IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-440

No. COA21-167

Filed 21 June 2022

Forsyth County, Nos. 15CRS58026; 19CRS436

STATE OF NORTH CAROLINA

v.

CHARLES THOMAS STACKS, Defendant.

Appeal by defendant from judgment entered on or about 18 April 2019 by Judge R. Stuart Albright in Superior Court, Forsyth County. Heard in the Court of Appeals 11 January 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Lisa Miles, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals a judgment convicting him of first-degree murder and possession of heroin. After careful review, we hold the trial court properly inquired into a question regarding a juror raised after the guilty verdict and did not err by not declaring mistrial. In addition, the trial court did not err by overruling defendant's objection to a statement during the State's closing argument as it was appropriate

when considered in context, so we conclude there was no error.

I. Background

¶ 2 Defendant was indicted for murder, intentional child abuse resulting in serious bodily injury, and possession of heroin. The heroin was found in defendant's home. As to the child abuse and murder charges, the State's evidence tended to show defendant severely abused a two-year-old child which ultimately resulted in the child's death from a head injury. One doctor testified, "there was no surface or component of his body that didn't have bruising, all four extremities," and his scrotum and penis. The deceased child's sister told law enforcement she had previously seen defendant kick and hit her brother. Defendant also confessed to another prisoner that he felt "demon possessed" and had "grabbed," "slammed," and "banged [the child's] head several times." The jury found defendant guilty of all charges. The trial court arrested judgment on the child abuse charge and sentenced defendant to life imprisonment without parole on the murder and heroin charges. Defendant appeals.

II. Mistrial

¶ 3 The trial was conducted in two phases; the first phase addressed defendant's guilt, and the second phase addressed issues related to sentencing defendant. After the first phase, the jury reached a guilty verdict on all counts. After the verdict was entered, the trial court and counsel were informed that a juror had responded to a guardian *ad litem* informational flyer which was in the jury room. The flyer is not

part of our record. The trial court took testimony on the matter. Defendant's attorney did not call any witnesses. Defendant's attorney moved to "strike" the juror and asked that "the Court use its inherent powers to disqualify" the juror from the sentencing portion of trial. The motion was denied.

¶ 4 Defendant first contends that

> the trial court abused its discretion in failing to order a mistrial *sua sponte* and counsel was ineffective in failing to move for a mistrial upon learning that improper, prejudicial materials had been made available to jurors and that at least one juror responded to the material during the course of her jury service.

(Original in all caps.) Defendant's argument fails for several reasons. First, North Carolina General Statute § 15A-1415(a) (2019) provides, "[*A*]*fter verdict*, a noncapital defendant by motion may seek appropriate relief[.]" (Emphasis added.) Accordingly, to retroactively address this issue and address a mistrial, the proper response to the issue raised would have been a motion for appropriate relief. *See generally id.*

¶ 5 Second, even if we presume defendant properly made a motion for appropriate relief by raising the issue regarding the juror, defendant is now raising an entirely different argument than the one presented before the trial court. Whether defendant's motion is treated as a motion for mistrial or a motion for appropriate relief, the trial court did a full inquiry regarding the juror by hearing from two witnesses regarding the guardian *ad litem* program, thoroughly questioning them,

and allowing the State and defendant's counsel to question them. As noted above, the actual flyer regarding the guardian *ad litem* program is not in our record, and defendant made no argument regarding why the substance of the flyer would have a retroactive impact on the verdict.

¶ 6 The testimony showed that information regarding the guardian *ad litem* program had been placed throughout the courthouse, including in the jury room. The juror at issue "attempted to apply" for the program on the website which causes "an email [to] disseminate[] to the district administrator[.]" The district administrator responded to the email, informing the juror that she would need to fill out the application, and the juror "partially completed" the application. At no time did the juror provide any information about the trial or the jury's deliberation process. The juror stated she had heard about the guardian *ad litem* program via "word of mouth[.]" In denying defendant's request to strike the juror for the sentencing portion of the trial, the trial court explained,

> The Court is going to make the following findings. The Court finds that [the juror] did, in fact, apply to become a guardian *a*[*d*] *litem*. She was responding to an application that was in the jury assembly room.
>
> Notwithstanding that, having heard from both witnesses and all of the contact that occurred between [the juror] and the two witnesses, Ms. Bell and Mr. Evans, the Court finds that there has been no contact improper or otherwise between [the juror] and the State in this case or obviously any of the defense attorneys in this case.
>
> Court finds there's been no interference with [the

> juror] and no improper misconduct on the part of [the juror]. The mere fact that she commented she was serving on a jury, she did not identify the defendant's name, the type of case in which -- of the jury on which she was serving for anything else about this case.
>
> She made no comment about the case in any way shape or form. She merely commented that she was serving on a jury. It's merely a scheduling issue.
>
> She wanted to attend some -- gave a reason why she couldn't attend various sessions, and that was it. She gave as little information as she could, again. She merely commented that she was serving on a jury.
>
> Again, I find that is not misconduct on her part. She's conducted – there's no evidence she conducted any independent investigation.
>
> Court finds -- I remember speaking with all of the jurors, and [the juror], and asked them if they knew anything about this case before they walked into courtroom during jury selection. She said no, she did not.
>
> She could be fair and impartial and follow my instructions on the law, and, again, she could be fair and impartial to both the State and the defendant. None of these facts have changed any of those previous statements from [the juror].
>
> The Court finds that she can continue to be fair and impartial. The fact that she applied to be a guardian *a*[*d*] *litem* has nothing to do with this case based on the facts that were presented to me.[1]

¶ 7 Before the trial court, defendant requested only that the juror be removed and replaced with one of the alternate jurors; he did not request mistrial, even after the trial court denied his request to remove the juror.

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[1] We note the juror had stated during *voir dire* that she had previously worked with two doctors involved in the case when she "had a pediatric anesthesia rotation" at their hospital. The juror stated she could still be fair and impartial.

> Our courts have long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. This swapping horses argument historically has applied to circumstances in which the arguments on appeal were grounded on separate and distinct legal theories than those relied upon at the trial court[.]

State v. Cheeks, 267 N.C. App. 579, 598, 833 S.E.2d 660, 673 (2019) (citation and quotation marks omitted), *aff'd*, 377 N.C. 528, 2021-NCSC-69. Here, defendant asked to strike the juror on two separate occasions, but on appeal does not address the motion to strike. Instead, defendant has presented a new argument for mistrial, which defendant could have raised before the trial court, but he did not.

¶ 8 Further, even if we assume defendant made a proper motion for appropriate relief *and* defendant may now present an argument for mistrial, the State contends a mistrial may not be declared after verdict arguing, "the trial court could not retroactively declare a mistrial because the jury had returned a verdict and the guilt-innocence phase of the trial was over. See State v. O'Neal, 67 N.C. App. 65, 68, 312 S.E.2d 493, 495[.]" Defendant disagrees. But we need not resolve this issue. Even if we were to presume the issue of mistrial was properly before us and an allowable remedy, the fact remains, defendant has not demonstrated error on the part of the trial court or his counsel, and he has not demonstrated prejudice.

¶ 9 We note defendant does not contend the juror issue had any impact on his sentencing. All of defendant's arguments address the issue of a mistrial for a verdict which had already been entered. We recognize that "a mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict," with such a determination within the discretion of the trial court. *State v. Dye*, 207 N.C. App. 473, 481-82, 700 S.E.2d 135, 140 (2010) ("Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." (citation and quotation marks omitted))

¶ 10 The trial court did not abuse its discretion in determining that a juror responding to a guardian *ad litem* flyer did not make it "impossible" for defendant "to attain a fair and impartial verdict," particularly in light of the overwhelming evidence, including heroin found in defendant's house, the child's traumatized body which exhibited head injuries which resulted in his death, and defendant's statements that he had "banged" the child's head. *Id.*

¶ 11 Further, we conclude defendant's counsel was not ineffective in failing to seek such a drastic remedy on defendant's behalf, as failure to ask for a mistrial over the flyer was not an error, much less one that was "so serious as to deprive . . . defendant of a fair trial" in light of the extensive evidence against him. *See generally State v. Warren*, 244 N.C. App. 134, 143, 780 S.E.2d 835, 841 (2015) ("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. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable." (emphasis added) (citation, quotation marks, and ellipses omitted)). The trial court conducted a thorough investigation into the issue raised regarding the juror's inquiry to the guardian *ad litem* program, and defendant had full opportunity to question the witnesses or to present additional evidence regarding his concern about the juror if he wished to do so. We also note defendant's counsel had previously questioned the juror during jury selection regarding her work at the children's hospital, which included working on a few occasions with doctors involved in the case. Thus, defendant had already had a full opportunity to question this particular juror regarding any potential bias arising from her work with children, and defendant accepted the juror. This argument is overruled.

III. Closing Argument

¶ 12 Defendant's only other argument on appeal is that "the trial court erred in overruling the defendant's objection to the prosecutor's argument where counsel for the State clearly misstated the law regarding the defendant's presumption of

innocence." (Original in all caps.) During closing arguments, the State stated,

> And you, 12 Members of the Jury, are going to be able to render a true and just verdict that you should not have any doubt. *That presumption of innocence disappeared* the minute Dr. Couture stepped off that witness stand and he said --
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> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> -- that this injury happened within hours of me performing the surgery. And where was [defendant] at? He had the children, particularly [this child] alone in that room while his wife was out looking for drugs.

(Emphasis added.)

¶ 13 Defendant argues the State contending "[t]hat the defendant's presumption of innocence 'disappeared'" was a "misstatement of law" and that, by overruling the objection, the trial court gave a "subsequent endorsement" of the State's improper statement.

> The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision.

State v. Jones, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations and quotation marks omitted).

¶ 14 Read in context, the State's argument was that the State had carried its burden

of proving guilt, by noting the exact moment in trial – Dr. Couture's testimony – it contended defendant's guilt was proven beyond a reasonable doubt. The statement at issue cannot be reasonably interpreted to mean defendant had no presumption of innocence. In addition, the trial court instructed the jury regarding the presumption of innocence, and there is no argument regarding any error in the jury instructions. The trial court's decision to overrule defendant's objection was plainly "the result of a reasoned decision" of the State's comment made in context. *Id.; compare State v. Williams*, 201 N.C. App. 103, 105-107, 685 S.E.2d 534, 537-38 (2009) (noting "the State's closing argument was proper" where defendant argued the trial court should have intervened when the State argued, among other things, the defendant "was practically a murderer" and "did not deserve the presumption of innocence afforded to him by our Constitution" because the statements were "a fair inference from the evidence" and the State noted there was indeed a presumption of innocence). This argument is overruled.

IV. Conclusion

¶ 15 We conclude there was no error by the trial court or defendant's counsel regarding a mistrial, and the State's closing argument was appropriate in context.

NO ERROR.

Judges TYSON and GORE concur.

Report per Rule 30(e).