NO. COA13-229
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v. Carteret County
Nos. 11 CRS 55947-48; 12 CRS 341

GEORGE ANTONIO SUTTON

Appeal by defendant from judgment entered 6 September 2012 by Judge Jack W. Jenkins in Carteret County Superior Court. Heard in the Court of Appeals 23 September 2013.

*Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Mary Cook, for defendant-appellant.*

ERVIN, Judge.

Defendant George Antonio Sutton appeals from a judgment sentencing him to 117 to 150 months imprisonment based upon jury verdicts convicting him of possession of cocaine with the intent to sell or deliver and the sale or delivery of cocaine and Defendant's plea of guilty to having attained the status of an habitual felon. On appeal, Defendant argues that the trial

court committed prejudicial error by making statements which amounted to an impermissible expression of opinion about the issue of Defendant's guilt. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

## I. Factual Background

### A. Substantive Facts

#### 1. State's Evidence

On 22 December 2010, Corbett Brandon, who was working as an informant for the Carteret County Sheriff's Office, arranged to purchase cocaine from Defendant. At Mr. Brandon's home, investigating officers searched Mr. Brandon, provided him with $300 for use in making the purchase, and watched Mr. Brandon engage in a hand-to-hand transaction with the driver of a vehicle that was registered to Defendant. Immediately after the transaction was completed, Mr. Brandon gave a bag containing crack cocaine to the investigating officers. Both Mr. Brandon and two of the investigating officers identified Defendant as the person who sold the crack cocaine to Mr. Brandon on 22 December 2010.

#### 2. Defendant's Evidence

According to Latasha Hill, the mother of Defendant's children, Defendant was at a family cookout in an adjoining county for several days on either side of 22 December 2010. Ms. Hill acknowledged that she had not informed investigating officers of this information because of uncertainty as to what she should do.

B. Procedural History

On 8 December 2011, warrants for arrest charging Defendant with possession of cocaine with the intent to sell or deliver and the sale or delivery of cocaine were issued. On 13 February 2012, the Carteret County grand jury returned bills of indictment charging Defendant with possession of cocaine with the intent to sell or deliver and the sale or delivery of cocaine. On 5 March 2012, the Carteret County grand jury returned a bill of indictment charging Defendant with having attained the status of an habitual felon. The charges against Defendant came on for trial before the trial court and a jury at the 4 September 2012 criminal session of the Carteret County Superior Court. On 6 September 2012, the jury returned verdicts convicting Defendant of possession of cocaine with the intent to sell or deliver and the sale or delivery of cocaine. After the trial court accepted the jury's verdict, Defendant entered a plea of guilty to having attained habitual felon status. At the

conclusion of the ensuing sentencing hearing, the trial court consolidated Defendant's convictions for judgment and sentenced him to a term of 117 to 150 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

On appeal, Defendant claims that the trial judge repeatedly expressed an impermissible opinion concerning the issue of Defendant's guilt by commenting upon the expected length of the trial and the burden imposed upon citizens by the necessity for jury duty. We do not find Defendant's argument persuasive.

At the beginning of Defendant's trial, the trial court stated in the presence of the jury venire that:

> Thank you for coming back. Thank you for your services this week. And this trial today will probably last less than a full day. We're not anticipating this going into tomorrow.
>
> Once again, as I said earlier this week, I don't want to make any promises I can't keep. You never know when things might drag out longer than anticipated, but I do think, realistically, we will complete this trial today.
>
> . . . .
>
> This trial should not take more than a day. It should not go into tomorrow, but you never know. Things sometimes come up and take time. . . . At least for now, having conferred with the lawyers and having a knowledge of what the anticipated evidence is and the issues, I don't think we'll go

> beyond today.

In addition, while discussing his personal experiences while serving as the member of a jury, the trial court stated that:

> I have actually sat on a jury before, a long time ago in Wake County . . . . And my experience, I wasn't very comfortable with it. I didn't like being trapped and I didn't like not being able to get up and move around or talk to anybody. But I particularly didn't like not knowing what was going to happen, and when. So I'll try to keep you posted of where we are, what the schedule is and so forth.

Finally, Defendant points to the trial court's statement to the jury prior to the lunch recess that "everybody recognizes that jury duty's an imposition on your time" and the trial court's apology, after the noon recess, for the temperature in the jury room. According to Defendant, these statements amounted to the expression of an opinion by the trial court to the effect that the trial was a mere formality, that any delay in the conclusion of their jury service was Defendant's fault, and that Defendant was guilty of the crimes with which he had been charged.

"'The 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.'" *State v. Bishop*, 343 N.C. 518, 541, 472 S.E.2d 842, 854 (1996) (quoting N.C. Gen. Stat. § 15A-1222), *cert. denied*, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997). "Whether a trial court's comment constitutes an

improper expression of opinion 'is determined by its probable meaning to the jury, not by the judge's motive.'" *State v. Mucci*, 163 N.C. App. 615, 620, 594 S.E.2d 411, 415 (2004) (quoting *State v. McEachern*, 283 N.C. 57, 59-60, 194 S.E.2d 787, 789 (1973)). In determining whether a trial court's statements constitute an impermissible expression of opinion in violation of N.C. Gen. Stat. § 15A-1022, we must examine the "totality of the circumstances" in which the challenged comments were made. *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). "Further, a defendant claiming that he was deprived of a fair trial by the judge's remarks has the burden of showing prejudice in order to receive a new trial." *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001).

After carefully reviewing the record, we find no merit in Defendant's contention. Each of the comments upon which Defendant relies constitutes nothing more than a simple expression of sensitivity to the jurors' needs and gratitude for their service. In spite of Defendant's claim to the contrary, the trial court's prediction that the trial would last no more than one day did not imply a belief "that the case was open-and-shut, a slam-dunk[,]" or "'in the bag' for the State[.]" *Cf. State v. Upchurch*, 332 N.C. 439, 451, 421 S.E.2d 577, 584 (1992) (holding that the trial court did not implicitly express an

opinion that the jury would reach the sentencing phase of the defendant's trial by informing potential jurors "that the two phases of a capital trial 'may' be seen like two halves of a football game"). Similarly, the trial court's comments did not amount to blaming Defendant for the inconveniences associated with the jury's service. On the contrary, the trial court clearly explained the fundamental constitutional protections to which Defendant was entitled and definitively informed them that the trial court did not have an opinion concerning the issue of Defendant's guilt or innocence. For example, the trial court explicitly instructed the entire venire that Defendant was entitled to a presumption of innocence and that the State bore the burden of proving guilt beyond a reasonable doubt. After jury selection, the trial court reiterated that the jurors owed a duty of "absolute fairness and impartiality" and instructed the jury to "remain a fair and impartial trier of the facts" and to refrain from forming an opinion concerning the issue of Defendant's guilt until all of the evidence had been presented. Prior to the beginning of the jury's deliberations, the trial court instructed the members of the jury that "[y]ou should not infer from anything I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be" and stated that "[i]t is your duty to

find the facts and to render verdicts reflecting the truth." As a result, when considered in context, we conclude that the challenged comments did not amount to an impermissible expression of opinion concerning the issue of Defendant's guilt. Thus, the trial court's judgment should, and hereby does, remain undisturbed.[1]

NO ERROR.

Judges GEER and DILLON concur.

Report per Rule 30(e).

[1]In addition to the comments discussed in the text, Defendant also relies on similar expressions of judicial solicitude for the jury made after it returned verdicts convicting Defendant of possession of cocaine with the intent to sell or deliver and the sale or delivery of cocaine. However, given that these comments were made after the jury decided to convict Defendant, we do not believe that there is any possibility that these post-verdict remarks could have influenced the outcome of his trial.