NO. COA01-946

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Buncombe County
No. 00 CRS 052009

JAMES STEPHEN RICE

Appeal by defendant from judgment entered 27 September 2000 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 14 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Rudy E. Renfer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Janet Moore, for defendant-appellant.

BIGGS, Judge.

James Stephen Rice (defendant) appeals his conviction of possession of a firearm by a felon. We find no error.

At trial, Officer Anthony Waters with the Asheville Police Department testified that on 9 February 2000, he and Officer Victor Lamar Morman were patrolling Livingston Street Apartments. While riding through the Apartments, Morman recognized defendant and indicated to Waters that he "wanted to question [defendant] in reference to a shooting at a residence." As the two officers approached defendant, who was standing in a grassy area, he and

three other individuals began walking away. At the time, defendant was wearing a heavy dark coat, with large pockets on the side. Morman watched the three men who went to his left, and Waters kept an eye on defendant and proceeded walking toward him. After a request by the officers for the individuals to stop, defendant continued walking. From approximately twenty to twenty-five feet, Waters observed defendant go behind a Housing Authority van, remove his coat, and throw it underneath the van. The only time Waters was unable to see any portion of defendant's body was when defendant's feet were behind the tires of the van. After removing his coat, defendant walked around the front of the van toward Morman. At that point, Waters walked behind the van and retrieved the coat defendant had placed there. Waters did not observe anyone else behind the van during the time defendant went behind the van and removed his coat. Waters discovered a gun in the coat pocket and advised Morman he had found a gun. Thereafter, Morman took defendant into custody.

On cross-examination, Waters testified that although he observed defendant with the coat, he never observed defendant with the gun. Waters also testified that prior to transporting defendant to jail, the two officers returned defendant's coat but retained the gun. On re-direct examination, Waters testified he and Morman returned defendant's coat to him because they had seen defendant wearing it and there was no reason to keep it. Waters did not order a fingerprint analysis on the gun because the gun was found in the coat, defendant had been the only person in the area

where the coat was found, he had been wearing the coat previously, and Waters had observed him placing the coat underneath the van.

Morman testified he was familiar with defendant and, on 9 February 2000, he was looking for defendant to speak with him concerning an earlier shooting. As Morman approached defendant and the other individuals, defendant went behind an Asheville Housing Authority work van and discarded the coat he was wearing. When defendant came from behind the van, he no longer wore a coat. Morman testified there was no doubt in his mind the coat containing the gun was the one defendant was wearing and discarded behind the van.

Detective Langdon Raymond testified that at the time defendant was admitted into jail, he had a black coat in his possession. On 10 February 2000, when defendant was released, he retrieved the same black coat.

Defendant testified that when he saw the police officers approaching on 9 February 2000, he attempted to hide behind the van, but there were other individuals hiding behind the van who told him "Squirrel, the police are coming. Get out from back here." Defendant then walked back toward the police officers. Defendant testified he was not wearing a coat or carrying a gun on 9 February 2000. Defendant stated that while he would "carry a knife in a minute," he would never carry a gun under any circumstances. On cross-examination, defendant admitted using various aliases and admitted to many previous convictions including a conviction for possession of cocaine with intent to sell.

The jury returned a verdict finding defendant guilty of possession of a firearm by a felon. The trial court sentenced defendant to the presumptive range for a Class C, Level V offense of a minimum of 121 months and a maximum of 155 months.

Defendant argues the following: (I) the trial court erred in sustaining the State's objection to evidence that defendant is not known to carry a gun as admissible character evidence; (II) the trial court erred in instructing the jury on constructive possession; (III) the State's closing arguments require reversal; and (IV) the trial court committed reversible error by failing to sentence him in the mitigated range.

I.

Defendant argues first that the trial court erred in sustaining the State's objection to material exculpatory evidence relating to defendant's reputation for carrying a gun. He contends that the testimony he has never carried a gun was relevant character evidence. In addition to tendering this evidence under N.C.G.S. § 8C-1, Rule 404(a)(1), defendant also tendered it under Rules 404(b), and 406. We conclude that the trial court properly excluded the evidence.

Generally, "[e]vidence of a person's character . . . is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a) (2001). A defendant in a criminal case, however, may offer "[e]vidence of a pertinent trait of his character," N.C.G.S. § 8C-

1, Rule 404(a)(1) (2001), as long as he tailors it "to a particular trait that is relevant to an issue in the case," *State v. Squire*, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988). The evidence "must be of a 'trait of character' and not merely evidence of a fact." *State v. Moreno*, 98 N.C. App. 642, 645, 391 S.E.2d 860, 862, *disc. review denied*, 327 N.C. 640, 399 S.E.2d 331 (1990). For instance, "being 'law-abiding' addresses one's *trait of character* of abiding by all laws, [whereas] a lack of convictions addresses only the *fact* that one has not been convicted of a crime." *State v. Bogle*, 324 N.C. 190, 200, 376 S.E.2d 745, 751 (1989). Likewise, "evidence of not dealing in drugs is plainly evidence of a fact," while "'[n]ot using drugs,' . . . is clearly a character trait, akin to sobriety." *Moreno*, 98 N.C. App. at 646, 391 S.E.2d at 863.

In this case, Kenneth Butler testified he had known defendant since 1975. Defense counsel asked Butler if he had ever known defendant to carry a gun; the State objected to this line of questioning. Outside the presence of the jury, defense counsel repeated the question to Butler and Butler testified that to his knowledge, he had not known defendant to carry a gun. Defense counsel stated Butler's testimony was being offered "as to the common plan or scheme of the way [defendant] operates." The trial court sustained the State's objection. Thereafter, defendant called other witnesses outside the presence of the jury to offer similar testimony as Butler. Sheriff Bobby L. Medford of Buncombe County testified he had known defendant since the mid-seventies and had never known defendant to carry a gun. In addition, Claudia

Tucker testified she had known defendant since the mid-seventies and she had never known defendant to carry a gun. The trial court determined that the testimony that defendant was not known to carry a gun did not describe a character trait and therefore was not admissible as character evidence.

Whether defendant had ever carried a gun is evidence of fact, indeed, a fact at issue in this case. Accordingly, since testimony concerning whether defendant has ever carried a gun was evidence of fact and not of a particular character trait, it was not admissible under Rule 404(a)(1).

Moreover, the testimony is not admissible under Rule 404(b) because it is not evidence of an "act," N.C.G.S. § 8C-1, Rule 404(b) (2001) (must be evidence of "other crimes, wrongs, or acts"), and it is not admissible under Rule 406 because it does not reveal the number of times defendant was seen without a gun, N.C.G.S. § 8C-1, Rule 406 (2001) (must be showing of habit); *State v. Chavis,* 141 N.C. App. 553, 562, 540 S.E.2d 404, 411-12 (2000) (must be showing of regular instances of conduct). Accordingly, this assignment is overruled.

II.

Defendant next argues the trial court erred in instructing the jury on constructive possession as the State only presented evidence of actual possession. We disagree.

In a criminal case, the trial court "has the duty to instruct the jury on the law arising from all the evidence presented." *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253, *disc.*

review denied, 315 N.C. 188, 337 S.E.2d 862-63 (1985). "To determine if an instruction should be given, the trial court must consider whether there is any evidence in the record which might convince a rational trier of fact to convict [the] defendant of the offense." *Id.* "Possession of any item may be actual or constructive." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). In order to have actual possession, a person must have physical or personal custody of the item. *Id.* Constructive possession, however, occurs when an item is not in an individual's physical custody, "but he nonetheless has the power and intent to control its disposition." *Id.*

In this case, at the close of the arguments, the trial court instructed the jury on the issues. Subsequently, during jury deliberations, the jury requested a legal definition of possession. Over defendant's objection, the trial court instructed the jury that "possession of an article may be either actual or constructive" and defined both actual possession and constructive possession. The evidence presented supports these instructions. Both Waters and Morman saw defendant possess the coat which was later found to contain a gun and also saw defendant place the coat underneath the van, but neither officer saw defendant actually possess the gun. There is, however, no indication that anyone other than defendant had access to the coat between the time he was seen wearing it and the time Waters retrieved it. At the time defendant was stopped, he had just walked away from placing the coat underneath the van. All of the evidence in this case directly

links defendant to the coat and consequently to the gun. Accordingly, as there is evidence defendant constructively possessed the gun, the trial court did not err in instructing the jury on constructive possession.

III.

Defendant next argues the State's closing arguments were improper in a number of ways which resulted in prejudice to him. We disagree.

Generally, the State is "given wide latitude in arguments to the jury and [is] permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). Moreover, control of jury arguments are within the sound discretion of the trial court. *State v. Smith*, 351 N.C. 251, 524 S.E.2d 28 (2000). It is well settled that counsel may not make uncomplimentary comments about their opposing counsel and should refrain from abusive language and conduct. *State v. Grooms*, 353 N.C. 50, 540 S.E.2d 713 (2000); *State v. Sanderson*, 336 N.C. 1, 442 S.E.2d 33 (1994). In addition, counsel may not argue matters outside the record or make remarks that are calculated to mislead or prejudice the jury. *State v. Wilson,* 335 N.C. 220, 436 S.E.2d 831, (1993); *see also* N.C.G.S. § 15A-1230(a). None of these proscriptions were violated here.

In closing arguments, the State was permitted to argue, over defendant's objection, there was a saying that "[i]f the law and

the facts are against you, you blow smoke." The State further argued defendant had "blown a lot of smoke around what the core of the facts are in the hopes that [it would] cloud [the jury's] ability to see what really happened."

The challenged argument by the prosecutor is as follows:

> The way that this process works is that I'm going to say just a few brief things, and then Ms. Burner is going to argue, and then I get to do my final closing argument.
>
> Before she argues, I want to do the opening, because I want to set a few things straight. There is a saying in our law that says, "If the facts are against you, you argue the law." This is from a Defendant's perspective. "If the law is against you, you argue the facts. *If the law and the facts are against you, you blow smoke*."
>
> MS. BURNER: Objection.
>
> THE COURT: Overruled, closing argument. Go ahead.
>
> MR. HASTY: That's exactly what has happened in this case. They have blown a lot of smoke around the core of the facts are [sic] in the hopes that that will cloud your ability to see what really happened. (emphasis added)

Where remarks made during arguments are challenged, these remarks must be viewed in the context in which they are made and the overall factual circumstances to which they referred. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, (1982).

In the case *sub judice*, the prosecutor, in addition to the challenged statement above, further argued:

> You need to focus in on the core facts of this case. The State does not need to prove to you beyond a reasonable doubt what type of fabric

> the jacket was made out of, where the Defendant and his buddies were standing when the police first drove in there. We don't have to prove to you what color the jacket was. All we have to prove to you is that the Defendant possessed a handgun. . . .
>
> So that's what I mean when I say smoke. You have to focus in and concentrate on the facts that the State has to prove beyond a reasonable doubt. All we have to prove is possession; not ownership, not where everybody was standing, not what type of material the jacket was, but that he possessed a firearm and was a Felon. That's all I want to do at this point is just to refocus you.

Taken in context, the prosecutor's reference to "blowing smoke" was not an attempt to undermine the integrity of the defense counsel; nor was it an expression of a personal belief as to the truth or falsity of the evidence. Rather it was an effort by counsel to have the jury focus on what he deemed to be the critical issues in the case. We conclude that this argument of counsel was not improper and the trial court did not err in overruling defendant's objection.

Defendant next argues the trial court erred in permitting the State to argue to the jury a hypothetical situation. The State asked members of the jury to pretend they were convenience store clerks who had been robbed and were being asked to recall minor details immaterial to the case. Over defendant's objection, the State was allowed to argue: "If you would let him go for robbing you based on those inconsistencies, you let him go. . . . Because it's the exact same situation."

"An argument asking jurors to put themselves in place of the victims will not be condoned," *State v. McCollum*, 334 N.C. 208,

224, 433 S.E.2d 144, 152, nor will the State be allowed to "make arguments premised on matters outside the record," *State v. Jones*, 355 N.C. 117, 127, 558 S.E.2d 97, 104. In this case, the State asked the jurors to assume facts not at issue and to place themselves as victims in a hypothetical case. This hypothetical was warranted neither by the evidence nor by the law; it referred to events and circumstances outside the record, and possibly misled the jury as to the facts at issue in the case. Accordingly, the State's argument placing the jurors in the role of a hypothetical victim was improper.

This argument, however, did not prejudice defendant. There was direct evidence from two police officers that just moments before the coat was found containing a gun, they had seen defendant wearing the coat. Moreover, there is evidence defendant assumed possession of the coat prior to being transported to jail and even after being released from jail. Accordingly, while we conclude that the trial court did err in allowing this argument, the error was harmless beyond a reasonable doubt.

Next, defendant contends error when the State rhetorically asked why defendant had not subpoenaed any of his friends who were at the scene on 9 February 2000. The trial court interjected and admonished the jury saying "the burden of proof in this case is totally upon the State to show that [defendant] is guilty beyond a reasonable doubt. . . . Defendant is not required to offer any evidence or prove anything." Afterward, the State argued defendant could have had the gun fingerprinted, but he had chosen not to do

so. "[O]ur Courts have consistently held that the State is permitted to comment on a defendant's failure to produce exculpatory evidence or to contradict evidence which the State has presented." *State v. Cobb*, __ N.C. App. _, __, 563 S.E.2d 600, 606 (2002). Accordingly, we find no error.

Next, without objection, the State argued defendant was a drug dealer and "[d]rug dealers carry guns." The evidence shows defendant was convicted of possession of cocaine with intent to sell. Therefore, the characterization of defendant as a "drug dealer" was a reasonable inference for the State to argue based on evidence admitted at trial. *See State v. Williams,* 127 N.C. App. 464, 469, 490 S.E.2d 583, 587 (1997). Moreover, there is a "common-sense association of drugs and guns." *State v. Willis*, 125 N.C. App. 537, 543, 481 S.E.2d 407, 411 (1997). Accordingly, the State's closing argument that defendant was a drug dealer and drug dealers carry guns was not so grossly improper as to require the trial court to intervene *ex mero motu*. *See Jones*, 355 N.C. at 133, 558 S.E.2d at 107 ("[t]he standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero moto*").

Defendant's assignments related to the jury arguments are overruled.

IV.

Defendant finally argues the "trial court committed reversible

error by failing to sentence [him] in the mitigated range, despite uncontroverted, material mitigating evidence." A trial court is required to take "into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing," *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997), and its decision to do so is within the discretion of the trial court. *State v. Streeter*, 146 N.C. App. 594, 598, 553 S.E.2d 240, 242 (2001). As the trial court imposed the presumptive sentence in this case, it was not required to take into account any evidence offered in mitigation and did not abuse its discretion by failing to do so.

Having carefully reviewed each of defendant's arguments, we conclude that defendant received a trial free of prejudicial error.

No error.

Judge GREENE concurring in the result with separate opinion.

Judge HUDSON concurs.

Report per Rule 30(e).

NO. COA01-946

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Buncombe County
No. 00 CRS 052009

JAMES STEPHEN RICE

GREENE, Judge, concurring in the result.

While I believe defendant received a trial free of prejudicial error, I write separately to address the impropriety of the State's "smoke" argument.

In determining if defendant is entitled to a new trial based on the State's argument to the jury, it must first be determined whether the remarks were improper. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). If improper, it is necessary to determine "if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.*

While the State is "given wide latitude in arguments to the jury and [is] permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence," *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996), wide latitude "has its limits," *Jones*, 355 N.C. at 129, 558 S.E.2d at 105. The law is clear in this state that in "closing arguments to the jury, an attorney may not: (1) become abusive, (2) express

his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or (4) make arguments premised on matters outside the record." *Id.* at 127, 558 S.E.2d at 104. Improper remarks during closing arguments include: "statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Id.* at 131, 558 S.E.2d at 106. "[O]ur courts have consistently refused to tolerate 'remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury.'" *State v. Jordan*, --- N.C. App. ---, ---, 562 S.E.2d 465, 467 (2002) (quoting *State v. Smith*, 352 N.C. 531, 560, 532 S.E.2d 773, 791-92 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001)). Likewise, the State is not permitted to undermine a defendant's "defense by casting unsupported doubt on [his] counsel's credibility and erroneously painting [the] defendant's defense as purely obstructionist." *Id.* at ---, 562 S.E.2d at 468.

A

"*Smoke*" *Argument*

In this case, the State argued that the facts and the law were against defendant, thus defendant's attorney had to blow smoke. The State's characterization of defendant's case as blowing smoke was improper because it undermined defendant's strategy by casting unsupported doubt on his counsel's credibility and integrity. *See State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992) (characterization of the defense counsel's argument as "smoke

screen" may be viewed as attacking opponent's integrity). Moreover, the State painted defendant's defense as contrived and improperly expressed a "personal belief as to the truth or falsity of the evidence." Accordingly, I believe this argument was improper.

B

Prejudice

I do not believe, however, this argument prejudiced defendant as there was direct evidence defendant had worn the coat just prior to it being found containing a gun. In addition, defendant assumed possession of the coat prior to being transported to jail and again after being released from jail. Thus, I do not believe the trial court erred in overruling defendant's objection to the "smoke" argument.