

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1549

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v.

Scotland County  
Nos. 08 CRS 001890-91

RICHARD THOMAS SMITH

Appeal by defendant from judgment entered 25 March 2009 by Judge Richard T. Brown in Scotland County Superior Court. Heard in the Court of Appeals 14 June 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Scott T. Slusser, for the State.*

*Faith S. Bushnaq, for defendant-appellant.*

STEELMAN, Judge.

The trial court was not required to intervene *ex mero motu* during the prosecutor's closing argument where the prosecutor used the same term to describe defendant as did a defense witness during his testimony. Based upon the evidence presented, the trial court properly charged the jury upon both actual and constructive possession of a firearm.

I. Factual and Procedural Background

On 23 June 2008, Officer James Munger (Officer Munger) of the Laurinburg Police Department was on patrol at approximately 8:00 p.m. when he saw Richard Thomas Smith (defendant) and Ollie

McEachin (McEachin) walking across the street. Officer Munger was familiar with both individuals. He saw a gun in defendant's right hand. He turned his car around in order to investigate, and he saw defendant drop and kneel behind a parked van. Both individuals then continued walking casually.

Officer Munger approached defendant on foot and searched both defendant and McEachin. No weapons were found on their persons. Officer Munger then looked behind the parked van and discovered a fully loaded semi-automatic pistol. He stood up and told the two men, "You all stay right there." Defendant immediately took off running. Officer Munger was unable to catch defendant, who was apprehended several days later.

Officer Munger questioned defendant at the police station and defendant stated that "he had gotten the gun from a guy named Mike about two weeks prior and that he threw the gun down and ran because he was scared." He stated, "Man, I'm gonna plead guilty to all the charges, but I don't want to write nothing down."

On 18 August 2008, defendant was indicted for the felony of possession of a firearm by a felon, and for having attained the status of an habitual felon. On 25 March 2009, a jury found defendant guilty of possession of a firearm by a felon and being an habitual felon. Defendant was sentenced to a prison term of 93 to 121 months. Defendant appeals.

## II. Prosecutor's Closing Argument

In his first argument, defendant contends that the trial court erred by failing to intervene *ex mero motu* when the prosecutor

referred to defendant as "the boy" during closing argument. We disagree.

A. Standard of Review

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). "[T]he trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *State v. Smith*, 351 N.C. 251, 269, 524 S.E.2d 28, 41 (quotation omitted), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000). Further, this Court has stated, "[a] prosecutor's improper remark during closing arguments does not justify a new trial unless it is so grave that it prejudiced the result of the trial." *State v. Nance*, 157 N.C. App. 434, 440, 579 S.E.2d 456, 460 (2003) (citation omitted). In order to establish such prejudice, a defendant must show that the improper comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quotation omitted).

B. Reference to Defendant

In the closing argument, the prosecutor discussed the testimony of McEachin as follows:

Now, the defendant testified that he took off walking, if you remember that. But his buddy that got on the stand, corroborated what the officer says that he took off running. So

even his own friend doesn't agree with what the defendant has to say. Even he says the boy took off running.

Defendant contends the use of the word "boy" constitutes impermissible name-calling that was abusive, not warranted by the evidence, and a comment on defendant's race.

Defendant cites us to the United States Supreme Court's decision in *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 163 L. Ed. 2d 1053 (2006). In *Ash v. Tyson Foods, Inc.*, the Supreme Court acknowledged that use of the word "boy" when referring to African American males, while not necessarily a sign of racial animus, might not always be benign. *Id.* at 456, 163 L. Ed. 2d at 1057. The Court stated, "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." *Id.* We note that the Court's discussion in *Ash v. Tyson Foods, Inc.* involved a situation where an employer was alleged to have used the word "boy" when referring to employees in a discrimination case, and did not involve a situation of alleged improper comments by a prosecutor during the closing argument to the jury in a criminal trial.

Reviewing the closing argument as a whole, we do not find that it constitutes a grossly improper comment which required intervention by the trial court. The prosecutor was summarizing testimony from McEachin. The term "boy" was used by McEachin during his testimony to refer to defendant, although he did not specifically say "the boy took off running." There is no indication in any part of the prosecutor's closing argument that

would suggest racial animosity or an intention to inflame the passion of the jury based on race. Defendant has failed to show that this comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Nance*, 157 N.C. App. at 440, 579 S.E.2d at 460. The trial court did not err in failing to intervene *ex mero motu* with respect to the prosecutor's closing argument. This argument is without merit.

### III. Jury Instruction on Actual and Constructive Possession

In his second argument, defendant contends the trial court erred by instructing the jury on both actual and constructive possession of the firearm. We disagree.

Possession of a firearm by a felon is prohibited by law: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction . . . ." N.C. Gen. Stat. § 14-415.1(a) (2009). "Possession of any item may be actual or constructive." *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (quotation omitted). Constructive possession may be shown where a person does not have physical custody of the item, but he or she "has the power and intent to control its disposition." *Id.* (quotation omitted).

In general, "[a] trial judge should not give instructions which present to the jury possible theories of conviction not supported by the evidence." *State v. Odom*, 99 N.C. App. 265, 272, 393 S.E.2d 146, 150 (citation omitted), *disc. review denied*, 327 N.C. 640, 399 S.E.2d 332 (1990). Here, we find that the

instructions on actual and constructive possession were adequately supported by the evidence. The State's evidence showed that defendant had actual possession when Officer Munger first drove by and saw a pistol in defendant's right hand. Thereafter, the officer saw defendant duck and kneel behind a van. A search of defendant's person revealed an absence of any weapons; however, Officer Munger found a gun on the ground behind the van where the officer saw defendant kneel down. Defendant was seen holding the gun immediately prior to the officer's search behind the van which turned up the gun, and the gun was in close proximity to the area where defendant was walking and stopped by Officer Munger. Based on this evidence, we find that the trial court's decision to instruct the jury on constructive possession was duly justified where the evidence could be interpreted to show that defendant "ha[d] the power and intent to control [the gun's] disposition." *Clark*, 159 N.C. App. at 525, 583 S.E.2d at 683. This argument is without merit.

Defendant failed to argue his remaining assignments of error and they are deemed abandoned. N.C.R. App. P. 28(b)(6).

NO ERROR.

Judges HUNTER, Robert C. and BRYANT concur.

Report per Rule 30(e).