NO. COA11-935
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Wake County
Nos. 10 CRS 6640-41

AKEEM XAVIER PAIGE,
Defendant.

Appeal by defendant from judgments entered 26 January 2011 by Judge Howard E. Manning in Wake County Superior Court. Heard in the Court of Appeals 28 November 2011.

Roy Cooper, Attorney General, by M. A. Kelly Chambers, Special Deputy Attorney General, for the State.

Thomas, Ferguson & Mullins, L.L.P., by James H. Monroe, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from judgments entered upon jury verdicts finding him guilty of robbery with a dangerous weapon and attempted common law robbery.

The State's evidence tended to show that on 12 June 2008, Damien Lott and Josiah Williams were selling shoes in the parking lot outside a convenience store on Poole Road in

Raleigh. Around midday, defendant pulled up in front of the convenience store in a Mercedes Benz driven by Jaquon Hawkins. Shakiera Owens, the mother of defendant's child, and her sister Jasmine Owens were also in the car. Defendant got out of the car and asked Mr. Lott and Mr. Williams the price of the shoes. Mr. Williams told defendant the price, and defendant walked back to the car, returning with a gun. Defendant pointed the gun at Mr. Lott's stomach, and indicated he should empty his pockets. Mr. Lott did not give defendant money, but fled into the convenience store and told the owner that "somebody [was] out there robbing." Jasmine Owens was in the store at the time, witnessed this exchange, and then ran out to the car.

Meanwhile, defendant pointed the gun towards Mr. Williams and told him, "come out [sic] your pocket," indicating he should give him all his money. Mr. Williams complied, giving him $100 of his own money and some additional money he was holding for the owner of the convenience store. Defendant took the money and attempted to enter the Mercedes Benz, but Mr. Hawkins would not allow defendant to enter the car because defendant had a gun. Defendant ran off down the street, and Mr. Hawkins drove away in the Mercedes Benz. The convenience store owner called

the police. Both Mr. Lott and Mr. Williams later identified defendant as the perpetrator in a photo lineup.

On cross-examination, Mr. Lott admitted that he had previously testified under oath that he did not see defendant with a gun. Mr. Lott contended he lied under oath because, at the time, he was in custody with defendant, who told other inmates that Mr. Lott was a "snitch" and that they should beat him up. Mr. Lott also testified he smoked marijuana the day of the alleged crime. Mr. Williams testified that the gun was a black revolver, while Mr. Lott testified it was a rusted chrome .38 caliber pistol.

Defendant raises two issues on appeal. He contends the trial court deprived him of a fair trial by foreclosing his counsel from questioning potential jurors during voir dire in violation of N.C.G.S. § 15A-1214(c), and by improperly expressing an opinion about the case. We find no prejudicial error.

Defendant first contends the trial court prevented him from questioning potential jurors during voir dire. Prior to jury selection, the court instructed both counsel that it would pose questions regarding potential sources of bias. The trial court

instructed jurors to answer honestly; if they felt they could not be fair, they would be excused. Under examination, two jurors indicated they could not be fair and were excused for cause by the court. After questioning each potential juror, the trial court told counsel, with respect to the matters inquired about, "that issue is no longer on the table in jury selection." Defendant, however, was able to inquire into potential areas of bias, including age discrimination, police preference, and past experience with robbery. The court never prevented defendant's counsel from asking any question he sought to ask. Both parties exercised peremptory challenges and were ultimately satisfied with the jury panel.

N.C.G.S. § 15A-1214(c) states "[t]he prosecution or defense is not foreclosed from asking a question merely because the court has previously asked the same or similar question." N.C. Gen. Stat. § 15A-1214(c) (2009). Defendant must show prejudice resulting from a violation of the statute in order to establish reversible error. *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 27 (1994). Although the trial court's initial instructions to counsel may have forecast a violation of the statute, defendant has not shown that his counsel was actually prohibited from inquiring into any areas of bias. Thus, although we do not

approve of the trial court's indication that matters which it inquired about were "no longer on the table," we conclude defendant was not prejudiced by the trial court's actions with regard to jury selection in this case.

Defendant next contends he was denied a fair trial because the trial court improperly expressed its opinion about the case in several statements made prior to jury selection.

Every person charged with a crime is "entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951). Accordingly, N.C.G.S. § 15A-1222 states "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2009). Yet, "[n]ot every indiscreet and improper remark by a trial judge is of such harmful effect as to require a new trial." *State v. Whitted*, 38 N.C. App. 603, 606, 248 S.E.2d 442, 444 (1978). A totality of the circumstances test is used to determine whether a judge's comments cross into the realm of impermissible opinion. *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L.Ed.2d 274 (1999). A court's improper statement is only prejudicial when

the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to: a factual issue; the defendant's guilt; the weight of the evidence; or a witness's credibility. *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). The defendant has the burden of proving the judge's remarks deprived him of a fair trial. *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979).

Defendant first contends the trial court erred when it stated to prospective jurors:

> And since I know something about the facts of this case, I'm just going to tell you, we're not dealing with rocket science. Okay. So don't be upset. This is not a two week trial. This is not dealing with medical malpractice. This is very simple. Basically, Mr. Lott and Mr. Williams were sitting on the sidewalk on Poole Road outside of a C store owned by some gentleman named Jose selling shoes on a summer afternoon in 2008. I guess you've seen that, but I haven't seen it, but selling Nikes or some kind of shoes. And the State alleges that up comes the Defendant, Mr. Paige, and asks something of Mr. Williams or Mr. Lott, and then contends that he went back to a Mercedes Benz which had driven up and came back with a pistol, and demanded that they give him the money. Mr. Lott fleed, as they say, back into the store, and Mr. Williams indicates that he had to give up his cash that he had gotten from selling shoes. And then they both claim, he claims that Mr. Paige left the scene. Now, that's not complicated and it took me about 35 seconds to tell you what the State's case

> is. Okay. Now, nobody got hurt. Nobody got shot. Nobody got stabbed on that particular incident.

This Court has previously held that a trial court's statements that a case is "simple" and should not take a long time was not sufficiently prejudicial as to require a new trial. *See State v. McNeil*, 196 N.C. App. 394, 411, 674 S.E.2d 813, 824 (2009). Such statements were merely intended to prevent unnecessary delay, *id.*, and to assuage jury concerns about being selected for a lengthy trial. Likewise, the court's statements in this case that "we're not dealing with rocket science" and that the case is "very simple" were made to inform the potential jurors that if selected, they would not be required to serve for a long, arduous trial. Based on the context of these statements, it is not reasonable that the jury would interpret the court's statements as an opinion on the strength of the State's case.

Defendant also argues the trial court improperly expressed its opinion when it failed to use proper qualifiers such as "contends" and "alleges" when summarizing the facts to potential jurors prior to trial. During its summary, the court stated the offenses "occurred" on 12 June 2008, that Mr. Lott and Mr. Williams "were sitting" on the sidewalk, and that "Mr. Lott

fleed, as they say, back into the store." However, the court also used many terms of qualification, including "contends," "alleges," "indicates," and "claims" to describe the State's version of the facts. Moreover, at the end of his summary, the court noted that this was a summary of the "State's case." The North Carolina Supreme Court has previously held that one use of the word "victim" by the trial court among several uses of "the alleged victim" was not a prejudicial error. *State v. Kennedy*, 320 N.C. 20, 34, 357 S.E.2d 359, 367-68 (1987). We believe that, although stating that the offenses "occurred" was improper, the jury could not have reasonably inferred from the court's summary of the case that it had an opinion as to a factual issue, the defendant's guilt, the weight of the evidence, or a witness's credibility.

Defendant further contends the trial court erroneously expressed its opinion when it failed to outline the contentions of the defendant in its summary of the facts to potential jurors. The trial judge is not required to state the contentions of the parties; but if he does, he must give equal stress to contentions of both parties. *State v. Hewett*, 295 N.C. 640, 643, 247 S.E.2d 886, 887-88 (1978). Even if defendant does not present evidence, the trial court still must summarize

evidence favorable to him. *State v. Spicer*, 299 N.C. 309, 315, 261 S.E.2d 893, 897 (1980). In this case, the trial court stated:

> Now, Mr. Paige has entered a plea of not guilty. . . . And remember, ladies and gentlemen . . . that the State of North Carolina has the burden of proof beyond a reasonable doubt. . . . The presumption of innocence remains with the Defendant throughout the trial of the case until the jury that is impaneled to hear the case is convinced by the facts and the law of the guilt of the Defendant beyond a reasonable doubt. . . . Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the guilt of the Defendant. As I said, ladies and gentlemen, there is no burden or duty of any kind upon Mr. Paige. The mere fact that he's been charged with a crime is no evidence of guilt.

The court repeated two more times that there was no burden or duty on defendant and stressed that defendant did not "have to do anything." Based on the totality of the circumstances, it is not reasonable that the jury would interpret the trial court's initial description of the State's case as an expression of opinion as to its merits given the entire statement made by the court. Therefore, we conclude that defendant is not entitled to a new trial.

No prejudicial error.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).