Volume 33 | Number 2 Article 18

2-1-1955

Trial and Appellate Practice -- Improper Comment by Solicitor in Argument to Jury

Walter Lee Horton Jr.

Trial and Appellate Practice—Improper Comment by Solicitor in Argument to Jury

What result should follow where on appeal defendant assigns as error improper comment[1] of a prejudicial nature by the solicitor in his argument to the jury, to which defendant has failed to object until after verdict?

The North Carolina Supreme Court recently[2] re-examined this problem of trial and appellate procedure and reached a decision which invites examination and comment not only as an example of the court's avoidance of an undesirable result, but because of questions raised by the decision as to future appeals under like circumstances.

In the instant case defendant appealed a conviction under the "drunken driving" statute[3] and assigned as error improper comment by the solicitor in his argument. The tenor of the comments was to the effect that the defendant was a wealthy intruder, this status being contrasted with the supposed menial station of the jurors. Further remarks were purely speculative, unfounded, not based on evidence introduced at the trial, and clearly outside the limits of proper summation.[4] There was no objection made at the time, but after the verdict was rendered defendant moved to set it aside because of the prejudicial remarks of the solicitor. The motion was refused, the trial judge asserting that he had endeavored to impress on the jury that it was their duty to give a man from Texas as fair a trial as a man from North Carolina and to give a man of means as fair a trial as a man of no means. The supreme court held that although the defendant's assignment of error could not be sustained because it was based on an exception not taken in apt time, "to sustain this trial below would be a manifest injustice to the defendant's right to a fair

[1] Speaking of the statute of 1844 which expanded the privilege of counsel to allow argument of law as well as of fact to the jury, [now N. C. GEN. STAT. § 84-14 (1950)], Brogden, J. said, "The declaration is broad and comprehensive and early lent itself to a construction by the profession that the field of jury argument was unlimited and boundless. Hence, in the course of time it became necessary for the courts to fence in the field by imposing certain restrictions upon counsel in presenting causes to the jury. These restrictions are reflected in certain legal inhibitions imposed by the courts." Conn v. Seaboard Airline R. R., 201 N. C. 157, 159, 159 S. E. 331, 333 (1931). There is a classification of these restrictions in the *Conn* case. See also Note, 4 N. C. L. REV. 132 (1926); Note, 28 N. C. L. REV. 342 (1949); *Survey of Decisions of North Carolina Supreme Court*, 32 N. C. L. REV. 380, 438 (1954); Notes, 39 VA. L. REV. 85 (1954), 10 LA. L. REV. 486 (1950).

[2] State v. Smith, 240 N. C. 631, 83 S. E. 2d 656 (1954).

[3] N. C. GEN. STAT. § 20-138 (1953).

[4] An example of the statements made is: "Just because he is a man of property and can afford a Lincoln car, are you going to allow him to drive through here and run down your little daughter, or your little son, or your's or your's, or your's? I say, No! You must find him guilty." State v. Smith, 240 N. C. 631, 633, 83 S. E. 2d 656, 657 (1954).

and impartial trial."[5] Accordingly, defendant was awarded a new trial, the court invoking its constitutional power[6] to supervise and control proceedings in the inferior courts.

It is the general rule that objection to improper comment of counsel must be made at some time before verdict in order that it be assigned as error,[7] and the objection if not made is deemed waived and is lost. The rule requiring objection before verdict is grounded in the consideration that objection will call the attention of the presiding judge to the remark and enable him to instruct the jury to disregard the remarks by either interrupting counsel at the time or, in his discretion, by including this instruction in the charge to the jury.[8] To this extent at least, objection after verdict would be superfluous. Another reason usually strongly asserted is that the rule removes the possibility that counsel might speculate on defendant's chances with the jury in contemplation of later assignment of the remarks as error on appeal.[9] The lone exception to this rule recognized in prior decisions applies to those cases wherein the death penalty

[5] State v. Smith, 240 N. C. 631, 636, 83 S. E. 2d 656, 659 (1954).

[6] N. C. CONSTITUTION Art. IV § 8.

[7] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953); State v. Lea, 203 N. C. 13, 164 S. E. 737 (1932); Perry v. Western N. C. R. R., 128 N. C. 471, 39 S. E. 27 (1901); Holly v. Holly, 94 N. C. 96 (1886). For citations to other cases see State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911) and State v. Tyson, 133 N. C. 192, 45 S. E. 838 (1903). The exception must also be made in a regular manner. In State v. Wilson, 158 N. C. 599, 73 S. E. 812 (1912), the trial judge permitted the exception to be made in stating the case, although no exception was noted at the time. The court held that this was too late and that the judge should not permit it to be made in stating the case. *But cf.* Perry v. Western N. C. R. R., 128 N. C. 471, 39 S. E. 27 (1901), where the court considered an exception which had not been clearly made below but allowed by the trial court stating that as the trial court had allowed the exception evidently for the purpose of giving the defendant the fullest opportunity of appeal, the court would examine it in the same spirit in which it was allowed. In the capital cases the remarks may be considered by the court *ex mero motu*, whether presented to it as an exceptive assignment of error or not. State v. Dockery, 238 N. C. 222, 77 S. E. 2d 623 (1953) and cases cited therein. See comment on the *Dockery* case in *Survey of Decisions of North Carolina Supreme Court*, 32 N. C. L. REV. 380, 438 (1954). Where the solicitor agrees that the exception made after verdict and the assignment of error based thereon shall constitute the case on appeal, this meets the requirements of Rule 21, Rules of Practice of Supreme Court, 221 N. C. 544 (1942). State v. Hawley, 229 N. C. 167, 48 S. E. 2d 35 (1948) (capital case).

[8] State v. Suggs, 89 N. C. 527 (1883).

[9] "A party will not be permitted to treat with indifference anything said or done during the trial that may injuriously affect his interests, thus taking the chance of a favorable verdict, and afterwards, when he has lost, assert for the first time that he has been prejudiced by what occurred. His silence will be taken as tacit admission that at the time he thought he was suffering no harm, but perhaps gaining an advantage, and consequently it will be regarded as a waiver of his right afterwards to object. Having been silent when he should have spoken, we will not permit him to speak when by every consideration of fairness he should be silent. We will not give him two chances. The law helps those who are vigilant—not those who sleep upon their rights. He who would save his rights must be prompt in asserting them." State v. Tyson, 133 N. C. 692, 699, 45 S. E. 838, 840 (1903).

may be imposed.[10] In those cases it must appear that the prejudice arising from the remarks of the solicitor is such that its effect could not have been removed from the minds of the jurors by any instruction that the trial judge might have given.[11]

The corollary to these rules is also discussed in the instant case, *e.g.*, the duty of the trial judge where counsel in his argument to the jury exceeds the bounds of propriety.

Even where there is no objection, it is the right and duty of the trial judge to interfere *sua sponte* where counsel's comments are beyond the bounds of propriety and calculated to prejudice the jury.[12] This duty is not absolute, however, and failure to interfere even where the abuse is gross is not reversible error.[13] Here again there is an exception to this general rule in those cases where the death penalty may be imposed.[14] Once objection is made, the duty to interfere may or may not be absolute depending on the nature of the improper comment. It is consistently said that the decision as to whether he will interfere upon objection to the improper remark, or wait and instruct the jury at the time of the charge to disregard the remark is a matter in the discretion of the trial judge.[15] If the comment is mere "cross firing with small shot"[16] or "harmless,"[17] there is discretion as to when the trial judge will interfere. However, if the comment is held to be a "gross abuse of the privilege of counsel and manifestly calculated to prejudice the jury"[18] there is a duty resting on the trial judge to interfere at once when objection is made, stop counsel immediately, and instruct the jury to disregard the remark.[19] Failure to interfere in the latter instance is reversible error, but in the former it is not.[20] It would then appear that where the comment is a gross abuse there is

[10] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953) and cases cited therein. *But cf.* State v. Evans, 177 N. C. 564, 98 S. E. 788 (1919).

[11] See note 10 *supra.*

[12] Cuthrell v. Greene, 229 N. C. 475, 50 S. E. 2d 525 (1948); Lamborn v. Hollingsworth, 195 N. C. 350, 142 S. E. 19 (1928); Forbes v. Harrison, 181 N. C. 461, 107 S. E. 19 (1921); State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1910); Cawfield v. The Asheville Street R. R., 111 N. C. 597, 16 S. E. 703 (1892).

[13] See note 12 *supra.*

[14] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953) and cases cited therein.

[15] State v. Bowen, 230 N. C. 710, 55 S. E. 2d 466 (1949); State v. Brackett, 218 N. C. 369, 11 S. E. 2d 146 (1940); State v. Tucker, 190 N. C. 708, 130 S. E. 72 (1925); State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911); State v. Tyson, 133 N. C. 192, 45 S. E. 838 (1903).

[16] State v. Underwood, 77 N. C. 502, 504 (1877).

[17] State v. Compo, 233 N. C. 79, 62 S. E. 2d 632 (1953).

[18] State v. Tyson, 133 N. C. 192, 194, 45 S. E. 838, 839 (1903).

[19] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953); State v. Tucker, 190 N. C. 708, 130 S. E. 721 (1925); State v. Peterson, 149 N. C. 533, 63 S. E. 87 (1908); Jenkins v. The North Carolina Ore Dressing Co., 65 N. C. 563 (1871).

[20] See note 19 *supra.*

no discretion,[21] and further, that when the court decides that the comment is not prejudicial but harmless, failure of the trial judge to act at any time is not reversible error.[22] The amount of interference necessary upon objection will vary with the nature of the remark.[23]

The burden resting on defendant's counsel to protect and preserve the legal rights of his client is shifted upon objection to the trial judge,[24] whose duty it then becomes to protect the defendant or the prejudiced party. This protection is ostensibly available whether objection is made or not, as there is a right and duty resting in the trial judge to interfere at any time counsel "travels outside the record"[25] or makes unfair comment which is prejudicial. As has been said, however, it is discretionary with the trial judge as to whether he chooses to assert this right or exercise this duty without objection. But, might failure to interfere without objection be reversible error? Except in the death cases the court has not laid down any tests for deciding this question but has made only general statements of a prospective nature.[26] Assuming that objectionable comment inconsistent with orderly justice would be subject to the trial judge's immediate interference and expurgation, it becomes apparent that the area of

[21] See note 19 *supra.*

[22] State v. Bowen, 230 N. C. 710, 55 S. E. 2d 466 (1949); Maney v. Greenwood, 182 N. C. 579, 109 S. E. 636 (1921).

[23] Ordinarily the degree of interference rests in the discretion of the court. Maney v. Greenwood, 182 N. C. 579, 109 S. E. 636 (1921); State v. Underwood, 77 N. C. 302 (1877). Where the remark is harmless or not prejudicial under the circumstances, interference sufficient to satisfy the requirement may be minimal. State v. Underwood, 77 N. C. 302 (1877) (The court said it was not clear from the record what the trial judge said or whether it was heard by the jury, but there was no prejudice at any rate). It may amount to no more than merely stopping counsel. State v. McCourry, 128 N. C. 594, 38 S. E. 883 (1901) (statement by trial judge that he did not remember any such evidence). See also State v. Rogers, 94 N. C. 860 (1886); Cannon v. Morris, 81 N. C. 139 (1879). *Cf.* State v. Russell, 233 N. C. 487, 64 S. E. 2d 579 (1951); State v. Compo, 233 N. C. 79, 62 S. E. 2d 579 (1951); State v. Correll, 229 N. C. 640, 50 S. E. 2d 117 (1948); State v. Brackett, 218 N. C. 369, 11 S. E. 2d 146 (1940). Where the abuse is gross, stronger interference is required. The language should be explicit, positive, and peremptory. Massey v. Alston, 173 N. C. 215, 91 S. E. 964 (1917); State v. Thompson, 217 N. C. 698, 9 S. E. 2d 375 (1948) (Trial judge told jury that he had no recollection of evidence commented upon by counsel but that the jury would have to depend on their own recollection. *Held* insufficient). Nor is explanation by the solicitor sufficient. State v. Buchanan, 216 N. C. 709, 6 S. E. 2d 497 (1939). *Cf.* State v. Pfifer, 197 N. C. 729, 150 S. E. 353 (1920).

[24] State v. Green, 197 N. C. 624, 150 S. E. 18 (1929); Lamborn v. Hollingsworth, 195 N. C. 350, 142 S. E. 19 (1928); Massey v. Alston, 173 N. C. 215, 91 S. E. 964 (1917).

[25] Cuthrell v. Greene, 229 N. C. 475, 481, 50 S. E. 2d 525, 529 (1948).

[26] "There may be cases where it would be the duty of the judge to stop the counsel, when his remarks and conduct are in violation of all rules of decorum and propriety that should be observed in the administration of justice when nothing the judge could say in his charge to the jury could rectify the wrong or efface the prejudice produced." Holly v. Holly, 94 N. C. 96, 98 (1886). *Cf.* State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953).

inquiry is not well defined and the distinguishing line between what is prejudicial and merely harmless is wavering and at times indistinguishable.[27] The remark may be prejudicial on its face but allowable within the framework of the case.[28] Accordingly, the nature of the wrong for which the defendant is being prosecuted and his apparent guilt or innocence may affect the evaluation of the comment,[29] as may factors most apparent to the trial judge at the time.[30] It would seem that the trial judge is in the best position properly to make this evaluation but the conclusion is easily drawn that the evaluation is actually made after the appeal when the court sitting in calm review decides whether the comment was gross, or whether the trial judge has sufficiently removed the effect of the prejudicial remark. The court has assumed the responsibility for making the evaluation through the rule that failure of the trial judge to interfere at once upon objection is reversible error where the abuse of counsel is gross.[31] There is no discretion in the trial judge unless the comment is clearly harmless.[32] Thus, there would seem to be no real importance attached to the discretion, as error in its exercise is not reversible error. Whatever the operation of the rule, however, it cannot be denied that it affords the defendant or prejudiced party the maximum protection of the court.

The court in avoiding the general rule as to objection before verdict in the instant case has deviated from a clear line of authority.[33]

[27] *Compare* Devries v. Phillips, 63 N. C. 54 (1868) *with* Maney v. Greenwood, 182 N. C. 579, 109 S. E. 636 (1921).

[28] "Gentlemen, you are dealing with a small time racketeering gangster" held not prejudicial in State v. Correll, 229 N. C. 640, 642, 50 S. E. 2d 717, 718 (1948). "The time has come when the decent people in North Carolina must stand up and defend the virtue and integrity of the fireside, and home against the vicious assaults of human vultures and wolves" held not prejudicial in State v. Meares, 182 N. C. 809, 811, 108 S. E. 477, 479 (1921). See also State v. Steele, 190 N. C. 507, 130 S. E. 308 (1925).

[29] *Compare* State v. McNair, 204 N. C. 106, 169 S. E. 184 (1933); State v. Lea, 203 N. C. 13, 184 S. E. 737 (1932); State v. Ballard, 191 N. C. 122, 131 S. E. 370 (1925); State v. Saleeby, 183 N. C. 740, 110 S. E. 844 (1922). Also see cases cited in footnote 24 and contrast these cases and the cases cited above with State v. Thompson, 217 N. C. 698, 9 S. E. 2d 375 (1940); State v. Pfifer, 197 N. C. 729, 150 S. E. 353 (1929); State v. Tucker, 190 N. C. 708, 130 S. E. 720 (1925).

[30] Factors apparent to the trial judge: (1) Did defendant "open the door" to the argument complained of by the opposing counsel? (2) Did the prosecutor or counsel making the comment "have" the jury at the time? (3) What was the appearance and manner of the offending counsel when the statement was made? (4) Tone of voice. (5) Prior conduct of prosecution and defense in examination and argument. (6) Quality of the jury.

[31] State v. Bowen, 230 N. C. 710, 55 S. E. 2d 466 (1949); State v. Brackett, 218 N. C. 369, 11 S. E. 2d 146 (1940); State v. Tucker, 190 N. C. 708, 130 S. E. 72 (1925); State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911); State v. Tyson, 133 N. C. 192, 45 S. E. 838 (1903).

[32] State v. Compo, 233 N. C. 79, 62 S. E. 2d 632 (1953); State v. Underwood, 77 N. C. 502 (1877).

[33] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953); State v. Lea,

This rule was applied indiscriminately in the capital and non-capital cases before the exception in the latter cases was recognized.[34] Whether the court in recognizing this error *ex mero motu* intended to extend the rule as applied in the capital cases to the non-capital cases is questionable. There is no rational basis for assuming this to be true on the authority of this decision alone, and those cases where the court has indicated that it will recognize the defect *ex mero motu* do not afford a basis for reaching that conclusion.[35] In the capital cases as indicated *supra,* the reason for the exception to the general rule is that there is serious doubt that the prejudice could be removed even if the jurors were instructed to disregard the extraneous remarks. This would not seem to be the case in the decision under consideration and no use was made of the test. It might well be inferred, however, from the fact that the court felt that the instruction here was insufficient,[36] in the light of the instruction given, that such was the case. There is no reason why the jurors might not be as strongly prejudiced in a non-capital as a capital case, but the positive pronouncement in the latter is in accord with the rigid scrutiny applied in capital cases where the decision is cloaked with such finality. Here the error seems to be that the trial judge, having recognized the error, did not take sufficient action to remove it, the charge not going far enough in the opinion of the court. Earlier cases make it clear that the sufficiency of the corrective action is also within the discretion of the trial court.[37] The inference could be drawn that there had been an abuse of discretion by the trial judge, but this discretion is not reviewed, apparently for the reason that the trial judge acted without objection to the improper comments.

---

203 N. C. 13, 164 S. E. 737 (1932); Perry v. Western N. C. R. R., 128 N. C. 471, 39 S. E. 27 (1901); Holly v. Holly, 94 N. C. 96 (1886). For citations to other cases see State v. Davenport, 156 N. C. 596, 72 S. E. 7 (1911); and State v. Tyson, 133 N. C. 192, 45 S. E. 838 (1903).

[34] *Compare* State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953) *with* State v. Steele, 190 N. C. 507, 130 S. E. 308 (1925).

[35] State v. Dockery, 238 N. C. 222, 77 S. E. 2d 632 (1953); State v. Hawley, 229 N. C. 167, 48 S. E. 2d 35 (1948); State v. Little, 228 N. C. 417, 45 S. E. 2d 542 (1947); State v. Isaacs, 225 N. C. 310, 34 S. E. 2d 410 (1945).

[36] There were two dissents in the instant case on the point that the charge of the trial judge was sufficient to allay any prejudice which might have been roused by the remarks of the solicitor. Bobbitt, J., wrote the dissenting opinion in which Johnson, J., concurred, arguing strongly that conceding the rules in the majority opinion were correct, this was not a case for the application of the remedy applied as the charge to the jury was sufficient. Higgins, J., dissented on the point that the case was within the general rule and that the exception came too late. Compare with the charge given in the instant case those approved in State v. Brackett, 218 N. C. 369, 11 S. E. 2d 146 (1940); State v. McNair, 204 N. C. 106, 169 S. E. 184 (1933); State v. Murdock, 183 N. C. 779, 1 S. E. 610 (1922).

[37] Maney v. Greenwood, 182 N. C. 579, 109 S. E. 636 (1921); State v. Underwood, 77 N. C. 302 (1877).

Attempting to reason from the rule applied in those cases where the trial judge charges the jury *ex mero motu,* but where there is reversible error in the charge, throws no light on this matter.[38] An instruction to the jury to disregard the comment of counsel where there is no abuse must be specially requested regardless of whether there is or is not objection at the time.[39] This would indicate that improper comment is not a matter of substance for which error might be assigned if the charge were insufficient, but this particular point has not been presented to the court for decision.

It would seem that the defendant in the instant case was extremely fortunate in having appealed with a favorable set of circumstances. The examination of the assignment of error was precluded under the general rule, as the exception came after verdict. On the other hand, the comment had been recognized below and an attempt made to remove its effect. It was also manifest that the remarks were improper, and obviously prejudicial. The result would seem to indicate a balancing of a desire for the maintainance of regularity of procedural rules against circumstances which the court felt required rectification, although prevented from doing so directly by procedural considerations. In this situation the court resorted to the broader constitutional remedy in the interest of a fair trial.[40]

[38] There is error in failing to charge on a substantial feature of the case regardless of whether a request is made for special instructions. State v. Puckett, 211 N. C. 66, 189 S. E. 183 (1937); State v. Ellis, 203 N. C. 836, 167 S. E. 67 (1933). The rule is generally stated that failure to charge on substantive features of the case arising on the evidence is prejudicial even in the absence of request for special instructions. But if subordinate elaboration is desired, and the instruction is proper as far as it goes, a party deeming more specific instruction necessary must request it. Thus, failure to charge on matters which the court would consider subordinate elaboration would not be error. State v. Ardrey, 232 N. C. 721, 62 S. E. 2d 53 (1950); McCall v. Glouster Lumber Co., 196 N. C. 597, 146 S. E. 579 (1929). This would seem to indicate that, excluding the capital cases, if counsel fails to object to the improper remark, the trial judge would not be under a duty to charge the jury and the failure to do so would not be reversible error. Upon objection, where the abuse is gross and manifestly calculated to prejudice the jury there is no necessity that the trial judge charge on the matter, having already instructed the jury to disregard the statement. If the trial judge, therefore, attempted to charge the jury *ex mero motu,* and the charge were insufficient, no error would be apparent as there is no substantial matter, but subordinate elaboration. *Cf.* State v. Steele, 190 N. C. 507, 130 S. E. 308 (1925); State v. O'Neal, 29 N. C. 251 (1847).

[39] See note 38 *supra.*

[40] "The Supreme Court shall have jurisdiction to review upon appeal, any decision of the courts below, upon any matter of law or legal inference. . . , and the court shall have the power to issue any remedial writ necessary to give it general supervision and control over the proceedings in the inferior courts." N. C. CONSTITUTION Art. IV § 8. This power, as applied in the instant case, has been rarely invoked, and those instances in which it was invoked seemed to present situations where all other legal mechanics were unavailable to rectify the conflict in opposing rules to the detriment of the party clearly entitled to relief. In State v. Cochran, 230 N. C. 523, 53 S. E. 2d 663 (1949), the defendant was clearly innocent of any violation of the law. This case is

As to the weight counsel might give this case in appealing under like circumstances, it would seem that there would have to be an extreme abuse of the privilege of counsel in order to elicit this same response from the court.

The field for speculation is narrow and marked by many obstacles, and counsel who takes the risk of not interposing objection in apt time is toying with his client's chances of receiving a favorable jury verdict, as well as waiving his right to appeal on the basis of the remarks if the verdict is an adverse one.

WALTER LEE HORTON, JR.

---

cited by the court in the instant case. See also Elledge v. Welch, 238 N. C. 61, 76 S. E. 2d 340 (1953) (Error appeared as to one defendant who had not appealed. Nevertheless, since the record showed that she was incompetent, her rights were committed to the care of the court. In the exercise of the supervisory power, the court took jurisdiction in her behalf). In Ange v. Ange, 235 N. C. 506, 71 S. E. 2d 19 (1952) even though the appeal under consideration was subject to dismissal, the court took jurisdiction to correct error in the judgment. In the following cases, however, the court refused to alter decisions, stating that it would only consider questions of law or legal inference, although it would appear that these cases present as strong a situation for the exercise of the supervisory power as the instant case: Alston v. Southern Ry. Co., 207 N. C. 114, 176 S. E. 922 (1934) (Refused to alter decision where plaintiff's attorney had signed a release to the defendant without authority); State v. Lawrence, 199 N. C. 481, 154 S. E. 741 (1930) (no review of trial judge's discretion in allowing guards to be stationed outside the courtroom while the trial was in progress).