NO. COA06-1284

NORTH CAROLINA COURT OF APPEALS

Filed: 01 May 2007

STATE OF NORTH CAROLINA

v. Pitt County
No. 05 CRS 56723

RONNIE WHITEHURST

Appeal by defendant from judgment entered 29 March 2006 by Judge William C. Griffin, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Parish & Cooke by, *James R. Parish, for defendant-appellant.*

STEELMAN, Judge.

The trial court did not express an impermissible opinion on any question of fact to be decided by the jury. Defendant either failed to preserve or waived any alleged impermissible questions asked of defendant by the prosecutor during cross-examination.

The State presented evidence tending to show that the prosecuting witness (hereinafter "Victim") turned twelve years of age on 29 December 2005. Victim resided with defendant, her mother, her older brother Chris, and her younger half brother and half sister in a mobile home in rural Pitt County in June 2005. Late that month, Victim was alone in the mobile home with

defendant. As Victim sat in a small chair, defendant inserted his penis into Victim's vagina. After about five to eight minutes, defendant switched places with Victim, removed a condom from his penis, and asked Victim to put his penis in her mouth. Victim complied.

Victim's brother Chris attempted to enter the mobile home but found the doors were locked. Chris stood on the tongue of the mobile home, peeked through a window, and saw Victim performing fellatio on defendant as defendant sat in a baby chair. A couple of days later Chris and Victim called their mother at work and told her that defendant had been molesting Victim. Their mother notified law enforcement on that day, 2 July 2005.

Victim underwent a medical examination on 21 July 2005 which revealed she had a "healed transection," or cut, of the vaginal hymen.

Defendant was indicted on charges of first degree rape, first degree sex offense, and taking indecent liberties with a child. A jury found defendant not guilty of the rape charge, but guilty of the other two charges. Defendant was sentenced to 336-413 months and 21-26 months imprisonment, the sentences to run concurrently. Defendant appeals.

In his first argument, defendant contends that the trial court impermissibly expressed an opinion in violation of N.C. Gen. Stat. § 15A-1222 by calling Victim "the lovely young lady[.]" We disagree.

Although defendant did not object to the court's statement,

appellate review is deemed preserved because of the mandatory statutory prohibitions stated in N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 (2005), against the judicial expression of an opinion on the evidence. *See State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005), *cert. denied*, ___ U.S. ___, 166 L. Ed. 2d 96 (2006). In evaluating a claim that a trial judge impermissibly expressed an opinion, the appellate court must examine the totality of the circumstances and determine whether the trial court's statement reasonably could have affected the jury's verdict. *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). Here, the trial court made the statement at the beginning of jury selection, while introducing to the jurors the participants in the trial. The trial court's complimentary description of Victim as "lovely" was not an expression of opinion on the evidence, especially when no evidence had been presented at that stage of the trial. This assignment of error is without merit.

In his second argument, defendant contends the prosecutor's cross examination of defendant improperly sought to demean him and to elicit irrelevant and prejudicially inflammatory evidence. We disagree. Defendant has failed to preserve this argument on appeal, therefore we decline to reach the merits of his argument.

Defendant purports to take exception to ten different questions asked of him by the prosecutor. One of these questions was not assigned as error on appeal. Two of these questions were not objected to at trial. Six of these questions were objected to at trial, and defendant's objections were sustained. A final

question was objected to and overruled by the trial court. Defendant argues on appeal that the question violated defendant's constitutional rights to a fair trial. However, he did not make this constitutional argument at trial. Therefore, it too is waived. *See, e.g., State v. Chapman*, 359 N.C. 328, 354, 611 S.E.2d 794, 815 (2005).

Assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

NO ERROR.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).