

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-590

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Forsyth County  
No. 07 CRS 54983

JOEL KEVIN STEPHENS

Appeal by Defendant from judgment entered 12 December 2007 by Judge V. Bradford Long in Forsyth County Superior Court. Heard in the Court of Appeals 8 December 2008.

*Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.*

*Jon W. Myers, for Defendant.*

ARROWOOD, Judge.

Joel K. Stephens (Defendant) was charged by warrant on 18 May 2007 with assault on a female. He was found guilty of the charge in District Court. Defendant appealed to the Superior Court and was again found guilty of the charge. From a judgment imposing an active term of 75 days, Defendant appeals.

A summary of the evidence is not necessary to an understanding of the two issues presented by Defendant.

Defendant first contends the court erred by allowing the prosecutor to make improper closing arguments. Defendant's counsel stated in open court for the record that he objected to the

prosecutor's argument that "the defendant has the power of subpoena. The defendant put on no evidence, as he's entitled to do." Counsel argued to the trial court that the prosecutor's argument improperly shifted the burden of proof to Defendant.

We overrule this contention. Our Supreme Court has held that although a prosecutor may not comment during closing argument regarding a defendant's exercise of his right not to testify, the prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. *State v. Mason*, 315 N.C. 724, 732-33, 340 S.E.2d 430, 435-36 (1986) (finding no error in prosecutor's argument "to the jury that defendant had not exercised his rights to call witnesses and produce evidence to refute the State's case"). We conclude the prosecutor's argument in the case at bar falls within a permissible comment on Defendant's failure to subpoena witnesses to contradict or refute the evidence of the State.

Defendant's remaining contention is that the court erred by allowing a witness, a Deputy Clerk of Superior Court who took photographs of Defendant's wife (Mrs. Stephens), whom Defendant was charged with assaulting, to refer to Mrs. Stephens as "the victim." Defendant argues the testimony should have been excluded because (1) the witness lacked personal knowledge that Mrs. Stephens was "the victim" of an assault and (2) it was inadmissible as lay opinion testimony.

The record is not clear that Defendant preserved this contention for review by timely and specific objection. The record

shows that the prosecutor asked the witness to identify a photograph and the witness responded, "[w]e take a full-page picture of the victim, but this picture also -." Defendant interrupted with an objection and requested a colloquy at the bench. After an unrecorded bench conference, the court overruled the objection. The transcript does not indicate the basis of Defendant's objection.

Assuming, *arguendo*, the issue is preserved for review, we find no error. In *State v. Wester*, 71 N.C. App. 321, 326, 322 S.E.2d 421, 424 (1984), this Court found no error in the admission of testimony by a rescue squad member referring to the prosecuting witness as "the victim" or "cutting victim" because the evidence was uncontradicted that the prosecuting witness was in fact the victim of an assault. Similarly, the evidence in the case at bar is uncontradicted that Mrs. Stephens was the victim of an assault - the question the jury had to decide was whether the perpetrator was Defendant or Defendant's sister.

We hold Defendant received a fair trial, free of prejudicial error.

No Error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).