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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-836

Filed 18 April 2023

Lincoln County, Nos. 20CRS52212-13

STATE OF NORTH CAROLINA

v.

KHALID KRISTIAN POOLE, Defendant.

Appeal by defendant from judgment entered 12 April 2022 by Judge W. Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 8 March 2023.

W. Michael Spivey for defendant-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State-appellee.

GORE, Judge.

Khalid Kristian Poole (“defendant”) appeals from judgment entered upon his conviction for discharging a weapon into an occupied vehicle while it was in operation, assault with a deadly weapon, and carrying a concealed weapon. Defendant presents one issue on appeal: whether the trial court violated his constitutional right to trial by a properly constituted jury by substituting an alternate juror after jury

deliberations had begun. Upon review, we determine that defendant failed to preserve his constitutional claim for appellate review. Accordingly, we discern no error in the trial court's judgment.

I.

Following closing arguments, the trial court instructed the alternate jurors to be placed in a separate room from the jury. The jury retired to deliberate at 12:00 p.m. At 12:17 p.m., the trial court received a note from the jury stating, "We need an alternate juror. There is a conflict of interest." The trial court had the jury foreperson return to the courtroom at 12:18 p.m. The jury foreperson informed the trial court that one of the jurors knew the alleged victim, and that the juror believed he had a conflict of interest.

The juror with the conflict was brought into the courtroom at 12:21 p.m. The trial court verified that the juror did not discuss the case with his fellow jurors other than to say he knew the alleged victim. At 12:23 p.m., the juror with the conflict left the courtroom and was isolated from the jury. The State asserted, "I think the safe thing is to replace him with the alternate." Defense counsel then stated, "Your Honor, under these circumstances, no objection."

At 12:28, the trial court dismissed the juror with the asserted conflict and substituted an alternate juror. The trial court then gave the following instruction to the entire venire:

Members of the jury, you should not speculate about the

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reason for this substitution. The law of this state grants the defendant the right to a unanimous verdict reached only after full participation of the 12 jurors who ultimately return a verdict. That right may only be assured if the jury begins deliberations anew. Therefore, you must restart your deliberations from the beginning. This means you should disregard entirely any deliberations taking place before [the substitute juror] was sat as an alternate and consider freshly the evidence as if the deliberations had not occurred.

Although this starting over may seem frustrating, please do not let it discourage you. It is important to our system of justice that each juror has a full and fair opportunity to explore their views and to respond to the views of others so that you may come to a unanimous verdict.

The jury returned guilty verdicts on all charges. The trial court sentenced defendant to a 51-months to 74-months active term of imprisonment.

This Court has jurisdiction to hear this appeal. Defendant timely filed written notice of appeal from a final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-26(b)(1) and 15A-1444(a).

II.

Effective 1 October 2021, the General Assembly amended N.C. Gen. Stat. §§ 15A-1215 and 15A-1221 to permit an alternate juror to replace a regular juror after deliberations have begun. 2021 N.C. Sess. Laws 374, 374-75, ch. 94, §§ 1-2. The General Assembly added, among other language, the following: “[i]f an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.” N.C. Gen. Stat. § 15A-1215(a) (2021). On appeal,

defendant presents the question of whether the 2021 amendment to N.C. Gen. Stat. § 15A-1215(a) permitting substitution of an alternate juror after jury deliberations have begun violates Article I, Section 24 of the North Carolina Constitution.

“It has never been doubted that the Constitution of this State requires a unanimous verdict for a valid conviction for any crime.” *State v. Williams*, 286 N.C. 422, 427, 212 S.E.2d 113, 117 (1975). “Article I, Section 24 of the North Carolina Constitution, which guarantees the right to trial by jury, contemplates no more or less than a jury of twelve persons.” *State v. Bunning*, 346 N.C. 253, 256, 485 S.E.2d 290, 292 (1997). Defendant’s constitutional challenge to N.C. Gen. Stat. § 15A-1215(a) (amended 2021) appears to be an issue of first impression in this State. We first address whether defendant’s constitutional claim is preserved for appellate review.

At trial, defendant did not object to the alternate juror substitution, nor did he argue that N.C. Gen. Stat. § 15A-1215(a) (amended 2021) is unconstitutional. “While Appellate Rule 10([a])(1) protects judicial economy and speaks to our adversarial system of justice by requiring the parties to object in the majority of instances, it nevertheless recognizes that some questions may be deemed preserved for review by rule or law.” *State v. Wilson*, 363 N.C. 478, 486, 681 S.E.2d 325, 331 (2009). Defendant cites to *State v. Ashe*, for its general rule that where “the error violates [a] defendant’s right to a trial by a jury of twelve, [a] defendant’s failure to object is not fatal to his right to raise the question on appeal.” 314 N.C. 28, 39, 331 S.E.2d 652,

659 (1985) (citations omitted).

However, we are not persuaded that the holding in *Ashe* compels a determination that defendant's issue is preserved for review notwithstanding his counsel's failure to object at trial. In *Ashe*, the Court's determination on the issue of preservation was based on the well-established principle that "when a trial court *acts contrary to a statutory mandate* and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." 314 N.C. at 39, 331 S.E.2d at 659 (emphasis added).

Our Supreme Court's holding in *Ashe* was narrow and specific, stating:

Both Art. I, § 24 of the North Carolina Constitution *and* N.C.G.S. § 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Under the principles stated above, *failure of the trial court to comply with these statutory mandates* entitles defendant to press these points on appeal, notwithstanding a failure to object at trial.

Id. at 40, 331 S.E.2d at 659 (emphasis added). We note that this is the only time *Ashe* mentions the North Carolina Constitution. The Court in *Ashe* addressed the question of whether the trial court had failed to comply with the statutory mandate in N.C. Gen. Stat. 15A-1233(a). This mandate, when considered together with Article 1, Section 24 of the North Carolina Constitution, imposed dual requirements on the trial court. The Court did not discuss a constitutional violation; it only addressed a statutory violation.

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In this case, defendant argues “[t]he 2021 amendment to N.C.G.S. § 15A-1215(a) permitting substitution of an alternate juror after deliberations begin is unconstitutional.” He contends, again in his own words, that “[t]he General Assembly lacks the power to enact a statute that violates our Constitution.” Defendant does not argue that both N.C. Gen. Stat. § 15A-1215(a) and the State Constitution impose dual requirements, or that the trial court failed to comply with those dual requirements. For the first time on appeal, defendant purports to raise a belated facial constitutional challenge to N.C. Gen. Stat. § 15A-1215(a) (amended 2021).

Here, we are guided by an alternative precept: “a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.” *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citation omitted). Where there was no constitutional issue before the trial court, and where defendant failed to raise any objection on a constitutional basis, we are precluded from considering whether the 2021 amendment to N.C. Gen. Stat. § 15A-1215(a) is constitutionally valid. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted) (“Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.”).

Alternatively, defendant’s express assent to the alternate juror’s substitution could be considered invited error. After the trial court specifically asked for any objections, defense counsel stated, “Your Honor, under these circumstances, no objection.” A defendant invites error where his counsel “expressed initial agreement

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with the trial court’s proposed instructions, and did not lodge any sort of objection to the instructions that the trial court actually gave” *State v. Hooper*, 382 N.C. 612, 626, 879 S.E.2d 549, 558 (2022).

III.

For the foregoing reasons, we determine that defendant’s challenge to the constitutionality of the General Assembly’s 2021 amendment to N.C. Gen. Stat. § 15A-1215(a) is not properly before us. Accordingly, we discern no error in the trial court’s judgment.

NO ERROR.

Judges DILLON and TYSON concur.

Report per Rule 30(e).