NO. COA06-1326

NORTH CAROLINA COURT OF APPEALS

Filed: 01 May 2007

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 04 CRS 247853

RICHARD B. HOVIS

Appeal by defendant from judgment entered 1 February 2006 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 09 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for the State.

Carol Ann Bauer for defendant-appellant.

STEELMAN, Judge.

None of the prosecutor's remarks during the closing argument to the jury rose to the level which would have required the trial court to intervene *ex mero motu* in the absence of an objection from defendant. We find no error in defendant's trial.

The State's evidence at trial tended to show that on the night of 19 October 2004, Angela Osborne and Feven Negash were working as cashiers at a BP FoodMart on The Plaza in Charlotte. A man, later identified as defendant, walked into the store at approximately 11:30 p.m., pointed a revolver at the cashiers and said, "Give me

all of your money." Defendant was wearing a white t-shirt, dark pants and a black do-rag on his head. Osborne opened her register and gave defendant "around one hundred dollars" in denominations of ones, fives and tens. Defendant put the money in his pants pocket and ran out of the store. The cashiers called 911 to report the robbery.

The cashiers gave written statements and a description of defendant to the responding officers. During a patrol of the area, police came upon defendant walking on McMillian Street, one street behind the BP FoodMart. Defendant ran away when police asked to speak with him. Police apprehended defendant. Defendant was wearing jeans or dark pants. Police found a white t-shirt and a revolver in the area near defendant's apprehension. Upon a search of defendant, police found $95 in denominations of ones, fives and tens in defendant's front pants pocket. Police transported the cashiers separately to McMillian Street and the cashiers positively identified defendant as the man who robbed them. The money found in defendant's pocket was the same amount missing from the register.

Defendant did not present any evidence at trial. A jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant to 82 to 108 months imprisonment. Defendant appeals.

In his sole assignment of error, defendant contends the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing arguments. We disagree.

"The standard of review when a defendant fails to object at trial is whether the [closing] argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998). "In determining whether the prosecutor's argument was [] grossly improper, this Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998).

Defendant first argues that the prosecutor's use of the following hypothetical prejudiced the jury by putting the jury's credibility on the same level as the eye witnesses' credibility and by personalizing the example. During closing argument, the prosecutor stated:

> Some of you, I imagine, are asking yourselves in light of the evidence in this case why are we having a trial, and that is a very good question. Every criminal defendant charged with a crime in North Carolina can demand a jury trial. And that is no matter how overwhelming the evidence may be against that person. For example, you all know our Bailiff, Mr. Myers, and if I were to do something a little stupid like going over here and punching him in the face, which I would not do, but if I were to do that there would be thirteen eye witnesses right here as to what I had just done to Mr. Myers, and if I could demand a jury trial in terms of requiring the State to prove the case against

> me in terms of assaulting Mr. Myers, and I could do that, but why would I do that? Perhaps because I can, just because I can and it is as simply [sic] as that. Perhaps I would hope that the eye witnesses-for example an armed robbery with two young female eye witnesses-may become so afraid of me, of my family, of my friends such that they will not testify. I may demand trial on they [sic] hope that the key law enforcement officer may be off in Alaska and may take off and refuse to come back and testify. I can demand a jury trial no matter how strong the evidence is against me. I can do it just because I can.
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> . . .
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> Now, the case where I went over and assaulted Mr. Myers and you personally observed it, you would be convinced beyond all doubt that I did it because he didn't provoke me and I just went over there and did it. So, you would know that beyond all doubt because you are an eye witness. . . Let's imagine that you are collectively, or individually, the proverbial fly on the wall inside the BP FoodMart and you, yourself, are observing everything that is happening and you observed the Defendant rob those two young ladies at gunpoint, taking the money and leaving, so you would have proof beyond all doubt as to this Defendant's guilt, but you could not be a juror in that trial because an eye witness cannot play the part of a juror. It makes sense, right. I mean, that's one of the rules of law, a witness to a crime cannot be a juror in that trial, period. But, there still is such a thing as proof beyond all doubt - Angela is proof of that and Feven is proof of that because they were the eyewitnesses. They saw what happened inside that store and they were presented to you.

The prosecutor's closing argument was not improper. Taken in context, the prosecutor merely used an illustration to assist the jury in its understanding of a defendant's right to trial and eye witness testimony.

Defendant also argues that the prosecutor's following remarks regarding defense counsel prejudiced the jury by inferring that defense counsel was attempting to hide the guilt of her client:

> Now, Ms. Harvell is an excellent defense attorney and she is going to have the last argument in this case but I ask that you recognize one inescapable fact, and that is that even the very best defense attorney - and she is excellent - but even the very best must on some occasions be faced with the prospect of representing a guilty client. I suggest to you that is the situation in this case.
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> . . .
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> Ms. Harvell may suggest to you that today is the most important day in her client's life. The first thing that I would ask that you recognize is that it would be a ploy or an effort to shift the responsibility for this Defendant's decisions and actions onto your shoulders. The responsibility for the Defendant's actions and decisions does not rest on your shoulders, it rest[s] on his shoulders.

None of the prosecutor's comments about opposing counsel rise to the level which would have required the trial court to intervene *ex mero motu*. Further, there was sufficient evidence to sustain defendant's conviction for robbery with a dangerous weapon regardless of the prosecutor's arguments to the jury. *See State v. Roache,* 358 N.C. 243, 297, 595 S.E.2d 381, 416 (2004)("[i]mproper argument [] may not be prejudicial where the evidence of the defendant's guilt is virtually uncontested"). Thus, defendant has failed to meet his burden of establishing the comments made infected the trial with unfairness, rendering the conviction fundamentally unfair. This assignment of error is overruled.

NO ERROR.

Judges MCCULLOUGH and LEVINSON concur.

Report per rule 30(e).