

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-598

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

ROBERT DURAN JOHNSON

Durham County  
Nos. 03 CRS 13562-63,  
47093

Appeal by defendant from judgments entered 16 December 2004 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals on 28 November 2005.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General W. Dale Talbert, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.*

JACKSON, Judge.

On 11 August 2003, defendant Robert Duran Johnson was indicted for first degree kidnapping, assault with a deadly weapon inflicting serious injury, and malicious castration. The case was tried at the 12 July 2004 Criminal Session of Durham County Superior Court.

The facts pertinent to this appeal are as follows: During defendant's trial, defendant failed to return after a recess. Following an unrecorded bench conference, the trial court stated in

the presence of the jury:

Let the record reflect that the Court has waited for twenty minutes past the end of the recess for the defendant, Mr. Johnson, to reappear. That his attorney has looked for him. And the officers in the building have looked for him and he has not been located. So we will -- The Court will find that he has apparently voluntarily absented himself.

Defendant's trial attorney did not object to the court's statement, nor did he request any instruction be given regarding defendant's absence.

Defendant was convicted of first degree kidnapping, assault with a deadly weapon inflicting serious injury, and castration without malice. Because defendant was absent from trial, sentencing was continued. On 16 December 2004, defendant was sentenced to a term of 116 to 149 months imprisonment for kidnapping, and terms of 34 to 50 months imprisonment on each of the remaining two charges - to run consecutively after completion of the kidnapping sentence. Defendant appeals.

Defendant argues that the trial court erred by informing the jury that he had "voluntarily absented himself." First, defendant contends that the trial court should have instructed the jury that it should not consider his absence when determining his guilt. Defendant further argues that the trial court's statement that he had "voluntarily absented himself" constituted an impermissible expression of opinion.

After careful review of the record, briefs and contentions of the parties, we find no error. First, there is no requirement in law that a trial court instruct a jury that it should not consider

defendant's absence in determining his guilt or weighing evidence when he absconds during trial. North Carolina General Statutes, section 15A-1032, which defendant contends should apply here, pertains to removal of disruptive defendants by a trial court and is not applicable. Moreover, defendant's trial counsel failed to request any instruction regarding his absence.

Second, we find that the trial court's statement did not constitute an impermissible expression of opinion. North Carolina General Statutes, section 15A-1222 states 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." North Carolina General Statutes, section 15A-1232 states that "[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." Neither statute applies here. The trial court was not expressing any opinion, but was merely explaining defendant's absence for the record. Additionally, the statement by the trial court did not concern any question of fact to be determined by the jury, and was not a comment on the evidence or the application of the law to the evidence.

However, even assuming *arguendo* that the statement could be considered an expression of opinion, we conclude that any purported error was harmless error. This Court has stated that "not every improper remark made by the trial judge requires a new trial."

*State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361, *disc. review denied*, 327 N.C. 143, 394 S.E.2d 183 (1990) (*citing State v. Guffey*, 39 N.C. App. 359, 250 S.E.2d 96 (1979)). "When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error. Defendant nonetheless bears the burden of establishing that the trial judge's remarks were prejudicial." *Id.* (citations omitted). The evidence in this case was overwhelming, and it is unlikely that a different result would have been reached at trial but for the court's statement. Accordingly, we conclude that defendant had a fair trial free from prejudicial error.

No error.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).