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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-748

Filed 18 June 2024

Caswell County, Nos. 19 CRS 50409, 54

STATE OF NORTH CAROLINA

v.

DEMISTRUS MCKINLEY INGRAM, Defendant.

Appeal by Defendant from judgments entered 16 April 2023 by Judge William A. Wood II in Caswell County Superior Court. Heard in the Court of Appeals 17 April 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary L. Maloney, for the State.

Sandra Payne Hagood for defendant-appellant.

MURPHY, Judge.

Notwithstanding the provisions of N.C.G.S. § 15A-1215(a), we have held that, in light of our Supreme Court's prior holdings, a trial court's substitution of an existing juror by an alternate juror during deliberations continues to constitute a violation of Article 1, § 24 of the North Carolina Constitution. Here, where such a substitution occurred, Defendant is entitled to a new trial.

BACKGROUND

Defendant Demistrus McKinley Ingram was convicted of one count of Possession with Intent to Sell or Deliver Cocaine and one count of Delivery of Cocaine under N.C.G.S. § 90-95(a) on 16 April 2023. After jury deliberations began but before a verdict was reached, one of the jurors became injured and was hospitalized. The parties agreed to replace the injured juror with an alternate, and the jury reached its verdict with the alternate in place. Defendant appealed.

ANALYSIS

On appeal, Defendant contends only that the trial court violated his rights under Article I, § 24 of the North Carolina Constitution by substituting the injured juror for an alternate after deliberations had begun. We recently explored the very same issue in *State v. Chambers*, holding both that such a substitution was impermissible and that this issue is preserved for our review irrespective of whether it was raised at trial:

Our North Carolina Constitution provides that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]” N.C. Const. art. I, § 24. Our Supreme Court has interpreted this provision to preclude juror substitution during a trial after the commencement of jury deliberations. *State v. Bunning*, 346 N.C. 253, 255-57[] . . . (1997).

In *Bunning*, shortly after jury deliberations had begun, a juror informed the court that she could not continue with jury deliberations due to a medical issue; she was, therefore, excused and replaced with an alternate juror. *Id.* at 255[] The trial court then instructed the jury to begin deliberations anew. *Id.* On appeal, our Supreme

Court held that the defendant's right under our state constitution to a properly constituted jury was violated by this substitution:

In this case, the jury verdict was reached by more than twelve persons. The juror who was excused participated in the deliberations for half a day. We cannot say what influence she had on the other jurors, but we have to assume she made some contribution to the verdict. The alternate juror did not have the benefit of the discussion by the other jurors which occurred before he was put on the jury. We cannot say he fully participated in reaching a verdict. In this case, eleven jurors fully participated in reaching a verdict, and two jurors participated partially in reaching a verdict. This is not the twelve jurors required to reach a valid verdict in a criminal case.

Id. at 256[]

The present case is strikingly similar to *Bunning*. Here, like in *Bunning*, a juror was excused and replaced with an alternate, after which the trial court instructed the jury to restart its deliberations. Consequently, following the reasoning in *Bunning*, the verdict here was also impermissibly reached by thirteen people.

The State argues, though, that Defendant failed to preserve any argument concerning the constitutional deficiency, as he failed to object when the juror substitution occurred. But we are bound by a 2003 case in which our Court held that a defendant's failure to object to the alternate juror's substitution after the commencement of jury deliberations does not preclude appellate review, as this error is not waivable. *State v. Hardin*, 161 N.C. App. 530, 533[] . . . (2003).[] This holding is consistent with our Supreme Court's holding in *State v. Hudson*, 280 N.C. 74[] . . . (1971). In that case, the defendant consented to be tried by only eleven jurors after one of the jurors could not continue, and the defendant made no argument regarding this deficiency on appeal. *Id.* at 78[] Notwithstanding, our Supreme Court ordered a new trial *ex mero motu*,

stating:

It is elementary that the jury provided by law for the trial of indictments is composed of twelve persons; a less number is not a jury. It is equally rudimentary that a trial in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains “not guilty.”

Id. at 79[]

State v. Chambers, __ N.C. App. __, ___, 898 S.E.2d 86, 87-88, *temp. stay allowed*, __ N.C. ___, 897 S.E.2d 668 (2024). As *Chambers* and *Bunning* are directly analogous, those decisions’ reasoning applies with equal force to this case.

The State invokes N.C.G.S. § 15A-1215(a) to argue that the legislature has abrogated the requirement that the composition of the jury must remain fixed from the time deliberations begin. See N.C.G.S. § 15A-1215(a) (2023) (“If an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. In no event shall more than 12 jurors participate in the jury’s deliberations. Alternate jurors receive the same compensation as other jurors and, unless they become jurors, must be discharged in the same manner and at the same time as the original jury.”). However, this argument was also considered and rejected in *Chambers*:

We note that, in 2021, our General Assembly amended a statute to provide that “[i]f an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. In no event shall more than 12 jurors participate in the jury’s deliberations.” [N.C.G.S.] § 15A-1215(a). However, where a statute conflicts with our state constitution, we must

follow our state constitution. *Bayard v. Singleton*, 1 N.C. 5 (1787). Our General Assembly cannot overrule a decision by our Supreme Court which interprets our state constitution. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 449[] . . . (1989) (“[I]ssues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by [our Supreme] Court.”).[]

Chambers, __ N.C. App. at __, 898 S.E.2d at 88.

As a result, Defendant is entitled to a new trial.

CONCLUSION

Defendant’s Article 1, § 24 rights were violated by the trial court’s replacement of an injured juror with an alternate juror during deliberations. Defendant is therefore entitled to a new trial.

NEW TRIAL.

Judge THOMPSON concurs.

Judge ARROWOOD concurs in result only by separate opinion.

Report per Rule 30(e)

ARROWOOD, Judge, concurring in result only.

I concur in the result because I agree that *State v. Chambers*, 898 S.E.2d 86 (2024) dictates, and we are bound by its result pursuant to *In re Civil Penalty*, 324 N.C. 373 (1989). However, I write to express my opinions regarding the *Chambers* decision, the jurisprudence it was based on, and its implications.

First, I believe *Chambers* violated *In re Civil Penalty* by ignoring *State v. Lynn*, 290 N.C. App. 532 (2023) and finding the issue was properly preserved. In my opinion, the *Chambers* panel should have considered and followed *Lynn* instead of relying on *State v. Hardin*, 161 N.C. App. 530 (2003). *Hardin*, which was decided years before this issue was before the court *and* before the 2021 amendment, is not on point and does not contradict *Lynn* or the unpublished opinions it references.

Chambers' reliance on *State v. Bunning*, 346 N.C. 253 (1997) is also notable. In that case, after a day of capital sentencing deliberations, a juror was excused because of an illness and replaced with an alternate. *Bunning*, 346 N.C. at 255. The trial court instructed the jury to begin its deliberations anew, and the reconstituted jury recommended the death penalty. *Id.* The defendant appealed, arguing that the trial court erred by substituting an alternate juror for a juror who was excused only after deliberations had commenced. *Id.*

The *Bunning* Court agreed, reasoning the verdict “was reached by more than twelve persons[,]” and it had to be assumed that the excused juror “made some contribution to the verdict.” *Id.* at 256. Although *Bunning* began its analysis by citing Article 1, Section 24 of the North Carolina Constitution and *State v. Bindyke*, 288 N.C. 608 (1975),¹ the Court went on to discuss the intent of the General Assembly. *See id.* at 256–57. Notably, in analyzing N.C.G.S. § 15A-1215(a) (as it was written at the time) and N.C.G.S. § 15A-2000(a)(2), the *Bunning* Court found these “sections clearly show that the General Assembly did not intend that an alternate can be substituted for a juror after the jury has begun its deliberations.” *Id.* at 257.

Although the *Bunning* Court concluded that the substitution was an error and granted the defendant a new sentencing hearing, it is unclear whether our Supreme Court applied a constitutional or statutory rule. *See id.* at 256–57. If the substitution of an alternate juror violates the face of Section 24 of the Constitution, it is unclear why the Court conducted a lengthy statutory analysis and weighed the General Assembly’s intent. However, if we are to consider the General Assembly’s intent, the 2021 amendment indicates that the General Assembly now intends to allow for jury substitution after deliberations begin—at least in the guilt or innocence phase of the trial.

¹ In *Bindyke*, the alternate juror was present in the jury room during deliberations, *with the original twelve jurors*, which “negate[d] a defendant’s right to trial by jury . . . of twelve in the inviolability, confidentiality and privacy of the jury room.” 288 N.C. at 626–27.

I find these facts notable because in North Carolina, the same jury is required to decide both guilt or innocence and then decide if the crime for which they found the defendant guilty warrants the imposition of the death penalty. In *Bunning*, one jury found the defendant guilty of the crime, and because of the substitution during the penalty phase, a different jury determined the penalty. Because guilt had already been determined, the jury could not truly begin deliberations again, and more than twelve individuals contributed to the verdict.

Conversely, in the present case, the jury had not determined defendant's guilt before the substitution. After the trial court instructed the jury to start its deliberations anew, twelve jurors deliberated and reached a unanimous verdict, which is fundamentally different than *Bunning*, where two differently composed juries entered verdicts, or *Bindyke*, where the deliberations of twelve jurors were attended by an additional alternate juror. Notably, *Bunning* dealt with a capital proceeding, whereas the 2021 amendment addresses rules governing the substitution of alternate jurors in non-capital proceedings, not capital ones, placing further question as to the applicability of *Bunning* to this case. In my view, the jury that determined defendant was guilty was properly constituted.

Second, I disagree that N.C.G.S. § 15A-1215(a) as amended violates a defendant's constitutional right to a jury of their peers. I believe the trial court's instructions that deliberation must begin anew once a substitution occurs protect that right. The *Chambers* panel seems to reason that we cannot rely upon a jury to do

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ARROWOOD, J., concurring in result only.

this. Following this reasoning and disregarding the 2021 amendment and *Lynn* would serve to upend decades of our state's jurisprudence which presumes juries will follow the trial court's instructions. *E.g., State v. McCarver*, 341 N.C. 364, 384 (1995) ("Jurors are presumed to follow a trial court's instructions."). If we cannot rely upon the jury to do so in this case, how can we presume that juries will do so in other cases?

Thus, I concur in the result only.