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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-529

Filed 19 February 2025

Cabarrus County, Nos. 20 CRS 53767, 20 CRS 000580

STATE OF NORTH CAROLINA

v.

MAURICE QUANTA WASHINGTON

Appeal by Defendant from judgment entered 30 November 2023 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 14 January 2025.

*Attorney General Jeff Jackson, by Special Deputy Attorney General J.D. Prather, for the State.*

*Center for Death Penalty Litigation, by Sydney Calas, for the Defendant.*

WOOD, Judge.

On 30 November 2023, a jury found Maurice Washington (“Defendant”) guilty of selling cocaine. Defendant pleaded guilty to his status as a habitual felon. On appeal, Defendant argues the trial court abused its discretion when it allowed an undisclosed witness to testify for the State. For the following reasons, we hold the trial court did not abuse its discretion in allowing the witness to testify, and

Defendant received a fair trial free from error.

### **I. Factual and Procedural Background**

In May 2020, the Cabarrus County Sheriff's Office, vice and narcotics division, received information that Defendant and other individuals were selling narcotics on Wig Street in Cabarrus County. Sergeant Matthew Hodges, along with other detectives within the division, attempted surveillance at different points in the area. The surveillance was unsuccessful, as the neighborhood was "tightknit." Sergeant Hodges then spoke with a confidential informant who explained they could purchase narcotics from that area.

On 29 May 2020, Detective Kepley, an officer in the narcotics unit in the Rowan County Sheriff's Office, picked up the confidential informant and met with Sergeant Hodges to formulate a plan for the controlled buy. The plan involved Detective Kepley, acting as an undercover officer, purchasing narcotics from an individual on Wig Street, with the confidential informant accompanying him during the transaction. That day, Detective Kepley pulled into a driveway, Defendant approached the passenger side of the vehicle, had a conversation with the informant, and exchanged \$60.00 for cocaine. Detective Kepley then left the residence to deliver the cocaine to Sergeant Hodges. Sergeant Hodges did not immediately arrest Defendant, as he did not believe it was in "the best interest" of the overall investigation. Approximately four months later, on 24 September 2020, Defendant was arrested and charged for the sale of cocaine that occurred on 29 May 2020. A

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search warrant was executed of the residence, but nothing was found that associated Defendant with the home, and it was discovered that Defendant was not the owner of the home.

Defendant's trial was held in Superior Court from 29 to 30 November 2023. On the first day of trial, before the jury was impaneled, the trial court asked the State and defense counsel whether they exchanged witness lists. Both responded affirmatively and the State provided the witness lists to the trial court. The State identified five potential witnesses: three officers from the Cabarrus County Sheriff's Office, including Sergeant Hodges; Detective Kepley; and an analyst from the State Crime Lab. Defense counsel listed only one potential witness, Defendant. Following this exchange, the jury was selected, and the State's first witness was called to testify.

Sergeant Hodges testified first. He testified about the investigation and the controlled buy. During cross-examination defense counsel asked Sergeant Hodges, in relevant part, "[a]re you aware as to whether or not [Defendant] was wearing an ankle bracelet on 5/29/2020?" Sergeant Hodges responded that he was not aware that Defendant had an ankle monitor on that day. Following his testimony, the trial court adjourned for the day.

On the second day of trial the State called Detective Kepley to testify. He testified about the procedure for a controlled purchase, the role of the confidential informant, and the events on 29 May 2020. The State further asked, "to be clear, the person you purchased crack cocaine from that day is this [D]efendant?" to which

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Detective Kepley responded, “Yes.” However, he was unable to recall what Defendant was wearing or if there was anything distinctive about him. The analyst for the State Crime Lab testified next. She explained the process of testing and identifying controlled substances in the lab and confirmed that the substance Defendant sold was cocaine.

Following this testimony, the State informed the trial court, outside the presence of the jury, of its intent to call an additional witness. The witness was Colby Brent, who was Defendant’s probation officer at the time of the controlled buy. The State was unaware that Defendant had been wearing an ankle monitor at the time of the offense until this information was disclosed during the cross-examination of Sergeant Hodges by defense counsel on the first day of trial. The State’s counsel explained:

To be clear and put on the record, this is a witness not on the witness list. Based on questions that were asked about electronic monitoring yesterday, detective did some research last night, pulled the report. They were unaware before yesterday that the defendant was on electronic monitoring. That came out in trial, so they were aware at that point. They had the probation officer pull the report of the GPS pings from that electronic monitor that the defendant was wearing. So, Your Honor, we would ask to be able to call that witness given that it came up in the middle of trial.

The State further explained that Brent’s testimony would reveal that “[D]efendant was at the area where the purchase was made at the time it was made.” The trial court then took a short recess, allowing time for Brent to arrive and for defense

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counsel's review of Defendant's electronic monitoring report. After reconvening, the trial court allowed the State to add Brent to the witness list "under the circumstances." Defense counsel objected, stating "I object to this witness who is not on the list being called." The trial court overruled the objection.

Brent then testified on behalf of the State. He disclosed that Defendant was on an electronic monitoring ankle bracelet in May of 2020. The State proceeded to introduce its monitoring report from the relevant period. Brent testified that the report showed Defendant's location was at Wig Street at 1:37 p.m. on 29 May 2020. He remained at this location until 10:24 p.m., totaling approximately nine hours. During cross-examination defense counsel questioned the accuracy of the report, asking whether it showed Defendant's location as inside or outside of the home, and whether he was in the driveway or elsewhere on the property. Brent responded that the report did not contain this information, rather, it only showed whether Defendant was located at the property. At the close of Brent's testimony, the State recalled Sergeant Hodges to testify. He confirmed that Defendant's location, as generated by the electronic monitoring report, was the same as the address targeted for the controlled buy. Similarly, the purchase had been made around 1:43 p.m.

Ultimately, the jury convicted Defendant of sale of cocaine on 30 November 2023. Defendant subsequently pleaded guilty to his status as a habitual felon. He was sentenced to a term of 102 to 135 months of imprisonment. Following his sentencing, Defendant gave oral notice of appeal to this Court.

## II. Analysis

Defendant raises one argument on appeal: whether the trial court erred by allowing Defendant's probation officer to testify when the State failed to disclose his name on the witness list, and whether he was prejudiced as a result of Brent's testimony.

When the trial court allows a "surprise" witness to testify, this Court reviews the admission of such testimony for an abuse of discretion. *State v. Taylor*, 178 N.C. App. 395, 411, 632 S.E.2d 218, 229 (2006). "[T]he admissibility of testimony by a surprise witness is within the discretion of the trial judge and is not reviewable on appeal absent a showing of abuse." *Kinlaw v. N. Carolina Farm Bureau Mut. Ins. Co.*, 98 N.C. App. 13, 19, 389 S.E.2d 840, 844 (1990) (citation omitted). Under this standard, the trial court's ruling is "accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citation omitted).

The requirements governing the State's disclosure of certain evidence, such as a witness list, are outlined in N.C. Gen. Stat. § 15A-903. The purpose of the statutorily required disclosures "is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990) (citations omitted). Initially, the State is not required to disclose a witness list to the defendant, rather, the requirement is triggered "upon a

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motion of the defendant,” followed by a court order. N.C. Gen. Stat. § 15A-903(a). If a trial court orders the State to do so, the State must provide to the defendant “at the beginning of jury selection, a written list of the names of all other witnesses whom the State reasonably expects to call during the trial.” N.C. Gen. Stat. § 15A-903(a)(3). Furthermore, “[i]f there are witnesses that the State did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called.”

The State may voluntarily provide a witness list pursuant to N.C. Gen. Stat. § 15A-902(a). *See* N.C. Gen. Stat. § 15A-903(b) (“If the State voluntarily provides disclosure under [Section] 15A-902(a), the disclosure shall be to the same extent as required by subsection (a) of this section.”). Under N.C. Gen. Stat. § 15A-902(a), a party may “request in writing that the other party comply voluntarily with the discovery request” or the parties may “agree in writing to voluntarily comply” with the request. Stated differently, the State may voluntarily disclose a witness list “in response to a request” by the defendant or pursuant to a “written agreement” between the parties. N.C. Gen. Stat. § 15A-902(b). If a request is made or a written agreement is executed, the “discovery is deemed to have been made under an order of the court.” *Id.*

In the case *sub judice*, discussion of the State’s witness list occurred between the parties and the trial court prior to jury selection. The trial court asked, “Have you all exchanged witness lists?” The State replied it had done so, and the trial court

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reviewed the list. The record does not indicate—Defendant filed a motion seeking the trial court to order the State to disclose a witness list pursuant to N.C. Gen. Stat. § 15A-903(a)(3). Likewise, the record does not indicate that Defendant requested a voluntary disclosure by the State or that the parties entered into a written agreement for such a disclosure, consistent with N.C. Gen. Stat. § 15A-902(a) and (b). Accordingly, because the record is devoid of a motion or request on behalf of Defendant, and a written agreement between the parties, the disclosure cannot be considered court-ordered, and the State was not required to comply with the disclosure requirements under N.C. Gen. Stat. § 15A-903(a)(3) or (b).

This conclusion does not end the analysis. In *State v. Brown*, this Court addressed the applicable standard for when the State volunteers a witness list which was not court-ordered and subsequently fails to disclose a name on the list. *State v. Brown*, 177 N.C. App. 177, 183-186, 628 S.E.2d 787, 791-792 (2006). There, the defendants argued “because the State volunteered to provide defendants with a witness list, the State’s voluntary list should have complied with N.C. Gen. Stat. § 15A-903(b) and should have provided the names of all witnesses the State expected to call.” *Id.* at 183, 628 S.E.2d at 791. The defendants further cited to *State v. Smith*, where our Supreme Court held that if the State furnishes a witness list pursuant to court order, and an undisclosed witness is called to testify, the trial court is required to “see whether the district attorney acted in bad faith, and whether the defendant was prejudiced thereby.” *State v. Smith*, 291 N.C. 505, 523, 231 S.E.2d 663, 675

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(1977) (cleaned up). The defendants in *Brown* argued that the *Smith* standard was “equally applicable in the case of voluntary disclosure as court ordered disclosure.” *Brown*, 177 N.C. App. at 184, 628 S.E.2d at 791.

This Court first noted that, “[i]f not deemed to have been made under a court order, such voluntary discovery would seem not to need to be ‘to the same extent as required by [N.C.G.S. § 15A–902(a)].’” *Id.* at 184, 628 S.E.2d at 792 (*citing* N.C.G.S. § 15A–903(b)). However, this Court recognized thereafter that “cases since *Smith* have used the *Smith* standard in cases where discovery was not court-ordered.” *Id.* at 184-85, 628 S.E.2d at 792. The Court in *Brown* considered two cases applying the *Smith* standard. *Id.* First, in *State v. Myers*, the defendant orally requested during jury selection that the State list the names of all of the witnesses who would be called to testify, to which the State complied. *State v. Myers*, 299 N.C. 671, 675, 263 S.E.2d 768, 771 (1980). At trial, three witnesses who were not named following the oral request were allowed to testify for the State; however, the trial court conducted a *voir dire* examination of the jury prior to each witness’s testimony to eliminate any potential bias of the jury. *Id.* at 676, 263 S.E.2d at 772 (1980). The Court in *Myers* applied the *Smith* standard to determine whether the State acted in bad faith by omitting the witnesses’ names. The Court held “[t]he *voir dire* established that the jurors did not know either of the witnesses the State had failed to name during jury selection . . . . [and this] inquiry satisfied the requirements of *State v. Smith*.” *Id.*

Second, in *State v. Mitchell*, the defendant argued the trial court erred in

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allowing a State's witness to testify when the witness' name had not been listed prior to *voir dire* examination of the jury. *State v. Mitchell*, 62 N.C. App. 21, 27, 302 S.E.2d 265, 269 (1983). The record did not indicate whether a witness list was provided to the defendant; however, it showed that the trial court questioned the jurors as to whether they knew of the witness prior to the witness' testimony. Additionally, the defendant "made no allegation of surprise [of the witness] at trial" and the witness was an individual whom the defendant could have expected to be called to testify. For these reasons, the Court in *Mitchell* held the *Smith* standard was satisfied, as the defendant failed to demonstrate bad faith or prejudice. *Id.* at 28, 302 S.E.2d at 270.

Ultimately, the Court in *Brown* applied *Myers* and *Mitchell* to determine whether the State acted in bad faith, or whether the defendant suffered prejudice under *Smith*. The Court held that because the trial court conducted a *voir dire* of the jury prior to the witness's testimony, and none of the jurors knew of the witness, any bad faith on behalf of the State was thereby eliminated. *Brown*, 177 N.C. App. at 185, 628 S.E.2d at 792. Further, the defendant did not suffer any prejudice, as the jury was instructed to consider the witness's testimony solely for purposes of corroboration.

We are guided by the holdings of *Brown*, *Myers*, and *Mitchell*, cases which applied the *Smith* standard even though the State's witness list was not court-ordered. We now must determine whether the State acted in bad faith, and whether

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Defendant was prejudiced as a result of Mr. Brent's testimony. *Smith*, 291 N.C. at 523, 231 S.E.2d at 675.

On the second day of trial and while outside the presence of the jury, the State informed the trial court of its request to call an additional, undisclosed witness. The State explained, prior to the first day of trial, it was unaware that Defendant was on electronic monitoring. However, testimony presented on the first day of trial revealed that Defendant was under court-ordered electronic monitoring at the time of the controlled purchase. That same night, the State had Brent pull Defendant's report containing the GPS location data from the electronic monitor. The State asked the trial court to allow Brent to testify about the report, as the issue arose during the first day of trial, and his testimony would show that "[D]efendant was at the area where the purchase was made at the time it was made." The trial court then held a short recess so Brent could arrive, and defense counsel could review the report. Shortly thereafter, the trial court allowed, over defense counsel's objection, Brent to testify "under these circumstances in [the trial court's] discretion." He testified about the report and Defendant's location on 29 May 2020, which Sergeant Hodges subsequently confirmed was the same address at which the controlled purchase had been conducted.

Although the trial court did not conduct a *voir dire* examination of the jury, as in *Brown*, *Myers*, and *Mitchell*, the admission of testimony from an undisclosed witness is reviewed for an abuse of discretion, a standard which accords great

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deference to the trial court's decisions. *Taylor*, 178 N.C. App. at 411, 632 S.E.2d at 229. Our review of the record indicates no abuse of discretion by the trial court. When the trial court first learned of the State's request, the State explained its reason for the request, why the witness was not originally disclosed, and its immediate action upon learning the information about the electronic monitoring. The trial court then questioned the State as to the purpose of Brent's testimony, followed by a recess which allowed defense counsel the time to review the report. During this time, both before and after the recess, Defendant did not allege to the trial court that it was surprised by this witness, did not request additional time to review the report or question the witness, and did not request *voir dire* examination of the jury. Defendant did object to the witness generally, but did not raise specific concerns to the trial court.

Furthermore, disclosure that Defendant was on electronic monitoring at the time of the controlled purchase was revealed during Defendant's cross-examination of Sergeant Hodges on the first day of trial. Defense Counsel asked Sergeant Hodges, "Are you aware as to whether or not [Defendant] was wearing an ankle bracelet on 5/29/2020?" and "So you all didn't even check or confirm that he was on an ankle bracelet on that day so that you could verify that he was where you all claim this transaction took place when it took place?" Sergeant Hodges admitted he was not aware that Defendant was on electronic monitoring at the time. Consequently, we cannot conclude that Defendant had been "surprised" by the State's additional

witness when Defendant had elicited this information himself. Likewise, the State would not have reasonably expected to call Brent to testify because it did not possess this information prior to the first day of trial. Therefore, under the *Smith* standard, we conclude Defendant can neither show bad faith on behalf of the State nor that he was prejudiced by the State's undisclosed witness. The trial court appropriately questioned the State about the witness and its reason for the delay. The trial court allowed time for Defendant to review the report. Defendant did not allege any concern as to Brent's testimony, did not seek additional time, and did not request a *voir dire* prior to the testimony. Thus, the trial court did not abuse its discretion when it allowed Brent to testify.

### **III. Conclusion**

For the foregoing reasons, we hold the trial court did not abuse its discretion in allowing an undisclosed witness to testify. Under the *Smith* standard, Defendant is unable to show bad faith or prejudice. Defendant received a fair trial free from error.

NO ERROR.

Chief Judge DILLON and Judge MURRY concur.

Report per Rule 30(e).