NO. COA06-882

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v. Alamance County
Nos. 03 CRS 56603-04

THEODIS LEVON RICE

Appeal by defendant from judgments entered 18 October 2005 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 21 February 2007.

*Attorney General Roy Cooper, by Assistant Attorney General Susan R. Lundberg, for the State.*

*Charns and Charns, by D. Tucker Charns, for defendant appellant.*

McCULLOUGH, Judge.

Theodis Levon Rice (hereinafter "defendant") pled guilty to kidnapping, robbery with a dangerous weapon, breaking and entering, and larceny charges. Defendant was thereafter sentenced to two consecutive terms of 92 to 120 months' imprisonment and 80 to 105 months' imprisonment from which he appealed. In a previous opinion, this Court determined that the trial judge erred in finding as an aggravating factor that "the victim was . . . very old" in violation of the requirements set forth by *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L.

Ed. 2d 851 (2004) and remanded the case for resentencing. *State v. Rice*, 172 N.C. App. 174, 616 S.E.2d 28 (2005).

Upon remand the sole issue before the jury was the determination of the existence of the aggravating factor of age under N.C. Gen. Stat. § 15A-1340.16(d)(11) (2005). The jury unanimously found from the evidence beyond a reasonable doubt the existence of the aggravating factor that "[t]he victim was very old." The trial court found that one mitigating factor did exist; however, the aggravating factor was found to outweigh the mitigating factor thereby allowing for an aggravated sentence. Judgments were thereafter entered sentencing defendant to consecutive terms of 90 to 117 months' imprisonment and 80 to 105 months' imprisonment. From these judgments defendant appeals.

Defendant contends on appeal that the trial court erred in submitting the aggravating factor under N.C. Gen. Stat. § 15A-1340.16(d)(11), admitting hearsay evidence in the sentencing phase of the trial, and failing to intervene *ex mero motu* during the State's closing argument.

Defendant first contends that the trial court erred in failing to dismiss the aggravating factor under N.C. Gen. Stat. § 15A-1340.16 where there was insufficient evidence to submit the charge to the jury.

Defendant concedes in his brief on appeal that no motion to dismiss was made at the close of the evidence. However, defendant asserts that appellate review of insufficiency of the evidence may still be had under N.C. Gen. Stat. § 15A-1446 which provides that

such a claim is reviewable even where defendant does not move to dismiss or object at trial. N.C. Gen. Stat. § 15A-1446(d)(5) (2005).

Our Supreme Court has stated,

> [U]nder Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure, the issue of insufficiency was not preserved for appellate review. N.C.G.S. § 15A-1446(d)(5) provides that questions of insufficiency of the evidence may be the subject of appellate review even when no objection or motion has been made at trial. However, Rule 10(b)(3) provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial. We have specifically held in this regard that: "To the extent that N.C.G.S. § 15A-1446(d)(5) is inconsistent with N.C. R. App. P. 10(b)(3), the statute must fail."

*State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995) (citation omitted). Accordingly, appellate review has been waived.

Defendant further contends that the trial court erred in allowing Detective Hamlett to testify to hearsay statements of the victim.

As the first witness to testify in the sentencing hearing, Detective Hamlett testified regarding statements made by the victim to the detective recounting the events on the night defendant broke into her home, kidnapped her, and stole her car. Counsel for defendant objected to the testimony of the detective on general grounds and those of relevance; however, defendant now attempts to

argue that the admission of such was admitted in error where it was hearsay.

The jury was impaneled for the sole purpose of determining whether the age of the victim was such to constitute an aggravating factor under N.C. Gen. Stat. § 15A-1340.16. The statute sets forth the following aggravating factor which must be proven beyond a reasonable doubt: "The victim was very young, or very old, or mentally or physically infirm, or handicapped." N.C. Gen. Stat. § 15A-1340.16(d)(11).

Where the victim testified at the sentencing phase of the trial that she was 80 years old at the time of the perpetration of the crimes upon her by defendant and defendant's objections to the detective's testimony rest merely on relevancy grounds, we perceive no prejudice in the admission of hearsay statements regarding the events surrounding the crimes. Therefore, this assignment of error is overruled.

Finally, defendant cites error in the trial court's failure to intervene *ex mero motu* during the State's closing argument.

The portion of the closing argument challenged by defendant is as follows:

> And if you ever go to the beauty shop or the barber shop and you sit around and you start talking about, why do they do this and that down at the courthouse, why do they let people go, why do they not do this. I want to remind you of one thing. Today you are the they. You are the they.

When a defendant fails to object to a challenged portion of a closing argument, the standard of review is whether the argument

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), *cert. denied,* 528 U.S. 835, 145 L. Ed. 2d 80 (1999). "'[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.'" *State v. Davis*, 353 N.C. 1, 31, 539 S.E.2d 243, 263 (2000) (citation omitted), *cert. denied,* 534 U.S. 839, 151 L. Ed. 2d 55 (2001). This Court will not disturb the trial court's exercise of discretion over the latitude of counsel's argument absent any gross impropriety in the argument that would likely influence the jury's verdict. *See State v. McNeil*, 350 N.C. 657, 685, 518 S.E.2d 486, 503 (1999), *cert. denied,* 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

Our Courts have "repeatedly stated that the prosecutor may properly urge the jury to act as the voice and conscience of the community." *State v. Peterson*, 350 N.C. 518, 531, 516 S.E.2d 131, 139 (1999), *cert. denied,* 528 U.S. 1164, 145 L. Ed. 2d 1087 (2000), *cert. denied,* 356 N.C. 621, 575 S.E.2d 519 (2002); *State v. Bishop*, 346 N.C. 365, 396, 488 S.E.2d 769, 786 (1997); *State v. Campbell*, 340 N.C. 612, 635, 460 S.E.2d 144, 156 (1995), *cert. denied,* 516 U.S. 1128, 133 L. Ed. 2d 871 (1996), *cert. denied,* 351 N.C. 362, 543 S.E.2d 137 (2000), *cert. denied* ___ U.S. ___, 166 L. Ed. 2d 669 (2000), *reh'g denied*, ___ U.S. ___, 167 L. Ed. 2d 153 (2007). The challenged excerpt from the closing argument cannot be said to be

such a gross impropriety that the court's failure to intervene amounted to an abuse of discretion. The mere urging by the prosecutor for the jury to act as the voice of community principles does not rise to the level of misconduct as contemplated by the duty imposed upon the trial court to intervene *ex mero motu*. Accordingly, we find that defendant received a sentencing hearing free from prejudicial error.

No prejudicial error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).