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NO. COA11-557  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Pitt County  
Nos. 10 CRS 53476-77

JAMES SWINSON,  
Defendant.

Appeal by defendant from judgments entered 14 December 2010  
by Judge W. Russell Duke, Jr., in Pitt County Superior Court.  
Heard in the Court of Appeals 17 January 2012.

*Attorney General Roy Cooper, by Assistant Attorney General  
Steven Armstrong, for the State.*

*Sue Genrich Berry for defendant-appellant.*

HUNTER, Robert C., Judge.

Defendant appeals from judgments entered upon jury verdicts finding him guilty of robbery with a dangerous weapon and possession of a firearm by a felon. On appeal, defendant contends the trial court erred in its supplemental instructions to the jury and by overruling his objections to the prosecutor's closing arguments. We find no error.

The State's evidence tended to show that on 30 April 2010, Rigoberto Hardee (Hardee) drove to a convenience store to cash his paychecks. Upon entering the store, Hardee briefly spoke with Troy Gorham (Gorham) who was standing outside the store. Three or four other men, whom Hardee did not know, were also outside the store. Hardee cashed his checks and exited the store. One of the men standing outside called for Hardee to come over. After Hardee and the man talked for a few minutes, the man pulled a gun from his pants and told Hardee, "give me your f[---]ing money." Hardee turned over his money, and the man fled the scene.

Hardee immediately reported the robbery to the Farmville Police Department. Out of a photographic lineup prepared by police, Hardee identified defendant as the man who robbed him. Afterwards, an officer interviewed Taha Almontaser (Almontaser), who was working at the store during the robbery. Almontaser told police that "James Junior" committed the robbery. When shown the photograph of the man Hardee identified, Almontaser told police that James Junior was the man in the photograph. Farmville police subsequently interviewed Gorham who identified the perpetrator by the name "Sparks" and then as "Jamal Swinson." At trial, however, Gorham testified that "Sparks" was

not at the store on the day of the robbery. Hardee identified defendant at trial as the man who committed the robbery.

Defendant did not present any evidence. The jury found defendant guilty of robbery with a dangerous weapon and possession of a firearm by a felon. The trial court sentenced defendant to 84 to 100 months imprisonment for the robbery conviction and 13 to 16 months imprisonment for the possession of a firearm by a felon conviction, to be served consecutively. Defendant appeals.

Defendant first contends the trial court's supplemental instruction to the jury "forced guilty verdicts" because the instructions failed to give jurors the benefit of the guidance provided by the language in N.C. Gen. Stat. § 15A-1235(b). The record discloses that after deliberating for about two hours, the jury sent a note to the judge stating "we cannot come to a decision." The judge gave the following supplemental instruction to the jury:

Ladies and gentlemen, I must emphasis [sic] the fact that it is your duty to do whatever you can to reach a verdict without surrendering your conscientious or honest convictions as to the weight or effect of the evidence because of the opinion of your fellow jurors. You should reason together as reasonable men and women, reconcile your differences, if you can and do whatever you can to do your duty as jurors to reach - -

and reach a verdict. Now please return to the jury room and resume your deliberations and see if you can reach a verdict. Thank you.

The judge then sent the jury back to deliberate longer. Neither defense counsel nor the State objected to the court's instruction, and both parties answered in the negative when the court inquired if they had additional requests. The jury resumed deliberations at 2:20 and at 3:20 p.m. the jury returned, finding defendant guilty as charged in two cases. When the jury was polled, one juror indicated that the verdict announced by the foreman was not her verdict. The judge ceased polling and instructed the jury to resume deliberations. At 3:30 p.m., the jury returned with unanimous guilty verdicts finding defendant guilty of robbery with a dangerous weapon and possession of a firearm by a felon. The judge polled the jury and each juror assented to the verdicts.

Defendant acknowledges that he did not object to the supplemental instruction at the time it was given, and thus, he asks this Court to review the matter under a plain error standard. See *State v. Williams*, 315 N.C. 310, 328, 338 S.E.2d 75, 86 (1986). Under this standard, we review the entire record and determine whether the instruction had a probable impact on the jury's finding of guilt. *State v. Odom*, 307 N.C. 655, 661,

300 S.E.2d 375, 379 (1983). "In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364-65 (1978).

In order to guide the trial court in situations of jury disagreement and to prevent the coercion of jury verdicts, our General Assembly enacted N.C. Gen. Stat. § 15A-1235 (2009), which provides in part:

(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

Here, the trial judge's instructions, similar to the language set forth in N.C. Gen. Stat. § 15A-1235, advised the jurors of their duty to reach a consensus without sacrificing firmly-held beliefs merely for the sake of returning a verdict. The jury then deliberated for an hour before reaching its unanimous verdict. Under these circumstances, it may be fairly stated that the instructions served as a catalyst for further deliberations without any element of coercion. *See Alston*, 294 N.C. at 593, 243 S.E.2d at 364-65. For the foregoing reasons, we conclude the trial court did not commit plain error.

Defendant also contends the trial court abused its discretion by overruling his objection to the prosecutor's closing arguments. We disagree.

Generally, counsel is allowed wide latitude in the scope of the closing arguments it presents to the jury; however, the scope of a counsel's closing arguments is not without limits. *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997). Specific guidelines for closing arguments in criminal jury trials have been set out by our General Assembly:

During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2009).

As defendant raised a timely objection to the improper argument challenged on appeal, we review the trial court's ruling for an abuse of discretion. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). This review entails determining whether the trial court's ruling "could not have been the result of a reasoned decision." *Id.* (quoting *State v.*

*Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)). "In order to be entitled to reversal based upon closing remarks, the defendant must establish both that the closing arguments were improper and that they prejudiced him before the jury." *State v. Peterson*, 179 N.C. App. 437, 466, 634 S.E.2d 594, 615 (2006) (citation omitted).

Defendant asserts the prosecutor improperly reflected her personal beliefs instead of facts in evidence by making the following remarks:

[PROSECUTOR:] Now Troy Gorham obviously was a surprise to me. The only conclusion that I can come up with is that - -

[DEFENSE COUNSEL]: Objection, Opinion.

THE COURT: Overruled.

[PROSECUTOR:] Is that Mr. Gorham might be afraid of this Defendant too.

[DEFENSE COUNSEL]: Objection. Facts not in evidence.

THE COURT: Overruled.

[PROSECUTOR]: - - that maybe street loyalty is more important the [sic] telling the truth under oath.

Assuming, *arguendo*, that the prosecutor's comment was improper under N.C. Gen. Stat. § 15A-1230(a), we conclude defendant has not demonstrated any prejudice resulting from the

prosecutor's comment. The evidence presented by the State amply established the identity of defendant as the perpetrator of the offense, and none of the State's evidence was seriously refuted or contradicted during cross-examination by defense counsel. Accordingly, we hold that the trial court's error in permitting the improper argument was not prejudicial in that "there [was no] reasonable possibility a different result would have been reached had the error not occurred." *State v. Allen*, 353 N.C. 504, 509, 546 S.E.2d 372, 375 (2001).

No error.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).