NO. COA10-85

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v. Orange County
No. 09 CRS 51402

JOEL WILLIAM MINTON

Appeal by Defendant from judgment entered 17 September 2009 by Judge Paul C. Ridgeway in Orange County Superior Court. Heard in the Court of Appeals 27 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for Defendant.

BEASLEY, Judge.

Joel William Minton (Defendant) appeals from judgment entered on his conviction of possession of a gun on educational property. For the following reasons, we hold there is no error.

Following his arrest on 14 April 2009, Defendant was indicted on 4 May 2009 for possession of a weapon on educational property — namely the University of North Carolina, Chapel Hill — in violation of N.C. Gen. Stat. § 14-269.2(b). On 15 September 2009, trial commenced before an Orange County jury in this matter.

Officer James Ellis of the University of North Carolina at Chapel Hill Department of Public Safety testified that on 14 April

2009, he and Officer Chris Burnett were on foot patrol on Franklin Street near the entrance of Porthole Alley in Chapel Hill. Around 11:00 p.m., the officers were walking through the Porthole Alley parking lot when Ellis noticed a box of ammunition on the passenger seat of one of the parked vehicles. Just before patrolling the parking lot areas, the officers had observed the driver of that same vehicle, later identified as Defendant, turning left from Franklin Street onto Porthole Alley and then making a right-hand turn toward the Porthole Alley parking lot. Both officers testified over objection that the parking lot in which Defendant parked his vehicle was part of the University of North Carolina.

Using their flashlights to look inside the vehicle, the officers saw a small handgun on the floorboard of the driver's side of the car and then awaited the driver's return. They waited approximately thirty to forty-five minutes until Ellis saw Defendant walking back up the alleyway and confirmed that he was the individual who had been driving the vehicle earlier. Burnett and another officer attempted to keep Defendant out of the vehicle, but Ellis noticed that Defendant was trying to get into his car despite the officers' commands otherwise. Defendant complied after further commands, at which time Ellis placed him in handcuffs. The officers then seized a loaded .22 caliber handgun and a fifty-count box of .22 magnum ammunition from Defendant's car and arrested Defendant for willfully and feloniously possessing a pistol on educational property. The jury found Defendant guilty as charged,

and Defendant noted his appeal in open court. Additional facts pertaining to the issues herein discussed are set forth below.

I.

Defendant argues that the trial court erred by allowing the officers to testify, over objection, that the parking lot in which Defendant possessed a firearm was property owned by the University of North Carolina. Specifically, Defendant disputes the trial court's reliance on the hearsay exception for reputation evidence concerning boundaries under Evidence Rule 803(20) in allowing the officers to testify to the extent of the university's property ownership. Because Defendant, however, elicited the same testimony on cross-examination as that to which he objected, we conclude that he waived any challenge to its admission on appeal.

At trial, the State asked Ellis if he received training during his course of employment as a UNC officer. Ellis said that he did and described the field training process: "We go over the boundaries of different areas, what buildings are ours, which ones are not, where we respond, where we don't." Ellis testified, over objection, that he was indeed "taught as part of that training what the boundaries of the University of North Carolina are." The State then asked whether the lot where Defendant's vehicle was parked is part of UNC and, following an objection for hearsay and foundation that was overruled, Ellis answered: "Yes sir. It's a lot we commonly patrol. We respond to all calls in the lot, whether it be for a traffic accident. We have made numerous arrests in that

lot[,] . . . [a]nd [in] field training it's, you know, taught to all officers it's our property." The State also questioned Burnett as to whether he had "received some training about [his] authority as a University of North Carolina police officer and in connection with that what the boundaries of the University campus are," to which the officer responded in the affirmative. Over objection, Burnett also agreed that the parking lot in which Ellis noticed Defendant's vehicle is part of UNC.

In an earlier colloquy concerning the admissibility of Ellis' testimony, defense counsel asserted that "one of the elements that the State has to prove is whether or not this parking area is in fact owned by UNC." She did not believe that Ellis was qualified to testify about that issue, contending "[h]e only knows that from what he has been told by somebody else who was told by somebody else who was told by somebody else." However, on cross-examination of Ellis, counsel for Defendant elicited the following testimony:

> [Defense counsel]: Now when you learned about being an officer, *you said that you were told about where to patrol*?
>
> [Ellis]: Yes ma'am. We were told where our jurisdictional boundaries were, so that, you know, for our courts of law and enforcement --
>
> [Defense counsel]: Well, you also go up on Franklin Street sometimes.
>
> [Ellis]: Yes, ma'am.
>
> [Defense counsel]: So do you share jurisdiction with Chapel Hill?
>
> [Ellis]: We do depending on where our property is and what's adjacent to our property.
>
> . . . .

> [Defense counsel]: Have you ever gone and looked up the plot maps to see where UNC property actually was?
>
> [Ellis]: No, ma'am. But we do have maps throughout the department dealing with the jurisdictional things.

Responding to defense counsel's question as to whether he was relying on maps that were certified, Ellis accorded deference to the patrol captains' understanding of their correctness.

Defendant now argues that the officers' testimony constituted inadmissible hearsay because their knowledge of whether the parking lot is educational property was based on what they were trained to believe regarding the boundaries of their power. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); N.C. Gen. Stat. § 8C-1, Rule 802 (2009) (providing that hearsay is generally inadmissible unless it comes within an exception). Defendant contends that the hearsay exception relied upon by the trial court in overruling his objections is not applicable to the testimony at issue. *See* N.C. Gen. Stat. § 8C-1, Rule 803(20) (2009) (excepting reputation evidence of boundaries affecting lands in the community from the ambit of the hearsay exclusion rule). Further, Defendant believes he was prejudiced because the officers' testimony as to UNC's ownership of the parking lot was the only evidence offered to satisfy this element of the offense, thus creating a reasonable possibility that without

it the jury would not have found Defendant was on educational property at the time the handgun was in his possession.

Even assuming *arguendo*, without deciding, that admission of the evidence was erroneous, it was harmless nonetheless. "It is well established that the erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986); *see also State v. Chavis*, 141 N.C. App. 553, 566, 540 S.E.2d 404, 414 (2000) ("The erroneous admission of evidence requires a new trial only when the error is prejudicial."). To meet his burden of showing prejudicial error, Defendant must convince us "that there was a reasonable possibility that a different result would have been reached at trial if such error had not occurred." *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998) (citing N.C. Gen. Stat. § 15A-1443(a)). However, "[e]rroneous admission of evidence may be harmless where there is an abundance of other competent evidence to support the state's primary contentions, or where . . . defendant elicits similar testimony on cross-examination." *State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985) (internal citations omitted).

In the instant case, the State offered abundant competent evidence to support its contention that the Porthole Alley parking lot was property owned by the University of North Carolina, and we thus reject Defendant's claim that the challenged testimony constituted the only proof of that element offered at trial. Ellis provided specific details from which a reasonable jury could find

that the parking lot is educational property. He testified that he and the other officers with the UNC Department of Public Safety commonly patrol the lot and respond to calls for service there. The officer described a sign situated on Porthole Alley near the entrance of the parking lot prohibiting weapons and firearms on campus. He indicated that the parking lot is reserved for UNC staff and permitted students during the daytime, explaining that entry is restricted by a university-owned gate during those hours and the gate is raised in the evening to make the lot available for general parking. He detailed another "big sign with an Old Well or University logo," which displays the days and times during which the lot is restricted to faculty and students with parking permits. Tia Watlington, an investigator with the Public Defender's Office and witness for the defense, corroborated that one of the signs near Porthole Alley has a picture of an Old Well and says N-2 faculty staff permit required 7:30 a.m. to 5:00 p.m. Monday through Friday. Defendant also acknowledged that the Old Well depicted in the left-hand corner of the parking lot sign is commonly associated with the University of North Carolina. In light of the above evidence, we do not believe that, absent the admission of the challenged testimony, a different result would have been reached and conclude that Defendant has failed to demonstrate prejudice.

Moreover, on cross-examination of Ellis, defense counsel asked, "Now when you learned about being an officer, you said that you were told about where to patrol?" The very effect of this question was that Defendant revisited the same question to which he

had previously objected regarding officer training about the boundaries of the university. *Cf. Weldon*, 314 N.C. at 412, 333 S.E.2d at 708 ("The effect of this question was that defense counsel put before the jury the very reputation evidence which he contends was prejudicially admitted when offered by the state."). The State's introduction of the officers' statements explaining how they learned that the parking lot was part of UNC was accordingly rendered harmless by Defendant's solicitation of substantially the same testimony on cross-examination. Therefore, the disputed evidence was not prejudicial — even without other competent evidence that the lot was educational property — because Defendant waived his objection to the admission thereof.

II.

Defendant argues that the trial court erred by sustaining the State's objections to portions of his counsel's closing argument.

In order to impress upon the jury the implications of being a felon, defense counsel, in closing, enumerated various jobs held by Defendant that demand trust because they required him to enter upon people's homes or property. The trial court then sustained the State's objections to each of Defendant's following statements: "Being a felon in this country means you can't be trusted"; "It changes your rights; it changes your status"; and "That's what the State wants you to do in this case is to make Joel Minton guilty of a felony." Defendant contends that the trial court thus precluded him from exercising his right under N.C. Gen. Stat. § 7A-97 to

inform the jury of the punishment that may be imposed upon conviction of the crime charged. We disagree.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion . . . ." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002); *see also State v. Taylor*, 289 N.C. 223, 226, 221 S.E.2d 359, 362 (1976) ("[A]rguments of counsel are largely in the control and discretion of the trial judge[.]"). This sound discretion, however, "does not include the right to deprive a litigant of the benefit of counsel's argument when it is confined to the proper bounds and is addressed to material facts of the case." *Kennedy v. Tarlton*, 12 N.C. App. 397, 398-99, 183 S.E.2d 276, 277 (1971) (citing *Puett v. R. R.*, 141 N.C. 332, 335, 53 S.E. 852, 854 (1906)). Still, while § 7A-97 entitles a criminal defendant to inform the jury of the punishment, a trial court's error in sustaining the State's objection thereto will require a new trial only when such error was prejudicial. *State v. Cabe*, 131 N.C. App. 310, 314-15, 506 S.E.2d 749, 752 (1998).

"In jury trials the whole case as well of law as of fact may be argued to the jury." N.C. Gen. Stat. § 7A-97 (2009). This section "secures to counsel the right to *inform* the jury of the punishment prescribed for the offense for which defendant is being tried." *State v. Walters*, 294 N.C. 311, 313, 240 S.E.2d 628, 630 (1978) (discussing former N.C. Gen. Stat. § 84-14, which was recodified as § 7A-97); *see also State v. Lopez*, 363 N.C. 535, 539, 681 S.E.2d 271, 274 (2009) ("In interpreting this statute, we have

held that the penalty prescribed for a criminal offense is part of the law of the case and that '[i]t is, consequently, permissible for a criminal defendant in argument to inform the jury of *the statutory punishment* provided for the crime for which he is being tried." (internal quotation marks omitted)). In exercising this right, "[c]ounsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged." *State v. Britt*, 285 N.C. 256, 273, 204 S.E.2d 817, 829 (1974).

> [However,] he may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the [prescribed punishment]. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely.

Walters, 294 N.C. at 313-14, 240 S.E.2d at 630 (internal quotation marks and citations omitted).

Although § 7A-97 requires the trial judge to give counsel "wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts," *Taylor*, 289 N.C. at 226, 221 S.E.2d at 362, counsel may not "travel outside the record" and inject into his argument theories "grounded wholly on personal beliefs and opinions not supported by the evidence." *State v. Britt*, 288 N.C. 699, 714, 220 S.E.2d 283, 292-93 (1975). Here, the closing argument remark by Defendant's trial counsel that "[b]eing a felon . . . means you can't be

trusted" constituted an improper infusion of personal opinion and belief not supported by the evidence.

Moreover, Defendant's statements do not come within the scope or purpose of the statutory right to inform the jury of the prescribed punishment. Entitling counsel to provide the jury with the respective punishment provisions "serves the salutary purpose of impressing upon the jury the gravity of its duty." *State v. McMorris*, 290 N.C. 286, 288, 225 S.E.2d 553, 554 (1976). Thus, "[i]t is proper for defendant to [urge upon the] jury the possible consequence *of imprisonment following conviction* to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration." *Id.* (emphasis added). Our Court has stated that this principle "pointedly permits apprising the jury *only* of the punishment *that may be imposed* upon conviction of the crime for which he is being tried." *State v. Dammons*, 159 N.C. App. 284, 295, 583 S.E.2d 606, 613 (2003) (emphasis added) (internal quotation marks and citations omitted). The law protects the parties' right to notify the jury of the *sentence* related to the verdict reached, not the consequences of that sentence. As such, § 7A-97 presupposes that the consequences of a conviction are limited to the *statutorily prescribed* punishment provisions. Thus, the statute does not support Defendant's attempt to extrapolate therefrom a right to discuss the social implications that may be associated with that sentence. Defendant never attempted to read or state to the jury the statutory punishment provision for possession of a firearm on educational property. *See Walters*, 294

N.C. at 313-14, 240 S.E.2d at 630 (concluding that the trial court erred in denying defense counsel the right to read the statutory provisions pertaining to punishment for first and second degree murder and manslaughter). Likewise, the general consequences of the status of being a convicted felon do not constitute a description of the statutory punishment prescribed for the particular crime charged. Therefore, the trial court never prevented Defendant from making any argument regarding punishment because Defendant did not exercise the right to do so.

Finally, Defendant argues on appeal that, in accordance with our courts' stated purpose of the right to inform the jury of the possible punishment, his trial counsel merely purported "to impress upon the jury the gravity of a felony conviction so that the jury would carefully consider the case." It is clear, however, that in the statements challenged during Defendant's closing argument, "counsel gave [her] argument a different slant." *State v. Wilson*, 293 N.C. 47, 57, 253 S.E.2d 219, 225 (1977). Immediately following her recap of the evidence and suggestion that the State failed to prove that the parking lot at issue was indeed university property, defense counsel provided the jury with her opinion on the collateral consequences of attaining felony status. She described Defendant's possession of the gun as an innocent act (even though there is no mens rea element to the offense) and then stated, "All of those are innocent behaviors, behaviors that he should not be convicted of a felony for." Defendant attempts to distinguish these facts from *Wilson*, where trial counsel in this case never

directly asked the jury to acquit her client because the punishment was so severe. However, the argument held to be improper in *Wilson* is actually quite similar to the statements at issue here. In *Wilson*, defense counsel "pointed to what he conceived to be the weakness in [the State's case]," then stating "[a]nd what the State . . . is asking you to do in this case is to send this defendant to prison for the rest of his life based on the [evidence]." *Id.* at 55, 235 S.E.2d at 224. The prosecutor's objection was sustained, and our Supreme Court agreed that this portion of defendant's jury argument was properly excluded by the trial judge. The Court explained that there, counsel implied that the State's identification evidence was questionable "and that, while such a view may be sufficient to convict in some situations, it is inadequate to convict in this case *because the punishment is so severe*." *Id.* at 57, 235 S.E.2d at 225. It is likewise clear that defense counsel here tried to link her conception of the deficiencies in the State's case to an appeal to the jury that "what the State wants [them] to do in this case is to make [Defendant] guilty of a felony," after opining on the subsidiary effects thereof. While it is true that Defendant did not directly request an acquittal, counsel was asking for a verdict of not guilty, not because the elements of the crime were not met, but because the indirect consequences of the statutory punishment provisions were too severe in light of Defendant's behavior. "Thus counsel was asking the jury to consider the punishment as part of its substantive deliberations and this [s]he may not do." *Id.*

In light of the foregoing, we conclude that the trial judge properly sustained the State's objections to these statements made during Defendant's closing argument.

No Error.

Judge GEER concurs.

Judge JACKSON concurs in result only.

Report per Rule 30(e).