

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-397
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v.

Columbus County
No. 11 CRS 54182

VALERIE SMITH

Appeal by defendant from judgment entered 27 November 2012 by Judge Arnold Jones in Columbus County Superior Court. Heard in the Court of Appeals 9 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Irons & Irons, P.A., by Ben G. Irons, II, for defendant appellant.

McCULLOUGH, Judge.

A jury found defendant guilty of malicious conduct by prisoner. The trial court suspended a prison sentence of sixteen to twenty months and placed defendant on thirty-six months of supervised probation. Defendant filed timely notice of appeal from the judgment.

Defendant first claims the trial court erred in denying her motion to dismiss the charge at the conclusion of the evidence. Specifically, she challenges the sufficiency of the evidence as to the first essential element of malicious conduct by prisoner under N.C. Gen. Stat. § 14-258.4 - that "the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim[.]" *State v. Noel*, 202 N.C. App. 715, 718, 690 S.E.2d 10, 13 (2010) (emphasis added).

In reviewing the denial of a motion to dismiss, we must determine whether the evidence would permit a reasonable juror to find defendant guilty of each element of the offense beyond a reasonable doubt. *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443 (1998). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (internal quotation marks and citation omitted). Moreover, "[a]ny evidence of the defendant which is favorable to the State is considered, but [her] evidence which is in conflict with that of the State is

not considered." *State v. Jacobs*, 31 N.C. App. 582, 583, 230 S.E.2d 550, 551 (1976).

In this case, the State's evidence showed that Columbus County Sheriff's Deputy Melanie Avant was on duty in her uniform and marked patrol car on 10 December 2011, when she responded to a larceny call involving an alleged theft of pecans on Brick City Road. Upon Deputy Avant's arrival on the scene, the alleged victim identified three young males who were approximately 100 feet down the street as the perpetrators. Deputy Avant then proceeded to investigate.

As Deputy Avant questioned the three young males about the pecans, defendant, the mother of one of the young males, approached "shouting [and] wanting to know what was going on[.]" After being informed of the allegations, defendant picked up a bucket of pecans, dumped them into a wet ditch, and said, "[H]ere's your mother f---- pecans[.]" Defendant then began to walk away, refusing Deputy Avant's request for her information and responding "f---- you." At that time, Deputy Avant attempted to arrest defendant for obstructing the investigation by disposing of the evidence. See N.C. Gen. Stat. § 14-223 (2011).

Defendant resisted arrest by struggling, cursing, and yelling. Nevertheless, Deputy Avant eventually handcuffed

defendant and placed her in the backseat of her patrol car. While standing in the doorway beside defendant with her hand on top of the open car door, Deputy Avant heard defendant preparing to spit. Defendant then leaned up, looked at the deputy, "turned and (indicating) spit in [her] direction." Deputy Avant was able to close the door in time to "just barely block[]" defendant so that "the spit ran down the window of [her] patrol car." During the booking process, defendant again made a sound indicating she was about to spit. Deputy Avant used her elbow to divert defendant's face and pin it against a window. Defendant did not spit on this occasion but continued to scream invectives at Deputy Avant. A magistrate subsequently jailed defendant for contempt.

In contradiction to the State's evidence, defendant testified that she spat on the inside of the car window after Deputy Avant closed the door and did not spit at the deputy.

We find the State's proffer sufficient to overcome defendant's motion to dismiss. Deputy Avant's testimony supported a reasonable inference that defendant spat at her from the backseat of the patrol car. Although the deputy was able to close the door in time to block the sputum, the offense of malicious conduct by prisoner does not require the offending

substance to make contact with the officer. See *State v. Crouse*, 169 N.C. App. 382, 388, 610 S.E.2d 454, 458 (2005) (distinguishing the offenses of felony malicious conduct by a prisoner and misdemeanor assault on a public official). Rather, it "is directed at deterring and punishing the projecting of bodily fluids or excrement at governmental employees by those in custody, whether or not such misconduct amounts to an assault." *Id.*; accord *Noel*, 202 N.C. App. at 718, 690 S.E.2d at 14.

Defendant next claims the trial court erred in denying her motion for a mistrial after the prosecutor improperly asked her on cross-examination about a prior conviction for assault of a government official that was more than ten years old. See N.C.R. Evid. 609(b). Under N.C. Gen. Stat. § 15A-1061, a mistrial is warranted when "there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2011). The trial court's denial of a motion for mistrial is reviewed only for manifest abuse of discretion. *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). "The trial court's decision in this regard is to be afforded great deference since the trial court is in a far

better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *Id.*

We find no abuse of discretion here. In response to the prosecutor's query whether she "remember[ed] a conviction for assaulting a government official[,] " defendant responded, "That wasn't within ten years." After a bench conference, the trial court sustained defendant's objection and issued the following curative instruction to the jury:

I am sustaining [defendant's] objection. Again, . . . that means you are not to consider the question that was asked, nor are you to consider any answer that was given or any comments you may have heard from the attorneys in this trial.

If you understand that and can follow that instruction, will you indicate by raising your hand for me? I need the record to reflect all thirteen jurors have indicated they understand and will and can follow that instruction. And, further, . . . if any answer was given by the witness, that is to be stricken as well.

Because it "sustained defendant's objection, allowed his motion to strike, and instructed the jury to disregard the statement[,] . . . the trial court cured any error by its action[.]" *State v. Thomas*, 350 N.C. 315, 341, 514 S.E.2d 486, 503 (1999). Accordingly, "we find no prejudice to defendant warranting a mistrial." *Id.*; accord *State v. Locke*, 333 N.C. 118, 124, 423

S.E.2d 467, 470 (1992) ("[T]he trial court's prompt actions of sustaining the objections and issuing a curative instruction were sufficient to cure any prejudice.").

No error.

Judges HUNTER (Robert C.) and BRYANT concur.

Report per Rule 30(e).