

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1474

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v.

Iredell County
Nos. 99 CRS 21376, 21896-97

DAVID DEWAYNE SMITH

Appeal by defendant from judgments entered 18 July 2001 by Judge Michael E. Helms in Iredell County Superior Court. Heard in the Court of Appeals 22 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anne Goco Kirby, for the State.

Michael E. Casterline for defendant-appellant.

WALKER, Judge.

In early December 1999, defendant was arrested and charged with assault on a female, communicating threats, and misdemeanor simple assault. On 2 February 2000, defendant pled no contest in district court to assault on a female and was sentenced to a suspended term of seventy-five days in prison and placed on supervised probation for thirty-six months. Defendant appealed. All three charges were consolidated for trial at the 16 July 2001 Criminal Session of Iredell County Superior Court.

The State presented evidence at trial which tended to show the following: On 4 December 1999, defendant and his daughter, Claire, entered a Burger King in Statesville, North Carolina, approached the counter, and ordered some food. After ordering, defendant asked Felicia Brown, the cashier who took his order, whether she had any Pokemon Gold Cards, which were being given out as part of a promotion. Brown told defendant that they were sold out. Shortly thereafter, while defendant was waiting for his food, another customer asked for a Pokemon card. Brown told the customer she had one that was "broken." Immediately, defendant began to verbally abuse Brown, cursing her, and using racial slurs. Then, one of Brown's co-workers, Duwan Murdock, told defendant "you don't need to be calling her all these names and stuff like that." Then, defendant started cursing Murdock. The manager then came to the front and instructed Brown and the other employees to go to the back.

While the other employees went to the back, Murdock went around the counter, into the lobby, and told defendant to leave the restaurant. Defendant then hit Murdock in her right eye with his fist, and the two started fighting. Meanwhile, a customer in the restaurant, George Cardin, was preparing to leave the restaurant because of defendant's conduct. After seeing defendant hit Murdock, Cardin grabbed defendant and told someone to call the police. While defendant struggled to get away from Cardin, he threatened to "kill everybody in the store." Defendant then told

his daughter to tell everybody "what I just got out of prison for." Defendant's daughter cried and responded "murder."

Defendant was convicted on all charges and sentenced to seventy-five days in prison for the assault on a female charge and a consecutive term of forty-five days in prison for communicating threats. Defendant was also sentenced to a consecutive term of forty-five days in prison for simple assault. However, that sentence was suspended and defendant was placed on supervised probation for thirty-six months. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by denying his motion for a mistrial because several witnesses referred to his prior conviction for murder during their testimony. Defendant argues that the testimony was solely to show the jury that he had a propensity for violence and was inflammatory and prejudicial. Additionally, Marie Cooper Cardin testified that, when defendant threatened to kill everyone at the restaurant, she thought of the Columbine High School shooting. Defendant argues that this testimony was similarly improper and was an attempt to appeal to the jury's emotions.

After careful review of the record, briefs, and contentions of the parties, we find no error. This Court has stated that:

A trial judge "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge. The decision to grant or deny such a motion will not be

disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion.

State v. Harris, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001), *disc. rev. denied*, 355 N.C. 218, 560 S.E.2d 146 (2002) (citations omitted). In the present case, defendant was convicted of communicating threats. To convict a defendant of communicating threats, the State must prove the following:

- (1) He willfully threatens to physically injure the person . . . or willfully threatens to damage the property of another;
- (2) The threat is communicated to the other person, orally, in writing, or by any other means;
- (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
- (4) *The person threatened believes that the threat will be carried out.*

N.C. Gen. Stat. § 14-277.1(a) (2001) (emphasis added). Several witnesses testified that, during the altercation at the Burger King, defendant threatened to kill everyone in the restaurant and told his daughter to tell everybody that he just got out of prison for murder. Although defendant argues that the testimony regarding his prior conviction for murder was prejudicial and should have resulted in a mistrial, we conclude that it was admissible to show the state of mind of the witnesses. Specifically, the testimony was admissible to prove an essential element of the State's case and to prove why the witnesses believed that defendant would carry

out his threat. Accordingly, since the testimony was properly admitted, we hold the trial court did not abuse its discretion by denying defendant's motion for a mistrial based on this testimony.

Defendant also contends that the trial court should have declared a mistrial based on Ms. Cardin's testimony that defendant's threats reminded her of the Columbine High School shooting. However, defendant's objections to the testimony were sustained. We note that defendant did not move to strike the testimony. Even so, we conclude that Ms. Cardin's unsolicited testimony, while improper, did not result in "substantial and irreparable prejudice to the defendant's case," especially in light of the overwhelming evidence of defendant's guilt. *Harris*, 145 N.C. App. at 576, 551 S.E.2d at 503. Accordingly, we hold the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

No error.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).