NO. COA09-1339

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July l2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 05 CRS 251273

STEPHEN BOMBO

Appeal by Defendant from judgment entered 18 March 2009 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 March 2010.

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

Mark Montgomery, for Defendant.

BEASLEY, Judge.

Defendant appeals a second degree rape conviction, arguing that the trial court impermissibly expressed an opinion as to his guilt during the proceedings. Because a careful review of the record reveals that the trial court expressed no opinion as to Defendant's guilt, we conclude that there is no error.

On the evening of 29 October 2005, E.M.[1] visited the apartment of her friend, Raheem Edwards. Edwards shared the apartment with another roommate and Defendant, Stephen Bombo. Shortly after

[1]Initials are used to protect the privacy of the victim.

E.M.'s arrival at the apartment, Edwards informed her that he planned to attend a party and asked if she would like to accompany him. E.M. declined Edwards' invitation and decided to wait at the apartment for his return. After Edwards left, E.M. removed her outer clothing, laid down on Edwards' bed, and fell asleep. During the night, E.M. awoke to find that Defendant was laying in bed next to her. Unable to recognize Defendant in the darkened bedroom, E.M. called out Edwards' name. Defendant only identified himself as "Stephen." E.M. became alarmed and "asked him who he was, and I asked him – I don't remember if he said his name. He started to say, 'If you don't tell, I won't tell.'" Thereafter, Defendant grabbed E.M., pinned her to the bed, and forced her to engage in sexual intercourse.

Following the act, Defendant released E.M. and went to the bathroom. E.M. used Defendant's departure as an opportunity to flee to a neighboring apartment for help. From the apartment E.M. contacted her parents, and upon their arrival they called the police. E.M. and her parents directed officers to the apartment where the incident occurred. The officers entered the apartment and spoke to Defendant. After a brief interview, Defendant was taken into custody and escorted from the apartment. Upon exiting the apartment, E.M. again identified Defendant as her assailant. A medical examination conducted later revealed that while there was evidence that E.M. engaged in sexual intercourse, the physical evidence was also consistent with consensual intercourse.

On 14 November 2005, a Mecklenburg County grand jury indicted Defendant with a single count of second degree rape. Following a trial, Defendant was convicted of the offense for which he was indicted on 18 March 2009. Defendant was sentenced to a minimum term of 58 months and a maximum term of 79 months in the custody of the North Carolina Department of Correction. Defendant was also required to enroll in the satellite-based monitoring program for the remainder of his life. Defendant appeals his convictions, arguing that: (I) "the trial court's *ex mero motu* instruction on Defendant as the perpetrator of 'this crime' was an expression of a judicial opinion that a crime had been committed;" and (II) "the trial court erred in overruling . . . Defendant's objection to the characterization of the complaining witness as a 'victim' [by a State's witness] and in repeatedly referring to the complaining witness as a 'victim'[during jury instructions]."

I.

Defendant first argues that the trial court's instruction to jurors characterizing the events as "this crime," was an impermissible expression of a judicial opinion that a crime had been committed. We disagree.

The North Carolina General Assembly has provided that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2009). Similarly, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to

state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2009). Our Court has provided that:

> [The trial court's instruction], however, must be viewed contextually, and whether a defendant was unduly prejudiced by the trial judge's remarks is determined by the probable effect on the jury in light of all the attendant circumstances, the burden being on defendant to show prejudice. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. Stokes, 174 N.C. App. 447, 458, 621 S.E.2d 311, 318 (2005) (internal quotations and citations omitted).

Here, in relevant part, the trial court instructed jurors that:

> In addition to the elements of the crime, I instruct you that one thing that the State has the burden of proving in the case is the identity of the defendant as the perpetrator of this crime and to make that proof beyond a reasonable doubt. That means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may determine the guilt.

Additionally, the trial court informed jurors that if they determined that the State had not met its burden of proving all elements of its offense beyond a reasonable doubt, including the fact that defendant engaged in vaginal intercourse with Massey, then jurors were required to return a verdict of not guilty. When read in context with all of the trial court's instructions, the use of the phrase "this crime" did not prejudice Defendant and was a

fair and clear representation of the law. The trial court's instruction merely informed jurors of the elements the State must prove to support a conviction for second degree rape. Jurors were also provided with a limiting instruction informing them that they could find Defendant guilty only if they found that he committed the acts constituting the crime beyond all reasonable doubt.

Our Supreme Court reviewed a similar set of facts in *State v. Anderson*, 350 N.C. 152, 513 S.E.2d 296 (1999). There, the defendant objected to the trial court's characterization of the victim's death as a "murder." *Id.* at 178, 513 S.E.2d at 312. Holding that the trial court's instruction to jurors was not plainly erroneous, our Supreme Court reasoned that when viewed in context with the remaining instructions, the trial court was "merely instruct[ing] the jury on the three possible theories on which a first-degree murder verdict could be based." *Id.* at 179, 513 S.E.2d at 313. Furthermore, where the trial court provided jurors with a limiting instruction explaining that any statements made by the court were not intended to be an expression of opinion, our Supreme Court reasoned that "when viewed in context, we find that the trial court's remarks were not prejudicial." *Id.* at 180, 513 S.E.2d at 313. Accordingly, we conclude that there is no error.

II.

Similar to the argument raised above, Defendant next argues that the trial court erroneously allowed the complaining witness to

be referred to as a "victim" and repeatedly used the word "victim" during its jury instructions. We disagree.

We note that Defendant's counsel failed to raise an objection to the trial court's use of the word "victim." Typically, our Courts will not find plain error where trial counsel fails to raise an objection to the trial court's use of the word "victim" during jury instructions. *See State v. McCarroll*, 336 N.C. 559, 565-66, 445 S.E.2d 18, 22 (1994) (holding that there was no plain error where the judge did not express an opinion as to the defendant's guilt and placed the burden of proof on the state); *State v. Richardson*, 112 N.C. App. 58, 66-67, 434 S.E.2d 657, 663 (1993) (stating that the word "victim" is included in the North Carolina pattern jury instructions and used regularly to instruct on rape and sexual offenses.) In the present case, the trial court utilized pattern jury instructions to inform jurors of the relevant legal principles. When read in context with the remaining jury instructions, the use of the pattern instructions was not an expression of the trial court's opinion.

Moreover, while Defendant's counsel did raise an objection to a testifying witness using the word "victim" to describe the complaining witness, in light of the evidence presented at trial, it is doubtful that an innocuous reference to the complaining witness as "victim" prejudiced Defendant's defense at trial. *See* N.C. Gen. Stat. § 15A-1443(b) (2009); *State v. Jackson*, __ N.C. App. __, __, 688 S.E.2d 766, 769 ("[The] [d]efendant's only objection to the use of the word 'victim' by the prosecutor was

overruled by the trial court. Even if the trial court erred in overruling [the] defendant's objection to the prosecutor's use of the term 'victim,' he must show prejudice to receive a new trial."), *disc. review denied*, 364 N.C. 130, __ S.E.2d __ (2010). Accordingly, we conclude that the use of the word "victim" was non-prejudicial error.

No Error.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).