NO. COA01-1606

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v. Henderson County
Nos. 98 CRS 2238-39
98 CRS 22084
98 CRS 22142
98 CRS 22143-44
98 CRS 22146

LEROY PHILLIPS

Appeal by defendant from judgments entered 15 July 1999 by Judge Jesse B. Caldwell in Superior Court, Henderson County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jane Ammons Gilchrist, for the State.

James L. Goldsmith, Jr. for defendant-appellant.

McGEE, Judge.

Defendant appeals from judgments entered on convictions by a jury of assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon with intent to kill, first degree kidnapping, first degree rape, and first degree sexual offense (three counts). The court imposed sentences of 133-169 months, 46-65 months, 133-169 months, 339-416 months, 339-416 months, 339-416 months, and 339-416 months, respectively.

The State presented evidence at trial tending to show that at

approximately 1:00 a.m. on 25 April 1998, S.C., an adult mother of four children, heard a noise in her house. She got out of bed and saw defendant, whom she knew as a neighbor, standing inside her house. Defendant asked her for a glass of water. As S.C. prepared to put ice in a glass, defendant wrapped his arm around her neck. Defendant, who was holding a knife in his hand, ordered S.C. to get S.B., a fifteen-year-old girl who was spending the night with S.C. and her children. S.C. awakened S.B. and brought S.B. to her bedroom. Holding the knife in his hand, defendant engaged in acts of cunnilingus with S.B., fellatio with S.C., attempted vaginal intercourse with S.C., and vaginal intercourse with S.B. He ordered S.C. to engage in cunnilingus with S.B. and ordered both females to perform oral sex on him. While they were performing oral sex on him, defendant jumped off the bed and ordered them to face the window. Defendant slashed S.B.'s neck with the knife and pulled S.B. down to the floor. When S.C. cried, defendant threw S.C. on the bed and approached her with the knife. Meanwhile, S.B. jumped out the window and ran to her house next door. Defendant ran downstairs and out of the house. S.C. ran to S.B.'s house. The police were called and the two victims were taken to a hospital for treatment. S.C. received sutures for multiple lacerations on her left arm. S.B. received stitches for a laceration to her neck.

Defendant testified that S.C. invited him into her house and he engaged in consensual sex with S.C. and S.B. for about two hours. He fell asleep and was awakened by the women, who were ordering him to leave. He refused to leave until they returned

money missing from his pocket. He wrestled a knife away from S.C. and cut her a couple of times on her arm. When S.B. jumped out the window, he left the house.

The single issue on appeal is whether the court erred by denying defendant's motion for a mistrial made during the prosecutor's closing arguments to the jury. The prosecutor made statements in her argument that "when scorned by a woman, or hurt by a woman, that [defendant] can become volatile," and that defendant "has an assaultive personality." Defendant argues that these statements are not supported by any trial testimony. He also contends that the prosecutor injected her own personal beliefs and opinions regarding defendant by making these statements.

"A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989). The decision whether or not to grant a mistrial is within the discretion of the trial court. *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985). The court's decision will not be disturbed on appeal unless it is so clearly erroneous that it amounts to a manifest abuse of discretion. *State v. McGuire*, 297 N.C. 69, 75, 254 S.E.2d 165, 169-170 (1979).

The record shows that the trial court sustained defendant's objections to the prosecutor's arguments and immediately directed the jury to disregard the prosecutor's last arguments and not to

consider the arguments in any way during deliberations. At the beginning of closing arguments, the trial court instructed the jury that "if during the course of making a final argument, an attorney should attempt to summarize or restate a portion of the evidence that you recall differently, you take your own recollection of the evidence, and disregard what counsel has suggested the evidence would be." When the trial court sustains an objection to improper argument and immediately instructs the jury to disregard it, the impropriety is cured. *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579-80 (1982). In addition, the arguments were not so grossly improper as to make it impossible for defendant to receive a fair verdict. S.C. and S.B. both testified that defendant was angry with S.B. because she had refused to sleep with him and he believed she had told others she had refused an offer of money to sleep with him. Sergeant Alan Baker of the Henderson County Sheriff's Department testified that he had witnessed defendant rip the screen door off a house in a fit of anger. Defendant admitted on the witness stand that he has been convicted of five counts of assault on a female, three counts of assault on a government official, communicating threats, resisting a public officer, aggravated assault with a gun, assault and battery, and burglary with assault and battery.

Finally, the evidence of defendant's guilt is overwhelming. Defendant admitted engaging in the sexual activity with the two women. While he offered an explanation for the cuts S.C. sustained, he did not explain how S.B. sustained her laceration.

The two women, though separated from each other at the time they gave their statements to law enforcement, related consistent facts of the criminal conduct they endured. The medical evidence and evidence at the scene of the crimes corroborated their testimony.

We find no error in defendant's trial and sentences.

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).