IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-876

Filed: 16 April 2019

Randolph County, Nos. 15 CRS 53534, 53636; 16 CRS 77

STATE OF NORTH CAROLINA

v.

KEVIN DERAND EUBANKS

Appeal by defendant from judgments entered 22 February 2018 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 12 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Lauren Lewis Ikpe, for the State.

Irons & Irons, PA., by Ben. G. Irons, II, for defendant.

DIETZ, Judge.

Defendant Kevin Eubanks appeals his convictions for felonious possession of stolen goods and possession of a firearm by a felon. He contends that the trial court erred by denying his request for a special instruction concerning possession and by failing to intervene, on the court's own initiative, when the State made improper remarks during closing argument.

As explained below, we reject Eubanks's challenge to the jury instructions because the trial court's instruction on possession, which mirrored the pattern jury instruction, contained the substance of Eubanks's requested instruction and did not mislead the jury. We reject Eubanks's challenge to the State's closing argument because, even assuming any of the challenged remarks were improper, they were not so grossly improper that they rendered the trial unfair and compelled the trial court to intervene on its own initiative where Eubanks's counsel chose not to object. Accordingly, we find no error in the trial court's judgments.

Facts and Procedural History

On 5 August 2015, Raymond Kinley broke into a home in Denton, where he stole jewelry, a canister of coins, and four firearms. The next day, law enforcement arrested Kinley, who gave a signed statement admitting to the break-in and theft. Law enforcement also found a message on Kinley's Facebook page indicating that Kinley and Kevin Eubanks had a conversation the same day as the break-in. On 10 August 2015, law enforcement arrested Eubanks after the investigation linked him to the sale of the stolen firearms and charged him with breaking and entering, larceny, possession of stolen goods, and possession of a firearm by a felon.

At trial, witness testimony established that Kinley offered to drive Eubanks to the DMV on the day of the break-in so that Eubanks could renew his driver's license. Kinley testified that he and Eubanks stopped at a Food Lion in Thomasville to cash

in the coins from the stolen canister. There, Kinley offered to sell the stolen guns to a man named Christopher Messick, who instructed Kinley to take the guns to his ex-wife's house.

Later that day, Kinley and Eubanks went to the home of Christy Hill, Messick's ex-wife, with the stolen guns inside their car. According to Kinley's testimony, Kinley entered the house alone, introduced Hill to Eubanks when they came outside, split the sale proceeds with Eubanks, and then drove Eubanks to the DMV.

Hill, who testified at trial, recalled seeing Eubanks enter her house after she asked Kinley to show her the guns. She said that Kinley left the house, returned with Eubanks, and "they both came back in with the guns. He was carrying the guns." Hill later clarified that Eubanks was the one carrying the guns. She paid Kinley $300 and saw the two men "split" the proceeds.

The trial court admitted into evidence a written statement taken by police when they interviewed Eubanks about the gun sale. The statement mentions Kinley spending roughly thirty minutes inside Hill's home, but it says nothing about Eubanks entering the home or handling the stolen guns.

On 22 February 2018, the jury found Eubanks not guilty of larceny and breaking and entering, but found him guilty of possession of stolen goods and possession of a firearm by a felon. The trial court sentenced Eubanks to 127 to 165

months in prison for possession of a firearm by a felon and a concurrent term of 111 to 146 months for possession of stolen goods. Eubanks appealed.

Analysis

I. Jury instruction on possession

Eubanks first argues that the trial court erred by refusing to give his requested instruction concerning possession.

Arguments "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Ordinarily, a trial court "must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (1997). But the trial court "need not give the requested instruction verbatim." *Id.* Instead, "an instruction that gives the substance of the requested instructions is sufficient." *Id.* Thus, to show that the refusal to give an instruction was error, the defendant "must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Beck*, 233 N.C. App. 168, 171, 756 S.E.2d 80, 82 (2014). In addition, "[t]he defendant also bears the burden of showing that the jury was misled or misinformed by the instructions given." *Id.* "[W]hen instructions, viewed in their entirety, present the law fairly and accurately to the jury, the instructions will be upheld." *State v. Roache*, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004).

During the charge conference in this case, Eubanks made a written request for a jury instruction related to the possession offenses, which said "[e]vidence suggesting that Defendant handled the stolen firearms is not sufficient to establish possession unless the State also proves beyond a reasonable doubt that Defendant had the power and intent to control their disposition or use."

The trial court denied this request and instead used language from the North Carolina pattern jury instruction for actual and constructive possession. But, importantly, the trial court's instruction included the substance of the instruction requested by Eubanks, including an emphasis on the State's burden to prove that Eubanks "had the power and intent to control [the] disposition or use" of the firearm:

> [T]he State of North Carolina bears the burden of proving possession beyond a reasonable doubt. Possession of an article may be actual or constructive. A person has actual possession of an article if the person has it on the person, is aware of its presence, and either alone or together with others *has both the power and intent to control its disposition or use.* Members of the jury, a person has constructive possession of an article if the person does not have it on the person but is aware of its presence and either alone or together with others – and has either alone or together with others *both the power and intent to control its disposition or use*. A person's awareness of the presence of the article and the person's power and intent to control its deposition [*sic*] or use may be shown by direct evidence or may be inferred from the circumstances. . . . However, *the defendant's physical proximity, if any, to the article does not by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or use.*

(Emphasis added).

Eubanks argues that the trial court's use of the pattern jury instruction was insufficient because the instruction failed "to explain to the jury that handling the firearms was not sufficient to establish his guilt of the possession offenses." But the instruction did so—it instructed the jury that it is not enough that a defendant "has [the firearm] on the person," but that the State also must prove that the defendant "has both the power and intent to control its disposition or use."

Thus, the trial court properly instructed the jury on the substance of Eubanks's requested instruction when it gave the pattern jury instruction on actual and constructive possession, and Eubanks has not shown that the challenged instruction was "likely, in light of the entire charge, to mislead the jury." *Robinson v. Seaboard Sys. R.R., Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987). Accordingly, we find no error in the trial court's instructions.

II. State's closing argument

Eubanks next argues that the State made improper closing arguments and the trial court erred when it did not intervene on the court's own initiative to address those improper remarks. Eubanks concedes that he did not object to these portions of the State's closing argument and thus our review is limited to whether these arguments were "so grossly improper as to warrant the trial court's intervention *ex mero motu*." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001). Under

this standard, "only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson,* 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

Eubanks first challenges the State's description of Hill's statement to law enforcement about the gun sale: "Was she nervous about getting charged? She admitted that to you. . . . If [law enforcement] could prove she knew those guns were stolen, she *would* have been charged." (Emphasis added).

Eubanks contends that this argument misstated the testimony because the evidence was that the officer told Hill she *could*, not *would*, be charged. Thus, Eubanks argues, the State gave a "personal opinion which was not supported by the record" and which prejudiced Eubanks by improperly bolstering Hill's credibility.

Next, Eubanks challenges the State's argument that Raymond Kinley told Hill that "[Eubanks] needs $110 to get his license back." Eubanks argues that, although the evidence indicated that he needed to "get his license back," there was no evidence that Eubanks "needs money" in order to do so.

Finally, Eubanks challenges a series of statements that, according to Eubanks, "led the jury to believe that a single incriminating circumstance such as Mr. Eubanks' presence in [] Mr. Kinley's vehicle or his handling the guns was enough to establish

actual or constructive possession." For example, Eubanks points to a line of argument in which the State contended that Eubanks "had possession of the property when he's in the car with Raymond Kinley. He had possession of the property when he's at the Coinstar. . . ." Eubanks contends that these "were incorrect and misleading statements of law" that suggested mere handling of property satisfied the legal definition of "possession."

We reject Eubanks's argument that these statements were so "grossly improper" that they compelled the trial court to intervene on its own initiative during closing argument. Even assuming these statements were objectionable—and this is a close case at best—they did not infect the trial with fundamental unfairness. Eubanks's trial counsel ably presented his defense, which attacked the credibility of the State's witnesses; showed that the State had no fingerprint analysis or other physical evidence trying Eubanks to the firearms; and emphasized that the State had not proved that Eubanks had the "power and intent" to control the firearms. Moreover, the trial court correctly instructed the jury on the law concerning possession and the other elements the State must prove to convict Eubanks.

As this Court has recognized, when the trial court intervenes on its own initiative during closing argument, it does so despite recognizing "an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Martinez*, __ N.C. App. __, __, 795 S.E.2d 386, 391 (2016). Because this sort of *sua*

sponte intervention by the court could inadvertently highlight arguments by the prosecutor that the defense, for strategic reasons, would prefer not to be highlighted in the jury's mind, we will not find error unless the challenged comments render the trial fundamentally unfair. As explained above, that did not occur here, and thus we find no error.

Conclusion

For the reasons explained above, we find no error in the trial court's judgments.

NO ERROR.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).