NO. COA01-469

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

STATE OF NORTH CAROLINA

v. Buncombe County
No. 99 CRS 58365

RONALD ALLEN LEE, JR.,
Defendant-Appellant

Appeal by defendant from judgment entered 14 June 2000 by Judge Richard L. Doughton in Buncombe County Superior Court. Heard in the Court of Appeals 14 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

Public Defender J. Robert Hufstader, by Assistant Public Defender John T. Barrett, for defendant-appellant.

BRYANT, Judge.

Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury on Allen Biggs and assault with a deadly weapon on Curtis Morgan. Beginning on 13 June 2000, the State and defendant presented evidence at trial as to altercations which defendant had with Biggs and Morgan on 3 July 1999. At the close of all the evidence, the trial court instructed the jury as to both offenses.

During the jury's deliberations, they sent a note to the trial

court in which they inquired, "What do we need to do if we cannot come to an agreement on one of two cases?" After reading the note in the jury's presence, the trial court instructed them as follows:

> Based on that, it appears to me that so far you've been unable to agree upon the verdict in one of the two cases. The Court wants to emphasize the fact that it's your duty to do whatever you can to reach a verdict in these cases. You should reason the matters over together as reasonable men and women and to reconcile your differences, if you can, without the surrender of conscientious convictions, but no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors, or for the mere purpose of returning a verdict.

The trial court then permitted the jurors to go to lunch, and reminded them to suspend all deliberations while at lunch.

Out of the jury's presence, the following exchange occurred:

> [DEFENSE COUNSEL]: Your Honor, I would note an objection to the first sentence the Court read, "It is your duty to do whatever you can to reach a verdict," and I realize the Court continued on and gave further instructions.
>
> THE COURT: Well, that's straight from the Pattern Jury Instruction, and I think you're well aware of that.
>
> [DEFENSE COUNSEL]: Yes, sir, I do. We do object.

Upon further deliberation, the jury found defendant guilty of the lesser included offense of assault with a deadly weapon inflicting serious injury on Biggs. As for the charge of assault with a deadly weapon on Morgan, the jury found defendant not guilty. The trial court then sentenced defendant to a term of forty-five to sixty-three months imprisonment. From the trial

court's judgment, defendant appeals.

Defendant contends the trial court's instruction to the jury regarding their duty to reach a verdict was coercive and constitutes reversible error. While acknowledging two cases which are contrary to his position, defendant argues that neither case specifically addresses the challenged language of the trial court's instruction. We are not persuaded by defendant's argument.

"One of the cardinal rules governing appellate review of trial court instructions is that the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled." *State v. Alston*, 294 N.C. 577, 594, 243 S.E.2d 354, 365 (1978). Our Supreme Court has on a prior occasion, approved an instruction with virtually identical language to that used by the trial court in the case at bar. In *State v. Forrest*, 321 N.C. 186, 197-98, 362 S.E.2d 252, 259 (1987), the court's instruction was as follows:

> Members of the jury, your Foreperson has indicated that you've been unable to reach a verdict at this particular point. The Court wants to emphasize the fact that it is your duty to do whatever you can to reach a verdict in this matter. You should reason the matter over together as reasonable men and women and to reconcile your differences if you can without the surrendering of your conscientious convictions. But no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of a fellow juror, or for the mere purpose of returning a verdict. The Court will now let you return to the jury room to continue your deliberations, and when you've reached a unanimous verdict — *please see if you can reach a unanimous verdict.* If you can

please knock on the door.

(emphasis added). As in *Forrest*, we decline to examine the one sentence found objectionable by defendant and " find that, in the context of the court's total instruction and, in particular, of its admonishment to the jury that no juror should surrender any conscientious convictions, this passage is not coercive and does not constitute error in the court's instructions." *Id.* at 199, 362 S.E.2d at 260. The trial court here properly exercised its "discretion to hold the jurors to their duty to deliberate thoroughly together before concluding that they were indeed unable to agree." *State v. Bussey*, 321 N.C. 92, 97, 361 S.E.2d 564, 567 (1987). Accordingly, we find no error.

No error.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).