

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-596

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Catawba County
No. 06 CRS 001887

ANDRIRIAN DEMONZ WOODS

Appeal by defendant from judgment entered 22 August 2006 by Judge Robert C. Ervin in Catawba County Superior Court. Heard in the Court of Appeals 8 December 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Richard Moore, for the State.

Leslie C. Bawls for defendants.

Slip Opinion

BRYANT, Judge.

Andririan Demonz Woods ("defendant") appeals from a judgment entered 22 August 2006 pursuant to a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon. The trial court found defendant had a prior record level of IV and sentenced defendant to an active term of 108 to 139 months imprisonment. Defendant did not give notice of appeal from his conviction. On 18 September 2007, pursuant to N.C. R. App. P. 21, this Court granted defendant's Petition for Writ of Certiorari to review the trial court's judgment. We find no error.

At defendant's trial, the State's evidence tended to show that on the evening of 11 August 2005, Nathan Jenkins, III, purchased some marijuana. He then drove to the Friendly Store on South Center Street in Hickory, North Carolina to buy a cigar in which to roll the marijuana for smoking. Several people were milling around the parking lot of the store and a few other were inside the store. Going into the store, Jenkins saw Revus Faggart, a person he knew from school, with a bandana tied around his neck.

As Jenkins left the store and got in his pickup truck, a man approached and asked Jenkins for some change. Reaching for the change, Jenkins saw Faggart, now wearing the bandana over his face, come from around the store toward the passenger side of the truck. Mr. Jenkins turned to try to back out of the parking lot and saw a man he did not recognize coming toward the driver's side of the truck carrying a small, silver handgun. Jenkins later identified the man with the handgun as defendant. Defendant pointed the gun at Jenkins and told Jenkins to give him what he had. Jenkins handed over the bag of marijuana he had purchased earlier in the evening. Meanwhile, Faggart opened the passenger door, got into the truck, searched the interior of the truck, and went through Jenkins' pockets, removing between \$75 and \$120. Defendant then opened the driver's door to the truck and Jenkins stepped out onto the parking lot. While defendant kept the gun pointed at Jenkins, Faggart came around and patted Jenkins down, asking where Jenkins kept his money. Jenkins replied, "y'all got everything I got," and Faggart hit him three or four times. Jenkins fell down and when he

stood back up defendant told him to run. Jenkins was too woozy to run and defendant shot him in his left shin. Defendant and Faggart left together and Jenkins drove himself home whereupon his girlfriend took him to the hospital. Defendant did not present any evidence at trial.

Defendant's sole argument on appeal is that the trial court erred when it questioned a State's witness in a manner that expressed an opinion as to the witness' credibility on a question of fact to be decided by the jury. We disagree.

A trial court has a duty to supervise and control the course of a trial, and in so doing "may question a witness in order to clarify confusing or contradictory testimony." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). However, while in the presence of the jury, a trial court must not express an opinion "on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2007). On appellate review, an alleged improper statement will be considered in the light of the circumstances in which it was made, and the defendant must show he was prejudiced by the remark. *State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988) (citing *State v. Howard*, 320 N.C. 718, 360 S.E.2d 790 (1987)); see also *State v. Williams*, 185 N.C. App. 318, 334, 648 S.E.2d 896, 907 (2007) ("Whether the accused was deprived of a fair trial by the challenged remarks must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant. In evaluating whether a

judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." (citations and internal quotations omitted)), *appeal dismissed and disc. review denied*, 362 N.C. 372, 664 S.E.2d 559 (2008). A defendant is prejudiced by a trial court's questioning of a witness where the questioning presupposes the proof of a fact to be determined by the jury. See *State v. McEachern*, 283 N.C. 57, 194 S.E.2d 787 (1973) (holding the defendant was prejudiced by the trial court's question as to where the victim was when she was raped, but the fact that the victim had been raped had not yet been established by any evidence before the jury).

Defendant argues the trial court expressed its opinion as to the credibility of Jenkins' testimony identifying defendant as the perpetrator of the charged offenses. Defendant challenges the following exchange between the trial court and Jenkins:

THE COURT: Let me ask a couple questions, make sure I'm following things. Did I understand you to say it was your opinion that this defendant shouldn't be charged with robbery?

. . .

[JENKINS]: My opinion is he did not take any money out of my pockets but it's also the person could not have robbed me if he did not have the gun on me.

THE COURT: Did any person actually take money from you?

[JENKINS]: Yes.

THE COURT: Who did that?

[JENKINS]: I'm sure Mr. Faggart took some money from me. I'm - so that way I won't say

he took it so I don't want to sit here and say he did. Mr. Woods.

THE COURT: But did you have money before the incident?

[JENKINS]: I had money that was taken.

THE COURT: Before that was taken?

[JENKINS]: Yes.

THE COURT: Mr. McGinnis, you may proceed with Redirect.

Prior to the trial court's questioning, Jenkins gave somewhat confusing testimony regarding which of the alleged assailants, defendant or Faggart, performed what acts during the robbery and the shooting. However, Jenkins had previously testified that it was not defendant, but his accomplice Faggart, who took his money while defendant held him at gunpoint. In its questioning of Jenkins, the trial court did not assume the State had proven a necessary fact to be determined by the jury, but asked for clarification of previously asked questions. Accordingly, after reviewing the totality of the circumstances surrounding the trial court's questioning, we hold the trial court's questioning of Jenkins did not amount to an expression of an opinion as to defendant's guilt or innocence, as to a fact to be decided by the jury, or as to the credibility of the witness. This assignment of error is overruled.

No error.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).