NO. COA01-760

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Swain County
No. 99-CRS-800, 801

CARROLL DEE SUTTON

Appeal by defendant from judgment entered 4 November 2000 by Judge Hollis M. Owens, Jr. in Swain County Superior Court. Heard in the Court of Appeals 17 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Lisa C. Glover, for the State.

Sean P. Devereux, for defendant.

BIGGS, Judge.

Carroll Dee Sutton (defendant) appeals his convictions of two counts of taking indecent liberties with a child. For the reasons herein, we find no error.

The State's evidence at trial tended to show the following: defendant and his wife, Shirley Deane Sutton (Sutton), were neighbors and close family friends of thirteen year-old CLR and her family. In June 1998, while Sutton was confined to her home because of a broken leg, CLR went to the Sutton home to assist with household chores on four or five occasions. On one occasion, defendant asked CLR if she wanted to go on a swimming trip. CLR

agreed to go, but also extended an invitation to her cousin. Upon returning from the trip, after dropping her cousin off at home, defendant asked CLR to sit on his lap as he drove to his house. While CLR sat on defendant's lap, he began grabbing her legs until she told him to stop.

On another occasion, CLR rode with defendant to a jewelry store. During the drive back to defendant's house, he began rubbing CLR's legs. Once inside his house, defendant sat beside CLR on the sofa and touched her breasts beneath her shirt and bra. CLR pushed his hand away, told him to stop and asked to go home. On the way to her house, defendant told CLR that "[she] didn't need to tell [her] mom what he did."

At a later date, defendant called CLR at home to accuse her of "fooling around". He threatened that if she "didn't give him what he wanted", he was going to tell her parents. Under the impression that defendant wanted to have sex with her, CLR decided to tell her mother, Ellen Rogers (Rogers), about the two occasions where defendant rubbed her legs and touched her breasts. Rogers then called social services and the sheriff's department to report defendant's misconduct.

Defendant denies that the incidents occurred. He was subsequently charged with and convicted of two counts of indecent liberties with a child in violation of N.C.G.S. § 14-202.1. From these convictions, defendant appeals.

I.

Defendant argues first that the trial court erred by allowing

the prosecutor, during closing argument, to comment on his right not to testify. Specifically, defendant argues that the trial court erred in denying his motion to dismiss, or alternatively, in failing to grant a mistrial or to give a curative instruction in response to the prosecutorial comments. We disagree.

We first determine whether defendant has properly preserved, for appellate review, objection to the trial court's refusal to: (1) grant defendant's motion to dismiss; (2) grant a mistrial, or (3) give a curative instruction following the prosecutor's comment during closing argument. In order to properly preserve a question on appeal, "a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make. . . ." N.C.R. App. P. 10(b)(1).

Here, defendant contends, and the State concedes, that he has properly preserved for appellate review the trial court's denial of his motion to dismiss. However, upon our review of the record, we conclude that defendant has failed to properly preserve for review whether the court should have granted a mistrial or given specific curative instructions. In fact, with regard to defendant's contention that the court should have granted a mistrial, defendant expressly argued at trial that "a mistrial would be entirely inappropriate and [an] unfair outcome . . . ." In addition, there is no evidence in the record that defendant requested curative instructions. "[A] trial court does not commit reversible error when it fails to give a curative jury instruction absent a request

by defendant." *State v. Williams,* 350 N.C. 1, 24, 510 S.E.2d 626, 641, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). Moreover, defendant has not assigned error to the trial court's failure to grant a mistrial or give curative instructions. Thus, it would appear that defendant has only preserved for appellate review the trial court's denial of his motion to dismiss.

However, a motion to dismiss tests the sufficiency of the evidence to support a conviction pursuant to N.C.G.S. § 15A-1227 (2001). Here, defendant does not challenge the sufficiency of the evidence; rather, he argues that he is entitled to relief due to prosecutorial misconduct. Thus, defendant has incorrectly relied on the motion to dismiss as the remedy for prosecutorial misconduct during closing arguments. *See State v. Riley,* 128 N.C. App. 265, 465 S.E.2d 181 (1998) (held that the prejudicial effect of an uncured, improper reference to defendant's failure to testify mandates the granting of a new trial), *disc. review denied and cert. denied*, 352 N.C. 596, 545 S.E.2d 217 (2000). We conclude that though defendant characterized the relief sought as a motion to dismiss, the more appropriate remedy would be a new trial. Thus, we elect to exercise our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure and review the merits of this appeal.

It is well settled that the prosecutor may not comment directly on the defendant's failure to testify during trial. *State v. Williams,* 341 N.C. 1, 459 S.E.2d 208 (1995), *cert. denied,* 516 U.S. 1128, 133 L. Ed. 2d 870 (1996); *State v. Reid,* 334 N.C. 551,

434 S.E.2d 193 (1993) (citation omitted). The prosecutor may, however, comment on a defendant's failure to produce witnesses or other evidence to refute the evidence presented by the State. *Williams,* 341 N.C. at 13, 459 S.E.2d at 216. When the State improperly comments on a defendant's failure to testify, the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness. *State v. Gregory*, 348 N.C. 203, 499 S.E.2d 753, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). An improper comment is not cured by subsequent inclusion in the jury charge of an instruction on a defendant's right not to testify. *Id.*

It is also well established that trial counsel are granted wide latitude in the scope of their opening and closing arguments. *State v. Shank,* 327 N.C. 405, 407, 394 S.E.2d 811, 813 (1990). Further, oversight of the arguments of counsel is left largely to the control and discretion of the trial judge. *Id.* Counsel's arguments are not improper where counsel argues the law, the facts in evidence, and all reasonable inferences to be drawn therefrom. *Id.* "On appeal, particular prosecutorial arguments are not viewed in an isolated vacuum." *State v. Moseley,* 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994), *cert. denied*, 514 U.S. 1091, 131 L. Ed. 2d 738 (1995)(citation omitted). Rather, "[f]air consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *Id.* Finally, a comment on the accused's failure to testify does not

call for automatic reversal but "requires the court to determine if the error is harmless beyond a reasonable doubt." *State v. Barfield,* 127 N.C. App. 399, 403, 489 S.E.2d 905, 908 (1997) (citation omitted).

In the case *sub judice*, defendant challenges the following comment made by the prosecutor during closing argument: "You have heard one side of the story and that's all you heard." Although closing arguments were not recorded, defendant argues that this statement was made after the prosecutor pointed out that CLR had taken the witness stand to tell her version of the events. Thus, defendant contends that the inescapable conclusion is that the prosecutor was commenting on defendant's failure to testify.

Relying on *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965) and *State v. Baymon,* 336 N.C. 748, 446 S.E.2d 1 (1994), defendant correctly argues that a prosecutor's comment upon a defendant's failure to testify violates that defendant's constitutional rights to remain silent. However, his contention that the prosecutor's comment, in the case *sub judice,* is "strikingly similar" to the arguments in *Griffin* and *Baymon*, which were held to be improper, is erroneous. Defendant cites the following excerpt of the prosecutor's argument from *Griffin* in support of his contention:

> Essie Mae is dead, she can't tell you her side of the story. *The defendant won't.* (emphasis added).

Griffin, 380 U.S. at 611, 14 L. Ed. 2d at 108. We believe, however, that defendant has failed to show the true extent of the

comment in *Griffin*, where there was repeated reference to what the defendant knew and clear reference to defendant's refusal to testify to what he knew. The relevant portion of the prosecutor's argument in *Griffin* is as follows:

> The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.
> What kind of a man is it that would want to have sex with a woman that beat up is she was beat up at the time he left? [sic]
> He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.
> These things he has not seen fit to take the stand and deny or explain.
> And in the whole world, if anybody would know, this defendant would know.
> Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

Griffin, 380 U.S. at 610-11, 14 L. Ed. 2d at 107-08. Likewise, the objectionable comment in *State v. Baymon*, is a direct, unveiled comment on the defendant's election not to testify:

> "[W]e don't know how many times but the defendant knows and he's not going to tell you; he doesn't have to tell you."

Baymon, 336 N.C. at 757, 446 S.E.2d at 6.

Our Courts have previously upheld comments similar to the prosecutor's statement in the instant case. In *State v. Styles*, 93 N.C. App. 596, 379 S.E.2d 255 (1989), this Court allowed the following comment:

> Now you compare those characteristics . . . to this man seated right here [referring to defendant] and compare them to Mr. Workman, *who you got to see up there; to hear from.* (emphasis added).

Styles, 93 N.C. App. at 610, 379 S.E.2d at 264. In *State v. Gregory,* 348 N.C. 203, 499 S.E.2d 753, *cert. denied,* 525 U.S. 952, 142 L. Ed. 2d 107-08 (1998), our Supreme Court held that the following comment was an isolated comment and not an extended reference to defendant's exercise of his right not to testify:

> Now, you know, I'm sorry [defendant] did not read his statement. Maybe I ought to be over to his table and let him look at State's Exhibit 52 in this courtroom and take the next hour reading it. And then tell you what he thinks about it.

Gregory, 348 N.C. at 210, 499 S.E.2d at 758. Similarly, in *State v. Stephens*, 347 N.C. 352, 493 S.E.2d 435 (1997), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998), our Supreme Court upheld the following statement in the State's closing argument:

> [Prosecutor]: The defense may raise other challenges to our evidence when they argue to you but I have a challenge. *I challenge them to explain why their client was found in an attic ---*
> [Defense Counsel]: Objection
> The Court: Overruled.
> [Prosecutor]: --- with one of the murder weapons located just inches from him if he's not guilty. (emphasis added).

Stephens, 347 N.C. at 361, 493 S.E.2d at 440-41. The Court determined that "[t]his brief statement . . . clearly does not constitute a comment on the defendant's failure to testify and merely draws the jury's attention to the fact that particular evidence offered by the State was uncontradicted or unrebutted."

Id. at 361, 493 S.E.2d at 441.

We conclude that the comments by the prosecutor, in the case *sub judice,* more closely resemble those in *Styles* and *Stephens* than *Griffin* or *Baymon* in that the State made an isolated comment not specifically directed at defendant's right not to testify. Further, we conclude that the prosecutor's comment referenced defendant's failure to present exculpatory evidence refuting the State's evidence that defendant took indecent liberties with CLR on two separate occasions.

In the present case, defendant contends that the prosecution's comment could not have been a reference to his failure to present exculpatory evidence because he did, in fact, offer evidence. Although defendant did offer evidence, such evidence did not negate the material issue presented: whether defendant took indecent liberties with a minor, in this case, thirteen year-old CLR. *See* N.C.G.S. § 14-202.1 (2001). During CLR's testimony regarding the offenses, she relayed that one incident had occurred on a day that she rode with defendant and Sutton to the school where Sutton worked. She stated that on that occasion, they were greeted at the office by a Ms. Linda Downs. Regarding the second incident, CLR testified that it occurred on the same day that defendant purchased a ring from Hollifield Jewelers. CLR was unable to specify specific dates and times but stated that both incidents did occur in June, before she and her family went on vacation to the beach.

Defendant presented the testimony of defense witnesses Linda Downs, Betty Lou Jenkins and Carolyn Buff who stated that they did

not see CLR during the month of June. Specifically, defendant offered Downs' testimony that she did not greet CLR, Sutton, and defendant at the school board office on any day in June. Defendant also offered into evidence a purchase receipt dated 9 July 1998, for a ring purchased at Hollifield's to refute CLR's testimony that the incident occurred in June. While defendant's evidence may challenge CLR's ability to remember exact times and dates of the offense, there was no direct evidence presented by defendant that the offense did not occur.

Based on the foregoing, we conclude that the prosecutor's comment was not an impermissible reference to the defendant's failure to testify. Therefore, we hold that the trial court did not abuse its discretion in declining the relief sought. Accordingly, this assignment of error is overruled.

II.

Defendant next argues that the trial court erred in permitting, over defendant's objection, the alleged victim to sit at the prosecution's table throughout the trial. We disagree.

"The presiding judge is given [wide] discretionary power as to the control of the trial." *State v. Young*, 312 N.C. 669, 678, 325 S.E.2d 181, 187 (1985); *State v. Rhodes*, 290 N.C. 16, 224 S.E.2d 631 (1976). As a general rule, "[i]n the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the courts, are within the trial judge's discretion" and are reviewed only for abuse of that

discretion. *Young*, 312 N.C. at 678, 325 S.E.2d at 187. "Where particular persons who are witnesses or who have an interest in the outcome of a trial sit in the courtroom is a matter left to the trial judge's discretion." *State v. Payne*, 328 N.C. 377, 393, 402 S.E.2d 582, 591 (1991). Moreover,

> [a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be 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.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

We reject defendant's contention that the State by seating the victim at counsel's table improperly vouched for her credibility as a witness. While the law is clear that the prosecution may not improperly vouch the credibility of a witness, *State v. Bunning*, 338 N.C. 483, 450 S.E.2d 462 (1994), the defendant fails to cite authority in support of his contention that merely seating CLR at the prosecutorial table, improperly vouches for her credibility; nor are we aware of such authority. Moreover, defendant has failed to demonstrate any prejudice. While we find no abuse of discretion by the trial judge on the facts of this case, this should not be read to endorse or encourage such practice. This assignment of error is overruled.

We hold that defendant received a fair trial free of error.

No error.

Judges WYNN and MCCULLOUGH concur.

Report per Rule 30(e).