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NO. COA01-1312

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v. Guilford County
No. 99CRS107020

ELIJAH JENKINS

Appeal by defendant from judgment entered 5 April 2001 by Judge Clarence W. Carter in Guilford County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Charles J. Murray, for the State.

Mark E. Hayes for defendant-appellant.

MARTIN, Judge.

Elijah Jenkins ("defendant") appeals from a judgment entered upon his conviction by a jury of assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence at trial tended to show that on 5 November 1999, defendant entered the Lincoln Grove Grocery in Greensboro, North Carolina and attempted to purchase alcohol. The nephew of the store's owner, Ahmed Abuzuaiter, asked defendant to leave the store because the owner had banned him from the store for previously causing disturbances. Defendant became upset when asked to leave and confronted Abuzuaiter, cursing at him. A fight erupted between the two. Breyon Hooper, a store clerk who witnessed the altercation,

testified that he saw something shiny in defendant's hand which he recognized to be a razor. Defendant cut Abuzuaiter in the neck, inflicting three wounds which caused profuse bleeding, requiring that Abuzuaiter be taken by ambulance to a hospital. Abuzuaiter received over twenty staples to close the neck wounds.

Defendant's evidence tended to show that he did not know he had been banned from the store and he went there to buy wine and cigarettes. He testified that Abuzuaiter grabbed him and began beating and choking him. He grabbed some object from the counter and struck Abuzuaiter; he did not know what the object was that he used to strike Abuzuaiter. At that point, his girlfriend came into the store and screamed. Abuzuaiter let defendant up and he left the store. Abuzuaiter followed him outside and threatened him with a handgun.

Defendant brings forward seven assignments of error on appeal. Preliminarily, we note that defendant did not object at trial to any of the trial court's actions to which he now assigns error, nor does defendant argue on appeal that any of the alleged errors amounts to plain error. His arguments are therefore not properly preserved for our review under the Rules of Appellate Procedure. *See* N.C. R. App. P. 10(b), (c)(4); *State v. Wilson*, 354 N.C. 493, 556 S.E.2d 272 (2001) (plain error review only available where defendant specifically and distinctly contends in brief that error constitutes plain error). We nevertheless exercise our discretion to review the merits of his appeal, *see* N.C. R. App. P. 2, and we

conclude defendant's trial was free of error.

Defendant first argues the trial court erred in advising him of his right to testify. Following the close of the State's evidence, defense counsel informed the trial court that she had advised defendant it was his choice as to whether to testify, but requested that the court also advise defendant. The following colloquy occurred:

> THE COURT: Do you understand that you have the right to testify, to take the stand and testify, in your own behalf? Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand further that you do not have to testify in this case? Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And do you -- all right. Do you understand that if you do testify, if you do take the stand, that you open yourself up for cross examination by the State's attorney after your attorney asks you questions?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: So you will be open for cross examination.
>
> DEFENDANT: Yes, sir.
>
> THE COURT: So have you made a decision as to whether or not you're going to take the stand?
>
> DEFENDANT: Not as of -- I haven't really decided as of yet, but I was thinking along the line of, you know, testifying.
>
> THE COURT: Well, it's either yes or no. You can't do both. You either do take the stand or you do not take the stand. Which are you going to do?

DEFENDANT: I'll take the stand.

THE COURT: You're going to take the stand?

DEFENDANT: Yes, sir.

Defendant argues the trial court's statements misled him and infringed on his rights because the court required him to make an immediate decision and implied the decision was irrevocable. This Court has held that it is entirely proper for a trial court on its own motion to inform a potential witness of his rights, so long as the trial court does not advise the witness as to whether or how he should testify. *State v. Mendez*, 42 N.C. App. 141, 256 S.E.2d 405 (1979); *see also*, *State v. Cogdell*, 74 N.C. App. 647, 650-51, 329 S.E.2d 675, 678 (1985) (trial court did not err in asking questions of defendant to determine whether he was aware of his right to decide whether to testify, "[a]nd since no effort was made to influence defendant one way or the other, no prejudice resulted.").

It is clear from the above-quoted exchange that the trial court did not attempt to influence defendant as to whether or how he should testify, but merely advised defendant of his rights and questioned defendant as to his choice. To the extent the trial court questioned defendant as to his choice, the trial court did not represent that the decision would be binding or that defendant would not be permitted to change his mind at a later time. Defendant has failed to cite any authority for the proposition that such an exchange constitutes an infringement on his right to decide whether to testify, and he has likewise failed to show that he was prejudiced in any way.

By his second assignment of error, defendant contends the trial court erred when it directed the courtroom bailiff to stand next to him while defendant was standing in the spectator rows of the courtroom to view the proceedings. As the State was preparing to play a videotape to the jury, defense counsel requested that defendant be allowed to move into the audience to get a better view of the videotape. The trial court allowed defendant to stand back in the second row of the spectator area, but directed the bailiff to stand beside him. Defendant argues that through this action, the trial court improperly expressed an opinion that defendant could not be trusted, resulting in prejudice to defendant. We disagree.

A trial court has the discretion to go so far as to shackle a defendant where such action will assist the trial court in maintaining order in the courtroom and providing safety to others. *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). In this case, the trial court's request to the bailiff to stand beside defendant while in the spectator area of the courtroom was a reasonable exercise of the court's discretion in order to provide safety to those in the courtroom, given that defendant was on trial for a violent crime. The trial court did not require that defendant be restrained in any way. Defendant has failed to show an abuse of discretion or that the bailiff's presence beside him in the spectator area altered the outcome of his trial, given the evidence against him.

Defendant next argues the trial court should not have

sustained the State's objection to the defense's cross-examination of Abuzuaiter. During that cross-examination, the following exchange occurred:

> Q. Now was that before or after you started choking [defendant]?
>
> A. Before or after I was choking him? This was -- I never choking [sic] him. I just put him on the table.
>
> Q. Well, you heard Breyon say yesterday that you were choking him --
>
> MR. WOOD: Objection. That's not what he said.
>
> THE COURT: Sustained.
>
> A. But I was --
>
> THE COURT: Sustained. You don't have to answer it. I sustained it.
>
> Q. You deny that you were choking Mr. Jenkins?
>
> A. Yes, ma'am.

G.S. § 8C-1, Rule 611(b), a witness "may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2001). Although Rule 611(b) affords wide latitude to the cross-examiner, such latitude "'does not mean that all decisions with respect to cross-examination may be made by the cross-examiner.'" *State v. Brooks*, 83 N.C. App. 179, 189, 349 S.E.2d 630, 636 (1986) (citation omitted). Rather, the trial court has wide discretion in controlling the scope of cross-examination. *State v. Beane*, 146 N.C. App. 220, 552 S.E.2d 193 (2001).

Here, the trial court did not abuse its discretion in limiting

the scope of cross-examination in this manner. We agree with the State that whether Abuzuaiter heard the prior witness' testimony was not relevant to any issue in the case. This assignment of error is overruled.

In his fourth argument, defendant maintains the trial court erred in repeating portions of Abuzuaiter's testimony. During Abuzuaiter's cross-examination about a prior incident involving defendant in a store, the following occurred:

> A. I just took [defendant] - I said I took him outside. That's what I said. Throw him outside. I already put him in somebody's car, and I left him right there outside. He came inside -- we came inside, me and my uncle. He got a knife, tried to cut my uncle with it. My uncle came back --
>
> THE COURT: He did what now?
>
> A. A small knife, tried to cut my uncle with it.
>
> THE COURT: Tried to do what with it?
>
> A. Tried to stab my uncle with it.
>
> THE COURT: To stab your uncle with it?
>
> A. The knife, the small knife, try to stab him with it, because my uncle kicked him out of the store because he was real drunk. He was real drunk that day, the homecoming, and he asked -- he wanted to buy some alcohol, and already [my uncle] asked him to leave. He said he can't buy no alcohol if he was like -- if he was real drunk. He can't even act or talk or walk that day.
>
> THE COURT: He could what?
>
> A. He couldn't walk or act or talk.
>
> Q. And so you threw him out --
>
> THE COURT: Can ya'll hear and understand

everything he's saying?

(All jurors indicate affirmatively.)

THE COURT: You said he could not walk?

A. Or act or talk.

THE COURT: Or add?

A. Act.

THE COURT: Act or talk. Oh, okay.

Defendant argues the trial court's statements impermissibly revealed to the jury the trial court's opinion that defendant was a dangerous person, thereby prejudicing defendant.

A trial court may not express an opinion as to the guilt of a defendant, the credibility of a witness, or any other matter which lies within the jury's province. *State v. Hudson*, 295 N.C. 427, 245 S.E.2d 686 (1978). "However, it is equally well settled that the trial judge controls the course of the trial and may direct questions to a witness which are designed to clarify or promote a better understanding of his testimony." *Id.* at 435, 245 S.E.2d at 691. In determining whether the trial court's statement constitutes impermissible opinion, a totality of the circumstances test is utilized. *State v. Pickard*, 143 N.C. App. 485, 547 S.E.2d 102, *disc. review denied*, 354 N.C. 73, 553 S.E.2d 210 (2001). "'Not every improper remark made by the trial judge requires a new trial. When considering an improper remark in the light of the circumstances under which it was made, the underlying result may manifest mere harmless error.'" *Id.* at 490, 547 S.E.2d at 106 (citation omitted).

In *Hudson*, our Supreme Court rejected an identical argument where it concluded the trial court's statements were made because the trial judge "could not hear the witness's answers and asked the questions in order that the court and jury might better understand the witness's testimony." *Hudson*, 295 N.C. at 435, 245 S.E.2d at 691. The Court stated: "We find nothing in any of the questions excepted to which would indicate that a juror could have reasonably inferred from any one of the questions, or from all of them, that the trial judge expressed an opinion as to the credibility of the witness or as to the guilt or innocence of defendant." *Id.* at 435, 245 S.E.2d at 692; *see also*, *State v. Harrison*, 14 N.C. App. 450, 452, 188 S.E.2d 541, 543, (rejecting argument that trial court prejudiced defendant by requesting certain questions and answers be repeated that were damaging to defendant: "'We might concede that it is desirable that no occasion arise which would prompt the trial judge to ask questions of a witness for clarification and understanding of the testimony.' Nevertheless, questions by the trial judge do become necessary at times." (citation omitted)) *cert. denied*, 281 N.C. 625, 190 S.E.2d 468 (1972).

Likewise, in this case, it is evident from the transcript that the trial court, in asking questions of Abuzuaiter and repeating some testimony, was attempting to understand Abuzuaiter's testimony and to ensure that the jury could also hear and understand Abuzuaiter. Such action was well within the court's authority, and given the totality of the circumstances, we do not interpret the trial court's actions as an impermissible statement of opinion on

defendant's guilt. Defendant's fourth assignment of error is overruled.

For the same reasons, we reject defendant's sixth assignment of error. In that argument, defendant contends the trial court erred by impermissibly repeating and emphasizing defendant's testimony on his prior convictions, thereby prejudicing him. The following colloquy ensued during the State's cross-examination of defendant:

> Q. Now, sir, what have you been tried and convicted of in the last 10 years that you could have gone to prison for 60 days or more for?
>
> A. Seven things of -- what is it -- resisting arrest.
>
> THE COURT: Did you say seven?
>
> A. Seven counts of resisting arrest since '95. Three -- wait a minute. Intoxicated and disruptive is seven counts, three resisting arrest, one assault on a female, one carrying a concealed weapon, and an assault on a child under 12.
>
> Q. What's that you're reading from?
>
> A. Oh, I've got a list of the things that I'm convicted of. . . .
>
> Q. Who wrote that down for you?
>
> A. It was given to me.
>
> Q. By who?
>
> A. I guess it was by my attorney. She wrote it down for me so I would have an exact count of what I've been convicted of.
>
> Q. So in the last 10 years --
>
> THE COURT: Did I understand you to say your attorney wrote it down for you?

A. Yes.

As we have already discussed, "in order to insure justice for the parties, the trial court may ask clarifying questions of a witness to alleviate confusion." *State v. Smarr*, 146 N.C. App. 44, 49, 551 S.E.2d 881, 884 (2001), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002). "Such questions are only prejudicial error if 'by their tenor, frequency, or persistence, the trial judge expresses an opinion." *Id.* at 49, 551 S.E.2d at 885 (citation omitted). Upon review of the totality of the circumstances, we hold the trial court's statements and questions of defendant were designed to insure the court understood defendant's testimony and did not amount to an improper opinion on defendant's guilt. This assignment of error is overruled.

By his fifth assignment of error, defendant asserts again that the trial court impermissibly intimated an opinion as to defendant's guilt in excusing a State's witness after his testimony. Following the defense's cross-examination of Officer Gregory of the Greensboro Police Department, the trial court stated: "Any reason why we can't excuse him, let him go out and continue enforcing the law?" Defendant argues this statement was prejudicial because it implied the trial court believed defendant had committed a crime because a police officer had been called to the scene to arrest defendant.

We simply cannot agree with defendant that the trial court's statement had the effect of implying defendant's guilt. The trial court only alluded to the fact that the witness was a law

enforcement officer, which was obvious to the jury since Officer Gregory testified that he was a police officer and had been called in that capacity to the scene on the evening in question. To the extent defendant argues the trial court's statement implied he had been arrested by a law enforcement officer, we cannot envisage how such would be prejudicial, as it would be obvious to the jury that defendant had been arrested, given that he was, in fact, on trial for the commission of a crime.

In his final argument, defendant asserts the trial court erred in denying his motion to dismiss for lack of sufficient evidence. Specifically, he alleges the State failed to present sufficient evidence of intent to kill, an essential element of assault with a deadly weapon with intent to kill inflicting serious injury. To withstand a defendant's motion to dismiss, the State must present substantial evidence of each element of the crime charged. *State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000). "'"Substantial evidence is that amount of evidence that a reasonable mind might accept as adequate to support a conclusion."'" *Id.* (citations omitted). The trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *Id.* at 457, 526 S.E.2d at 462.

As the Supreme Court stated in Grigsby,

> "An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." "[T]he nature of the assault, the manner in which it

> was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." Moreover, an assailant "must be held to intend the natural consequences of his deliberate act."

Id. (citations omitted); *see also State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001) (citation omitted) (holding State presented sufficient evidence of intent to kill where evidence established that defendant swung a steel bat at victim's head).

Here, the State presented evidence establishing that when asked to leave the Lincoln Grove Grocery by Abuzuaiter because of having caused previous disturbances, defendant became confrontational and approached Abuzuaiter in a hostile manner. The two struggled, during which defendant cut Abuzuaiter's neck three times with a razor, inflicting three significant wounds to Abuzuaiter's neck. The injuries were significant enough to cause profuse bleeding and require that Abuzuaiter be taken by ambulance to a hospital for stapling of the wounds. Taken in the light most favorable to the State, this evidence was sufficient to withstand defendant's motion to dismiss and allow for the jury's consideration of the matter.

Defendant received a fair trial, free of prejudicial error.

No error.

Judges TYSON and THOMAS concur.

Report per Rule 30(e).