NO. COA09-1697

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v. Cabarrus County
No. 08 CRS 52053

JASON PATRICK HALLMAN,
Defendant.

Appeal by defendant from judgment entered 15 June 2009 by Judge W. David Lee in Cabarrus County Superior Court. Heard in the Court of Appeals 19 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Charlotte Gail Blake for defendant-appellant.

GEER, Judge.

Defendant Jason Patrick Hallman appeals from his conviction of robbery with a dangerous weapon and resisting arrest. On appeal, he contends that the trial court erred in denying his motion for a mistrial after the prosecutor made several improper statements during her closing argument. The trial court had, however, sustained defendant's objections to each of the statements and instructed the jury to disregard them. Because we are required to presume that the jury obeyed the instructions given by the trial court and defendant has not rebutted that presumption, any improprieties were cured by the instructions, and the trial court

did not abuse its discretion in denying defendant's motion for a mistrial.

Facts

The State's evidence tended to show the following facts. On 5 June 2008, defendant walked into a Domino's restaurant in Kannapolis, North Carolina where employees Kelly Safrit and Brandon Evans were working. Safrit testified that defendant told her he had a gun. Evans testified that defendant said, "I'm here to rob you," lifted his shirt slightly showing Evans a pistol grip, and then stated, "I don't want to use it, but I will." Evans pulled out all the money in the register, which totaled between $60.00 and $70.00, and placed it on the counter. Defendant took the money, left the restaurant, got on his bicycle, and rode away.

Evans called 911 immediately after defendant left, reporting that he had been robbed and that defendant was leaving on a bicycle. The 911 dispatcher put out a call that an armed robbery had occurred at the Domino's in Kannapolis. Kannapolis Police Officer David Drake was passing the Domino's, looked out the window of his patrol car, and saw defendant on his bicycle traveling in the opposite direction. Officer Drake made a U-turn, pulled behind defendant, and activated his lights and siren. Defendant pulled into a parking lot and stopped.

Officer Drake then exited his vehicle and drew his service weapon, anticipating, because of the dispatch, that defendant might be armed. Officer Drake repeatedly ordered defendant to get off of his bicycle, and eventually defendant did so. The officer then

ordered defendant to lie down on the ground on his stomach, but defendant did not obey. Officer Drake pulled his OC spray[1] from his belt and warned defendant that he would spray him if defendant did not comply. After being warned, defendant made a move as if to flee, and Officer Drake sprayed defendant, striking him on his right shoulder.

After being struck by the OC spray, defendant took off running. Officer Drake pursued defendant for about 300 yards until defendant fell to the ground. Officer Drake approached and ordered defendant to place his hands behind his back, warning defendant that he would be sprayed again if he did not do so. Defendant complied with the order, and the officer, when securing defendant, found a wad of money in defendant's left hand. Defendant was placed in custody as several other officers arrived on the scene. Officer Drake informed the other officers that defendant had been sprayed with OC and needed to be decontaminated in accordance with police policy.

The police officers then conducted a search of the area for any evidence or weapons that might have been discarded. Officer Drake testified that he did not see defendant discard anything and had not lost sight of him. No weapon was ever recovered.

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[1]Defendant's expert witness, Gary Mugridge, testified that "OC spray" — which is oleoresin capsicum spray or, more commonly, pepper spray — causes burning in the eyes and difficulty breathing, which produces the sensation of suffocating. These sensations cause the suspect to panic, making it easier for the officer to take the suspect into custody.

Defendant was taken to the Kannapolis Police Department and advised of his *Miranda* rights, which he waived. Defendant gave a statement to police that was later reduced to writing and signed. Officer Drake testified that during the questioning of defendant, Officer Drake had no concern about defendant's being impaired.

In his statement, defendant said that he unsuccessfully tried to cash a check at a bank. He left the bank and started walking north on Highway 29 through town when a car pulled up and the two men inside offered to give him a ride. The men asked if defendant partied, and defendant responded that he was going to cash his check so he could buy some crack. After defendant was able to cash his check, the two men in the car bought some crack cocaine, and the three men smoked all of it. About that time, another man showed up on a bicycle, and defendant was told to ride the bicycle to the Domino's and wait for the other men to arrive. Defendant rode to the Domino's and when he approached the men in their car, he saw a revolver in the driver's lap. The driver told defendant to rob the Domino's so they could get high all night. Defendant claimed in his statement that the men did not give him the gun.

Defendant walked into the store, told Safrit and Evans he had a gun, even though he did not, and demanded all the money in the register. Evans opened the register and gave him the money. According to defendant, when he left the Domino's, the car was gone, so he took off on the bicycle. Defendant reported that after the officer stopped him and pulled his gun, defendant ran because

he was scared. He explained: "I knew that I was going to jail, so I ran until I wore myself out. I got so tired so I quit."

After giving his statement, while defendant was being transported to the magistrate's office, defendant claimed that he had swallowed 50 Valium pills during the chase by the officer. Officer Drake then took defendant to an emergency room as a precaution. The emergency room doctor testified at trial that, at the time of his examination, defendant did not exhibit any of the symptoms expected of someone who had taken Valium and that defendant was "awake, alert" and "in no distress."

On 23 June 2008, defendant was indicted for robbery with a dangerous weapon and resisting a public officer. The case came on for trial on 9 June 2009 in Cabarrus County Superior Court. During opening statements, defense counsel stated that defendant took money from the Domino's and ran. The trial court immediately inquired whether defendant understood that he was admitting to two of the elements of the offense and that this statement also tended to indicate a third. Defendant acknowledged that he understood, that he had discussed the admission with his attorney, and that he had given his informed consent.

Defendant testified on his own behalf at trial and admitted robbing the Domino's, but he denied having a gun or saying anything about having a gun. He testified that "the word 'gun' never came out of my mouth." He specifically denied that there was anything stuck in the waistband of his pants. Defendant claimed that when he saw the officer approaching, after he rode away on the bicycle,

he swallowed a bag with approximately 50 Valium pills so that he "would not get caught and charged with [them]."

Defendant testified that as the officer approached him with the gun, defendant was "really scared," froze for a minute, and then threw down his bicycle and responded to the officer so that he would not be sprayed. Defendant claimed that while he was not sure where the spray actually hit him, he felt some liquid on his face and shoulder and he "felt the effects of it getting into [his] lungs." He ran from the officer until he lost his breath, lay down, and gave up. According to defendant, he was never decontaminated from the OC spray.

When asked about his statement to the police, defendant said that while giving his statement, he was having trouble breathing, his throat was burning, and he could not focus on anything. Defendant noted that the officer first wrote his statement by hand, but later it was typed up and given to him to sign. Defendant denied ever telling the police that he had threatened to use a gun during the robbery. Defendant said he was scared and did not read the statement before signing it. Defendant also told the jury that he had never even owned a gun. On cross-examination, however, defendant admitted that subsequent to his arrest in this case, he and a friend went back to the house where he had smoked the crack cocaine with the men in the car, and they traded a gun for crack cocaine.

Defendant also called Gary Mugridge as an expert witness on OC spray to testify about the possible effects of being hit by or

exposed to OC spray. Mugridge testified that the OC spray could have impacted defendant even if it did not hit him in the face.

During closing arguments, defendant's counsel objected to several statements made by the prosecutor. The trial court sustained each objection and instructed the jury to disregard the statements. After closing arguments, defendant moved for a mistrial based on the cumulative effect of the statements made by the prosecutor during her closing argument. That motion was denied by the trial court.

The jury convicted defendant of both robbery with a dangerous weapon and resisting a public officer. The trial court consolidated the offenses and sentenced defendant to a presumptive-range term of 98 to 127 months imprisonment. Defendant timely appealed to this Court.

Discussion

In his sole argument on appeal, defendant contends that the trial court abused its discretion in denying his motion for a mistrial. A trial court is required to grant a motion for 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." N.C. Gen. Stat. § 15A-1061 (2009). "'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. Warren*, 327 N.C.

364, 376, 395 S.E.2d 116, 123 (1990) (quoting *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603, 110 S. Ct. 1465 (1990)).

This Court reviews the trial court's decision whether or not to grant a mistrial under an abuse of discretion standard. *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). A trial court abuses it discretion when its ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Here, defendant's timely objections to the prosecutor's statements were sustained by the trial court, and the jury was instructed to disregard those remarks. After the closing arguments, which were not recorded, defendant moved for a mistrial, arguing that the prosecutor improperly referred to expert witness Mugridge as a "hired gun," stated that defendant ran because he "was guilty," and asserted defendant knew he was "cooked."

Defense counsel further noted that the information on the PowerPoint presentation used by the State during closing argument was difficult to read because it was dense and not all of it was read aloud. Defense counsel argued that she could not see what the jury saw and that because the slides were not admitted into evidence, she believed that defendant's constitutional right to a fair trial was breached. She requested that a printout of the PowerPoint slides be included in the record in order to "solve the issue."

Before addressing defendant's motion, the trial court summarized for the record the objections made by defense counsel during the State's closing argument. The court noted that defense counsel

> objected at the time that the district attorney made reference to the witness, Mr. Mugridge, being a hired gun and also that the defendant was cooked and that when you made those objections, I sustained those and asked that the Court — asked that the jury disregard those. I think also on those occasions when you made reference to the Power Point [sic] that I was not able to see in its entirety, you indicated in the presence of the jury what you found to be objectionable with respect to each of those and I believe I sustained the objection and asked the jury to disregard.
>
> Is that your recollection?

Defense counsel indicated that her recollection matched the trial court's. The trial court directed the district attorney to make the PowerPoint slides available for inclusion in the record on appeal.

The trial court then denied defense counsel's motion for a mistrial. The court explained:

> I don't - didn't see anything in any of the closing arguments that could not be and were not properly addressed, in my view at least, by my instructions and I don't believe there's been any type of manifest injustice of the nature that would be required in order to grant the motion for a mistrial, so that motion, in my discretion, is denied.

The record does not specifically identify which of the PowerPoint slides defendant objected to during the closing arguments. "It is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*,

307 N.C. 321, 341, 298 S.E.2d 631, 645 (1983) (observing that since record did not contain substance of specific paragraphs of defendant's motion, "defendant's assignment of error amounts to a request that this Court assume or speculate that the trial judge committed prejudicial error in his ruling"). "This Court's review on appeal is limited to what is in the record or in the designated verbatim transcript of proceedings. . . . An appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it." *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254 (holding that Court was precluded from reviewing denial of motion for appropriate relief on appeal when appellant declined trial court's offer to reconstruct closing arguments that were not recorded), *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985).

On appeal, defendant has relied upon a number of statements in the PowerPoint slides in arguing that the trial court erred in denying the motion for a mistrial. Because, however, defense counsel did not preserve for the record her specific objections to the PowerPoint slides, we are unable to determine whether defendant also pointed at trial to each of those statements as grounds for a mistrial. In any case, it is undisputed that the trial court sustained each objection defendant made to the PowerPoint slides.

"Jurors are presumed to follow the trial court's instructions." *State v. Gregory*, 340 N.C. 365, 408, 459 S.E.2d 638, 663 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478, 116 S. Ct. 1327 (1996). Therefore, as a general rule, if

"immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, *the impropriety is cured*." *State v. Woods*, 307 N.C. 213, 222, 297 S.E.2d 574, 579 (1982) (emphasis added).

The North Carolina appellate courts have repeatedly held, with respect to closing arguments, that an instruction to disregard an improper argument was sufficient to cure any impropriety. *See State v. Maynor*, 331 N.C. 695, 701-02, 417 S.E.2d 453, 457 (1992) (holding that instructions to disregard repeated statements by prosecutors in closing argument that they personally disbelieved key defense witness cured any impropriety); *State v. Herring*, 322 N.C. 733, 745, 370 S.E.2d 363, 371 (1988) (holding that trial court's prompt action in instructing jury to disregard eight statements during closing argument "removed any possibility of reversible error"); *State v. Peterson*, 179 N.C. App. 437, 469, 634 S.E.2d 594, 617 (2006) (holding that although prosecutor expressed her personal belief in credibility of State's witnesses, "the improprieties of the prosecutor's personal opinions were cured and possible prejudice to defendant eliminated upon the trial court's curative instruction to the jury"), *disc. review denied*, 361 N.C. 225, 643 S.E.2d 17, *aff'd*, 361 N.C. 587, 652 S.E.2d 216 (2007), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d 377, 128 S. Ct. 1682 (2008); *State v. Ross*, 100 N.C. App. 207, 214, 395 S.E.2d 148, 152 (1990) (holding that trial court's instruction to State to "keep its argument within the evidence" effectively "removed any

impropriety" after prosecutor referred to defendant as "a wolf in sheep's clothing"), *disc. review denied*, 328 N.C. 96, 402 S.E.2d 425, *aff'd*, 329 N.C. 108, 405 S.E.2d 158 (1991); *State v. Rozier*, 69 N.C. App. 38, 57-58, 316 S.E.2d 893, 905-06 (upholding trial court's denial of defendant's motion for mistrial based on trial court's instructions to jury to disregard prosecutor's statements during closing argument describing defense counsel's question as "'slick,'" discussing effects of drugs on small children, referring to "higher law," and commenting on lack of death penalty in case), *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984).

In this case, the trial court sustained each of defendant's objections and instructed the jury to disregard the prosecutor's improper statements. Defendant makes no showing that these instructions were insufficient to cure any impropriety under *Woods* and does not attempt to distinguish this case from prior decisions finding no error. *See also State v. Johnson*, 78 N.C. App. 68, 73, 337 S.E.2d 81, 84 (1985) (holding that trial court did not err in denying motion for mistrial when court sustained objections and instructed jury to disregard prosecutor's statements, during closing argument, based on facts not in evidence).

In support of his argument that the trial court should have granted a mistrial, defendant cites *State v. Miller*, 271 N.C. 646, 660, 157 S.E.2d 335, 346 (1967), in which the Supreme Court found the State's argument that the defendants were "habitual storebreakers" was "grossly unfair and well calculated to mislead and prejudice the jury." The Supreme Court, however, also pointed

out that the defendants should have objected, adding: "The error in the case at bar consists in the fact that the court did not forbid the grossly unfair and improper argument of the solicitor . . . and did not charge the jury to disregard such grossly unfair argument." *Id.*

Defendant also cites *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002). In *Rogers*, the defendant likewise failed to object to statements during the closing argument regarding the defendant's expert witness, although the defendant had unsuccessfully objected to portions of the State's cross-examination of the expert. *Id.* at 462, 562 S.E.2d at 885. The Court held that the trial court erred in failing to intervene *ex mero motu* during the closing argument and ordered a new trial because, given the cumulative effect of the improper cross-examination and closing argument, the Court was "unable to conclude that defendant was not unfairly prejudiced." *Id.* at 465, 562 S.E.2d at 886.

As *Miller* expressly and *Rogers* implicitly held, the error was the lack of any instruction to the jury to disregard the prosecutor's improper arguments. That error did not occur in this case. Neither *Miller* nor *Rogers* addresses the situation when, as happened here, the trial court promptly sustains objections to the closing argument and instructs the jury to disregard the improper remarks.

In short, defendant has not demonstrated that the trial court's instructions were insufficient to cure any impropriety, especially given that at trial, he essentially conceded all of the

elements of the charges except for whether he used a firearm. Therefore, we cannot conclude that the trial court abused its discretion in denying defendant's motion for a mistrial.

No error.

Judges JACKSON and BEASLEY concur.

Report per Rule 30(e).