



North Carolina v. Cummings

206 S.E.2d 781 (1974) | Cited 0 times | Court of Appeals of North Carolina | July 17, 1974

Defendant, by his first assignment of error, contends that the trial court erred in admitting into evidence, over defendant's objection, the testimony of the witness Bieso as to defendant's sobriety at the time of the shooting. It is a well settled rule that a witness may give his opinion as to whether a person was drunk or sober on a particular occasion; however, such opinion testimony may not be admitted unless a proper foundation has been laid demonstrating that the witness was afforded sufficient opportunity to observe the individual who is the subject of his testimony. *State v. Dawson*, 228 N.C. 85, 44 S.E.2d 527 (1947); *State v. Harris*, 213 N.C. 648, 197 S.E. 142 (1938); See, 1 Stansbury, N.C. Evidence (Brandis Revision), § 129, pp. 411-414.

The admission of the witness Bieso's opinion testimony was error as the record reveals that Bieso, who was a bartender at the Playboy Lounge on the night of the shooting, did not have a sufficient opportunity to observe the defendant. This error, however, was rendered harmless because several other witnesses testified, without objection by the defendant, that they observed defendant on the night in question and were of the opinion that although he was drinking he was not drunk. Thus, the testimony of Bieso was only cumulative in effect and its erroneous admission was not prejudicial.

Next, defendant asserts that he was prejudiced by the form of certain questions asked his witness David Locklear upon cross-examination. The witness was asked whether he had been "charged, tried, and convicted" of speeding and driving under the influence, and whether he had been "charged, tried, and convicted" of forgery. The form of these questions was proper as "[f]or purposes of impeachment a witness may be asked whether he has committed specific criminal acts or been guilty of reprehensible conduct." *State v. Gainey*, 280 N.C. 366, 185 S.E.2d 874 (1972). See also, 1 Stansbury, N. C. Evidence (Brandis Revision), § 112, pp. 342-346.

Finally, the defendant argues that the trial court erred in charging that defendant's intoxication could have no bearing upon his guilt or innocence of the lesser included offenses in the charge of first degree murder. This contention is without merit. In *State v. Kelly*, 216 N.C. 627, 6 S.E.2d 533 (1940), we find the following germane language:

"And the charge that if the jury found that these defendants were so drunk that they did not know or realize what they were doing, they would not be guilty of murder in the first degree but would be guilty of murder in the second degree has been approved in effect by this Court in the case of *S. v. Williams*, 189 N.C. 616-20. Here the Court approved the following charge in this regard:

'Drunkenness under the law is no excuse for crime and does not relieve the person of guilt for crime entirely. But in the case of murder, if a person is so intoxicated and rendered so insensible and so



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irrational by intoxication of any kind, or is naturally so weak-minded from natural cause that he cannot form an intent and cannot premeditate and deliberate, then it reduces the offense from murder in the first degree to murder in the second degree."

Thus, the defendant's intoxicated condition went only to negate the specific intent necessary to find him guilty of first degree murder and the trial judge in the instant case was correct in his statement in the charge as to the effect of a finding of defendant's intoxication upon the lesser included offenses of first degree murder.

The defendant was afforded a fair trial, free from prejudicial error.

No error.

Disposition

No error.

