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Topic:
PREJUDICIAL EXPRESSIONS
OF OPINION BY JUDGE

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PREJUDICIAL EXPRESSIONS OF OPINION BY JUDGE DURING TRIAL (NONINSTRUCTIONAL)

Some Recent Cases[1]

C. E. Hinsdale

> [When the trial judge expresses an opinion on the facts] ...it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation....
>
> Whether the conduct or language of the judge amounts to an expression of his opinion on the facts is to be determined by its probable meaning to the jury, and not by the motive of the judge.
>
> -Judge Sam Ervin, Jr.
> in State v. Canipe,
> 240 N.C. 60 (1954)

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1. From N.C. Reports, Vols. 250-290 (p. 555): N.C. App. Reports, Vols. 1-30 (p. 597).

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G.S. 1-180 states: "No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven...." [Rule 51(a) of the Rules of Civil Procedure, G.S. 1A-1, applies the same standard to civil cases.] This is the most troublesome part of the most troublesome statute for trial judges. New trials are granted more frequently for violations of this language than for any other error.

Case law has extended the prohibition beyond the charge to expressions of opinion by the judge at any time during the trial. State v. Carriker, 287 N.C. 530 (1975); State v. Holden, 280 N.C. 426 (1972); State v. Canipe, supra; and In re Will of Bartlett, 235 N.C. 489 (1952). This paper will examine a number of the most recent cases interpreting this extension of G.S. 1-180 [and Rule 51(a)].

A. INTERFERENCE WITH EXAMINATION OF WITNESSES

A judge is entitled to question a witness in order to clarify his testimony, but numerous cases indicate that the limits of clarification can be narrow, and questions--or objections--from the bench can quickly enter the area of opinion expression that is forbidden by G.S. 1-180. An aggravated case is State v. Steele, 23 N.C. App. 524 (1974), in which the judge had intervened in the taking of testimony with questions or comments over 100 times. In addition, some of his comments (unquoted) had tended to belittle and humiliate defense counsel in the eyes of the jury. Finally, the judge had made and sustained objections on his own to defense testimony, assuming the role of solicitor. The appellate court held that each of these actions amounted to an expression of opinion, in violation of G.S. 1-180. In State v. Bond, 20 N.C. App. 128 (1973), the judge had asked the defendant and several of his witnesses numerous questions of an impeaching nature. Samples of this interrogation, too long to be quoted here, are set forth in the opinion and are a clear example of how not to ask "clarifying" questions.

Volume 18 of the Court of Appeals Reports contains three instances of prejudicial error committed by the trial judge in questioning the defendant or his witness: State v. Pinkham, 18 N.C. App. 130 (1973); State v. Sharpe, 18 N.C. App. 136 (1973); and State v. Battle, 18 N.C. App. 256 (1973). While G.S. 1-180 is cited in only one of these cases, it is clear from quoted passages of the judges' interrogation of one defendant and two defense witnesses that the examinations tended to impeach the witnesses and thus amounted to an expression of opinion as to their credibility, in violation of that statute.

In State v. Medlin, 15 N.C. App. 434 (1972), a drunk-driving case, the judge had objected to several legitimate questions by defense counsel of State's witnesses and had asked questions of the breathalyzer operator designed to bolster the witness's testimony as to his expertness and reliability. Cumulatively, the court said, citing G.S. 1-180, these departures from the "cold neutrality of the law" were prejudicial.

In State v. Lemmond, 12 N.C. App. 128 (1971), the judge had sustained his own objection to sixteen questions asked by defense counsel of two defense witnesses. Recognizing that a trial judge may exclude inadmissible evidence on his own motion, even if there is no objection, the court nevertheless felt that the judge in this case had gone too far. (In addition, on two occasions the judge, after sustaining his own objection, had said to the defense counsel, in the presence of the jury, "You know better than that.") This indicated, cumulatively, an antagonistic attitude toward the defense forbidden by G.S. 1-180. Worrell v. Hennis, 12 N.C. App. 275 (1971), a civil case, is to the same effect.

Another civil case is Southwire v. Long, 12 N.C. App. 335 (1971), in which the judge was held to have gone far beyond mere clarification in a prolonged examination of plaintiff and his witnesses. Several pages of the judge's questions directed to the plaintiff are set forth as "illustrative" in the opinion. Following the quoted matter, the court disposed of the case in one sentence, without citing either statute or case law, obviously considering the illustrative quotation as overwhelmingly persuasive of prejudice.

In State v. Lowery, 12 N.C. App. 538 (1971), the judge had asked one defendant only one question ("Mr. Lowery, at the time you fired your shotgun you knew there was someone in the Bertha Leslie Club, didn't you?") and another defendant only five (one was "What have you been tried and convicted for?"); the court held prejudicial error.

In State v. Dickerson, 6 N.C. App. 131 (1969), the judge had supplemented the solicitor's cross-examination of the defendant as to his previous convictions by a series of questions of his own on the subject. The court found prejudicial error. Apparently even a single question by the judge on this subject can be impeaching or discrediting, and hence fatal.

In State v. McEachern, 283 N.C. 57 (1973), a single question by the judge ("--you were in the car when you were raped?") was held to express an opinion by the judge as to the defendant's guilt, so that a new trial was granted. (Two dissenting judges were of the opinion that the question was asked merely for clarification of where the alleged rape took place. This case contained another prejudicial error, making it easier for the majority to reach the decision it did.)

In McEachern, the majority relied heavily on State v. Oakley, 210 N.C. 206 (1936), a burglary case in which the trial judge asked a prosecuting witness, "You tracked the defendant to whose house?" There was no evidence in the case linking the defendant to the tracks, and although the judge immediately after asking the question instructed the jury that he had not meant to say "defendant," the Supreme Court found prejudice and awarded a new trial. The McEachern Court distinguished Oakley from State v. Cureton, 215 N.C. 778, (1939), in which the Court found no prejudice in a homicide case when the judge asked a witness, "When did he [defendant] shoot him [deceased] the last time?" The dissenting justices in the McEachern case cited Cureton in support of

their position that the quoted question did not prejudicially portray to the jury a forbidden opinion. The McEachern and Oakley cases indicate the extreme caution with which a judge must phrase a "clarifying" question of a witness, especially a prosecuting witness or the defendant in a criminal case.

In State v. Lynch, 279 N.C. 1 (1971), the judge had instructed the court reporter to enter "overruled" in the record after every objection made by defense counsel. Thirty-eight such entries followed that the judge did not rule on individually. The Supreme Court held that the judge's ruling "...belittled both defendant's cause and his attorney in the eyes of the jury. The clear implication was that there could be no merit in any objection defendant's counsel might make or defendant was so obviously guilty his objections were a waste of the court's time." A new trial was ordered.

In State v. Lea, 259 N.C. 398 (1963), the judge had interrupted the solicitor and defense counsel about ten times to propound at least fifty questions to various witnesses. The per curiam opinion noted that most of the questions would have been proper if asked by the solicitor, but nevertheless granted a new trial, citing as authority State v. Peters, 253 N.C. 331 (1960), another per curiam opinion involving substantially similar facts.

Of course, not all cases in which a question has been raised about the propriety of the judge's questioning of parties, defendants or witnesses have been decided against the judge. In State v. Freeman, 280 N.C. 622 (1972), for example, the judge had asked eighteen questions of two state's witnesses and nine questions of the defendant. The Supreme Court, without quoting the question, ruled that each question was obviously designed to clarify the witness's testimony. It cited with approval State v. Colson, 274 N.C. 295 (1968), in which the Court affirmed a duty on the part of the judge on occasion to see that the whole truth and nothing but the truth is laid before the jury, provided that his questions by their tenor, frequency, or persistence do not ever tend to convey to the jury in any manner an impression of judicial "leaning."

In State v. Case, 11 N.C. App. 203 (1971), the judge had questioned a State's witness thirty-four times in less than a day, causing some repetition of testimony, but no prejudice was found on appeal. The defense sought to invoke the "cumulative error" doctrine, but the court merely found the repetitious testimony "clarifying." See also State v. Williams, 17 N.C. App. 31 (1972), and State v. Tennyson, 17 N.C. App. 349 (1973).

In State v. White, 271 N.C. 391 (1967), the judge had excluded the testimony of the defendant who sought to explain a prior conviction. The judge said, "...we can be here 60 days trying all this stuff." Upon objection to his remark, he promptly told the jury not to consider it. The Court found that the instruction cured the error, if any.

For additional cases on this topic, see 1 Stansbury, North Carolina Evidence § 37 (Brandis ed. 1973).

B. QUESTIONING OF PROSPECTIVE JURORS

In State v. McSwain, 15 N.C. App. 675 (1972), the judge had asked eight prospective jurors in a capital case a series of probing questions concerning their unwillingness to impose the death sentence. Although each juror so questioned was excused, and although only a verdict of voluntary manslaughter was returned, the Court of Appeals found prejudice in the judge's questioning because it took place before other prospective jurors and there was an issue as to the defendant's sanity. The court felt that the jurors may have been improperly swayed on the insanity issue by the judge's leaning toward guilty, as implied in his questions.

State v. Canipe, 240 N.C. 60 (1954), quoted in the introduction to this paper, is a capital case in which the judge rigorously interrogated various prospective jurors as to the strength of their convictions against the death penalty. Although he thereafter explained to the jury that he had not meant to compare the case at issue with several celebrated homicide cases he had referred to in his questioning, the Court said such explanation could not cure the prejudicial impression conveyed by the questioning and awarded a new trial.

C. COMMENTS AND RULINGS OF THE JUDGE

State v. Johnson, 20 N.C. App. 699 (1974), is the most recent example of prejudicial disparagement of a witness by a judge. A defendant's witness in a trial for dissemination of obscenity in a public place had been examined by the judge as to his education and knowledge of literature. Apparently displeased with the answers he was receiving, the judge remarked: "He [the witness] really doesn't know anything and he thinks that he does." The court of appeals said: "Regardless of the motive or intent of the trial judge in making his comments in the instant case, these remarks tend to ridicule and belittle the witness ... impair his credibility, and prejudice defendant's case," and awarded a new trial.

State v. Frazier, 278 N.C. 458 (1971), is perhaps the leading case on the disparagement of witnesses, counsel, and the defendant by the trial judge. Five instances were brought to the Supreme Court's attention. In the first instance, the judge had made a sarcastic remark to the defense counsel; the Court deemed it "gratuitous and unnecessary" but not prejudicial. In the second instance, the judge had admonished the defendant-witness not to "come out with any short answers in my court"; the Court found the judge's language not the wisest choice but not reversible error. In the third instance, the judge on his own motion had objected to a question that defense counsel asked a defendant; the Court apparently felt the manner of ruling improper but did not specifically find prejudice. In the fourth instance, the judge had made a comment

tending to ridicule a witness (wife of a defendant); the Court felt the comment tended to impair the witness's credibility but did not specifically find prejudice. In the fifth instance, the judge had upheld a State's objection to evidence on grounds of repetitiousness, and the Court agreed with him. The Court then ruled that any one of the five remarks might not, standing alone, be prejudicial, but it held that cumulatively they, again, violated the "cold neutrality of the law," and it further held that the tenor, frequency, and content of the judge's remarks portrayed an antagonistic attitude on his part toward the defendants. A new trial was ordered. The case is valuable for its citations to cases that discuss the duty of the judge to be absolutely neutral and impartial in all his remarks and rulings.

In State v. McBryde, 270 N.C. 776 (1967), as a leading defense witness stepped from the witness stand, the judge had told him in the presence of the jury not to leave the courtroom. Shortly thereafter, the judge and the sheriff conferred in whispers, and the witness (having been arrested outside the courtroom) was placed in custody by the sheriff in the prisoner's box in plain view of the jury. The Supreme Court held that this action prejudicially weakened the witness's testimony in the eyes of the jury and granted a new trial. In causing the arrest of the witness in this manner, the judge expressed an opinion to the jury as to the witness's credibility.

In State v. Hopson, 265 N.C. 341 (1965), the defense counsel had objected to cross-examination of the defendant as to an out-of-state offense, since according to the witness there had been no conviction. The judge said, "...I think it is ...unreasonable for a man to be sent to jail or prison ...for nothing." The Supreme Court granted a new trial for this expression of opinion by the judge as to the defendant's credibility.

In a civil case, Petroleum Corporation v. Oil Company, 255 N.C. 167 (1961), the plaintiff had tendered a witness to give cumulative testimony but the judge was "of the opinion that it had been sufficiently gone into...." The Court held this to be a prejudicial expression of opinion as to the weight and sufficiency of the evidence.

In a case involving receipt of stolen goods, the judge interrupted a State's witness to ask, "Do you know what he did with the stuff?" The Court found error, citing McEachern, supra. In the same case, the judge had "belittled" defense counsel with several remarks--among them: "If you think I am going to listen to instructions while you argue to the jury, you are crazy." Putting all this together, the Court found that the cumulative effect was prejudicial and granted a new trial. State v. Hewitt, 19 N.C. App. 666 (1973).

In State v. Byrd, 10 N.C. App. 56 (1970), the judge had told the defendant, who was unrepresented by counsel, in the jury's hearing that if he (the judge) "...had some witnesses who saw what you say they saw, I would have them here." The Court found that this amounted to an expression of opinion as to the defendant's credibility and granted a new trial.

In State v. Carter, 268 N.C. 648 (1966), the judge had conducted the voir dire as to the admissibility of an incriminating statement made by the defendant and announced in the jury's presence that he found the statement to have been made voluntarily. This finding assumed that the statement had been made, and thus usurped a function of the jury. This inadvertence was held to be prejudicial and not curable by instructions to disregard it. To the same effect is State v. Walker, 266 N.C. 269 (1965).

In a malpractice case, Galloway v. Lawrence, 266 N.C. 245 (1965), the judge had announced in the jury's presence that the defendant, a prospective witness, was qualified as an "expert in surgery." The Court found prejudicial error because the witness was the defendant whose very expertness was in issue. (There is no error in qualifying a witness before the jury as an expert if his expertise in no way deals with an issue before the jury. State v. Frazier, 280 N.C. 181 (1971); Speizman Co. v. Williamson, 12 N.C. App. 297 (1971)).

In State v. Williamson, 250 N.C. 204 (1959), defendant had been charged with various violations of the liquor laws. A State's witness testified that he had purchased whisky at the defendant's house, where he saw girls sitting on men's laps. In overruling defense counsel's objection to testimony concerning girls, the judge said, "They go hand in hand." The Court found this ruling prejudicial and awarded a new trial, stating that it amounted to an expression of opinion that a display of amorousness was proof of illicit liquor dealings. In the same case, the judge expressed another prejudicial opinion when, at the close of the evidence, in the jury's presence and before arguments of counsel, he announced that he was going to give a peremptory instruction that if the jurors believed the evidence they should find the defendant guilty. In fact, the judge never gave a peremptory instruction, so the premature announcement amounted to a statement by the judge that in his opinion the evidence was sufficient for conviction and that a jury argument by the defense counsel would be useless.[2]

Sometimes the trial judge makes an injudicious comment that indicates not bias or antagonism but frustration or pique, and the appellate court, finding no prejudice, rules in his favor. Most often these cases involve an exchange with the defense counsel. On appeal, the judge's remarks may be characterized as "not felicitious," or inappropriate, or ill advised, or undignified, or unflattering, or unnecessary, but the conviction is upheld. Examples are State v. Davis, 266 N.C. 633 (1966); State v. Faust, 254 N.C. 101 (1961) (a good collection of cases); State v. Davis, 253 N.C. 86 (1960); State v. Harper, 21 N.C. App. 30 (1974); Little v. Grubb, 12 N.C. App. 894 (1971); and State v. McPherson, 7 N.C. App. 160 (1960).

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2. For more cases on expressions of opinion in rulings, see 1 Stansbury, N.C. Evidence, § 28 (Brandis ed. 1973).

D. COMMENTS BETWEEN TRIALS

In State v. Carriker, 287 N.C. 530 (1975), in an earlier marijuana case the judge, in the presence of the jury panel, had said that marijuana is a habit-forming drug and once the habit is formed, "anything goes"--leading to robbery or anything else to get money--and many so charged "get religion" when they come into the courtroom. The next case called (Carriker) included a charge of a felonious distribution of marijuana. The defense counsel moved for a continuance. Denial of the motion resulted in a new trial on appeal. The Supreme Court held that G.S. 1-180 and the letter of G.S. 1-180.1 (the latter prohibiting comment by the judge upon a verdict) were inapplicable but the spirit of fairness emanating from G.S. 1-180.1 required that the defendant be granted a continuance in order to obtain an untainted jury. State v. Brown, 29 N.C. App. 391 (1976), is substantially similar, the forbidden comment of the judge having been "I have no sympathy for drug users."

In State v. Dark, 22 N.C. App. 566 (1974), cert. den. 285 N.C. 760 (1974), the judge, in the jury's presence, had dismissed a felony charge, telling the jury that he did not feel like wasting their time by submitting a case he did not believe would result in conviction. Immediately thereafter, defendant Dark's case for drunk driving was called. After conviction, defense counsel on appeal argued that the judge committed prejudicial error in violation of G.S. 1-180 in so addressing the jury in the preceding case in the presence of the jury panel. The court, holding that G.S. 1-180 applies only to trials and a trial does not start until prospective jurors are called and examined, found no error. It also stated that defendant's remedy, if he thought he had been prejudiced, had been to ask for a continuance or a special venire before the trial began--to assert error for the first time on appeal was too late. The decision leaves open the possibility that, had a motion for continuance or a special venire been made and denied, error might have been found upon appeal even though no violation of G.S. 1-180 had occurred. The court could have done this under the "spirit of fairness" doctrine later set out in the Carriker case, supra (anti-marijuana-user remarks made by judge between two marijuana-user trials).

In a substantially similar case, State v. Hiatt, 3 N.C. App. 584 (1969), the judge had discharged the jury without comment in the presence of the entire panel, apparently because it had acquitted a drunk-driving defendant in the previous case. The succeeding case was also a drunk-driving case, and the defense asked for a continuance, citing G.S. 1-180.1, which prohibits comment on a jury verdict in the presence of the jury panel. The judge's denial of the motion was upheld on appeal; the court held that the judge has the power to discharge a jury at any time and is free to discharge it in the presence of the panel, at least if he does not comment. Again, the court might have initiated the "spirit of fairness" doctrine later enunciated by the Supreme Court in the Carriker case.

No case has been found in which the words (rather than the spirit) of G.S. 1-180.1 have been used to grant a new trial.[3]

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3. For N.C. cases antedating 1959 on this overall topic, see Strong, N.C. Index 2d, *Trial* § 10, and *Criminal Law* § 99.