NO. COA00-1539

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 97 CRS 35471

TIMOTHY STEPHEN BELCHER

Appeal by defendant from judgment entered 23 February 2000 by Judge Timothy S. Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals 29 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Dennis P. Myers, for the State.

Allen W. Boyer for defendant-appellant.

McGEE, Judge.

Timothy Stephen Belcher (defendant) was convicted of second degree rape on 23 February 2000 and was sentenced to 116 to 149 months in prison.

The evidence presented by the State at trial tended to show the victim was evicted from her home on 13 September 1997. Later that day, she met defendant at a McDonald's restaurant in Charlotte, North Carolina. Defendant offered to help her. When the victim could not reach any friends, defendant invited her to stay with him, and she accepted. They shared a single mattress in a room where defendant worked, but the victim told defendant,

"don't touch me." The next day the victim was still unable to find a place to stay. As a result, she and defendant stayed together at a different location, again sharing a mattress. When the victim prepared to leave, defendant grabbed her and threw her on the floor. He began to choke her and ordered her to take off her clothes, which she did. Defendant raped her. The victim told defendant she needed to go to the bathroom. She ran through the door and across the street to a gas station. She told the attendant she had just been raped, and she called 911. Defendant arrived at the gas station, but left when the attendant told him the police were on the way. After the police arrived, the victim was taken to a hospital and a rape kit was prepared. She was examined by Dr. E. Parker Hays (Dr. Hays). Dr. Hays testified the victim was "distraught and disheveled." He observed that she had bruising to her genital area which was consistent with an assault having occurred within the past twenty-four hours. Mr. Louis Coleman (Mr. Coleman), defendant's boss, testified that he and defendant had a confrontation on the day prior to the alleged rape. During this confrontation, defendant choked Mr. Coleman. Defendant did not present any evidence. Defendant appeals from the judgment entered 23 February 2000.

I.

Defendant first argues the trial court erred in denying defendant's motion for a mistrial following testimony by Officer Susan Kendall (Officer Kendall) of the Charlotte-Mecklenburg Police Department that defendant was a known sex offender. Defendant

contends the limiting instruction the trial court gave to the jury following defendant's objection to the testimony was inadequate to cure the prejudicial effect of the testimony. We disagree.

The trial court "must declare a mistrial upon [a] 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." N.C. Gen. Stat. § 15A-1061 (1999). "The decision to grant or deny a mistrial rests within the sound discretion of the trial court. . . . Consequently, a trial court's decision concerning a motion for mistrial will not be disturbed on appeal unless there is a clear showing that the trial court abused its discretion." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991).

In general, "in a prosecution for a particular crime, the State may not offer evidence that the defendant has committed other separate offenses." *State v. Gregory*, 37 N.C. App. 693, 696, 247 S.E.2d 19, 21 (1978). However, "[w]here a trial court sustains a defendant's objection to the answer of a witness, strikes same, and instructs the jury not to consider it, the jury is presumed to have heeded the instruction and any prejudice is removed." *Id.*, 37 N.C. App. at 697, 247 S.E.2d at 22. This theory is "based [on] the assumption that the trial jurors are [people] of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Moore*, 276 N.C. 142, 149, 171 S.E.2d 453, 458 (1970).

"Whether curative instructions can remove the prejudice depends on the nature of the evidence and the particular circumstances of the case." *Gregory*, 37 N.C. App at 697, 247 S.E.2d at 22.

In *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967), our Supreme Court held an officer's reference to the defendant's prior indictment for murder prejudiced the jury as to the defendant's charge of armed robbery. The Court held the incompetent testimony prejudiced the defendant, and "the court's instruction did not remove from the minds of the jurors the prejudicial effect of the knowledge they had acquired . . . that [the defendant] had been or was under indictment for murder." *Id.*, 270 N.C. at 273, 154 S.E.2d at 61. Defendant relies on *Aycoth* in arguing Officer Kendall's comments materially prejudiced his rights.

However, *Aycoth* has been distinguished in other cases. In *State v. Moore*, 276 N.C. 142, 171 S.E.2d 453 (1970), a witness repeatedly testified over sustained objections that the defendant had previously killed at least one man. Our Supreme Court, however, upheld the trial court's denial of the defendant's motion for a mistrial because the trial court had provided an appropriate limiting instruction.

> In [*Aycoth*], the unresponsive statement was that the defendant had been *indicted* for murder. Here the statement was only that defendant had "killed one person." Was the killing accidental, in self-defense, or felonious? The statement contained no suggestion that the homicide was the result of a criminal act or that defendant had been prosecuted for it. Furthermore, no *subsequent events* tended to emphasize this inconclusive testimony that defendant "had killed one man." We do not, therefore, deem this evidence so

> inherently prejudicial that its initial impact--whatever it was--could not have been erased by the judge's prompt and emphatic instructions that the jury should not consider the testimony for any purpose whatsoever.

Moore, 276 N.C. at 149, 171 S.E.2d at 458. In *Gregory*, a witness testified he had "worked" a theater for the defendant. *Gregory*, 37 N.C. App. at 696, 247 S.E.2d at 22. After giving the jury a limiting instruction, the trial court denied the defendant's motion for a mistrial. Our Court affirmed and distinguished the facts as not rising to the seriousness of the facts in *Aycoth*. *Gregory*, 37 N.C. App. at 697, 247 S.E.2d at 22.

In the case before us, no subsequent events or testimony at trial emphasized this statement. Although Officer Kendall's testimony was inadmissible evidence, we hold the prejudicial effect did not rise to the level of prejudice found in *Aycoth*, and the trial court's limiting instruction was sufficient to overcome any prejudice the statement may have caused. We overrule this assignment of error.

II.

Defendant next argues the trial court erred in denying defendant's motion to elicit testimonial evidence on cross-examination of the State's witness of prior sexual behavior of the complainant under N.C. Gen. Stat. § 8C-1, Rule 412(b)(2).

Rule 412(b)(2) states "the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior . . . [i]s evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged

were not committed by the defendant[.]" N.C. Gen. Stat. § 8C-1, Rule 412(b)(2) (1999). This statute

> was designed to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has low probative value. However, . . . the statute was not designed to shield the prosecuting witness from her own actions which have a direct bearing on the alleged sexual offense.

State v. Younger, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982). Defendant contends the victim's choice to engage in consensual sex three days prior to the alleged sexual assault has a direct bearing on the alleged sexual assault with which defendant was charged. We disagree.

In *Younger*, the defendant sought to introduce evidence of an inconsistent statement by the prosecuting witness which affected her credibility at trial. Likewise, in *State v. Johnson*, 66 N.C. App. 444, 311 S.E.2d 50 (1984), the prosecuting witness made inconsistent statements to the examining physician and at a pretrial hearing. Our Court relied on *Younger* and admitted the evidence.

In the case before us, however, there is no inconsistent statement by the victim. *See State v. McCrimmon*, 89 N.C. App. 525, 528, 366 S.E.2d 572, 578 (1988) (holding neither *Younger* nor *Johnson* apply because the "present case does not concern such inconsistent statements by the prosecutrix about her sexual activity."). The victim stated to Dr. Hays that she had consensual sex three days before the alleged attack, and her statement has

never changed. Defendant apparently would contend the marks and bruising on the victim's body could have resulted from this earlier encounter. However, Dr. Hays, who treated the victim shortly after the assault, testified that the bruising she sustained in her genital area was consistent with a sexual assault having occurred within the previous twenty-four hours. He also testified that in the thousands of gynecological exams he has performed for women, many "have had consensual sex in times within minutes to hours of the time of [the] examination, and [he has] not seen evidence of bruising, in any of those instances." The evidence here shows serious injuries to the victim's face, neck and genital areas. Whether the victim had consensual sex three days prior to the alleged attack is not probative of whether the alleged attack occurred or whether defendant committed the attack. We overrule this assignment of error.

III.

Defendant next argues the trial court erred in denying defendant's motion to suppress the testimony of Mr. Coleman that defendant choked him on the day prior to the alleged rape. Defendant contends the choking of Mr. Coleman was different from the alleged choking by defendant of the victim on the following day; therefore, this evidence should not have been admitted under Rule 404(b). We disagree.

Rule 404(b) allows evidence of other crimes or wrongs for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or

accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). "The use of evidence [as permitted] under Rule 404(b) is guided by two constraints: 'similarity and temporal proximity. When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value.'" *State v. Johnson*, 145 N.C. App. 51, 58, 549 S.E.2d 574, 579 (2001) (quoting *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)). Defendant argues the two choking incidents in this case are different because the alleged choking of the victim occurred in order to submit her to defendant's will, while the choking of Mr. Coleman by defendant occurred because defendant was angry. We disagree with this distinction. In both conflicts defendant confronted the person with physical force which included choking that person. These two incidents occurred within a day of each other. The trial court properly admitted this evidence under Rule 404(b) and *Johnson*. We overrule this assignment of error.

IV.

Defendant next argues the trial court erred in not granting defendant's motion to dismiss based on the insufficiency of the State's evidence.

When considering a motion to dismiss for insufficiency of the evidence, the trial court must

> consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. . . . When

> considering such motion the court is not concerned with the weight of the testimony but only with its sufficiency to carry the case to the jury and sustain the indictment.

State v. McNeil, 280 N.C. 159, 161-62, 185 S.E.2d 156, 157 (1971). The trial court must determine if there is "substantial evidence of each essential element of the offense charged" such that "a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In the case before us, defendant does not argue there is no evidence to support any specific element of the crime charged. Defendant essentially argues the evidence should not be found to be credible. However, this Court will not weigh the evidence, nor was the trial court required to do so. We find there is sufficient evidence in the record of each element of second degree rape; consequently, we dismiss this assignment of error.

V.

Defendant next argues the trial court erred in overruling defendant's objection to the State's argument to the jury that defendant was destroying evidence at the time of his arrest, even though no evidence of this destruction was offered to the jury at trial.

"Trial counsel are allowed wide latitude in jury arguments. Counsel are permitted to argue the facts based on evidence which has been presented as well as reasonable inferences which can be drawn therefrom. Control of closing arguments is in the discretion of the trial court." *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 39-40, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)

(citations omitted). Furthermore, in order to justify a new trial, "the prosecutor's comments must have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d. 144, 157 (1986) (other citations omitted)).

In the case before us, the State presented evidence that officers located defendant at an automotive shop shortly after the alleged assault occurred. The officers discovered defendant in a bathroom washing his hands. A small washer and dryer was located in the same room as defendant. In the washer, officers found clothes which matched a description of the clothes defendant was wearing when he followed the victim to the gas station after the alleged rape occurred. The State is entitled to make the inference defendant was washing the clothes to remove evidence. In any event, the State's argument to the jury does not rise to such a prejudicial level as to be a denial of due process. We overrule this assignment of error.

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).