255 N.C.App. 449
Unpublished Disposition
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Court of Appeals of North Carolina.

STATE of North Carolina
v.
Christopher Anthony CLEGG

No. COA17-76
|
Filed: September 5, 2017

Appeal by defendant from judgment entered 6 April 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 9 August 2017. Wake County, No. 14 CRS 202101

Attorneys and Law Firms

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Opinion

ARROWOOD, Judge.

***1** Christopher Anthony Clegg ("defendant") appeals from judgment entered upon his conviction for robbery with a dangerous weapon. On appeal, defendant argues that the trial court erred by overruling his *Batson* objections and by admitting prejudicial victim impact testimony. For the reasons stated herein, we hold the trial court did not commit error.

I. Background

On 8 April 2014, defendant was indicted in case number 14 CRS 202101 for robbery with a dangerous weapon, in violation of N.C. Gen. Stat. § 14-87. Defendant was also indicted in case number 14 CRS 180 for possession of a firearm by a convicted felon.

Defendant was tried at the 4 April 2016 criminal session of Wake County Superior Court, the Honorable Paul C. Ridgeway presiding. The State's evidence tended to show that on 25 January 2014, Patrice Williams ("Williams") was working at a sweepstakes business located at the Timber Landing Business Center in Garner, North Carolina. Around 3:00 a.m., a person attempting to enter the business appeared on the business' video camera system. Williams testified that in order to gain entrance into the business, an employee would have to "buzz" that individual in. Williams observed that the person was wearing a heavy coat, scarf, and toboggan and requested that he remove the scarf that was covering his face. The person complied, and after gaining a clear view of his face, Williams allowed him to enter. Williams described the person as an African-American male.

The man entered the business and approached Williams. Williams testified that they engaged in a five to ten minute conversation about the weather and how to play the sweepstakes. Williams asked the man for his driver's license. The man stated that he did not have his keys or driver's license and that they must both be in his car.

Williams testified that during this interaction, she noticed that the man had a "Nike swoop" tattoo on his face. She told him "Oh, that's unique" and he replied, "Oh, yeah, this is my thing.... How people know me."

The man then left the store for approximately three minutes. When the man returned to the door, he had his face covered again. He removed the clothing and Williams buzzed him in again. The man approached Williams, pulled a gun from his pants, and pointed it at her. The man stated, "B****, you know what this is. Run me my money." Williams made a courtroom identification of defendant as the man who pointed the gun at her and demanded money.

Williams testified that although it had been two years since the incident, it was "etched" in her head. She felt like her life was threatened and that the gun being pointed at her was a

real weapon. Williams testified that she saw the bullets in the chamber and described the weapon as a black revolver with an eight to ten inch barrel. Defendant walked into the employee area, where Williams was standing, and pointed the gun at Williams' stomach. They were close enough that they could hear each other breathe. Williams could not recall whether she gave or defendant took $80 to $85 from the cash register. Defendant stated, "Is this all?" and Williams replied, "That's all I have." Defendant then pointed the gun and pressed it into Williams' neck.

***2** Defendant observed a safe and ordered Williams to open it. He moved the gun to Williams' left temple. Williams informed defendant that she did not have the code to the safe and explained that she had given him everything she had. Defendant noticed something flicker and asked Williams if anyone else was in the business. Williams knew that there was a customer in another room, but lied to defendant by stating that no one else was around. Defendant, still pointing the gun at Williams, stated, "Don't you know I will kill you, woman, if you don't tell me the truth." Defendant then took the business' phone and left.

On 6 April 2016, a jury found defendant guilty of robbery with a dangerous weapon. Defendant was acquitted of the possession of a firearm by a felon charge. Defendant was sentenced to a term of sixty-six to ninety-two months imprisonment. On 8 April 2016, defendant filed notice of appeal.

II. Discussion

Defendant presents two issues on appeal. First, defendant argues that the trial court erred by overruling his *Batson* challenge. Second, defendant contends that the trial court committed plain error by admitting prejudicial victim impact testimony, in violation of Rules 401, 402, and 403 of the North Carolina Rules of Evidence. We address each argument in turn.

A. *Batson* Challenge

Defendant first argues that the trial court erred by finding that the State had not struck the only two African-American women from the jury based on racial bias. Defendant contends that the State's exercise of peremptory strikes was racially biased, in violation of the United States and North Carolina Constitutions. We disagree.

> The "clear error" standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry. Since the trial judge's findings ... largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. The trial court's ultimate *Batson* decision will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous.

State v. James, 230 N.C. App. 346, 348, 750 S.E.2d 851, 854 (2013) (internal citations and quotation marks omitted).

In a non-capital case, the State is allowed six peremptory challenges. N.C. Gen. Stat. § 15A-1217 (2015). However, "[t]he Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit race-based peremptory challenges during jury selection." *James*, 230 N.C. App. at 348, 750 S.E.2d at 854.

"In *Batson v. Kentucky*, [476 U.S. 79, 90 L.Ed. 2d 69 (1986),] the United States Supreme Court set out a three-part test for determining whether the state impermissibly excluded a juror on the basis of race," and the North Carolina Supreme Court adopted the same test. *State v. Taylor*, 362 N.C. 514, 527, 669 S.E.2d 239, 254 (2008), *cert. denied*, —— U.S. ——, 175 L.Ed. 2d 84 (2009).

> First, the defendant must make a prima facie showing that the state exercised a race-based peremptory challenge. If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation for the peremptory challenge. Finally, the trial court must

> decide whether the defendant has proved purposeful discrimination.

Id. (citations omitted). "However, [o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *State v. Bell*, 359 N.C. 1, 12, 603 S.E.2d 93, 102 (2004) (internal quotation marks and citation omitted), *cert. denied*, 544 U.S. 1052, 161 L.Ed. 2d 1094 (2005).

***3** In the present case, the record reveals that defendant is African-American. There is no indication of the race of the victim or other witnesses in the case. During the process of jury selection, there was a total of twenty-two venire members. The State exercised a total of four peremptory challenges. First, the State exercised its peremptory challenges against three prospective jurors: Juror 2, Joseph Barello; Juror 5, Viola Jeffreys ("Jeffreys"); and Juror 11, Brian Williams. After a *voir dire* of three new prospective jurors, the State exercised another peremptory challenge against Juror 5, Gwendolyn Aubrey ("Aubrey").

Defendant raised a *Batson* challenge as to the State's exercise of peremptory challenges against prospective jurors Jeffreys and Aubrey. Defendant argued that Jeffreys and Aubrey were the only African-Americans in the jury venire and that both had been excused by the State. The State offered explanations for why it peremptorily challenged Jeffreys and Aubrey and defendant argued why these justifications should be considered pretext.

The trial court noted that the racial composition of the entire venire was not reflected in the record. It held that the prosecutor's justifications "constitute[d] neutral justifications for exercising peremptory challenges and that the defendant ha[d] failed to rebut that with—by establishing that race was a motivating factor or a significant factor in striking these jurors, and so the objection is overruled."

Thereafter, defense counsel asked each potential jury member to state their ethnicity. Juror numbers 1 through 11 stated that they were Caucasian. Juror number 12 stated that his "dad is black and my mom is Chinese." After additional questioning, defense counsel exercised a total of five peremptory challenges, excusing juror numbers 8 through 11 and a prospective alternate juror. Out of the twelve jury members, plus one alternate, that were ultimately chosen, twelve were Caucasian and one was of mixed race. Defense counsel renewed her *Batson* challenge and the trial court denied it for the reasons stated previously.

Because the trial court heard the State's reasons for striking Jeffreys and Aubrey prior to making a ruling on defendant's *Batson* objections, "we must now consider whether the State has met its burden of providing a race-neutral explanation for its peremptory challenges." *James*, 230 N.C. App. at 349, 750 S.E.2d at 854.

In the second step of the *Batson* inquiry, "the prosecution must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Headen*, 206 N.C. App. 109, 116, 697 S.E.2d 407, 413, (internal quotation marks and citation omitted), *disc. review denied*, 364 N.C. 607, 704 S.E.2d 275 (2010).

> The prosecutor's explanation ... need not rise to the level justifying exercise of a challenge for cause. The prosecutor is not required to provide a race-neutral reason that is persuasive or even plausible. Moreover, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

State v. King, 353 N.C. 457, 469, 546 S.E.2d 575, 586 (2001) (internal quotation marks and citations omitted), *cert. denied*, 534 U.S. 1147, 151 L.Ed. 2d 1002 (2002). "The issue at this stage is mere *facial* validity[.]" *Headen*, 206 N.C. App. at 116, 697 S.E.2d at 413 (internal quotation marks and citation omitted).

In the present case, the State offered the following basis for peremptorily striking Jeffreys: her prior work experience as a nurse's aide at Dorothea Dix and how, with some of the "underlying issues" of the case, it might affect her ability to fairly assess the evidence; failure to make eye contact; and body language. The State also explained its basis for its peremptory strike against Aubrey: body language; failure to make eye contact; and her answer "I suppose" to the question of whether she could be "fair and impartial."

***4** As a preliminary matter, we note that there is a discrepancy between the State's characterization of its *voir dire* of Aubrey and what the transcript reveals. Although the State argued at trial and on appeal that Aubrey answered "I suppose" to the question of whether she could be fair and impartial, the transcript demonstrates as follows:

> [STATE]: Okay. Ms. Aubrey, do you feel confident you can focus on what's going on here?
>
> [AUBREY]: I suppose.
>
> [STATE]: I want you to be confident about it. You just don't want to be a juror or do you feel like if you were here, you could focus and do what we need you to do?
>
> [AUBREY]: I think so.

Aubrey actually answered "I suppose" to the question of whether she was able to focus on the trial. Consequently, we review the State's argument in light of this clarification.

Our Supreme Court has previously identified the failure to make appropriate eye contact as a race-neutral reason a party may rely upon when exercising peremptory challenges. *State v. McQueen*, —— N.C. App. ——, ——, 790 S.E.2d 897, 903 (2016). In addition, our Supreme Court has specified that "jury selection is often driven by inferences about a juror's ability to be fair based upon counsel's observation of the juror's behavior during voir dire. Thus, a prospective juror's nervousness or uncertainty in response to counsel's questions may be a proper basis for a peremptory challenge[.]" *State v. Smith*, 328 N.C. 99, 125-26, 400 S.E.2d 712, 727 (1991) (internal citation omitted). The State's concerns of both Jeffreys' and Aubrey's failure to make eye contact and their ability to be fair and focused on the trial constitute neutral explanations for each peremptory strike. We find no discriminatory intent inherent in the State's explanations and thus agree with the trial court's determination that the State's justifications were race neutral.

Therefore, we move to the third step of the *Batson* inquiry and consider whether the trial court erred by finding that there was no *Batson* error. "In the third step, the defendant may introduce evidence that the State's explanation is merely a pretext, and the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination." *Headen*, 206 N.C. App. at 117, 697 S.E.2d at 413 (internal quotation marks and citation omitted). Factors that a defendant may rely upon to establish pretext include:

> (1) the characteristic in question of the defendant, the victim and any key witnesses; (2) questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of discrimination based upon the characteristic in question; (3) the frequent exercise of peremptory challenges to prospective jurors with the characteristic in question that tends to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members with the characteristic in question; (4) whether the State exercised all of its peremptory challenges; and, (5) the ultimate makeup of the jury in light of the characteristic in question.

***5** *State v. Carter*, 212 N.C. App. 516, 525-26, 711 S.E.2d 515, 524 (citation omitted), *appeal dismissed and disc. review denied*, 365 N.C. 351, 718 S.E.2d 147 (2011). "To determine whether the defendant makes such a showing, the trial court should consider the totality of the circumstances, including counsel's credibility, and the context of the information elicited." *McQueen*, —— N.C. App. at ——, 790 S.E.2d at 903 (citation omitted).

Defendant first points to the fact that the State exercised its peremptory strikes against "all of the women of color on the panel" as evidence of race-based bias. However, our Court has explained that

> the requirement under *Batson* is purposeful discrimination; disparate impact is not sufficient. In other words, a defendant must demonstrate that the State intentionally challenged the prospective juror based on his or her race. It is not enough that the effect of

> the challenge was to eliminate all or some African-American jurors.

Carter, 212 N.C. App. at 527, 711 S.E.2d at 524 (citation omitted).

Next, defendant argues that the State's strike of Aubrey was racially motivated because the State's race-neutral justification applied equally to a white juror who was not stricken. Defendant contends that although the State claimed to be dissatisfied with Aubrey's response to a question about her ability to pay attention, that juror 11, David Williams, gave a "clear statement that he would be distracted" and the State only replied "okay" and then turned its attention to Aubrey. Defendant relies on the United States Supreme Court's holding in *Miller-El v. Dretke*, 545 U.S. 231, 241, 162 L.Ed. 2d 196, 214 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step."), for his assertion.

Our review of the record demonstrates that the State asked David Williams if there was "[a]nything going on in your life that would make it difficult or impossible to serve?" David Williams replied by explaining that although he was an irrigation contractor and "this is our season, and I'm one of the service techs. But I can juggle things around." Later on, when asked by the State about the ability to focus on the case, David Williams replied "I have 11 employees out in the field, so—." The State then proceeded to question Aubrey about her ability to focus. The distinguishing factor between Aubrey and David Williams appears to be the State's additional stated bases for striking Aubrey. The State's race-neutral basis for striking Aubrey was not solely due to her lack of confidence in her ability to focus, but also based on her body language and failure to make eye contact.

Furthermore, defendant argues that the State's strike of Jeffreys was revealed to be pretextual because it bore no rational relation to her qualification as a fair and impartial juror. The State explained that because Jeffreys had worked at Dorothea Dix, a psychiatric hospital, as a nurse's aide, it had concerns regarding her ability to be fair and impartial in regards to the "underlying issues" in the case. The transcript shows that while handling pre-trial matters, the trial court noted that there was a competency evaluation of defendant ordered and defense counsel stated that she had also requested an in-custody evaluation of defendant. Considering the totality of the circumstances, the State's basis for striking Jeffreys due to her work history is rationally related to defendant's potential competency issues. Moreover, we note once again that the State explained that it also exercised its peremptory strike on Jeffreys based on her body language and failure to make eye contact. As such, defendant has failed to carry his burden of proving purposeful discrimination.

***6** Based on the foregoing, we hold that defendant has failed to establish the trial court was clearly erroneous in its ruling. Therefore, defendant's *Batson* challenge was properly denied.

B. Victim-Impact Testimony

In his final argument on appeal, defendant asserts that the trial court committed plain error by allowing the State to introduce irrelevant, cumulative, and prejudicial victim-impact testimony from Patrice Williams, in violation of Rules 401, 402, and 403 of the North Carolina Rules of Evidence. Specifically, defendant argues that Williams was erroneously allowed to testify repeatedly about her children and husband who were not relevant to the robbery, to emphasize her piety, to testify at length and repeatedly about the "after-effects the crime had on her," to volunteer that she was taking anti-depressant medications as a result of this crime, and to portray herself as "forever changed and traumatized by this crime." Defendant asserts that admission of this testimony had an impact on the guilt determination because Williams' testimony was the only evidence the State produced to suggest that defendant possessed and threatened to use a firearm, an element of robbery with a dangerous weapon. We are not convinced by defendant's arguments.

Because defendant failed to object to this testimony at trial, we review for plain error. N.C. R. App. P. 10(a)(4) (2017).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and

> only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2015). "Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403.

N.C. Gen. Stat. § 15A-833 provides that

> (a) A victim has the right to offer admissible evidence of the impact of the crime, which shall be considered by the court or jury in sentencing the defendant. The evidence may include the following: (1) A description of the nature and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant.

N.C. Gen. Stat. § 15A-833(a)(1) (2015).

> Victim impact evidence is generally relevant and admissible in sentencing, though its admissibility in sentencing is limited by the requirement that the evidence not be so prejudicial it renders the proceeding fundamentally unfair. However, the effect of a crime on [the victim] often has no tendency to prove whether a particular defendant committed a particular criminal act against a particular victim; therefore victim impact evidence is usually irrelevant during the guilt-innocence phase of a trial and must be excluded.

***7** *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007) (internal citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 362 N.C. 477, 666 S.E.2d 765 (2008).

Here, during the guilt-innocence phase of the trial, Williams testified that all she could imagine was "saying 'I do' to my husband.... All I saw was my whole 34 years of my life flash before my eyes, and thinking I can't see my kids grow up if he shoots" in response to a question about where defendant was pointing the gun. Williams also mentioned thanking God on numerous occasions. Williams further testified about the physical effects the crime had taken on her and how she was taking anti-depressant medications as a result of the crime.

Assuming *arguendo* that the challenged testimony should not have been admissible, we are not convinced that admission amounted to plain error. It is well established that use during a robbery of what "appear[s] *to the victim* to be a firearm or other dangerous weapon ... [creates] a mandatory presumption that the weapon was as it appeared to the victim to be." *State v. Allen*, 317 N.C. 119, 124, 343 S.E.2d 893, 897 (1986) (emphasis added). Here, Williams testified that defendant held a black revolver with an eight to ten inch barrel to various locations on her body, which felt like cold metal. She testified that she saw the bullets in the chamber and that it was not a "cute little toy gun[.]" Since there was evidence that the implement used by defendant was a firearm and no evidence presented to the contrary, a mandatory presumption that the weapon was as it appeared to the victim to be was established. Defendant has failed to establish that admission of Williams' victim-impact testimony would have caused the jury to reach a different verdict. Accordingly, we hold that the trial court did not commit plain error by admitting the challenged testimony.

NO ERROR.

Report per Rule 30(e).

Judges ELMORE and DIETZ concur.

All Citations

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