NO. COA00-1268

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

CARROLL EUGENE WHISNANT,
Plaintiff

v.

Catawba County
No. 95 CVD 1541

SHIRLEY BOWMAN WHISNANT,
Defendant

Appeal by defendant from judgment entered 9 March 2000 by Judge L. Suzanne Owsley in Catawba County District Court. Heard in the Court of Appeals 6 November 2001.

Crowe & Davis, by H. Kent Crowe, for plaintiff-appellee.

Wilson, Palmer, Lackey & Rohr, P.A., by W. C. Palmer and Timothy J. Rohr, for defendant-appellant.

CAMPBELL, Judge.

Plaintiff and defendant were married in South Carolina on 30 December 1960. On 13 June 1995, plaintiff commenced a lawsuit in Catawba County District Court seeking, among other relief,[1] equitable distribution of the couple's marital property. Defendant filed an answer on 9 August 1995 admitting that plaintiff was entitled to equitable distribution and asserting his own counterclaim for equitable distribution.

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[1] Plaintiff also sought a divorce from bed and board, possession of certain marital property, and injunctive relief against defendant.

On 22 April 1997, defendant filed her equitable distribution affidavit ("affidavit"). Plaintiff filed his affidavit on 24 April 1997. After several pre-trial hearings, the parties' equitable distribution trial began on 7 September 1999 before Judge L. Suzanne Owsley ("Judge Owsley"). Testimony was heard on 8, 9 and 27 September 1999, as well as 1 and 2 November 1999.

During the 8 September 1999 court session, the trial court heard a motion *in limine* made by plaintiff. Plaintiff's motion requested that per section 50-21 of the North Carolina General Statutes ("section 50-21"), defendant be barred from offering evidence about certain marital property listed in her affidavit without specificity. Defendant testified that those items, with an alleged total value of $400,000.00, were summarized with limited descriptions because plaintiff's control over the items prevented her from doing a proper inventory. Based on this testimony, the court denied plaintiff's motion *in limine*. However, this motion was later granted after the court learned that nearly two years prior to the filing of her affidavit, defendant had given her attorney a notebook containing fourteen pages of individually listed items subject to distribution. Thus, an order was filed on 10 September 1999 disallowing defendant from presenting evidence as to those items not listed with specificity in part I, subsection V of the household goods section of her affidavit.

As court began on 1 November 1999, Judge Owsley stated:

> . . . I have decided that we're going to change the format today. I'm going to have both parties . . . sworn and I'm going to inquire about the next few pages [of] the

> affidavit regarding the items of personal property and I'll be inquiring of each one of you . . . . I will give each attorney an opportunity to cross-examine the other party a little bit later on, so you'll need to make note of whatever questions you have regarding any of these items.

Judge Owsley then preceded to question the parties about several pages of the affidavit. After questioning the parties about a particular affidavit page, counsel for each party was allowed to cross-examine the opposing party only about those items listed on that page. Defendant's counsel raised no objections regarding the judge's actions. However, the following morning defendant's counsel moved for a mistrial arguing that Judge Owsley's direct examination of the witnesses was "unfair" and "unprecedented." This request was denied.

No additional testimony was offered after 2 November 1999. After extensively reviewing all the evidence, the trial court filed the equitable distribution judgment on 9 March 2000. Defendant appeals this judgment and brings forth three assignments of error.

I.

In defendant's first assignment of error she argues the trial court erred in determining the equitable distribution judgment without allowing her to offer evidence regarding certain items of marital property for the purposes of classification, valuation and distribution. We disagree.

Section 50-21 provides the procedures in actions for equitable distribution of property. It states, in part, that:

> Within 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property. Within 30 days after service of the inventory affidavit, the party upon whom service is made shall prepare and serve an inventory affidavit upon the other party. . . . Any party failing to supply the information required by this subsection in the affidavit is subject to G.S. 1A-1, Rules 26, 33, and 37.

N.C. Gen. Stat. § 50-21(a) (1999). In the event of either party's non-compliance, the statute states:

> Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:
>
> (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
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> (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

N.C. Gen. Stat. § 50-21(e) (1999). Additionally, this Court holds:

> [W]hether to impose sanctions and which sanctions to impose under G.S. § 50-21(e) are decisions vested in the trial court and reviewable on appeal for abuse of discretion. In applying an abuse of discretion standard, this Court will uphold a trial court's order of sanctions under section 50-21(e) unless it is 'manifestly unsupported by reason.'

Crutchfield v. Crutchfield, 132 N.C. App. 193, 195, 511 S.E.2d 31, 34 (1999) (citations omitted).

In the present case, the trial court's order of sanctions preventing defendant from offering evidence about the marital property she failed to list with specificity was manifestly *supported* by reason. During the trial, defendant testified that she had created a notebook containing fourteen pages of individually listed items of marital property "approximately 6 weeks after her separation date of May 1995, and that she gave this [information] to her attorney soon thereafter and he . . . had this in his possession for almost 2 years prior to the filing of [her] affidavit." Despite having this information, defendant's affidavit was filed with only limited descriptions of several items of marital property, which was directly counter to the requirements of section 50-21(a). Defendant then waited until the trial began, which was nearly two and a half years after she filed her affidavit, before she made any attempt to provide more specific descriptions of these items to the court. Thus, it was not an abuse of discretion for the trial court to sanction defendant because she willfully failed to comply with section 50-21. Furthermore, the court's allowing defendant to offer this evidence years later would have been prejudicial to plaintiff's interest.

II.

In defendant's second assignment of error she argues the trial court committed reversible error in characterizing her counsel's

cross-examination of plaintiff as an attempt to "trick" plaintiff, followed by the trial court's direct examination of defendant. However, defendant's argument misstates the facts. The court's characterization was not followed by a direct examination of defendant because court recessed immediately after the statement was made. Defendant's counsel was allowed to continue cross-examining plaintiff on the following trial date, 27 September 1999. Furthermore, although the court did conduct a direct examination of defendant, this examination did not take place until the 1 November 1999 trial date and both parties were questioned by the court at that time. Thus, we find this assigned error to be without merit since there is no prejudice to defendant when these events are viewed in an accurate sequence.

III.

In defendant's third assignment of error she argues the trial court committed reversible error when it conducted the direct examination of both parties. We disagree.

Rule 614 of the North Carolina Rules of Evidence ("Rule 614") states that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." N.C. Gen. Stat. § 8C-1, Rule 614(a) (1999). Our case law has held that a court may interrogate a witness (1) to clarify the witness' testimony or (2) to ensure proper development of the facts. *See Vick v. Vick*, 80 N.C. App. 697, 700, 343 S.E.2d 245, 247 (1986); *United States v.*

King, 119 F.3d 290 (4th Cir. 1997), *appeal from denial of post-conviction relief dismissed*, 213 F.3d 633 (4th Cir. 2000), *cert. denied, King v. United States*, 531 U.S. 1193, 149 L. Ed. 2d 108 (2001). However, it is improper for the court to "engage in frequent interruptions and prolonged questioning." *State v. Huffman*, 7 N.C. App. 92, 95, 171 S.E.2d 339, 341 (1969). Finally, Rule 614 also states that "[n]o objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." § 8C-1, Rule 614(c).

While we agree it is improper for a trial judge to conduct an extensive direct examination of a witness, we find Judge Owsley's actions did not amount to reversible error in the case *sub judice*. Judge Owsley's direct examination took place in a non-jury trial and pertained only to those items listed on a few pages of the affidavit. With respect to each item listed, the judge's questions centered around whether each party had: (1) an independent recollection of the item; (2) an opinion as to the fair market value of the item at the date of separation; (3) an opinion as to the current value of the item; and (4) an opinion as to whom the item should be distributed. After answering these questions, each party's counsel was allowed to cross-examine the other party about those same items. Although not the best practice, these questions show no bias by the court towards either party, especially since there was no jury present that could be influenced by Judge

Owsley's examination. However, even if a jury had been present, it is unlikely that "the questions asked by the trial judge . . . were [] such that would convey to the jury an opinion of the court." *Huffman*, 7 N.C. App. at 95, 171 S.E.2d at 341.

Additionally, the trial judge's direct examination assisted in expediting the trial. Nearly all the testimony on 27 September 1999 consisted of defendant's counsel cross-examining plaintiff on items listed on two pages of the affidavit. Plaintiff was unable to answer many of questions posed by defendant's counsel because plaintiff could not remember several of the relevant facts pertaining to these items. Judge Owsley commented that it would take a year to hear the entire case at the rate it was proceeding. Therefore, Judge Owsley's decision to conduct the direct examination of each party on the following trial date enabled the court to hear testimony relevant to the same number of affidavit pages in only a fraction of the time. Under those circumstances, Judge Owsley's actions provided a more efficient way to develop the facts that were relevant and material to the proceeding.

In conclusion, we find that the trial court did not commit reversible error when it: (I) prevented defendant from offering evidence regarding certain marital property items in her affidavit with limited descriptions; (II) commented that defendant's counsel's cross-examination was an attempt to "trick" plaintiff; and (III) conducted a direct examination of the parties under the circumstances present in this case.

Affirmed.

Judges GREENE and McCULLOUGH concur.

Report per Rule 30(e).