

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1021

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

JERRY LOCKLEAR,  
Defendant.

Robeson County  
Nos. 00 CRS 53186  
00 CRS 53189  
00 CRS 53665

Appeal by defendant from judgments entered 27 April 2005 by Judge James F. Ammons, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 11 September 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, for the State.*

*Terry F. Rose for defendant-appellant.*

GEER, Judge.

Defendant Jerry Locklear appeals his convictions for two counts of assault with a deadly weapon inflicting serious injury and one count of assault on a female. On appeal, defendant argues that the trial court erred (1) by denying his motion for a mistrial based on a witness' reference to his incarceration, and (2) by denying his motion to dismiss the charge of assault on a female on the grounds that the alleged victim initiated the altercation. We hold that defendant failed to establish that the trial court abused its discretion in denying the mistrial in light of the measures used to mitigate any prejudicial effects of the testimony and that,

when the evidence is viewed in the light most favorable to State, a jury could find that defendant was the aggressor. Accordingly, we conclude that defendant received a trial free of prejudicial error.

#### Facts

The State's evidence at trial tended to show the following facts. On 20 October 2000, Allie Locklear Cox and her fiancé, Ron Jacobs, were visiting Cox's mother, Mollie Bell Smith, at the family farm owned by Smith. At the time, defendant, who is Cox's brother and Smith's son, was living on the property in a separate trailer. Other adult children of Smith lived in houses on the property as well.

During their visit, Cox and Jacobs sat with Smith and other family members on the front porch of a house belonging to one of Smith's daughters. Noting that a number of defendant's friends were gathering at defendant's trailer, Smith became concerned that they were using marijuana on her property. She walked to the trailer and told defendant's friends to leave. Some refused, and defendant ignored her request for assistance. Smith returned to the porch very aggravated, but later walked back towards the trailer with Cox following.

Defendant emerged from behind the trailer and walked toward Cox. Defendant told Cox, "I should have slapped [Smith] in[to] the ground." As defendant walked past Cox, she turned and saw that Smith was standing behind her, and she heard defendant say, "I believe I will." Cox grabbed defendant so that he could not hit

their mother, and Cox and defendant exchanged blows. Another sibling stopped the fight.

Cox and defendant then had a discussion near his trailer. Defendant brought up the subject of their deceased brother-in-law and indicated that he had killed him. Cox's response – "You don't know whether you did it or not" – upset defendant, who picked up a bumper jack. When he saw Jacobs running towards Cox, defendant shoved the jack at another woman standing nearby, grabbed Cox around the neck, and slammed her head into the bed of a truck, rendering her unconscious.

After Cox regained consciousness, she joined Jacobs, Smith, and other family members on the porch. Defendant approached them with a machete. When defendant raised his arm to hit Cox, Smith intervened to deflect the blow, and the machete sliced her hand. Defendant then sliced Jacobs when he also tried to stop defendant. Because the local hospital could not control Smith's bleeding, she was transferred to Duke University Hospital where she underwent the first of two surgeries on her hand. Ultimately, Smith lost the use of one finger and has only partial use of her hand. Jacobs lost full use of his hand.

On 7 April 2003, defendant was indicted on one count of assault on a female and two counts of assault with a deadly weapon inflicting serious injury. A jury found defendant guilty of all charges, and the trial court sentenced defendant to 150 days imprisonment for the assault on a female conviction and two consecutive sentences of 53 to 73 months imprisonment for the two

convictions for assault with a deadly weapon inflicting serious injury. Defendant timely appealed to this Court.

Motion for Mistrial

Defendant first argues that the trial court erred in denying his motion for a mistrial. "Upon motion by a defendant, the judge must declare a mistrial . . . 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. The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will be reversed on appeal only upon a clear showing that the trial court abused its discretion." *State v. Hurst*, 360 N.C. 181, 187-88, 624 S.E.2d 309, 316 (2006) (internal citations and quotation marks omitted). Not every error or defect in a court proceeding requires the declaration of a mistrial. Such a declaration "'is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.'" *State v. Wood*, 168 N.C. App. 581, 583, 608 S.E.2d 368, 370 (quoting *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985)), *disc. review denied*, 359 N.C. 642, 614 S.E.2d 923 (2005).

In this case, when the prosecutor asked Cox on direct examination if defendant looked the same at trial as he had at the time of the assault, Cox replied: "[H]onestly, [defendant] looks better right now while he's been locked up . . . ." Defense counsel objected, and the trial judge removed the jury from the

courtroom. The trial judge then denied defense counsel's motion for a mistrial, but instructed other witnesses in the courtroom not to mention defendant's incarceration. He offered defense counsel a choice of curative instructions for the jury. When the jury returned, he gave the curative instruction chosen by defense counsel, and directed the jury:

[T]he last statement of this witness is to be disregarded by you. I don't know whether you heard it or not — she spoke it kind of low — but if you did hear it, just strike it from your mind. It's not to play any part in the determination of any fact in this matter.

In response to the trial judge's inquiry, after this instruction, each member of the jury raised his or her hand, indicating that the juror could abide by this instruction.

Our courts have held that when a trial court takes measures such as these to mitigate or eliminate the prejudicial impact of an error or defect, "any prejudice is ordinarily cured," because jurors are presumed to follow a trial court's instructions. *State v. Morgan*, 164 N.C. App. 298, 302, 595 S.E.2d 804, 808 (2004) (quoting *State v. Walker*, 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987)). Indeed, this Court, in *Morgan*, found no abuse of discretion when the trial court proceeded precisely as the trial court did here. *Id.* (holding that trial court did not err by denying defendant's motion for a mistrial despite inadmissible testimony regarding possible crimes committed by defendant, because the court's instruction to the jury to disregard the statement and its request that any juror who could not do so raise a hand was sufficient to mitigate any prejudice).

Defendant nevertheless argues that Cox's testimony after the denial of the motion for a mistrial – recounting defendant's remark claiming responsibility for their brother-in-law's death – exacerbated the prejudice from Cox's reference to defendant's incarceration such that the trial court should have intervened *ex mero motu* and ordered a mistrial. At the time of that testimony, counsel for defendant did not object; indeed, he elicited further testimony regarding defendant's remark during cross-examination of Cox. We need not, however, address whether the trial court should have ordered a mistrial on its own motion because defendant has not made that argument the subject of an assignment of error. “[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . .” N.C.R. App. P. 10(a). Defendant's assignment of error states only: “Did trial court [sic] err in denying the Defendant's motion for a mistrial following a witness' testimony that the Defendant had been incarcerated.” Accordingly, we do not consider this aspect of defendant's argument.

#### Motions to Dismiss

Defendant next contends that the trial court erred in denying his motion to dismiss the charge of assault on a female. In considering a motion to dismiss, the trial court must determine whether the State presented substantial evidence of each essential element of the offense charged and of the defendant's being the perpetrator of the offense. *State v. Wardrett*, 145 N.C. App. 409, 412, 551 S.E.2d 214, 216 (2001). Substantial evidence is that

amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Williams*, 133 N.C. App. 326, 328, 515 S.E.2d 80, 82 (1999). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences that may be drawn from the evidence. *Id.*

An assault on a female consists of the following four elements: "(1) an assault (2) upon a female person (3) by a male person (4) who is at least eighteen years old." *State v. Wortham*, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987). See also N.C. Gen. Stat. § 14-33(c) (2) (2005) (setting out the elements of the crime of assault on a female). Defendant does not contest the sufficiency of the evidence of these elements, but instead argues that the evidence established that Cox initiated the altercation and that defendant acted in self defense.

When self defense is claimed,<sup>1</sup> the "State has the burden of proving that a defendant is not entitled to the defense." *State v. Poland*, 148 N.C. App. 588, 597, 560 S.E.2d 186, 192 (2002). In this case, the jurors were presented with different versions of the circumstances surrounding Cox's injury. The State offered evidence that after the initial fight between Cox and defendant ended, there was a period of calm. A reasonable juror could conclude that defendant thereafter initiated a new confrontation during the conversation near the trailer and that he was, therefore, the

---

<sup>1</sup>Defendant requested and obtained an instruction regarding self defense.

aggressor. Although defendant argues that his statement to the police at the time of his arrest "should certainly be more reliable as to the events at the time than a recollection some five (5) years later," questions regarding the witnesses' credibility are for the jury to determine. See, e.g., *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002) ("[I]t is the province of the jury, not the court, to assess and determine witness credibility."), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823, 123 S. Ct. 916 (2003). The trial court, therefore, properly denied defendant's motion to dismiss.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).