NO. COA01-1177

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v.

Durham County
Nos. 00 CRS 61211, 61212
00 CRS 18778

SHERROD LAMAR NEALE

Appeal by defendant from judgment entered 24 April 2001 by Judge Stafford G. Bullock in Durham County Superior Court. Heard in the Court of Appeals 22 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for the State.

Brian Michael Aus for defendant-appellant.

WALKER, Judge.

Defendant was convicted of second-degree rape, second-degree sexual offense, and attempted second-degree sexual offense. The State's evidence tended to show the following: In March of 2000, defendant and Nancy Duke met at Northgate Mall, talked, and exchanged information. Ms. Duke only knew defendant as "Devonte" and not by his real name. On the afternoon of 11 April 2000, Ms. Duke paged defendant because her vehicle was stuck in the mud behind her house. Defendant agreed to come and help her move her vehicle. He arrived at her house at approximately 9:00 p.m. with two male friends. Defendant and his friends freed the vehicle and

then cleaned up. Ms. Duke agreed that defendant could return to her house after he dropped off his friends.

When he returned, defendant and Ms. Duke sat on the couch in the livingroom. They talked and watched television while her infant daughter slept in the bedroom. As it was getting late, Ms. Duke suggested that it was time for defendant to leave. She testified that defendant reached across her, turned off the lamp beside the couch, and straddled her by putting one leg on each side while pulling her towards him. Ms. Duke tried to pull away and asked what he was doing. At first, she believed he was only playing. Defendant then put his hand up her shirt. Ms. Duke testified that defendant told her to stop playing and that she should have expected it. She realized from his demeanor and facial expressions that he was not playing. He then demanded that she take off her shirt. Ms. Duke testified as follows that when she did not do as he demanded:

> I remember him putting his hand like in his -- I don't know if it was his waist, his pocket, or what. He said, "You know, I can shoot you right now." And he said -- he said -- he said something about my baby. I just remember him saying he can hurt her, or it's just me and her in the house, or something to that effect.
>
> And that's all I heard him say, was something about my child. And that kind of made me listen to whatever he said, because I didn't want him to hurt her.
>
> And I took my shirt off, and I thought he was going to stop. But it was just like just a sequence of events. After I took my shirt off, then he said, "Take off your pants."

Ms. Duke further testified that defendant wanted to teach her a lesson because she had invited him over to her house. Defendant finally told Ms. Duke to take off her underwear and bend over the couch. She testified, "[H]e said that that was going to be the last thing he was going to tell me to do, and then he would leave." She testified:

> The first thing he did was, he stuck his finger inside of my vagina . . . . I tried to pull away and I told him to stop. And I said, "You told me you weren't going to touch me." And I just kept saying, "Please don't hit me," because I thought he was going to hit me. Because I wasn't looking at him, I didn't know what he was doing behind me.

While she was bent over the couch, defendant placed his penis in her vagina. When she would not participate with him, he removed his penis and attempted to place it in her anus. Ms. Duke testified that she begged him not to and so he placed it back into her vagina. When he finished with her, he went back to the bedroom where Ms. Duke's baby was sleeping, kissed the baby, and then left the house saying, "I'm going to call you."

After he left, Ms. Duke immediately called the police. She was taken to a hospital where she was examined and a rape kit was collected. Although she was unable to provide police with defendant's real name, she provided the name "Devonte" and the pager and cell phone number which the police ultimately traced back to being in the possession and use of defendant. Ms. Duke identified defendant as the perpetrator from a photographic lineup.

Martin Charles Walkowe, an investigator with the Durham Police Department, testified that he interviewed Ms. Duke at the hospital

on the night of the incident. He testified that Ms. Duke "was very upset. At times during discussing what happened, she became very tearful. But for the most part, the thing that stuck out in my mind was that she was very exhausted." In his testimony, he read the statement given by Ms. Duke on 14 April 2000. In her statement, Ms. Duke told Investigator Walkowe that the acts of defendant were not consensual.

Investigator Walkowe arrested defendant on 12 August 2000. After being informed of his *Miranda* rights, defendant waived them and gave a statement to Investigator Walkowe. In his statement, defendant admitted that he had helped Ms. Duke move her vehicle but that neither he nor his friends had entered her house. He also denied ever having sex with Ms. Duke. Investigator Walkowe testified that, based on his investigation and interviews with witnesses, he caused a search warrant to be executed in an attempt to obtain hair, saliva, and blood samples from defendant.

Jennifer Elwell, a forensic serologist in the molecular genetics unit of the State Bureau of Investigation, testified that she detected the presence of semen in samples obtained from Ms. Duke's vagina, rectum, and underwear. David Alan Freeman, with the State Bureau of Investigation, performed DNA analysis on the samples obtained from Ms. Duke and the samples obtained pursuant to the warrant from defendant. Mr. Freeman testified that, based on his training and experience, it was "scientifically unlikely that this profile could be generated from anyone else except from [the defendant]."

Defendant testified that he met Ms. Duke on a telephone chat line. Although he had a girlfriend, he gave Ms. Duke a cell phone and pager number where he could be reached. On 10 August 2000, defendant called Ms. Duke and learned that her vehicle was stuck in the mud. Defendant agreed to get some friends and come help her get the vehicle out. Once it was free, Ms. Duke drove the vehicle to the front of the house while defendant and his friends were there. While she did this, defendant held Ms. Duke's baby who fell asleep in his arms. Ms. Duke gave paper towels to defendant and his friends so they could clean off the mud. Defendant then carried Ms. Duke's baby into the house and put her on the bed. Defendant's friends remained outside.

While inside, defendant made a telephone call from the livingroom. After the call, he sat on the couch and watched television for a minute or two. Defendant testified that Ms. Duke came into the livingroom and asked what she could do to repay him for moving her car. He testified, "I asked her could she caress me." Defendant testified that Ms. Duke consented to performing oral sex on him and then consented to having sex with him.

Frederick Cannady testified that he did not loan his cell phone to defendant on the day in question and that his cell phone bill showed no incoming or outgoing calls from the cell phone to Ms. Duke's number. John Townes testified he was a friend of the defendant and helped move Ms. Duke's vehicle that night. He testified that defendant went into the house with Ms. Duke to get the paper towels. After cleaning off the mud, he sat in

defendant's car with the other friend while defendant was in Ms. Duke's house. After about five minutes, defendant and Ms. Duke came out of the house, kissed, and then they left. Mr. Townes further testified that after dropping off the other friend, defendant and Mr. Townes sat outside Mr. Townes' house drinking beer and talking for twenty to twenty-five minutes before defendant left.

On rebuttal, the State recalled Investigator Walkowe through whom the State introduced the search warrant to corroborate his previous testimony. Investigator Walkowe further testified that the previous statement given by Mr. Townes varied somewhat from his testimony at trial. Both the search warrant and the statement of Mr. Townes were admitted into evidence.

On appeal, defendant first contends that the trial court erred in admitting the search warrant into evidence. Defendant claims there was error because the affidavit of Investigator Walkowe was attached to the search warrant. The affidavit stated the following in part:

> Based upon the factual information hereinafter described in detail, I believe probable cause exists to conclude that the evidence described in this application probably is located on the person to be searched as described in this application. The information related in this affidavit is based upon the personal knowledge of this Investigator executing this application and upon information received from the people interviewed in the course of this investigation. All the citizens interviewed appeared creditable and truthful in relation to whatever information they had relevant to this investigation. None of the persons interviewed have an apparent motive to be untruthful. None of the persons interviewed

> have any reputation or history for being untruthful [or] uncooperative with Law Enforcement Officers performing in an investigation. The information received by me in the course of this investigation is discussed in detail in this affidavit and is believed to be accurate and true. No significant contradictions or difference exists in the information I have received from the victim interviewed since April 11, 2000.

Because there was no objection when the search warrant and affidavit were admitted, this Court reviews for plain error. *State v. Davis*, 353 N.C. 1, 19, 539 S.E.2d 243, 256 (2000), *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 55 (2001). "Plain error is '"fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done."'" *Id.* (*quoting State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

Here, Investigator Walkowe testified without objection to facts similar to those contained in the affidavit. It was not until the State's rebuttal that the affidavit and search warrant were offered to corroborate Investigator Walkowe's earlier testimony. Thus, we find there was no prejudicial error in the admission of the search warrant with the affidavit attached.

Defendant also contends he was denied effective assistance of counsel for failure to object to the admission of the search warrant. To show ineffective assistance of counsel, defendant must meet a two-prong test to show that the conduct of counsel fell below an objective standard of reasonableness. The first prong is that the performance of the counsel was deficient such that the error was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *State*

v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985)(citations omitted). The second prong is that the defendant was prejudiced by the deficiency such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984).

Here, the contents of the search warrant and affidavit had already been admitted through the testimony of Investigator Walkowe during the State's case-in-chief. There is nothing in the record to indicate that a failure to object to the admission of the search warrant denied defendant a fair trial or that there was a reasonable probability that the result of the trial would have been different if counsel had objected. Thus, we find defendant was not denied effective assistance of counsel by the failure to object to the admission of the search warrant and affidavit.

Defendant next contends the trial court erred in failing to conduct an inquiry of the remaining jurors after the alternate juror was dismissed. After the jury and alternates had been selected, it was brought to the trial court's attention that at least one of the jurors had been verbally abused by three men in the hallway outside of the courtroom. When the trial court inquired as to who had encountered the verbal abuse, only the alternate juror responded. In the presence of the jury, the three men were brought before the trial court which determined the men were not affiliated with this case. The trial court admonished them and banned them from the courtroom and from loitering in the

hallway. The trial court then instructed the jury that these men were not connected with the case and that the jury should not hold their actions against either the State or the defendant.

Prior to court convening the following day, defendant informed the trial court that the alternate juror had made a comment that he could no longer be fair and impartial because of this incident. Defendant requested that the alternate juror and the remaining jurors be individually questioned regarding their impartiality. The trial court granted the motion but withheld ruling on questioning the other jurors until the alternate juror had been questioned.

Pursuant to questioning outside the presence of the other jurors, the alternate juror testified that "I believe that I am biased because of what occurred . . . . I just feel that I was targeted, and I don't think that I can be as impartial as I should be . . . . Even though they said that they not [sic] connected, it's hard for me to believe that, since they followed me into this courtroom instead of from farther away." The trial court questioned the alternate juror regarding possible comments to the rest of the jury which may have affected their impartiality as follows:

> THE COURT: There have been no statements, implications, insinuendoes [sic] whatsoever that, first of all, what happened offended you, and that which offended you as it being part of anybody that's involved in this trial?
>
> THE ALTERNATE JUROR: Correct.
>
> THE COURT: All right, sir.

> THE ALTERNATE JUROR: I have not mentioned it at all to the other jurors, that anything was said.

The trial court then excused the alternate juror but denied the motion to individual questioning of the remaining jurors "based on the fact that the reason for that was stated by the alternate juror that he had made no statements whatsoever to other members of the jury."

Defendant now contends the trial court erred in failing to grant a mistrial *sua sponte*. N.C. Gen. Stat. § 15A-1063 (2001) empowers the trial court to grant a mistrial on his own motion if it is impossible to proceed in conformity with the law, such as where there is evidence of jury tampering not done at the direction of the defendant or his lawyer. *State v. Cooley*, 47 N.C. App. 376, 383, 268 S.E.2d 87, 92, *disc. rev. denied*, 301 N.C. 96, 273 S.E.2d 442 (1980). The decision to grant such a motion is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Johnson*, 295 N.C. 227, 234-35, 244 S.E.2d 391, 396 (1978).

Here, the trial court questioned all of the jurors regarding this incident. Only the alternate juror responded that he had encountered it. He testified that he did not speak to any of the other jurors regarding the incident nor express his feelings about the individuals. The trial court instructed the remaining jurors that the individuals were not connected with the case nor with any parties. We find the trial court's actions were appropriate and

did not abuse its discretion in failing to grant a mistrial *sua sponte*.

Alternatively, defendant contends he should have been permitted the opportunity to examine the remaining jurors. Since there has been no showing that the alternate juror discussed this incident with the remaining jurors, the trial court did not err in denying defendant's motion to individually question the remaining jurors.

Defendant finally contends the trial court erred in denying his motion to dismiss for insufficient evidence. A motion to dismiss should be granted only where the State fails to present substantial evidence of each element of the crime charged. *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). "The State is entitled to every reasonable inference. Evidence favorable to the State must be deemed to be true, and any inconsistencies or contradictions therein must be disregarded." *State v. Brown*, 332 N.C. 262, 269, 420 S.E.2d 147, 151 (1992).

Defendant was charged with second-degree rape, second-degree sexual offense and attempted second-degree sexual offense. Defendant contends the State failed to present substantial evidence that the sexual acts occurred "by force and against the will of the other person." N.C. Gen. Stat. §§ 14-27.3(a)(1), 14-27.5(a)(1). Our Supreme Court has held that force "may be established either by

actual, physical force or by constructive force in the form of fear, fright, or coercion." *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987). Constructive force may be proven by threats which compel the victim to submit to sexual acts. *Id.* "Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat." *Id.* (*citing State v. Barnette*, 304 N.C. 447, 284 S.E.2d 298 (1981)).

Here, Ms. Duke testified that defendant forced her to stay with him on the couch by straddling her and pulling her back against him, thus preventing her from leaving. Further, she attempted to pull away but was not allowed to do so. When defendant demanded that she remove her clothing and she refused, he put his hands at his waist and said, "You know, I can shoot you right now." He made statements about her baby which she interpreted as threats to her baby's safety. Furthermore, she repeatedly told him to stop. She was afraid that he would hit her if she did not cooperate. Thus, we find there was overwhelming evidence of threatening language and forceful actions by defendant such that a reasonable person could find defendant committed the sexual acts by force and against Ms. Duke's will.

In conclusion, we find there was no prejudicial error in the admission of the search warrant and affidavit into evidence. Furthermore, the trial court did not err in denying defendant's motion for individual questioning of the jurors and in not ordering a mistrial *sua sponte*. The trial court further did not err in

submitting all of the charges to the jury. The defendant received a fair trial free from prejudicial error.

No error.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).