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NO. COA08-455

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Wake County  
No. 06 CRS 88878

MOSES ALLEN JACKSON

# Court of Appeals

Appeal by defendant from judgment entered 2 October 2007 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 8 December 2008.

# Slip Opinion

*Attorney General Roy Cooper, by Special Deputy Attorney General Thomas M. Woodward, for the State.*

*J. Clark Fischer for defendant-appellant.*

BRYANT, Judge.

On 5 February 2007, defendant Moses Allen Jackson was indicted for assault with a deadly weapon inflicting serious injury. The case was tried during the 1 October 2007 Criminal Session of Wake County Superior Court, and a jury found defendant guilty of assault with a deadly weapon inflicting serious injury. The trial court entered judgment on that ground and sentenced defendant to between 44 to 62 months. For the reasons stated below, we hold no error.

The evidence presented at trial tended to show that on 19 August 2006, Wilson Dwayne Pulley walked to a store on New Bern

Avenue in Raleigh, North Carolina, to buy some dog food. On his way home, Pulley spotted the defendant, Moses Allen Jackson. Pulley stated that defendant, who he referred to as "Jimmy," was his cousin. Pulley testified that he had previously given defendant \$1.06 so defendant could get a beer. Pulley asked defendant when he was going to pay him back, and defendant claimed he had paid him back the night before. Pulley disagreed. Pulley stated that defendant then stepped back and put his hand in his pocket. Pulley then testified as follows:

I said: Man, if you come out of your pocket with a knife, I know he carry a knife, if you come out with a knife I hit you with a can of dog food.

I look to the left. I felt something hit me.  
I look. [Defendant] was running down the street.

After defendant ran away, Pulley realized that he had been cut on his chest. Pulley asked a neighbor to call an ambulance, and he made his way back home. When he arrived home, the ambulance was already there. Pulley was then taken to the hospital where he received stitches and staples to close the wound.

Testifying on his own behalf, defendant denied borrowing any money from Pulley. Defendant testified that after leaving the store, he and Pulley exchanged words. Defendant further stated that Pulley told him he was going to "whup" him and hit him in the nose. Defendant claimed that he cut Pulley with the knife to defend himself from being hit with a can of dog food.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. The trial court entered judgment

on that ground and sentenced defendant to a term of 44 to 62 months imprisonment. Defendant appealed.

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Defendant raises two issues on appeal: (I) whether the trial court committed plain error by referring to the Assistant District Attorney as the "victim's" attorney; and (II) whether the trial court erred by submitting a Class E assault to the jury.

*I*

Defendant first argues that the trial court committed plain error during its introductory remarks to the jury. At the outset of the trial, while introducing the parties to the prospective jury, the trial court identified the prosecutor as "the victim's attorney." Defendant contends that by describing the prosecutor as the attorney for the victim, the trial court improperly bolstered Pulley's credibility. Defendant asserts that this "mischaracterization . . . was so inherently prejudicial as to rise to the level of plain error." We are not persuaded.

In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule of law without any such action may still be the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

*State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007) (citing N.C. R. App. P. 10(c)(4)). "A plain error is one so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Carroll*, 356 N.C. 526,

539, 573 S.E.2d 899, 908 (2002). It is to be applied cautiously and only in the exceptional case where the error is so prejudicial, that justice cannot have been done. *State v. Baldwin*, 161 N.C. App. 382, 388, 588 S.E.2d 497, 503 (2003). However, our Supreme Court has limited plain error review "to instructions to the jury and evidentiary matters." *Cummings*, 361 N.C. at 469, 648 S.E.2d at 807. However, even assuming defendant's assignment of error had been preserved, the trial court's statements would not warrant a new trial.

Under North Carolina General Statute § 15A-1222, "[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." N.C. Gen. Stat. § 15A-1222 (2007).

Moreover, trial judges must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury.

*State v. Scercy*, 159 N.C. App. 344, 350, 583 S.E.2d 339, 342-43 (2003) (citation omitted). In *Scercy*, the trial court addressed the jury pool prior to jury selection, and in its remarks, made the following statement:

Now, I can assure you these lawyers--as I told you are very competent, and I can assure you that [the Prosecutor] does not object to this law; she willingly takes [the] burden of proving to you beyond a reasonable doubt. And *that's what we'll do* --what will go on in this case.

*Id.* at 349, 583 S.E.2d at 342. On appeal, the defendant argued that the judge's comments gave the appearance that he was aligned with the prosecution and expected the defendant to be proven guilty. *Id.* at 349, 583 S.E.2d at 342. We held that the defendant's argument was without merit because

[a]lthough it is the better practice for a court to avoid even ambiguous comments that may imply that it and the prosecutor are a team, here we believe that the court was merely commenting on the roles of the court and the attorneys in the trial, which is not a question of fact to be decided by the jury.

*Id.* at 351, 583 S.E.2d at 343.

Here, defendant argues that he was prejudiced when the trial court, while introducing the parties to the jury, referred to the prosecutor as "the victim's attorney." As in *Scercy*, we believe that the trial court was merely commenting on the roles of the attorneys in the trial, which is not a question of fact to be decided by the jury. Accordingly, defendant's argument is without merit.

## II

Defendant next contends the trial court erred by denying his motion to dismiss. Specifically, defendant argues that there was insufficient evidence that Pulley suffered a serious injury. We disagree.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "Substantial evidence is relevant evidence that a

reasonable mind might accept as adequate to support a conclusion." *Id.* at 717, 483 S.E.2d at 434 (internal quotations omitted). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

A "serious physical injury" has been defined as an injury "that cause[s] great pain and suffering." *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 303 (1991). Our Supreme Court has stated:

Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury.

*State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991).

In the instant case, Pulley testified that he received a quarter-inch wide cut, extending from his left shoulder to his stomach. At trial, the jury viewed the foot long scar that resulted from the assault. Pulley testified he lost so much blood as a result of the cut that he felt nauseated and thought he was going to pass out. Furthermore, Pulley's wound required immediate transport to the hospital by ambulance. A police detective who interviewed Pulley at the hospital stated that Pulley was "bleeding profusely." Pulley required stitches and staples in order to close

the wound, the stitches and staples remained in Pulley for a month, and Pulley was prescribed vicodin for the pain. Pulley further testified that as a result of the injury, he was unable to perform his normal duties at work.

We conclude that this evidence, when taken in the light most favorable to the State, was sufficient for a jury to determine that the wound suffered by Pulley constituted a serious injury. Accordingly, we find no error.

No error.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).