The Things Judges Say! Judges' Comments in Jury Trials

In *Lacey v. Kirk*, (COA14-688; Dec. 31, 2014), the Court of Appeals considered whether a judge's statements in the jury's presence entitled defendant to a new trial. Defendant took issue with several things the judge said while defendant testified, including instructing her to "tell the truth" when she was evasive; that she had "a problem" if she couldn't prove a point without hearsay; and to "answer the question first" before explaining. The court held that—considered cumulatively and in context—these comments were an attempt to aid the flow of evidence and were not prejudicial. Also, the judge's instructions to counsel to move faster and avoid repetition "exhibited a certain degree of impatience" but were "meted out" to both sides and were appropriate to preserve court time. *Lacey* is a fresh example our courts' basic analysis of judge statements in front of a jury: Neutrality is paramount, but context and cumulative impact determine whether questionable remarks taint a party's case.

Neutrality required. Improper comments by a judge in front of the jury are an irregularity under Rule of Civil Procedure 59(a)(1) and, when prejudicial, may require a new trial. Judges are prohibited from making certain statements that weigh more in one party's favor than the other: "Every litigant in the courts of this State is entitled by the law to have his cause considered with the cold neutrality of the impartial judge[.]" Russell v. Town of Morehead City, 90 N.C. App. 675, 679 (1988). Rule of Civil Procedure 51(a) states that "[i]n charging the jury…, a judge shall not give an opinion as to whether or not a fact is fully or sufficiently proved[.]" A new trial was required over paternity where the judge implied that the jury should give more weight to the mother's testimony than to defendant's witnesses, *Searcy v. Justice*, 20 N.C. App. 559, 562 (1974), and in a tort case where the charge referred to a witness as "of perhaps weak mentality" though nothing in evidence related to her mental condition, *Burkey v. Kornegay*, 261 N.C. 513, 513 (1964). New trials were ordered when the judge suggested a jury give more weight to defendant's appraisers than plaintiff's lay witnesses, *State Highway Comm'n v. Ferry*, 19 N.C. App. 332, 336, (1973), and more weight to one witness than they "would to another witness," *In Re Holland's Will*, 16 N.C. App. 398, 399–400 (1972).

Applies to whole trial. Neutrality is required during the entire trial, not just the charge conference. *Russell*, 90 N.C. App. at 680; Saintsing v. Taylor, 57 N.C. App. 467, 472 (1982). "Juries entertain great respect for [the judge's] opinion, and are easily influenced by any suggestion coming from him. As a result, he must abstain from conduct or language which tends to discredit or prejudice (any party) or his cause with the jury." *Searcy*, 20 N.C. App. at 561. Where defendants were town officers, a judge made numerous disparaging remarks about public officials:

- When asked to excuse some defendants to attend town business and a ship's dedication, he replied, "It would suit me just fine if they never come back" and "All politicians go to all meetings. I imagine they will have a pigpicking on the grounds."
- When a witness testified to seeing public employees on disputed property, the judge

declared, “Typical, public service workers sitting around doing nothing.”
- Before the charge, he gave a speech about protecting citizens against government and encouraged the jurors to “think about the fact that you live in a country in which the government itself is subject to law.”
- He suggested in front of the jury that the charge conference would be short and said: “I have already got my mind made up.”

Russell, 90 N.C. App. at 680?82. A new trial was required because of the “cumulative prejudicial effect” of the comments. *Id.* at 683. Likewise, in an action involving an ABC agent, the court made 37 comments at defendant’s expense, ranging from jokes about defendant and alcoholic beverages to criticism of defense examination, including, “I’m bored with the repetition, frankly, and I think everybody else is” and “I don’t know why we’re getting so torn to pieces by a little liquor and gambling going on.” Meanwhile, the judge openly complimented an opposing party witness, telling him, “[t]hank you for being here, sir. I enjoyed your explanation.” McNeill v. Durham Cty ABC Bd, 322 N.C. 425, 429–30 (1988). In another case, when a judge curtailed an examination and counsel responded in frustration, the judge threatened, “[a]bout two remarks like that, you are going to have more trouble than you have in your life.” With further “sharp remarks,” the statement “tended to discredit defendants’ counsel, and hence their cause, in the eyes of the jury.” Board of Transp. v. Wilder, 28 N.C. App. 105, 107–08 (1975); *see also* Worrell v. Hennis Cred. Union, 12 N.C. App. 275, 279 (1971) (judge sustained own objections to ten defense questions, struck defense testimony on own motion, and displayed “antagonistic attitude” toward defendant).

Impact on jury is key. Whether a statement warrants new trial depends on its impact on the jury. The movant must show prejudice, and “the probable effect upon the jury, and not the motive of the judge, is determinative.” Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 103 (1984). The statement will be evaluated in context “because a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Id.* Using the phrase “the negligent defendant” in a last clear chance instruction was not prejudicial in the context of the entire charge, *Bowden v. Bell*, 116 N.C. App. 64, 72–73 (1994), and an instruction to examine one exhibit “very carefully” was not a prejudicial comment on the exhibit’s probative force, *Mack Fin. Corp. v. Harnett Transfer, Inc.*, 42 N.C. App. 116, 123 (1979). *See also* O’Mara v. Wake Forest Univ. Health Sciences, 184 N.C. App. 428, 441 (2007) (judge’s extensive questioning of expert was for clarification and not prejudicial); Ward v. McDonald, 100 N.C. App. 359, 362 (1990) (no prejudice where judge remarked to the jury that trial needed to be shortened); Lenins v. K-mart Corp., 98 N.C. App. 590, 594–95 (1990) (“informal and even jocular” comments not prejudicial in light of all facts); *Colonial*, 310 N.C. at 103–04 (no prejudice where judge interrupted testimony stating, “I don’t believe that is relevant.”); *Saintsing*, 57 N.C. App. at 472–73 (no prejudice where judge responded harshly to objections).

In sum, judges must refrain from comments that compromise the fairness of jury trials. But—as *Lacey* shows—they often need to speak up to keep the case under control. For this reason,

“remarks made by the trial court in the jury’s presence do not always constitute prejudicial error. Judges are not merely mute observers of the legal drama before them. They are the most important participants in the search for truth through trial by jury.” *Colonial,* 310 N.C. at 103.