NO. COA01-677

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Cumberland County
No. 99 CRS 54797

JENYON RONQUELL MCELVINE

Appeal by defendant from judgment entered 5 December 2000 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 27 March 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Beaver, Holt, Sternlicht, Glazier, Carlin, Britton & Courie, P.A., by Haral E. Carlin and Richard B. Glazier, for defendant-appellant.

WALKER, Judge.

On 17 March 1999, fifteen-year-old Jessica McNeill was in the company of Sheila, Cecilia, and defendant in a room at the Days Inn off of Bragg Boulevard in Fayetteville. At some point, Sheila and Cecilia left the room leaving defendant and Ms. McNeill alone. Ms. McNeill testified that she and defendant were "talking" in the motel room and having sex.

While they were still in the room, Ms. McNeill heard Dafe Gbenedio, known as Jamaican (Jamaican), yelling and banging on the door but no one answered. When they finally left the room, they

saw Jamaican, Terrence Burden, LeWilliam Currie, "Little Folk," and "D" speaking with Sheila and Cecilia on the balcony. Defendant left the premises while Ms. McNeill stayed to talk. As defendant left, he gave Jamaican and Jamaican's friends "pounds" or "some dap" which is a street greeting and handshake. Ms. McNeill testified that she and her friends attempted unsuccessfully to get Jamaican and the other men to leave because it was defendant's room. Later, Ms. McNeill and her friends finally left the motel where Jamaican and his friends remained.

Mr. Currie testified that when he and his friends first arrived at the motel, Sheila and Cecilia were talking outside on the balcony. Jamaican walked up to the door of the room and started to knock. After Jamaican knocked on the door, "Jessica and the dude right there (indicating [defendant]) came out." Defendant said, "What's up?" to the group outside the motel room and then left. Although he did not observe any bad feelings or ill words at the motel, Mr. Currie testified that Jamaican "was beating on the door. He was, like, 'Let me in. Let me in.' Beating on the door. Said, 'Let me in. This is my hotel room now.'"

After talking for awhile, Ms. McNeill, Sheila and Cecilia left but indicated they were coming back. Mr. Currie testified that he went with Jamaican, Mr. Burden, "Little Folk" and another man into the motel room. As they entered, Jamaican said, "This is our hotel room now." Jamaican called two girls that he knew to come to the motel. Jamaican and Mr. Currie then left to either go pick them up or go to the store. Mr. Currie testified that he and Jamaican were

pulling out of the parking lot when another car entered the lot. They recognized the driver and stopped to "cop some reefer" from him. As Jamaican was backing up, Mr. Currie saw a man jump over the fence and run past the car. "I guess he noticed us. He stopped. And I turnt [sic] around. I seen [sic] a gun come out." Mr. Currie ducked down in his seat and yelled at Jamaican "Go. Go." As they were leaving, Mr. Currie heard gunshots. "Jamaica [sic] was holding his chest, say [sic] he was shot. 'He shot me.'" After Jamaican passed out in the driver's seat, Mr. Currie managed to stop the car not far from the parking lot of the motel. The police were immediately on the scene and called an ambulance for Jamaican. Jamaican died as a result of the gunshot wounds. Mr. Currie identified the defendant as the man who came over the fence, ran towards the car, and started shooting at it. He further testified that, on the night of the shooting, he identified defendant as the perpetrator from a photographic lineup.

Angela Pollard, an investigator with the Fayetteville Police Department, interviewed Mr. Currie and escorted him back to the Days Inn to conduct further interviews. Investigator Pollard testified as to what Mr. Currie related to her regarding the events of that afternoon. He related that, after the man who had been in the room with Ms. McNeill had departed, Mr. Currie and the others went into the room with the remaining young women. Jamaican decided that he wanted to go to the store and Mr. Currie went with him. As they were leaving the parking lot, another car entered. They recognized the driver and backed up to talk with him. Mr.

Currie said that then "he saw someone coming running down out of the woods towards the car. He first did not pay too much attention to them -- to the person running down the hill out of the woods, and that the guy ran past the car, and he looked back and saw him pulling a gun and he started yelling, 'Go, go, go!' So Jamaican could drive off. He said that Jamaica [sic] started driving off." Defendant did not offer any evidence.

During jury deliberations, the jury sent two notes to the trial judge asking for more information. In the first note, the jury asked to look at three exhibit photographs again, which was allowed. The second note stated, "Please bring us (the jury) the entire transcript of Mr. Curry [sic]." (emphasis in original). The judge responded to the State and the defendant out of the presence of the jury:

> We have had this conference at the bench. It's my belief at this point that I'll ask the court reporter just to reread his--Mr. Le- -- Mr. Currie -- LeWilliam Currie's, I think -- ... -- testimony to the jury. It's not in a form to be sent to them at this point, and the length is not that great. So, in my discretion, I'll elect to do that.

There was no objection by defendant. The trial court then brought in the jury and the court reporter read back the testimony of Mr. Currie. At the conclusion, a juror asked to rehear the testimony of Investigator Pollard. After a bench conference, the trial court granted the request and the court reporter read back her testimony.

On 5 December 2000, the jury returned a verdict of guilty of felony discharge of a firearm into occupied property and guilty of

first degree murder under the theory of "malice, premeditation and deliberation" and under the felony murder rule.

Defendant first contends that the trial court erred in allowing the court reporter to read back the testimonies of Mr. Currie and Investigator Pollard. Because there was no objection, this Court reviews the record for plain error. *State v. Davis*, 353 N.C. 1, 19, 539 S.E.2d 243, 256 (2000), *cert. denied*, ____ U.S. ____, 151 L. Ed. 2d 55 (2001). "Plain error is '"fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done."'" *Id.* (*citing State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

N.C. Gen. Stat. § 15A-1233(a)(1999) states:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge, in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

This statutory requirement imposes two duties on the trial court. "First, the trial court must have all jurors present in the courtroom. Second, the trial court must exercise its discretion in determining whether to permit the requested evidence to be read to the jury." *State v. Weddington*, 329 N.C. 202, 207, 404 S.E.2d 671, 675 (1991), *cert. denied*, 508 U.S. 924, 124 L. Ed. 2d 283 (1993).

Here, upon receiving a request from the jury, the trial court informed both defendant and the State of the request, brought the jury into the courtroom and, in open court, exercised its discretion to allow the testimony of the witness to be read back to the jury. Upon further request for the testimony of Investigator Pollard, the trial court again informed the defendant and then, in its discretion, allowed this testimony to be read back to the jury without objection.

The trial court properly exercised its discretion in allowing this testimony to be read back to the jury during deliberations. We find no fundamental error which would have resulted in justice not being done. Thus, the trial court did not err in allowing the testimonies of Mr. Currie and Investigator Pollard to be read back to the jury.

Defendant next contends that the trial court erred in "repeatedly allowing the prosecution to massively lead all of the State's witnesses." Defendant did not object at trial on the basis of leading questions; therefore, our standard of review is again plain error.

N.C. Gen. Stat. § 8C-1, Rule 611(c) states:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

In interpreting this rule, our Court has held that leading questions on direct examination should be permitted if the witness

is hostile, has difficulty understanding the question, is discussing a subject of a delicate nature, is contradicting the testimony of prior witnesses, is being aided to refresh his memory, is recalling preliminary or introductory testimony, or where "the mode of questioning is best calculated to elicit the truth." *State v. Wiggins*, 136 N.C. App. 735, 739, 526 S.E.2d 207, 210, *disc. rev. denied*, 352 N.C. 156, 544 S.E.2d 243 (2000)(citations omitted). The decision of whether to permit leading questions is within the sound discretion of the trial court and should not be disturbed absent an abuse of discretion. *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

Here, of the five witnesses for the State who were at the motel, four were under the age of nineteen and two of those were residing in youth correctional facilities at the time of trial. These young witnesses answered questions using slang terms, short answers, and street names. Some of these witnesses were questioned regarding sexual and drug activities. The State's questions focused all of the witnesses on an event or sequence of events. Additionally, questions were asked for clarification and to further explain matters. It is apparent from the record that it was necessary for the State to ask these leading questions in order to help the jury understand and develop the testimony of the witnesses. Again, we find no fundamental error which was "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Davis*, 353 N.C. at 19, 539 S.E.2d at 256.

Thus, the trial court did not abuse its discretion in allowing the State's questioning of these witnesses.

Defendant finally contends that the trial court improperly instructed the jury on the presumption of innocence during its preliminary instructions. Again, defendant did not object to the instructions at trial; thus, we review for plain error.

During preliminary jury instructions before jury selection had begun, the trial court gave the following instruction in part:

> Under our system of justice, a defendant who pleads not guilty is not required to prove his innocence; he is presumed to be innocent. And this presumption remains with the defendant throughout the trial until the jury selected to hear the case is convinced from the facts and the law beyond a reasonable doubt of the guilt of the defendant.
>
> The burden of proof is on the state to prove to you that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is not a vain or a fanciful doubt. It is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt. If the state doesn't -- first, there is no burden or duty of any kind on the defendant. The mere fact that he has been charged with a crime is no evidence of guilt. A charge is merely the mechanical or administrative way by which a person is brought to a trial. If the state proves guilt beyond a reasonable doubt, then the function of this jury by its verdict is to say guilty. If the state fails to prove guilt or if you have a reasonable doubt, it is then your duty to say not guilty.

Jury instructions are reviewed in the context of the overall instruction, not in isolation. *State v. Davis*, 349 N.C. 1, 58, 506

S.E.2d 455, 487 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). When taking the entire instruction as a whole and in context, the trial court properly instructed the prospective jurors on the presumption of innocence and the burden of proof on the State. Thus, we find the trial court did not err in its preliminary instructions to the jury.

In conclusion, we find there was no error in the trial and conviction of defendant for first degree murder and felony discharge of a firearm into occupied property.

No error.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).