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NO. COA05-1265

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v.

JOHN HENRY YOUNG

Forsyth County  
Nos. 04 CRS 11386,  
54540-54541

Appeal by defendant from judgment entered 24 February 2005 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 29 May 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas, for the State.*

*Kevin P. Bradley for defendant appellant.*

McCULLOUGH, Judge.

Defendant appeals from judgment entered after a jury verdict of guilty of assault with a deadly weapon inflicting serious injury and misdemeanor breaking or entering charges. Defendant pled guilty to habitual felon status, and the court sentenced him to two consecutive active terms of imprisonment.

The State presented evidence tending to show the following: On 9 April 2004, Dennis Smith visited the home of Pamela Boston and engaged in sexual intercourse with her. Defendant had a prior romantic relationship with Boston and lived with her at that

residence until Boston ordered him to move out in February 2004. When defendant entered Boston's house on 9 April 2004, he encountered Smith wearing only his boxer shorts and socks, and Boston was in the bedroom. Defendant swung at Smith with a kitchen knife and a struggle ensued between the two men. Smith, who had been stabbed in his shoulders, sides and hands, escaped to a bathroom and locked the door. Meanwhile Boston ran into another room and attempted to call the police. Boston returned to the bedroom and defendant charged at her. Heeding Boston's plea not to hurt her, defendant stopped and ran out of the house.

Defendant testified that Ms. Boston gave him a key to the residence and that he spent the night there on 8 April 2004. He left the residence the next morning to help a niece start her car, and that when he returned, he saw a truck parked outside the house. He opened the door with his key and he heard "moaning and groaning" coming from the bedroom. He grabbed a knife from the kitchen, walked into the bedroom, and saw Boston putting on an article of clothing and Smith pulling up his boxer shorts. Smith charged at defendant and tried to grab the knife. Smith "got stabbed" while they were falling down.

Defendant contends the court erred by refusing to allow him to cross-examine Smith regarding Smith's infidelity to his wife. Although cross-examination of an adverse witness is a matter of right, the scope of cross-examination is subject to the control of the trial court. *State v. Hosey*, 318 N.C. 330, 334, 348 S.E.2d 805, 808 (1986). In exercising this control the trial court must

seek to "avoid needless consumption of time" and "protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2005). "The trial judge's rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced." *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d 815, 816 (2000).

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b). For the purpose of attacking or supporting the credibility of a witness, inquiry may be made on cross-examination into specific instances of conduct of the witness if, in the discretion of the court, the evidence is probative of truthfulness or untruthfulness. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2005).

Defendant argues that evidence of Smith's marital infidelity "is probative of his untruthfulness both because it shows a character willing to disregard solemn vows and because it shows a character willing to lie." The law, however, squarely states otherwise: "Adultery is not the type of misconduct which falls under Rule 608(b)." *State v. Woodard*, 102 N.C. App. 687, 692, 404 S.E.2d 6, 9, *appeal dismissed and disc. review denied*, 329 N.C. 504, 407 S.E.2d 550 (1991). We are bound by this decision. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Even if defendant's argument could be accepted, we are not persuaded that the exclusion of this cross-examination could have affected the jury's verdict. The evidence is uncontradicted that Smith sustained multiple lacerations to both

of his shoulders, sides, and hands and that the walls and doors of the bedroom contained blood spatters. The foregoing evidence is inconsistent with Smith falling on the knife and injuring himself. We conclude the court did not abuse its discretion by excluding this cross-examination.

Defendant next contends the court impermissibly expressed an opinion in its charge to the jury by stating "that the defendant inflicted serious injury which all of the evidence tends to show." Although defendant did not object to this instruction, appellate review is deemed preserved because of the mandatory statutory prohibitions stated in N.C. Gen. Stat. §§ 15A-1222 and 15A-1232 (2005) against the judicial expression of an opinion on the evidence rather than the plain error review requested by appellate defense counsel. *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005). In evaluating a contention that a trial judge impermissibly expressed an opinion, the appellate court examines the totality of the circumstances and determines whether the court's statement reasonably could have affected the jury's verdict. *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). Our Supreme Court has held that "[t]he use of the words 'tending to show' or 'tends to show' in reviewing the evidence does not constitute an expression of the trial court's opinion on the evidence." *State v. Young*, 324 N.C. 489, 495, 380 S.E.2d 94, 97 (1989). Our Supreme Court has also held that "[i]n the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if

reasonable minds could not differ as to their serious nature." *State v. Hedgepeth*, 330 N.C. 38, 54, 409 S.E.2d 309, 318-19 (1991). Pertinent factors establishing whether an injury is serious include hospitalization, pain, loss of blood, and lost time from work. *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983).

In the instant case, the evidence is uncontradicted that as a result of the stabbing, Smith sustained multiple lacerations to his shoulders, sides, and hands. He underwent emergency surgery to remove his spleen, spent seven days in the hospital, received morphine and other painkillers for pain, and sustained damage to the nerves and tendons of his dominant left hand which cause him difficulty in using the dominant hand. He is unable to straighten a finger on his right hand. Reasonable minds could not disagree that the injuries Smith sustained are serious. This assignment of error is overruled.

Defendant's final contention is that the court erred by denying his motion to dismiss the charge of breaking or entering. He argues he could not be convicted of breaking and entering his own residence.

Upon a motion to dismiss, a court must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn therefrom. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Contradictions and discrepancies in the evidence are to be disregarded and left for resolution by a jury. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). The trial court

determines whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982).

Viewed in the light most favorable to the State, the evidence shows that Boston terminated her relationship with defendant two months prior to this incident, that she ordered him to leave the residence, that she removed all of his belongings from the inside of the residence, that defendant never spent a night at her residence after she evicted him, and that she changed the locks to prevent defendant from entering her residence. Based upon the foregoing evidence, a jury could find that, as of the date of this incident, defendant was not a resident of the house and that his entry was unauthorized and without Boston's consent. The court properly denied the motion to dismiss. This assignment of error is also overruled.

Accordingly, we hold defendant received a fair trial, free of prejudicial error.

No error.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).