NO. COA01-928

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Pasquotank County
No. 00 CRS 2445

MARCUS CONELL ALSTON,
Defendant.

Appeal by defendant from judgment entered 12 February 2001 by Judge William C. Griffin, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 22 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Mary Penny Thompson, for the State.

James R. Gilreath, Jr., for defendant-appellant.

HUDSON, Judge.

Defendant Marcus Conell Alston was charged with first degree rape. Defendant tendered a plea of guilty and stipulated, through counsel, to the following narration of the evidence by the State: On 20 April 2000, between 11:00 and 11:30 a.m., defendant approached a female victim[1] at her residence in Elizabeth City, North Carolina on three separate occasions. Initially, the victim encountered defendant on her enclosed back porch, when he asked if

[1] Due to the sensitive nature of the offense, we will not refer to the victim by name.

he could mow the victim's lawn. When the victim responded negatively, defendant left, only to return a second time to ask for the names of the victim's neighbors so that he could cut their grass. Defendant returned a third time ostensibly to leave his telephone number so that the victim could call him if she ever needed someone to cut her grass. The victim asked defendant to leave. She thereafter left home to go to a 2:00 p.m. appointment.

When the victim returned to her residence at about 3:45 p.m., she began to work outside in her backyard. After working in the backyard for awhile, the victim decided to go inside through the back porch, where defendant was again standing. The victim loudly demanded that defendant leave, whereupon defendant grabbed the victim and a struggle ensued. Defendant wrestled the victim to the floor, and brandishing a box cutter, defendant threatened to kill the victim if she did not remain quiet. Defendant then dragged the victim into the kitchen of the residence, where he placed duct tape over the victim's mouth and taped her hands together. After taking $2.00 from the victim's purse, defendant made several attempts to digitally penetrate her. Defendant subsequently raped the victim. Defendant spoke briefly to the victim, before binding her legs with duct tape and leaving the scene.

During the sentencing hearing, the State submitted a victim impact statement and a statement of medical expenses less insurance reimbursement. Defendant, through counsel, argued that the court should find as mitigating factors that he had accepted responsibility for his conduct, that he made payments to help raise

his son, and that he had a difficult childhood. The State argued for several aggravating factors including severe injury, home invasion, and premeditation and deliberation. After hearing the arguments of counsel, the trial court found as an aggravating factor that defendant "acted with sleuth, premeditation and deliberation, lying in wait for an opportunity to commit the offense." The court found no mitigating factors and sentenced defendant to an aggravated term of 420-513 months imprisonment. Defendant appeals.

By his sole assignment of error on appeal, defendant argues that the trial court erred in finding as an aggravating factor that he "acted with stealth, premeditation and deliberation, lying and waiting for the opportunity to commit the offense." Defendant argues that the State did not present competent evidence to support such a finding. We disagree.

"The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists." N.C. Gen. Stat. § 15A-1340.16(a) (1999). A stipulation by defense counsel that the prosecutor may state the evidence during entry of a guilty plea allows the statement to be used as evidence to support the finding of an aggravating factor. *State v. Mullican*, 95 N.C. App. 27, 381 S.E.2d 847 (1989), *aff'd*, 329 N.C. 683, 406 S.E.2d 854 (1991).

The use of the nonstatutory factor found by the court in the instant case was specifically adopted for rape cases in *State v. Ruff*, 127 N.C. App. 575, 579-81, 492 S.E.2d 374, 376-77 (1997), *rev'd on other grounds*, 349 N.C. 213, 505 S.E.2d 579 (1998). *See*

also State v. Hammond, 118 N.C. App. 257, 263, 454 S.E.2d 709, 713 (1995) (finding in a rape case that there was sufficient evidence of premeditation where defendant waited for his victim near her office with scissors and electrical cord). Our Supreme Court has defined the terms "premeditation" and "deliberation" as follows:

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason.

State v. Elliott, 344 N.C. 242, 267, 475 S.E.2d 202, 212 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997) (internal quotation marks and citations omitted). Premeditation and deliberation are rarely established by direct evidence, and are most often proved by circumstantial evidence. *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000).

The facts, as narrated by the State and with the consent of the defendant, tend to show that defendant approached the victim three times between 11:00 and 11:30 a.m., under the guise of soliciting work. The first conversation took place on the victim's enclosed back porch. On each occasion, the victim declined defendant's offer to perform yard work for her or her neighbors. After defendant's third visit, the victim asked him to leave. The victim left the residence to go to a 2:00 p.m. appointment,

returning around 3:45 p.m. At some time subsequent, defendant returned to the victim's home, where the victim encountered him for a second time on her enclosed back porch. Defendant then subdued the victim with the use of a box cutter that he brought with him. Defendant wrestled the victim to the back porch floor and dragged her into the kitchen, where he taped her mouth and hands with duct tape that he brought with him. After taking $2.00 from the victim's purse, defendant asked her who was in the house and what time someone would be home. When the victim held up five fingers (to indicate that someone would be arriving home at 5:00 p.m.), defendant pulled her dress up and attempted to digitally penetrate her. Defendant then raised the victim's knees to her chest and raped her. He spoke briefly with her after the rape and then bound her legs with duct tape and left. Defense counsel did not object to the State's recitation of the facts.

Defendant argues that the trial court improperly relied on unsworn statements made by the prosecutor about feces on the property that may have been left by defendant to find the existence of the subject aggravating factor. It is well settled that the trial court, which sits as finder of fact, is presumed to disregard incompetent evidence in making its decision. *State v. Allen*, 322 N.C. 176, 185, 367 S.E.2d 626, 631 (1988). We conclude that even without consideration of the prosecutor's statements about the presence of human feces in the victim's yard, the trial court had before it sufficient circumstantial evidence to support the inference that defendant "acted with sleuth, premeditation and

deliberation, lying in wait for an opportunity to commit the offense." Specifically, the time between defendant's initial contact with the victim on the morning of 20 April 2000 and his later assault and robbery, along with the fact that he brought a box cutter and duct tape to accomplish his crimes, tends to show that defendant had contemplated his actions. Moreover, defendant's actions in asking the victim who was in the house and what time someone would be home, as well as his taking the time to briefly speak with his victim before leaving the scene, tend to show that defendant was in a cool state of mind. Accordingly, this assignment of error is overruled.

Having so concluded, the judgment and commitment of the trial court is affirmed.

Affirmed.

Judges GREENE and TYSON concur.

Report per Rule 30(e).