NO. COA01-823

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. New Hanover County
Nos. 99 CRS 22558,
99 CRS 22559

JARKESH JOHNSON

Appeal by defendant from judgments entered 6 February 2001 by Judge Russell J. Lanier, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 17 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Donald R. Teeter, for the State.

Geoffrey W. Hosford for defendant-appellant.

WALKER, Judge.

Defendant appeals his convictions for robbery with a dangerous weapon, assault with a deadly weapon inflicting serious injury, possession of a firearm by a felon, and assault by pointing a gun. The State's evidence tends to show the following: On the afternoon of 1 October 1999, Lewis Shipman (Shipman) and Julie Ellison (Ellison) were standing outside their residence in Wilmington. A dark-colored Acura Legend drove past them, made a U-turn and parked alongside the road. Terrill Lloyd, Jamar Damon (Damon), and defendant were inside the vehicle. Defendant emerged from the

vehicle and began a conversation with Shipman. At some point, defendant pulled a handgun from his rear waistband, pointed it at Shipman, and demanded money and drugs. Shipman initially refused, but he acquiesced following a brief struggle. Once defendant had taken Shipman's money and drugs, he shot Shipman in the abdomen. Shipman fell to the ground and defendant removed a gold necklace from him. He then pointed the handgun at Ellison, who was screaming for someone to call for an ambulance. Defendant returned to the vehicle and left.

Shipman was treated for a gunshot wound at New Hanover Region Medical Center by Dr. Samuel Jones (Dr. Jones). Dr. Jones testified that he performed surgery to repair injuries to Shipman's stomach, liver and intestines and that he also removed a bullet from Shipman's left side. Following a recovery period, Shipman was discharged and thereafter moved from Wilmington to Ohio. Despite efforts by the State to locate him, Shipman did not appear at defendant's trial. Defendant did not present evidence.

Defendant first contends the trial court violated his due process rights by allowing the prosecutor to "stake out" prospective jurors during *voir dire*. The record shows the prosecutor, over defendant's objection, asked the following question of prospective jurors:

> As I told you, Lewis Shipman may not testify in this case, but you will hear other evidence in this trial presented by the state. If you are convinced, beyond a reasonable doubt, after listening to that evidence, will you be able to return a verdict of guilty, even though Lewis Shipman may not testify?

Defendant argues the question was improper by reason that it forced the jurors to commit themselves to "a particular course of action."

Due process commands "the impartiality of any jury empaneled to try a cause." *Morgan v. Illinois*, 504 U.S. 719, 726, 119 L. Ed. 2d 492, 501 (1992). A properly conducted *voir dire* plays "a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 68 L. Ed. 2d 22, 28 (1981). The control of questions posed to prospective jurors is generally left to the sound discretion of the trial court. *Id.* at 189, 68 L. Ed. 2d at 29; *see also State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). Nevertheless, our Supreme Court has noted that during *voir dire*:

> Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. Counsel should not argue the case in any way while questioning the jurors. Counsel should not engage in efforts to indoctrinate, visit with or establish "rapport" with jurors. Jurors should not be asked what kind of verdict they would render under certain named circumstances.

State v. Phillips, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980).

Here, the question posed by the prosecutor is similar to the questions asked in *State v. Clark*, 319 N.C. 215, 353 S.E.2d 205 (1987), and *State v. Hatfield*, 128 N.C. App. 294, 495 S.E.2d 163 (1998). In *Clark*, the prosecutor noted that the State did not have an eyewitness to the crime but would be relying on circumstantial evidence. He then asked the potential jurors: "Does the fact that

there are no eyewitnesses cause you any problems?" Applying the rules announced in *Phillips*, the Supreme Court held it was not error to allow this question. The Court found the question merely informed the jurors that the State would be relying on circumstantial evidence and inquired as to whether the lack of an eyewitness could "cause them problems." *Clark*, 319 N.C. at 221, 353 S.E.2d at 208. Similarly, in *Hatfield*, the defendant sought to inquire as to whether the prospective jurors thought "that children were more likely to tell the truth when they made allegations of sexual abuse." This Court found the question to be proper since "it simply informed the jurors that the State would offer a child's testimony and sought to ensure that their impartiality would not be swayed" by the fact that a child would be testifying. *Hatfield*, 128 N.C. App. at 296-97, 495 S.E.2d at 164-65.

As with the questions in *Clark* and *Hatfield*, the question posed by the prosecutor here merely informed the prospective jurors of the nature of the State's evidence and sought to ensure their impartiality. It neither "fishes" for an answer to a legal question nor attempts to "stake out" the jury's position based on an assumed set of facts. The question does not demonstrate an effort on the part of the prosecutor to indoctrinate or establish a rapport with the jury. Rather, the question notes for the jury that the victim may not testify and seeks to determine whether this factor would influence its decision. Hence, we conclude the trial court did not err in allowing the question.

Defendant next assigns as error the trial court's admission of testimony which he maintains constitutes inadmissible hearsay. During the State's evidence, Ellison testified, over defendant's objection, that immediately following the shooting, Shipman had stated to her: "Tell the police it was--Jarkesh was his name." Defendant argues this testimony was improperly admitted by reason that the State had failed to comply with the requirements for the admission of a "dying declaration." *See* N.C. Gen. Stat. § 8C-1, Rule 804 (2001)(requiring that the declarant must be "unavailable" to testify in order for a statement made under a belief of impending death to be admissible).

Rather than determine whether the State complied with the requirements for the admission of a "dying declaration," we address whether defendant was prejudiced by the admission of this testimony. *See* N.C. Gen. Stat. § 15A-1443; *see also State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986)(the erroneous admission of hearsay is not always so prejudicial as to require a new trial). The record shows that both Ellison and Damon identified defendant in their testimonies as the person who shot Shipman. Thus, the admission of evidence that Shipman had also identified defendant as his assailant merely served to corroborate their testimonies. We conclude any error in the admission of Shipman's statement was harmless.

Next, defendant asserts the trial court erred in permitting Damon to testify on the grounds that the State did not provide reasonable notice of a plea arrangement, in which it agreed to

dismiss all charges against Damon in exchange for his testimony. Pursuant to N.C. Gen. Stat. § 15A-1054(c) where the State enters into a plea agreement with a party upon an understanding that the party will provide truthful testimony:

> written notice fully disclosing the terms of the arrangement must be provided to defense counsel . . . against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify.

N.C. Gen. Stat. § 15A-1054(c). However, the remedy for failure to provide reasonable notice is a motion by the defendant for additional time in which to prepare for the introduction of the evidence, rather than the suppression of the testimony. *State v. Lester*, 294 N.C. 220, 229, 240 S.E.2d 391, 398 (1978).

The record reveals the State had not secured the plea arrangement with Damon until the morning he was scheduled to testify, at which time defendant was notified. Prior to his testimony, the trial court granted defendant's request for a recess. When the trial resumed, defendant did not seek any additional time in which to prepare for Damon's testimony. The trial court then immediately proceeded to instruct the jury that Damon was testifying under an agreement with the State and the jury should examine his testimony "with great care and caution" before deciding whether to believe it. Under these facts, we conclude the trial court properly complied with the requirements of N.C. Gen. Stat. § 15A-1054(c); therefore, we overrule this assignment of error.

Defendant next argues the trial court erred in denying his request to sequester the State's witnesses. "The decision whether to sequester witnesses is addressed to the discretion of the trial judge and is not reviewable on appeal absent a showing of abuse of discretion." *State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E.2d 230, 236 (1984)(*citing State v. Royal*, 300 N.C. 515, 268 S.E.2d 517 (1980)).

Sequestration serves two general purposes: (1) to prevent witnesses from tailoring their testimony to that of prior witnesses and (2) to assist the jury in identifying testimony which is less than candid. *Geders v. United States,* 425 U.S. 80, 87, 47 L. Ed. 2d 592, 598 (1976). We find nothing in the record which indicates that a witness' testimony had been influenced by another witness or that witness' testimony, or which demonstrates the trial court abused its discretion in denying defendant's motion. Therefore, we overrule this assignment of error.

Finally, defendant contends the trial court erred in denying his motion to dismiss for insufficient evidence arguing that the State's evidence only raises a strong suspicion that he committed the crimes. "In ruling on a motion to dismiss based on the insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the crime charged and that defendant was the perpetrator." *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993)(citations omitted). "[T]he trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable

inferences in the State's favor." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

In the present case, two eyewitnesses positively identified defendant as the person who shot Shipman and removed his personal property. Such testimony was clearly adequate to establish, by substantial evidence, that defendant was the perpetrator of the crimes charged. Thus, we find no merit in defendant's contention that the trial court erred in denying his motion to dismiss.

We have reviewed defendant's remaining assignment of error and find it to be without merit. In sum, we conclude defendant received a trial free from prejudicial error.

No error.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).