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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1085

Filed: 31 December 2020

New Hanover County, Nos. 17 CRS 60179, 18 CRS 694-95

STATE OF NORTH CAROLINA

v.

KEVIN LAMONT WHITING, Defendant.

Appeal by Defendant from judgments entered 8 May 2019 by Judge John E. Nobles, Jr., in Superior Court New Hanover County. Heard in the Court of Appeals on 22 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Benjamin O. Zellinger, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi E. Reiner, for Defendant-Appellant.

McGEE, Chief Judge.

Kevin Lamont Whiting (“Defendant”) appeals from judgments entered upon a jury’s verdicts finding him guilty of assault inflicting injury by strangulation, first-degree kidnapping, and felonious assault. Defendant argues that the trial court erred by (1) denying his *Batson* challenge; (2) temporarily closing the courtroom to the public; and (3) admitting evidence of a prior bad act in violation of N.C. Gen. Stat.

8C-1, Rule 404(b). We remand for a new *Batson* hearing, dismiss Defendant's challenge to the temporary closing of the courtroom, and find no prejudicial error in the trial court's admission of evidence.

Factual and Procedural History

In the early morning hours of 1 December 2017, Annette Manzi ("Ms. Manzi") left the hotel in which she and her husband were staying to go for her customary brisk, 45-minute walk. Ms. Manzi passed Defendant on her way to a walking path, and Defendant asked if she had a light. She replied that she did not. However, Ms. Manzi noticed that there was caution tape at the entrance to the walkway, and she asked Defendant if the path was open. Defendant responded that he "was just back there, it's fine." Ms. Manzi assumed that Defendant was a walker or runner.

Ms. Manzi entered the walking path, and started her walk. When she stopped to tie her shoe, she realized that Defendant was standing behind her, smoking. Ms. Manzi continued her walk, and realized that Defendant was following her. She told Defendant she was uncomfortable with him following her so closely, and Defendant asked her for money. She told Defendant that she did not have any money, and turned to continue her walk. Defendant then threw her to the ground and attacked her, repeatedly punching her in the face with both of his fists; he then twisted her neck; and he then grabbed her neck with both hands and strangled her until she was

rendered unconscious. Her last thought before passing out was that she was about to die.

When Ms. Manzi regained consciousness, she found herself in a field with Defendant, who pointed to the back of the field and said, “Now we’re going to go back there . . . and have sex.” She protested, and falsely told Defendant that her boyfriend had AIDS and that she was “a very sick woman.” Defendant and Ms. Manzi returned to the walking path, where a woman passed them. Ms. Manzi realized, and thought that Defendant also realized, that the woman could become “a witness to whatever might occur from then on.”

Defendant and Ms. Manzi started talking. Defendant told her, “I don’t know why I did this to you,” and said that he believed he would be “going to go to jail for a long time” because Ms. Manzi would contact law enforcement. She said she would not and asked Defendant to let her walk away. Defendant asked if she had a tissue so that he could clean her face, but she declined and again asked if she could walk away. Based on the tenor of the conversation, Ms. Manzi felt as though Defendant was allowing her to leave, which she did. She returned to the hotel, bloody, bruised, dirty, and disheveled, and hotel employees insisted on calling law enforcement. EMTs transported Ms. Manzi to the local hospital by ambulance.

Defendant was charged with assault inflicting physical injury by strangulation, first-degree kidnapping, attempted first-degree rape, and habitual

misdemeanor assault. Defendant was tried in Superior Court in New Hanover County on 7 May 2019. During jury selection, Defendant's counsel raised a *Batson* challenge, claiming that the prosecutor unconstitutionally struck two African American prospective jurors from the venire. Before hearing the *Batson* challenge, the trial court cleared the courtroom of the prospective jurors and the public. After hearing defense counsel's argument, the trial court summarily denied Defendant's *Batson* challenge, and reopened the courtroom.

At the conclusion of the State's evidence, Defendant stipulated that he had two prior misdemeanor assault convictions for the purposes of the charge of habitual misdemeanor assault. Defendant did not present any evidence as to the remaining charges, and the jury returned verdicts finding Defendant guilty of assault inflicting physical injury by strangulation, first-degree kidnapping, and habitual misdemeanor assault. The jury found Defendant not guilty of attempted first-degree rape. Defendant appeals.

Discussion

Defendant contends that the trial court erred by (1) denying his *Batson* challenge and ruling that he did not establish a prima facie case of discrimination; (2) closing the courtroom to the public during the hearing on Defendant's *Batson* challenge; and (3) allowing the State to present inadmissible character evidence of a prior bad act.

I. *Batson* Challenge

Defendant first argues that the trial court erred by summarily denying his *Batson* challenge, contending, *inter alia*, that the trial court “fail[ed] to engage in the well-established, mandatory, three-step *Batson* analysis.” We agree.

A. Batson v. Kentucky

Although “peremptory challenges generally allow a party to remove a prospective juror for any reason, article 1, section 26 of the North Carolina Constitution prohibits the use of peremptory challenges to exclude potential jurors ‘from jury service on account of sex, race, color, religion, or national origin.’” *State v. Hood*, ___ N.C. App. ___, ___, 848 S.E.2d 515, ___ (2020) (citing N.C. Const. art. I, § 26). The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States also “prohibits discrimination in jury selection on the basis of race.” *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986).

Once a party raises a *Batson* challenge, the trial court must engage in a three-part burden-shifting analysis “to determine whether a prosecutor impermissibly exercised a peremptory challenge based upon a prospective juror’s race in violation of *Batson*.” *State v. Bennett*, 374 N.C. 579, 592, 843 S.E.2d 222, 231 (2020).

First, the party raising the claim must make a *prima facie* showing of intentional discrimination under the totality of the relevant facts in the case. Second, if a *prima facie* case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the

trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.

Id. (citation omitted).

This case concerns the first step in the *Batson* analysis—“a prima facie showing of intentional discrimination.” “[A] defendant satisfies the requirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” *State v. Hobbs*, 374 N.C. 345, 350, 841 S.E.2d 492, 497 (2020) (citation omitted). As “the burden on a defendant at this stage is one of production, not of persuasion,” *id.* at 351, 841 S.E.2d at 498, it follows that this step “is not intended to be a high hurdle for [a] defendant[] to cross,” *Bennett*, 374 N.C. at 597, 843 S.E.2d at 234 (citation omitted). “So long as a defendant provides evidence from which the court can infer discriminatory purpose, a defendant has established a prima facie case and has thereby transferred the burden of production to the State.” *Hobbs*, 374 N.C. at 350, 841 S.E.2d at 497.

Our Supreme Court has identified several factors for a trial court to consider in determining whether the defendant has established a prima facie case of intentional discrimination:

[T]he defendant’s race, the victim’s race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution’s use of a disproportionate number of peremptory challenges to

strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

Id. at 350, 841 S.E.2d at 497–98 (citation omitted).

B. Standard of Review

“Upon review of a *Batson* inquiry, the findings of a trial court are not to be overturned unless the appellate court is convinced that its determination was clearly erroneous.” *Hood*, ___ N.C. App. at ___, 848 S.E.2d at 519 (citation and internal quotation marks omitted). “Issues of law are reviewed de novo.” *Id.* (quoting *Hobbs*, 374 N.C. at 349, 841 S.E.2d at 497).

C. Merits

Defendant argues that “the trial court failed to engage in the [*Batson*] process at all” by summarily denying his *Batson* challenge without finding that he “had or had not made a prima facie case, without asking the State for its reasons for striking Nixon and Sidbury, and without determining whether the State’s strikes of Nixon and Sidbury were permissible under *Batson*.”

Defendant’s counsel raised a *Batson* challenge after the State exercised peremptory challenges against Sidion Nixon, Gerome Sidbury, and Hugh Highsmith.¹ Arguing that there was a prima facie case of racial discrimination, defense counsel asserted that Nixon and Sidbury “appear to be African-American,”

¹ The State had not exercised any peremptory challenges prior to these three. Only one prospective juror, Leslie Martin, had been excused by the State for cause.

and that the prosecutor apparently struck them “because of expressing some displeasure with the system, criminal system.” Defense counsel argued that although Nixon expressed displeasure at the fact that her brother was held in the county jail for three years waiting for his case to be heard, “[o]therwise there’s nothing different about her answers than any other juror there.” In addition, defense counsel argued that despite the fact that Sidbury is related to someone who has “been in and out of trouble” with the law, Sidbury was “apparently not convicted”; while Sidbury “expressed some displeasure about some of [his relative’s] charges,” he “didn’t condemn the system.”

After listening to defense counsel’s argument, the trial court asked counsel about Jammal Cato, an African American prospective juror. The prosecutor had not challenged Cato, and he remained on the jury panel. Defense counsel explained that, unlike prospective jurors Sidbury and Nixon, “[Cato] gave no answers that tended to say that he criticized the system for what most people would.” The trial court then summarily denied Defendant’s motion without making any findings of fact.

“The trial court’s summary denial of a [d]efendant’s *Batson* challenge precludes appellate review.” *Hood*, ___ N.C. App. at ___, 848 S.E.2d at 522. “To allow for appellate review, the trial court *must make specific findings of fact at each stage* of the *Batson* inquiry that it reaches.” *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998) (emphasis added). As our Supreme Court recently made clear,

“[a] trial court’s *findings* with respect to the issue of whether a defendant has made out a prima facie case of discrimination will be upheld on appeal unless they are clearly erroneous[.]” *Bennett*, 374 N.C. at 592, 843 S.E.2d at 231 (emphasis added) (citations and internal quotation marks omitted).

In this case, the trial court summarily denied Defendant’s *Batson* challenge. In the absence of *any* findings of fact, this matter must be remanded for a new *Batson* hearing so that the trial court may adequately address the issue of whether Defendant established a prima facie case of discrimination as to jurors Nixon and Sidbury. On remand, if Defendant is able to “satisfy the requirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred, with the existence of such a permissible inference not being the same thing as an ultimate conclusion that impermissible discrimination has, in fact, taken place,” *id.* at 598, 843 S.E.2d at 235 (citation and internal quotation marks omitted), then the trial court shall proceed with the *Batson* analysis, *see id.* at 602–03, 843 S.E.2d at 238.

Lastly, we note that the fact that the prosecutor accepted other African-American prospective jurors does not necessarily prevent Defendant from establishing a prima facie case of discrimination. As our Supreme Court observed in *Bennett*, “the trial court’s reference to the fact that the prosecutor had accepted . . . African American prospective jurors in finding that [the] defendant had failed to

make out a prima facie case of discrimination may rest upon a misapprehension of the manner in which *Batson* . . . should be applied.” *Id.* at 599 n.8, 843 S.E.2d at 236 n.8. It is well settled that “a single, racially motivated peremptory challenge directed to a qualified African American prospective juror may constitute grounds for a valid *Batson* claim regardless of the rate at which the prosecutor accepted African American prospective jurors over the course of the entire jury selection process.” *Id.*

II. Closed Courtroom

Defendant next argues that the trial court impermissibly closed the courtroom to the public during the hearing on his *Batson* challenge. However, Defendant concedes that his counsel did not object to this issue at trial.

N.C.R. App. P. 10(a)(1) states that “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” Recognizing that this issue was not properly preserved, Defendant requests that we invoke Appellate Rule 2 in order to reach the merits of this issue.

Rule 2 provides that “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules[.]” N.C.R. App. P. 2. Suspension of the Appellate

Rules is an “extraordinary step” to be used cautiously and only in “exceptional circumstances.” *State v. Harris*, 222 N.C. App. 585, 588, 730 S.E.2d 834, 837 (citation omitted), *disc. review denied*, 366 N.C. 413, 736 S.E.2d 175 (2012). “[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017).

We discern no manifest injustice warranting the suspension of the Appellate Rules. We are not persuaded that this is the exceptional case in which invocation of Rule 2 is appropriate. Accordingly, this portion of Defendant’s appeal is dismissed.

III. Rule 404(b)

Defendant also argues that the trial court erred by admitting inadmissible character evidence in the form of Rachel Carter’s testimony that, on the day before Manzi’s assault, she was in a public park reading a book when she noticed Defendant staring at her and masturbating. Defendant asserts that “[a]ny probative value the Carter evidence may have had was minimal in comparison to the substantial prejudice engendered by it[.]”

A. Standard of Review

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019) states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” Nevertheless, character evidence

may be admissible for purposes unrelated to a defendant's propensity to commit a crime, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant," allowing such evidence to be admitted unless "its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990).

Whether "evidence is, or is not, within the coverage of Rule 404(b)" is a conclusion of law reviewed de novo on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). If the evidence is being offered for non-propensity purposes, the trial court must then evaluate, pursuant to Rule 403, whether the probative value of the evidence is outweighed by its prejudicial nature. *See id.* This Court will "review the trial court's Rule 403 determination for abuse of discretion." *Id.*

Ultimately, however, the admission of evidence in violation of Rule 404(b) does not necessitate a new trial unless the error is prejudicial. *See* N.C. Gen. Stat. § 15A-1443(a) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is 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."); *accord State v. Groves*, 324 N.C.

360, 372, 378 S.E.2d 763, 771 (1989) (“The defendant has failed to carry his burden of showing prejudice resulting from any possible violation of Rule 404(b).”).

B. Merits

Defendant argues that Carter’s testimony “had no probative value to prove any material fact other than [his] character and seriously affected the fairness and integrity of the proceeding.” However, Defendant has not established that a reasonable possibility exists that, “had the error in question not been committed, a different result would have been reached at the trial.” N.C. Gen. Stat. § 15A-1443(a). Assuming, *arguendo*, that the trial court erred by admitting improper character evidence, the jury was presented with ample other evidence to support its guilty verdict.

At trial, Ms. Manzi presented a detailed account of Defendant’s attack on her and his subsequent actions. The jury heard Ms. Manzi describe how Defendant slowly pursued her, battered her, strangled her to the point of blacking out, and then—when she regained consciousness in the dark, and in a different location—instructed her to have sex with him. She testified to the pain she endured, as well as her fear of being raped and dying. In addition, Ms. Manzi recounted conversations that she had with Defendant immediately after the assault, including Defendant’s statements, “I don’t know why I did this to you,” and, “I’m going to go to jail for a long time.” Defendant did not object to Ms. Manzi’s testimony regarding these inculpatory

statements, nor did he object to the admission into evidence of numerous photographs of the injuries she sustained.

Moreover, Ms. Manzi identified Defendant from a photo lineup, as well as in the courtroom at trial. Lori Lynch (“Ms. Lynch”) testified that she happened to see Defendant and Ms. Manzi in the field after Ms. Manzi was beaten, and that she called 911 to report what she perceived to be an emergency. Ms. Lynch also identified Defendant in the courtroom. Officer Maurice Thorpe and Detective Robert Pearce testified to their investigation of the attack on Ms. Manzi, and the jury was shown a videotape of Detective Pearce’s interview of Defendant. Assuming, *arguendo*, that the admission of Carter’s testimony was error, Defendant cannot show that he was prejudiced by its admission.

We also note that the trial court provided a limiting instruction in its jury charge with regard to Carter’s testimony. “Generally, when a trial court properly instructs jurors to disregard incompetent or objectionable evidence, any error in the admission of the evidence is cured.” *State v. Diehl*, 147 N.C. App. 646, 650, 557 S.E.2d 152, 155 (2001), *cert. denied*, 356 N.C. 170, 568 S.E.2d 624 (2002); *see also* N.C. Gen. Stat. § 8C-1, Rule 105 cmt. (providing “that evidence . . . inadmissible for one purpose may be admitted for other and proper purposes” after the trial court has instructed the jury accordingly).

Thus, given the trial court's limiting instruction and the substantial other evidence of Defendant's guilt, Defendant "has failed to show . . . that, but for the admission of [Carter's testimony] . . . a different result would have been reached at trial." *Groves*, 324 N.C. at 372, 378 S.E.2d at 771. Defendant's argument is without merit.

Conclusion

We remand to the trial court for a new *Batson* hearing so that it may make appropriate findings of fact regarding whether Defendant established a prima facie case of discrimination in the prosecutor's use of peremptory challenges to strike jurors Nixon and Sidbury. *See Bennett*, 374 N.C. at 592, 843 S.E.2d at 231. If on remand the trial court determines that Defendant has, in fact, made out a prima facie case, then the matter will proceed with the next steps of the *Batson* analysis. *See id.* at 602–03, 843 S.E.2d at 238.

Defendant failed to preserve any challenge to the temporary closing of the courtroom to the public during the hearing on Defendant's *Batson* challenge, and therefore, we dismiss this portion of Defendant's appeal. Finally, we conclude that Defendant received a fair trial, free from prejudicial error.

NO ERROR IN PART; REMANDED FOR REHEARING; DISMISSED IN PART.

Judges ZACHARY and ARROWOOD concur.

STATE V. WHITING

Opinion of the Court

Report per Rule 30(e).