IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-115

No. COA20-341

Filed 6 April 2021

Mecklenburg County, Nos. 17 CRS 236477-80, 18 CRS 12976

STATE OF NORTH CAROLINA

v.

JOHNATHAN TYLER AUTRY

Appeal by Defendant from Judgments entered 31 May 2019, by Judge Lori I. Hamilton in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Taylor H. Crabtree, for the State.

Appellate Defender Glenn Gerding and Assistant Appellate Defender Anne M. Gomez for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Johnathan Tyler Autry (Defendant) appeals from Judgments entered 31 May 2019, upon jury verdicts finding him guilty of First-Degree Kidnapping, Possession of a Firearm by a Felon, Non-Felonious Breaking or Entering, Robbery with a

Dangerous Weapon, and attaining Habitual-Felon Status. The Record, in relevant part, tends to reflect the following:

¶ 2 On the morning of 20 May 2019, Defendant was scheduled to appear in Mecklenburg County Superior Court for trial on the charges of First-Degree Kidnapping, First-Degree Burglary, Possession of a Firearm by a Felon, and for attaining Habitual-Felon Status. When the trial court called Defendant's case for trial that morning, however, Defendant was not present in court. The State reported that Defendant, who was out on bail and subject to electronic monitoring, was shown to be traveling to Charlotte from Shelby, North Carolina. The State requested the trial court hold the matter open in anticipation of Defendant's arrival. The trial court handled other matters before it again called Defendant's case. The State indicated Defendant's electronic monitoring estimated Defendant was still around thirty minutes away. Again, the State requested the trial court hold the case open. The trial court obliged but made clear: "[W]hat I don't intend to do is sit idle this morning while we're waiting for somebody. I just drove almost two hours to get here. I got here on time. I expect people who have business before this Court to be on time."

¶ 3 When the trial court called for Defendant a third time, he was still not present. Consequently, the trial court entered an order for Defendant's arrest, an order for forfeiture, and tripled Defendant's bond. Electronic monitoring later indicated Defendant was heading in the opposite direction of the trial court, and that afternoon

Defendant was arrested in Shelby, North Carolina.

¶ 4 The next morning, on 21 May 2019, the trial court announced it was ready to proceed with Defendant's case; however, Defendant and defense counsel could not be located because of apparent logistical issues occurring somewhere between the jail and the courthouse and despite the fact Defendant was now in custody. Again, the trial court turned to other matters but expressed concern about further delay in reaching Defendant's case. Eventually, both defense counsel and Defendant were located, and Defendant brought into the courtroom.

¶ 5 Then, Defendant elected to first proceed on his pending Motion to Continue the trial. The State opposed the Motion to Continue, arguing no further delays in Defendant's trial should be permitted given: the seriousness of the allegations against Defendant; the fact the incident alleged occurred in September 2017; the fact that while out of custody and awaiting trial, Defendant had been arrested and charged with additional felonies; and, further, that during a 29 January 2019 pretrial readiness conference, Defendant was expected to plead guilty under a plea agreement in which he would be sentenced to a total of 120 to 156 months, active sentence. Defendant, however, did not accept the plea offered at the time, which resulted in the case being set for trial. In response to the trial court's inquiry, the State told the trial court Defendant faced a potential sentence of up to 557 to 681 months if found guilty of all charges and if the sentences were ordered to run consecutively. The trial court

denied Defendant's Motion to Continue.

¶ 6 The trial court proceeded to hear at length regarding additional pretrial motions on behalf of both Defendant and the State, including the State's Motion in Limine. The State sought to introduce and play bodycam footage from the responding and arresting officers that depicted the incident leading up to Defendant's shooting as well as the officers rendering care afterward. Defendant opposed the State's introduction of the videos arguing they were highly prejudicial and irrelevant to the elements of the offenses charged. The trial court viewed the videos and granted the State's Motion in part, allowing portions of the videos to be played before the jury. After ruling on both parties' respective motions, the trial court continued with jury selection for the remainder of the day.

¶ 7 When Defendant's trial resumed on the morning of 22 May 2019, defense counsel reported Defendant wished to accept the plea offer previously extended by the State in which Defendant would agree to plead guilty and to an aggravating factor and be sentenced to 120 months. The State, however, pointed out it had withdrawn that offer after Defendant failed to agree to it in January 2019. Instead, the State proposed that if Defendant now pleaded guilty on those terms, the State would recommend the trial court sentence Defendant to three, consecutive Class C sentences in the aggravated range and incorporating Defendant's habitual-felon status, which would result in a minimum sentence of 300 months.

¶ 8 Defense counsel beseeched the trial court to consider the ten-year minimum sentence upon accepting Defendant's guilty plea, including an aggravated factor. However, defense counsel also requested the trial court accept the plea but further postpone Defendant's sentencing hearing to a later date so that Defendant's family could be present. The State asked if it could be heard; at that point, the trial court responded: "I don't think you really need to." The trial court then continued:

> Let me just say this: I watched the videos yesterday. I received the presentation of the facts or the forecast of the facts from both sides, and this is what I've seen. This is a 29 year old -- I'm going to call him a man, I don't think his actions demonstrate that he's actually a man, but I'm going to call him a man, who at 29 years of age, about half my age, has amassed a record that makes him not only a habitual felon but a level three habitual felon which means he's been quite busy in his very young life.
>
> He has apparently dedicated a great deal of his adult life to this point to breaking the laws of our society. On this occasion, he busted in the door of a home where a pregnant woman and a very young child were alone in the night. He did it intentionally, as was demonstrated by the way he was dressed wearing gloves and a hoodie, and he had a firearm. He did it intentionally and he did it in in a way that was obviously intended to cause maximum terror with complete disregard to the safety of this pregnant woman and her young child.
>
> He took the pregnant woman hostage, used her as a human shield again demonstrating complete, total disregard for her safety and the safety of her unborn child with only the concern of getting away from the consequences of having committed now these heinous crimes.
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> While he's awaiting trial in this case, he gets into more trouble which further demonstrates to this Court his inability to conform

> his actions to the expectations to the rules of society, and for all of those reasons, I am not inclined to cut him a break. . . . I am perfectly okay with this case going to trial. I am perfectly okay with the jury seeing the evidence and rendering a decision based on that evidence, and I am perfectly okay with sentencing him at the top of the aggravated range on each one of these four charges if the jury finds him guilty on all of those and finds that he is an habitual felon.
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> And so, for that reason, I am certainly not going to have this young man walk after ten years. I don't think that comes anywhere close to justice. I would be more inclined to accept the State's recommendation because my natural inclination is to go all the way to the top of the aggravated range on each one of these four to essentially put him in prison until he is such an old man that he cannot come back out and terror my community anymore. That's where I stand, and your client may decide, based on my personal feelings about what I have seen and what I've been presented in this case, that he doesn't want to take the plea. He may decide he would rather go to trial since this hard hearted judge is not willing to let him out with a -- what in this case under these facts would in my opinion be a slap on the wrist, and if that's the case, I'm perfectly okay with him withdrawing or not entering the plea, changing his mind and going to trial.

¶ 9 When the trial court judge concluded, defense counsel made an oral motion for recusal, on the basis "that the Court has already made its mind up as to [Defendant's] innocence or guilt," and the "[trial court] already pretty much stated [it] out as to what [it] would sentence [Defendant] to even without hearing the evidence in this case at this point in time." The trial court denied Defendant's Motion for Recusal, stating, "I have indicated my inclination. I have not made up my mind[.]"

¶ 10 Defendant's case proceeded to trial. At the close of all the State's evidence,

Defendant renewed his Motion for Recusal, which the trial court again denied. Defendant then took the stand in his defense. After Defendant concluded his testimony, and outside the presence of the jury, the trial court clarified its earlier comments:

> I treated your presentations, your arguments to me, much like any other conversation that happens quite frequently when counsel for both sides wants to get a forecast from the judge, based on what we've told you, judge, how do you think you will sentence? And that's how I treated that presentation and those arguments.
>
> I treated them as an invitation for me to give you an idea that if you entered into this plea what I would do so that the defendant would have the benefit of knowing what he was going to get into if he decided to take this plea because I don't think it's fair for people to make those very serious decisions without having some of idea of what they're getting into.
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> . . . .
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> That was simply my expression to you of my inclination. I had not heard the facts. I had received the evidence. I was simply giving you some idea of where I might go or could go if the facts turned out to be as they were forecasted to me.
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> . . . .
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> [Defense counsel], you have indicated, and I think this is you telling me what your client has told you, that your client senses an animus toward him. One of the reasons that I think he has given for feeling that way is, and I quote from the record from earlier today, I was reluctant to call your client a man. Let me clarify.
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> When I said what I said, my meaning was that he has

> exhibited, so far, a level of irresponsibility and immaturity, just in the couple of days that I had to deal with him, that gave me pause to give him the credit of being an adult. That's all I meant."

¶ 11 The jury ultimately returned verdicts finding Defendant guilty of First-Degree Kidnapping, Possession of a Firearm by a Felon, Non-Felonious Breaking or Entering (a lesser-included offense of the First-Degree Burglary charge), Robbery with a Dangerous Weapon, and attaining Habitual-Felon Status. The trial court found as an aggravating factor that Defendant committed a probation violation in the past ten years.[1]

¶ 12 Accordingly, the trial court sentenced Defendant in the aggravated range to a total, active sentence of 390 to 504 months for his convictions of First-Degree Kidnapping, Possession of a Firearm by a Felon, and Armed Robbery, and a consecutive, 120-day active sentence for Misdemeanor Breaking and Entering. Defendant entered Notice of Appeal in open court.

Issue

¶ 13 The sole issue before this Court is whether the trial court abused its discretion in failing to recuse itself from presiding over Defendant's trial.

Analysis

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[1] Factor 12a on AOC Form 605 states "The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation . . . . The Court finds this aggravating factor beyond a reasonable doubt."

¶ 14 "A fair jury in jury cases and an impartial judge in all cases are prime requisites of due process." *Ponder v. Davis*, 233 N.C. 699, 704, 65 S.E.2d 356, 359 (1951). Accordingly, N.C. Gen. Stat. § 15A-1223 provides:

> (a) A judge on his own motion may disqualify himself [or herself] from presiding over a criminal trial or other criminal proceeding.
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> (b) A judge, on motion of the State or the defendant, must disqualify himself [or herself] from presiding over a criminal trial or other criminal proceeding if he [or she] is:
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> (1) Prejudiced against the moving party or in favor of the adverse party; or
>
> . . . .
>
> (3) Closely related to the defendant by blood or marriage; or
>
> (4) For any other reason unable to perform the duties required of him in an impartial manner.

N.C. Gen. Stat. § 15A-1223(a)-(b) (2019). Furthermore, "[a] motion to disqualify *must* be in writing and *must* be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification." *Id.* § 15A-1223(c) (2019) (emphasis added). Then, upon a proper motion, "[t]he burden is on the party moving for recusal to demonstrate objectively that grounds for disqualification actually exist." *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993) (citations and quotation marks omitted). "Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge

that he [or she] would be unable to rule impartially." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987) (citation and quotation marks omitted). We review a trial court's denial of a motion to recuse for abuse of discretion. *State v. Inman*, 39 N.C. App. 366, 369, 249 S.E.2d 884, 886 (1979).

¶ 15 Here, Defendant contends the trial court abused its discretion in denying Defendant's Motion to Recuse or, alternatively, for failing to refer Defendant's Motion to Recuse to another judge. Defendant argues the trial court exhibited "open animus and disgust toward [Defendant], showing actual bias against [Defendant] personally, or at least giving the appearance of bias."

¶ 16 As a threshold matter, Defendant's Motion to Recuse was made orally; the Record contains no evidence of a written motion *or* of any accompanying affidavits, both of which are required by N.C. Gen. Stat. § 15A-1223(c). N.C. Gen. Stat. § 15A-1223(c); *see State v. Moffitt*, 185 N.C. App. 308, 311, 648 S.E.2d 272, 274 (2007) (noting the defendant's "request to the trial court to recuse himself was made only orally, not in writing as required by [N.C. Gen. Stat. §15A-1223(c)]"). Accordingly, Defendant's Motion to Recuse does not comply with the requirements of Section 15A-1223(c).[2] Thus, without a proper motion, we are constrained to hold the trial court did not

[2] Section 15A-1223(d) continues: "A motion to disqualify a judge must be filed no less than five days before the time the case is called for trial unless good cause is shown . . . ." and defines "good cause" to include "the discovery of facts constituting grounds for disqualification less than five days before the case is called for trial." N.C. Gen. Stat. §15A-1223(d).

abuse its discretion in denying Defendant's oral Motion to Recuse or in failing to refer the Motion to another judge for consideration.

¶ 17 The issue remains, however, whether the trial court was required to recuse itself on its own motion in light of its comments made prior to Defendant's trial. Our Supreme Court has opined:

> 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. . . . The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts.

Fie, 320 N.C. at 628, 359 S.E.2d at 775-76 (citations and quotation marks omitted) (ellipses in original).

¶ 18 Furthermore, the burden is on the party seeking recusal to "demonstrate objectively that grounds for disqualification actually exist." *Id.* at 627, 359 S.E.2d at 775 (citation and quotation marks omitted). The party may meet this burden by showing "substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he [or she] would be unable to rule impartially." *Id*. (citation and quotation marks omitted). "However, not every instance of a judge's impatience, 'acerbic' remarks, or failure to demonstrate 'a model of temperateness,' when viewed in the totality of circumstances, deprives a defendant of a fair trial." *State v. Oakes*, 209 N.C. App. 18, 30, 703 S.E.2d 476, 485 (2011) (citations omitted).

¶ 19 Here, although the trial court's comments were perhaps not a model of temperateness, they tend to reflect the seriousness of the charges, the trial court's impatience with Defendant's delays, and its perception Defendant lacked maturity. Therefore, considering the totality of the circumstances, Defendant has not met his burden of demonstrating "substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that [s]he would be unable to rule impartially." *Fie*, 320 N.C. at 627, 359 S.E.2d at 775 (citation and quotation marks omitted).

¶ 20 Specifically, the trial court's comments were made in the context of Defendant's effort to secure the plea agreement the State previously revoked, in which he would have received a minimum sentence of 120 months. And, further, in the context of Defendant asking the trial court to consider imposing that sentence rather than the State's new proposal of a minimum of 300 months. At that point, Defendant also asked the trial court to not only accept his proffered plea, but to further delay the proceedings by sentencing him at a later date. By this stage, the trial court had heard and ruled on several motions including, *inter alia*, Defendant's Motion to Continue and the State's Motion in Limine. In ruling on the State's Motion, the trial court reviewed the officers' bodycam footage, received a forecast of evidence from the State, and heard arguments from counsel. It was then, upon this forecast of the evidence, that the trial court provided its inclination to accept the State's recommendation for

Defendant's sentence. When Defendant moved for the trial court to recuse itself on the basis it had made up its mind about Defendant's purported guilt, the trial court explained: "I have indicated my inclination. I have not made up my mind, and I will not grant your motion."

¶ 21 As such, our review of the Record reflects the trial court—as it clarified—was providing Defendant with the trial court's inclination not to accept a proposed minimum sentence of only ten years, instead indicating it would be more inclined to accept the State's recommended minimum sentence, and, further, that given the forecast of evidence the trial court had already received, Defendant would be subject to greater punishment if found guilty on all charges by the jury. *See State v. Logan,* 250 N.C. App. 824, 794 S.E.2d 558 (2016) (unpublished) (slip op at 6) (Recusal not required where "[t]he judge's comments regarding making 'chicken salad' out of 'chicken shit' were not referencing defendant or the evidence of his case specifically. Rather, the comments were general and reference the fact that defendant would be indicted as [a] habitual felon with a higher presumptive sentence if he decided to go to trial instead of taking the plea agreement.").

¶ 22 Moreover, Defendant points to no other instance during the trial or in Defendant's ultimate sentence reflecting any lack of impartiality or the appearance thereof. Therefore, under the totality of the circumstances, Defendant has not met his burden to show the trial court's comments reflect Defendant was deprived of his

right to a fair trial. *See Oakes*, 209 N.C. App. at 30, 703 S.E.2d at 485. Thus, the trial court did not abuse its discretion in declining to recuse itself *ex mero motu*.

Conclusion

¶ 23 Accordingly, for the foregoing reasons, the trial court did not abuse its discretion in denying Defendant's Motion to Recuse, in failing to refer Defendant's Motion to Recuse to another judge, or in failing to recuse itself *ex mero motu*. Therefore, there was no error.

NO ERROR.

Judges DILLON and TYSON concur.

Report per Rule 30(e).