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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-209

Filed: 2 June 2020

Nash County, No. 16 CRS 51960

STATE OF NORTH CAROLINA

v.

JOAQUIN SILVER

Appeal by defendant from judgments entered 18 April 2018 by Judge Walter H. Godwin, Jr., in Nash County Superior Court. Heard in the Court of Appeals 27 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather H. Freeman, for the State.

Mary McCullers Reece for defendant.

PER CURIAM.

Defendant Joaquin Silver appeals his convictions for discharging a weapon into an occupied dwelling and assault with a deadly weapon inflicting serious injury. Silver argues that he is entitled to a new trial, pointing to two instances where he contends the trial court improperly expressed an opinion as to the weight and credibility of a witness's testimony in violation of N.C. Gen. Stat. § 15A-1222. We find

that the trial court did not improperly express an opinion regarding a witness's testimony in violation of N.C. Gen. Stat. § 15A-1222. For the reasons discussed below, we find no error in the trial court's judgments.

Background

The State's evidence tended to show the following: On 15 May 2016, Andrew Griffin had some friends over at his house for a cookout, including his cousin, Jonathan Griffin, and Billy McCullen. Defendant Joaquin Silver lived next door to Andrew and joined the gathering at Andrew's house sometime in the late afternoon. The group socialized on the porch listening to music, grilling food, and drinking alcohol. Later in the evening, it began to rain, and everyone moved inside to eat. Silver, who is wheelchair bound, was carried up the steps and into the house.

A short time later, Silver, Billy, and Jonathan were in the living room while Andrew and another friend, Pam, washed dishes in the kitchen. Jonathan asked Silver for a lighter and when Silver reached into his pocket to get it, the gun he had in his pocket discharged. Although no one was injured, Andrew became upset that a gun was discharged inside his home and told Silver he needed to leave. Andrew and Pam carried Silver out of the house, and Pam helped him off of the front porch. Andrew testified that Silver was upset and slapped him in the face. Andrew went back inside the house and closed the door behind him. Silver then pulled out his gun

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and fired multiple rounds at the residence. Two rounds penetrated the front door and struck Andrew, one in the arm and one in the side.

After realizing he had been shot, Andrew called 911 on his cellphone. Law enforcement and emergency services arrived a short time thereafter, and Andrew was taken to the hospital in an ambulance. Andrew testified that the bullets remain lodged inside him because “it would do more damage to remove [them].”

When officers arrived at the scene, Silver told them that he had defended himself because he was robbed. Silver also told officers that Billy and Jonathan had hit him while he was inside the residence, and that Billy had “stuck a large silver gun to his right temple,” before trying to rob him. Officer Daniel Joyner, who was employed with the Rocky Mount Police Department at the time of the shooting, testified that he decided to take out charges against Silver because Silver’s version of the events that evening was inconsistent with the bullet holes through the closed door, the location of Silver’s cell phone, and the absence of other guns in the residence.

On 17 January 2017, Silver was indicted on charges of discharging a weapon into occupied property and assault with a deadly weapon inflicting serious injury. The matter came on for trial in Nash County Superior Court on 16 April 2018. At the close of the State’s evidence, Silver moved to dismiss the charges, and the trial court denied the motion. Silver testified that when he, Billy, and Jonathan were in the living room, he heard a gunshot. He did not know where the gunshot came from but

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he knew there was a gun under the couch because Billy kept playing with it. Silver testified that Andrew came into the living room and asked who was shooting in his house. Silver told him he did not do it, but Andrew started forcing him out of the house. Silver testified that he and Andrew “got outraged,” and a fight broke out between him, Andrew, and Billy. Silver eventually was taken out of the house and carried off the front porch. Silver testified that after he was removed from the home, Billy and Andrew were standing near the front door, and he saw Billy point a gun at him over Andrew’s shoulder. Silver testified that he was scared Billy was going to shoot him, and he fired five shots at the house.

At the close of all evidence, Silver again moved to dismiss the charges, which the trial court denied. The jury found Silver guilty of discharging a firearm into occupied property and assault with a deadly weapon inflicting serious injury. The trial court sentenced Silver to consecutive sentences of 65 to 90 months and 23 to 40 months of imprisonment. Silver appealed.

Analysis

Silver argues that he is entitled to a new trial because the trial court improperly expressed an opinion as to the weight and credibility of a witness’s testimony in violation of N.C. Gen. Stat. § 15A-1222. We disagree.

Section 15A-1222 of our General Statutes prohibits the judge from expressing “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. “Whether a trial court’s comment constitutes an improper expression of opinion is determined by its probable meaning to the jury, not by the judge’s motive.” *State v. Mucci*, 163 N.C. App. 615, 620, 594 S.E.2d 411, 415 (2004). In determining whether a trial court’s statement constitutes an impermissible expression of opinion, a totality of the circumstances test is utilized. *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). “Further, a defendant claiming that he was deprived of a fair trial by the judge’s remarks has the burden of showing prejudice in order to receive a new trial.” *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001).

Silver identifies two occasions at trial where he contends the trial court improperly expressed an opinion regarding the weight and credibility of Andrew’s testimony. We conclude that neither instance constituted an impermissible expression of an opinion by the trial court on any question of fact to be decided by the jury in violation of N.C. Gen. Stat. § 15A-1222. We address each instance in order below.

Silver first identifies when the trial court interjected during Andrew’s cross-examination by stating, “[h]e just said there was no tussling.” Silver argues the trial court “chilled further cross-examination” and impermissibly expressed an opinion on a fact to be decided by the jury because the issue of whether there was a struggle when Andrew carried Silver out of the house and Silver’s perception of a threat was

central to his self-defense theory. Silver asserts that the jury might reasonably have perceived that the judge cut off the question because he believed that Andrew's testimony up to that point was sufficient to establish that there was no struggle and no reason for Silver to feel threatened. Viewing the trial court's comment in context, we disagree.

"The trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination." *State v. Jones*, 347 N.C. 193, 207, 491 S.E.2d 641, 649 (1997). "In exercising control over the conduct of the trial, the trial judge, in his discretion, may object to repetitive questions because he has an obligation to avoid useless repetition of the evidence." *State v. Watkins*, 89 N.C. App. 599, 604, 366 S.E.2d 876, 879 (1988); N.C. Gen. Stat. § 8C-1, Rule 611(a).

In this case, Andrew testified on direct examination that no one got into a scuffle or a fight with Silver that day, and defense counsel cross-examined him on the issue. Defense counsel also cross-examined Andrew regarding whether he had hit Silver, whether Billy had hit Silver, and whether anyone tried to steal from Silver that day:

[DEFENSE COUNSEL]. Was there a struggle inside your house?

[ANDREW]. No. Not at all.

Q. Did you hit [Silver]?

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A. Not at all.

Q. Did Billy hit [Silver]?

A. Nobody hit Billy. Nobody hit [Silver].

Q. Did anybody try to steal?

A. No sir. Why would we steal anything that—

THE COURT: Don't ask questions. Just please answer his questions to the best of your ability.

A. Yes, sir.

Q. Did anybody try to steal from Joaquin Silver?

A. No, sir.

Q. Basically, you just told him to leave and you escorted him to the door?

A. That's it.

Q. That is all that happened?

A. (Witness nodded head.)

Only after defense counsel again asked whether Andrew had fought with Silver did the trial judge interject and state, "He just said there was no tussling." We hold the trial court's comment was not an expression of an opinion on the facts of the case but rather fell within its duty to control the examination of witnesses and avoid repetitive questions. Indeed, on at least three other occasions during the trial, the court limited repetitive questioning or urged counsel to "move along."

Further, the trial judge did not interject “with his own interpretation of Andrew’s testimony” as suggested by Silver. Andrew testified multiple times that no one got into a fight with Silver, no one hit Silver, and no struggle had occurred inside the house. Based on the totality of the circumstances, we hold the trial court did not improperly express an opinion on the evidence or Andrew’s credibility, and we do not believe a juror would construe the trial court’s statement as such.

Silver next identifies when the trial court questioned Andrew regarding his injuries at the close of his re-cross examination. During his direct examination, Andrew testified to the following:

Q. I want to talk about your wounds. Tell me once you realized you were shot, what was that like? Were you in pain? Were you in shock?

A. Oh yeah. Very much so, I was in shock and pain. It even hurts to today, to this day.

Q. Tell me about that where the, did you have to undergo surgery, what happened?

A. They couldn’t do surgery because it would do more damage to remove the bullets. This is something that I have to live with the rest of my life. I have to have these bullets in my body for the rest of my life.

Q. Where are the two bullets located?

A. They’re somewhere in – there is one in here (witness indicating) in my flesh. There is one down in my hip, lodged. You can only see them on x-rays, because they’re little 25 caliber bullets.

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Q. Do they still cause you pain, do you feel that they're there?

A. Yes. Everyday.

At the end of re-cross examination, the trial court asked, “The wound that you testified to in your side, is the bullet still in your side also?” to which Andrew answered, “Yes, sir. Two bullets.” Silver contends the trial court “intervened to reiterate Andrew’s testimony” and to “emphasize[] the seriousness of his injuries,” and that this amounted to an improper comment on the evidence. Again, viewing the court’s question in context, we disagree.

Pursuant to North Carolina Evidence Rule 614(b), the trial court may direct questions to a witness for the purpose of developing a relevant fact or clarifying the witness’s testimony. N.C. Gen. Stat. § 8C-1, Rule 614(b); *see also State v. Pearce*, 296 N.C. 281, 285, 250 S.E.2d 640, 644 (1979) (“[I]n the exercise of his duty to supervise and control the course of a trial, the trial judge may interrogate a witness for the purpose of developing a relevant fact or clarifying a witness’s testimony in order to ensure justice and aid the jury in their search for a verdict that speaks the truth.”). “Where the court does not express an opinion as to the facts, it is not error for a court to question a witness when necessary to clarify even a critical element of the case.” *State v. Rios*, 169 N.C. App. 270, 282, 610 S.E.2d 764, 772–73 (2005).

After reviewing the record, there is no indication that, in this single clarifying question, the trial court improperly expressed an opinion in violation of N.C. Gen.

Stat. § 15A-1222. Although the seriousness of Andrew’s injuries was an element of the assault charge, Andrew had already testified as to the nature of his injuries, and the trial court’s questioning only sought clarification of Andrew’s testimony within its authority under N.C. Gen. Stat. § 8C-1, Rule 614(b). Indeed, after Andrew responded to the question, the trial court stated, “I just wanted to make sure that I heard you correctly.” We do not believe that a juror could reasonably infer that the judge’s single question amounted to an expression of an opinion on a fact to be decided by the jury or on the weight of the evidence or Andrew’s credibility. Therefore, based on the totality of the circumstances, we hold the trial court’s questioning did not amount to an impermissible expression of an opinion in violation of N.C. Gen. Stat. § 15A-1222.

Conclusion

For the reasons discussed above, we find no error in the trial court’s judgments.

NO ERROR.

Panel consisting of Judges DILLON, DIETZ, and MURPHY.

Report per Rule 30(e).