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NO. COA05-608

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 04 CRS 52469

DENORRIS LAVELLE SANDERS

Appeal by defendant from judgments entered 20 January 2005 by Judge Kimberly S. Taylor in Forsyth County Superior Court. Heard in the Court of Appeals 27 February 2006.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury for the State.

Franklin E. Wells, Jr. for defendant-appellant.

ELMORE, Judge.

Defendant was charged with robbery with a firearm, first degree kidnapping and first degree sexual offense. The State's evidence tended to show that C.J. was walking to her car parked in an apartment complex parking lot when two men approached her. One man had a gun and told her not to scream. The two men pushed her into a nearby wooded area where one of the two men demanded oral sex from C.J. After C.J. complied, the two men took her purse and left the area. C.J. was later taken to the hospital and examined. During the examination, swabs were taken of a dried substance on

C.J.'s face and chin. Although C.J. was unable to identify any suspects, a test concluded that samples taken from C.J.'s face contained DNA likely to be from defendant.

A jury found defendant guilty as charged. The trial court arrested judgment on the first degree kidnapping charge and sentenced defendant to an active term of imprisonment for robbery with a firearm, second degree kidnapping and first degree sexual offense. Defendant appeals.

Defendant argues that the trial court erred by failing to declare a mistrial *sua sponte* after it had been alerted that jurors had been discussing the case before the jury had been adjourned for deliberations. We disagree.

A trial court is required to "declare a mistrial upon the 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 (2005). "It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422-23 (1998) (quoting *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996)), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

Here, the trial court instructed the jury not to discuss the case with fellow jurors and others on the first day of the trial. Shortly after recess on the second day of testimony, defense

counsel told the trial court that he heard some of the jurors discussing the case. The following exchange took place:

THE COURT: I need to put something on the record. During the recess, Mr. Crump, I think you asked - - said that you heard, overheard the jurors discussing the case?

MR. CRUMP: I did, Your Honor.

THE COURT: And I did ask, I believe, one of the Bailiffs went back there and what is your name?

DEPUTY: Deputy Fuell (phoenetic).

THE COURT: Fuell, and I believe you just cautioned the Jury not to talk about the case.

DEPUTY: Yes, ma'am.

THE COURT: All right, Mr. Crump and I discussed that, I didn't have a chance to talk to the District Attorney about the response, but I believe the Defendant agreed that I should caution them, send the Bailiff back to caution the Jury. Either party have anything for the record regarding that?

MR. RABIL: No, Your Honor.

MR. CRUMP: I don't, Your Honor.

THE COURT: Bring them back in.

Prior to recessing at the end of day two, the trial judge again instructed the jurors not to talk to anyone about the trial and not to deliberate. At the start of day three, the judge stated on the record:

THE COURT: I know the Defendant is not in here. The Bailiff said that one of the jurors had approached him wanting to know something about credentials, how the State and the Defendant could - - credentials for the nurse. Is that their question?

BAILIFF: That was her question, she wanted to

know how are they to believe who a person is without some sort of credentials being presented, and I told her that was something that - -

THE COURT: Yeah, and I think he tried to tell her, you know, not to be speculating.

BAILIFF: Yes, ma'am.

THE COURT: I don't really know what that question was about, but you ought to know that the Bailiff had been approached about that.

MR. RABIL: Are we supposed to hold a badge up or something?

THE COURT: Maybe she wanted to see a license or something, I don't know.

MR. RABIL: She testified she's was licensed, so.

THE COURT: Well, yeah, without objection. I thought it was kind of unusual too, but I wanted you both to know that she had asked the Bailiff about it. I think from now on what the Bailiff needs to say is once the Jury is back in the jury room deliberating if they have a legal question or something I guess they can write it out. I wish they would quit talking to people, but I appreciate you telling me that, it's the right thing to do.

BAILIFF: Yes, ma'am.

Before the jury came in, the trial court asked the prosecutor and defendant's attorney whether they wanted her to give any jury instructions outside of the pattern jury instructions. Once the jury came in, the trial court stated:

Ladies and Gentlemen, get you (sic) settled in. I understand that someone did approach the Bailiff in the hall with a question, at this point we can't answer or I can't answer questions. We need to wait until the Jury has gone back to the jury room deliberating, and then if the Jury has a question you can write it out for me and I will answer your question

for the Jury as a whole, but we don't want jurors finding out things on their own about the case, and that would include talking to other people outside of the courtroom, even if you have questions. We need you to wait until you go back to deliberate on your verdict, and then if you have a question I will answer it after I talked to the attorneys about how best to answer your questions. Does anybody have any question about that?

Defendant did not object to the instruction nor did he request further action by the trial court. Defendant did not move for a mistrial or object to the trial court's method of handling the alleged discussion of the case. Finally, prior to deliberations, the trial court instructed the jury as follows:

You must then apply the law which I am about to give you to those facts. It's absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way and have the same law applied to him.

Defendant asserts that the trial court's failure to declare a mistrial constituted plain error. An assertion of plain error on appeal pursuant to N.C.R. App. P. 10(c)(4) requires defendants to cite authority defining the relevant standard and to apply that standard to the specific facts of the case at hand. *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). In his brief, defendant fails to cite any authority or define the plain error standard as required. Even if defendant had properly argued plain error, the North Carolina Supreme Court has restricted review for

plain error to issues involving either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence. *State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996), *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). Since plain error review is not available here, this assignment of error is waived. In any event, we conclude the trial court did not abuse its discretion in failing to declare a mistrial since the trial court admonished the jurors and properly instructed the jury afterwards.

No error.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).