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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-451

Filed 20 June 2023

Gaston County, No. 19 CRS 59605

STATE OF NORTH CAROLINA

v.

CHARLES JEVON EUBANKS

Appeal by defendant from judgment entered 20 July 2021 by Judge David A. Phillips in Gaston County Superior Court. Heard in the Court of Appeals 25 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jocelyn C. Wright, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

ZACHARY, Judge.

Defendant Charles Jevon Eubanks appeals from a judgment entered upon a jury's verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, Defendant argues that the trial court "prejudicially erred under N.C. Gen. Stat. §§ 15A-1222 and 15A-1232" by instructing the jury in accordance with its "erroneous opinion that there was a stipulation as to

[certain] contested facts.” After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

Defendant and M.E.¹ were married in 2007 and had two children, J.E. and T.E. M.E. testified at trial that their marriage had fallen apart due to Defendant’s violent behavior, and in 2018, she obtained a temporary restraining order against him. Defendant and M.E. attempted to reconcile following the expiration of the restraining order, to no avail; approximately one week prior to the evening in question, M.E. notified Defendant that she wanted a divorce.

On the evening of 23 August 2019, Defendant stayed in a hotel. However, M.E. testified that he “called constantly, every five minutes, accusing [her] of being with someone that tampered with the security cameras” in their home, to which she replied, “[N]o, I was not.” She then told him, “[T.E.] had a friend here[,] [c]ould you stop acting like this[?]” The following morning, 24 August 2019, Defendant “kept calling [M.E.] again accusing [her] of the same thing of what happened last night[,]” which made M.E. “[n]ervous” and prompted her to delete Defendant’s door access code so that “when he walked out [of the home] he would not be able to get back in.”

Nevertheless, later that day, M.E. discovered that Defendant had somehow regained entry to the house. Although M.E. was “scared to go home” because she knew

¹ Given the sensitive nature of this appeal, we use the wife’s and adolescent children’s initials, consistent with the parties’ briefs on appeal.

that Defendant was aware that she had locked him out of the residence, she “decided to go back anyway.” Upon her return home, M.E. found Defendant seated in the living room. M.E. testified that she decided to sleep on the couch in the living room that evening because she felt “scared and nervous[.]” Both M.E. and Defendant testified that at some point that night, M.E. was awakened by Defendant, who was standing over her holding a hammer and demanding to know who was texting her.

Defendant and M.E. began to argue, which prompted their older child, J.E., to tell Defendant, “[I]f you don’t stop, I’m going to call the police.” M.E. instructed J.E. to pack a bag, which she did. At trial, Defendant and M.E. presented conflicting accounts of what transpired next; however, it is undisputed that a physical altercation involving the hammer ensued between Defendant and M.E. M.E. and J.E. then fled the house, hid in the bushes of a neighboring home, and called 9-1-1 in the early morning of 25 August.

At trial, M.E. testified that Defendant attacked her with the hammer, and although she did not know how many blows he struck, he hit her “repeatedly in the back of [her] head.” Defendant testified that he “hope[d] the hammer didn’t strike [M.E.] more than five times, because [he] wasn’t sure that the hammer was hitting her at all.” The State presented evidence that M.E. had suffered “several lacerations on [her] head, [her] ear was split[,], [her] face was fractured[.]” and she “was bruised from one shoulder across all of the way to the other shoulder.” Because of the injuries M.E. sustained, she had to follow a soft-diet regime for two weeks and she testified

that she still had “some difficulty hearing” in her right ear.

Prior to trial, the parties stipulated to the admissibility of certain evidence in order to “[forgo] chain of custody evidence.” Included in the stipulation was State’s Exhibit #5, the recording of the 9-1-1 call placed by M.E. in the early morning of 25 August 2019. In the 9-1-1 call, M.E. states that Defendant “tried to kill [her].”

On 13 July 2021, after the parties’ opening statements, the trial court instructed the jury with regard to Exhibit #5: “Members of the jury, the State and Defendant . . . have agreed or stipulated that certain facts shall be accepted by you as true without further proof. The agreed facts in this case are as follows: The [9-1-1] call made by [M.E.] on August 25, 2019.” Defense counsel did not object to the jury instruction and the trial continued.

Two days later, on 15 July 2021, after J.E. testified, the trial court repeated its instruction to the jury: “Members of the jury, the State and Defendant . . . have agreed or stipulated that certain facts shall be accepted by you as true without further proof. The agreed facts in this case are as follows: The [9-1-1] call made by [M.E.] on August 25, 2019.” During a brief break in the trial, the jury was excused and defense counsel addressed the court:

[DEFENSE COUNSEL]: Your Honor, I need to address the [c]ourt before we take our recess. The stipulations that we entered into [are] that the items were admissible without further foundation, not that they were true, and I think that is [an] important distinction for the jury to know.

THE COURT: That is denied, [defense counsel]. The

stipulation is the Pattern[] Jury Instruction 104.65.

[DEFENSE COUNSEL]: The order that we presented to the [c]ourt, the first line says we stipulate that the following items are admissible without further foundation.

THE COURT: [The State?]

[THE STATE]: Your Honor, on this position, as much as it pains me to agree, I tend[] to agree with [defense counsel] on this particular fact. I read that pattern[] jury instruction myself, [Y]our Honor. I see that more coming into play when there are stipulations as to facts, if there [are] stipulations that the defendant is a convicted felon as relates to a possession of firearm by felon and that stipulation as being true, but the stipulations in this case had to do with chain of custody.

THE COURT: It is the [9-1-1] call.

[THE STATE]: I understand.

THE COURT: You stipulated to what is in the [9-1-1] call.

[DEFENSE COUNSEL]: We stipulated that she would not have to bring the [9-1-1] operator and make a chain of custody and identify [M.E.'s] voice and that it was the actual call. That we would not have to go through all of that to establish that it was the [9-1-1] call. Obviously, [Y]our Honor, she is still able to argue that she is going to be able to ask [M.E.] about the truth of it. I just think it is dangerous for the jury to be instructed that what [M.E.] says is true. I would never stipulate to that. I understand how that was confusing, but the actual order that we signed and gave the [c]ourt - -

THE COURT: I have the order attached to the stipulation under the Pattern[] Jury Instruction, [defense counsel].

[DEFENSE COUNSEL]: I understand, but the agreement was not truth of the content. Our stipulation is to

admissibility. It is not - -

THE COURT: It is not on the order I received. You tell me what you want me to do

Defense counsel then replied, “I am not asking the [c]ourt to give a curative instruction or call attention to it. I would ask that . . . the instruction is that certain items were stipulated as to their admissibility. I have not stipulated to the truth of any of these items.” Noting that “[t]his is the second time” the trial court had given these instructions to the jury, the court offered twice to “cure it in any[]way you would like for me to do.” Defense counsel declined the offer:

Honestly, I don’t believe a curative instruction is necessary. I just want to on a go-forward basis. It may be more damaging if that instruction was given to other evidence as opposed to this [9-1-1] call. The [9-1-1] call is what it is.

. . . .

I guess what I am saying is I don’t think there has been any damage done. I want to make sure with regard to other evidence there is, that they are giving the impression they consented.

When the jury returned, defense counsel did not request a curative instruction, the trial court did not deliver one, and the trial continued without further discussion of the matter.

On 20 July 2021, the jury returned its verdict finding Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court entered judgment upon the jury’s verdict, sentencing Defendant to a term of

104 to 137 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal in open court.

Discussion

On appeal, Defendant contends that “the trial court prejudicially erred under N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 when it instructed the jury that certain contested facts should be accepted as true pursuant to an erroneous opinion that there was a stipulation as to those contested facts.” We disagree.

I. Preservation

“A statute will automatically preserve an issue for appellate review if the statute either: (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial.” *State v. Austin*, 378 N.C. 272, 276, 861 S.E.2d 523, 527 (2021) (citation and internal quotation marks omitted). N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 “specifically prohibit a trial court judge from expressing an opinion during trial and when instructing the jury.” *Id.* Therefore, “whenever a defendant alleges a trial court made an improper statement by expressing an opinion on the evidence in violation of [N.C. Gen. Stat.] §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions.” *Id.* at 276, 861 S.E.2d at 528 (citation omitted).

II. Standard of Review

“When an alleged statutory violation by the trial court is properly preserved,

either by timely objection or, as in this case, by operation of rule of law, we review for prejudicial error pursuant to [N.C. Gen. Stat.] § 15A-1443(a).” *Id.* at 276–77, 861 S.E.2d at 528.

The defendant bears the burden of showing prejudice under § 15A-1443(a). N.C. Gen. Stat. § 15A-1443(a) (2021). Prejudice is demonstrated where “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *Id.*

Consequently, in the instant case, Defendant must “show that the comments had such a prejudicial effect that there is a reasonable possibility of a different result absent the error.” *Austin*, 378 N.C. at 277, 861 S.E.2d at 528. “When reviewing alleged improper expressions of judicial opinion under this standard, we utilize a totality of the circumstances test to determine whether the trial court’s comments crossed into the realm of impermissible opinion.” *Id.* (citation and internal quotation marks omitted).

III. Analysis

N.C. Gen. Stat. § 15A-1222 prohibits a judge from “express[ing] 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. Section 15A-1232 provides 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.” *Id.* § 15A-1232.

However, “not every impropriety by the trial judge results in prejudicial error.” *Austin*, 378 N.C. at 278, 861 S.E.2d at 529 (citation and internal quotation marks omitted). In this context, prejudicial error occurs when “the jury may reasonably infer from the evidence before it that the trial judge’s action intimated an opinion as to a factual issue, the defendant’s guilt, the weight of the evidence or a witness’s credibility[.]” *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). “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) (citation and internal quotation marks omitted). “Furthermore, a totality of the circumstances test is utilized under which [the] defendant has the burden of showing prejudice.” *Id.* (citation and internal quotation marks omitted).

Here, the alleged opinion of the trial court, given twice to the jury, was the following: “Members of the jury, the State and Defendant . . . have agreed or stipulated that certain facts shall be accepted by you as true without further proof. The agreed facts in this case are as follows: The [9-1-1] call made by [M.E.] on August 25, 2019.” Defendant contends that the trial court’s impermissible opinion was “particularly prejudicial . . . because one of the alleged facts from the [9-1-1] call was a statement from [M.E.] asserting Defendant ‘tried to kill her’”; thus, “the trial court’s improperly expressed opinion on the evidence here completely obliterated Defendant’s intended defense of disputing that he ever formed an intent to kill

[M.E.],” resulting in Defendant being found guilty of the charge of assault with a deadly weapon with intent to kill inflicting serious injury.

Our courts have determined that an incorrect jury instruction regarding a stipulation may express an opinion, in violation of N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 if, under the attendant circumstances, “the trial court’s instruction could have been reasonably interpreted by the jury as a mandate to accept certain disputed facts of th[e] case as true[.]” *State v. Berry*, 235 N.C. App. 496, 505, 761 S.E.2d 700, 706 (2014) (Hunter, J., concurring in part and dissenting in part), *rev’d per curiam for the reasons stated in the dissent*, 368 N.C. 90, 773 S.E.2d 54 (2015).

Here, it is clear that the trial court gave an erroneous instruction. Nonetheless, when viewed under the totality of the circumstances, it is far from clear that the court’s erroneous instruction could reasonably have been interpreted by the jurors as requiring them to accept as fact the statements *made by M.E. in the 9-1-1 call*, rather than accepting as fact that *M.E. made the 9-1-1 call* in question. And it is even less clear that Defendant can demonstrate that he was prejudiced by the improper instruction.

On the charge of assault with a deadly weapon with intent to kill inflicting serious injury, the State was required to prove that Defendant: (1) assaulted M.E.; (2) with a deadly weapon; (3) with the specific intent to kill; and (4) inflicted serious injury. *See, e.g., State v. King*, 343 N.C. 29, 35–36, 468 S.E.2d 232, 237 (1996); *see also* N.C. Gen. Stat. § 14-32(a). Ample evidence was produced of each element of this

charge, including the audio recording of the 9-1-1 call; photographs of M.E.'s injuries; and testimony from M.E., Defendant, and law enforcement officers.

In addition, the trial court repeatedly instructed the jury concerning the State's burden of proving that Defendant intended to kill M.E. Such instructions were not only proper, but mandatory, as the jury was required to find this essential element in order to convict Defendant of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues that the allegedly impermissible "opinion" offered by the trial court in instructing the jury as to the parties' stipulation on the admissibility of certain evidence—namely, the 9-1-1 call—"completely obliterated Defendant's intended defense of disputing that he ever formed an intent to kill [M.E.]."

With regard to the charge of assault with a deadly weapon with intent to kill inflicting serious injury, the court instructed the jury, in pertinent part: "For you to find [D]efendant guilty of this offense, the State must prove . . . beyond a reasonable doubt" that Defendant "had the *specific intent to kill* the victim." (Emphasis added).

The court then instructed the jury:

If you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty to the assault with a deadly weapon with the intent to kill, inflicting serious injury, but must determine whether [D]efendant is guilty of assault with a deadly weapon inflicting serious injury.

The trial court also instructed the jurors that they were "the sole judges of the

weight to be given any evidence.” The evidence of which the jurors were the “sole judges” included the recording of the 9-1-1 call placed on the evening in question in which M.E. stated that Defendant “tried to kill [her].” Moreover, the jurors were “the sole judges of” the credibility of M.E.’s out-of-court statement in the 9-1-1 call that Defendant “tried to kill [her].” At trial, Defendant had an opportunity to cross-examine M.E. about the contents of the 9-1-1 call, and Defendant testified in his own defense that when he picked up the hammer, he “just wanted [M.E.’s] phone. I wanted an answer.”

Finally, we note that after the parties alerted the trial court to its apparent misapprehension regarding the scope of the parties’ stipulation concerning the 9-1-1 call, the trial court offered Defendant at least three opportunities to remedy the mistake, all of which Defendant declined. When the trial court offered to deliver “any curative instruction you would like[,]” defense counsel declined, explaining that he didn’t “believe a curative instruction [wa]s necessary” and that he did not “think there ha[d] been any damage done.” Rather, defense counsel explained, he was making the request “on a go-forward basis[,]” as “[i]t may be more damaging if that instruction was given to other evidence as opposed to this [9-1-1] call. The [9-1-1] call is what it is.” See N.C.R. App. P. 10(a)(1) (requiring a timely objection, request, or motion, and the trial court’s ruling on the same, in order to preserve an issue for appeal); N.C.R. App. P. 10(a)(2) (similar requirement for alleged errors involving jury instructions); *State v. Jones*, 342 N.C. 523, 535–36, 467 S.E.2d 12, 20 (1996) (“Counsel claiming

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error has the duty of showing not only that the ruling was incorrect, but also must provide the trial court with a specific and timely opportunity to rule correctly.”).

For all of these reasons, Defendant has not shown a reasonable possibility of a different result at trial absent the alleged error, as is his burden pursuant to N.C. Gen. Stat. § 15A-1443(a). We therefore conclude that Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges GORE and GRIFFIN concur.

Report per Rule 30(e).