differently than the replacement juror. This argument, however, is purely conjecture and does not establish "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443 (2017). Defendant has failed to cite any authority to support his argument that the mere possibility a removed juror would have reached a different verdict amounts to prejudice requiring a new trial. Nor has Defendant shown, or even suggested that the replacement juror, or any other juror, who actually served was incompetent to do so or objectionable, depriving him of a fair trial. *See State v. Kirkman*, 293 N.C. 447, 453, 238 S.E.2d 456, 459 (1977) (finding no reversible error where the trial court allowed the district attorney's

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request to reopen *voir dire*, and the district attorney exercised a peremptory challenge to remove a juror without additional questioning of the juror).

The trial court did not abuse its discretion in allowing the prosecutor's request to reopen *voir dire* of the Juror to address his equivocal response to the defense's inquiry about sitting in judgment. Alternatively, Defendant has not established prejudice.

NO PREJUDICIAL ERROR.

Judges DIETZ and ZACHARY concur.

Report per Rule 30(e).