IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1266

Filed: 17 July 2018

Durham County, Nos. 16 CRS 56836-37

STATE OF NORTH CAROLINA

v.

CHRISTOPHER EUGENE IVEY

Appeal by defendant from judgments entered 13 April 2017 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 16 July 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Anna M. Davis, for the State.

Charlotte Gail Blake for defendant-appellant.

DAVIS, Judge.

Christopher Eugene Ivey ("Defendant") appeals from his convictions for violating a domestic violence protective order, habitual misdemeanor assault, and misdemeanor breaking or entering. On appeal, he contends that the trial court erred in denying his motion for a mistrial. After a thorough review of the record and

applicable law, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: Defendant and Melanie Reaves were in a dating relationship beginning October 2015. On or about 12 April 2016, Reaves obtained a Domestic Violence Protective Order ("DVPO") against Defendant. During the early morning hours of 9 July 2016, Defendant broke into Reaves' apartment while she slept. Reaves awoke with a flashlight shining in her face and did not know who the intruder was until Defendant shined the light on his own face. Defendant sat on Reaves' chest and threatened to smash her face with a beer bottle that he was holding. He covered her mouth and nose, and Reaves drifted in and out of consciousness several times. While at the apartment, Defendant head-butted Reaves twice, hit her knee with the beer bottle, and burned her hand with a cigarette.

Defendant forced Reaves out of the apartment and into her car. He drove the vehicle to a nearby gas station for more cigarettes. At the gas station, while Defendant was inside the store, Reaves grabbed the keys from the ignition and threw them away from the vehicle. When Defendant ran outside to get the keys, Reaves ran inside the store and told the clerk to dial 911. Defendant drove away before emergency medical technicians ("EMT") and law enforcement officers arrived.

On 19 September 2016, Defendant was indicted by a Durham County grand jury for breaking or entering with intent to injure and violating a DVPO. Defendant was indicted on 20 March 2017 for assault inflicting physical injury and habitual misdemeanor assault. On 3 April 2017, Defendant filed various pre-trial motions, including two motions *in limine*. The first motion *in limine* sought to bar all references at trial to Reaves as the "victim." The second motion *in limine* was to exclude from evidence Defendant's previous convictions for assault on a female as well as evidence "of any time spent in jail and/or on probation for previous convictions for prior assault offenses."

A jury trial was held beginning 10 April 2017 in Durham County Superior Court before the Honorable Beecher R. Gray. That morning, a pre-trial hearing was held on Defendant's motions. The trial court granted Defendant's first motion *in limine* and instructed counsel that the parties should refer to Reaves as either the "alleged victim" or "complaining witness." With regard to Defendant's second motion *in limine*, the court stated that it would allow evidence related to "the [DVPO], that there was one in place," but instructed counsel to "stay away from the assault part of that."

During trial, Defendant admitted to prior assault convictions supporting the habitual misdemeanor assault charge outside the presence of the jury. On 13 April 2017, the jury convicted Defendant of violating a DVPO, assault on a female inflicting

physical injury, and misdemeanor breaking or entering — the lesser-included offense of felony breaking or entering with intent to injure. The trial court sentenced Defendant to 20 to 33 months imprisonment for the habitual misdemeanor assault conviction and to consecutive terms of 120 days and 150 days imprisonment, respectively, for the breaking or entering and violating a DVPO convictions. Defendant gave timely notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court abused its discretion in failing to declare a mistrial as a result of statements made by the State and its witnesses at trial. He contends that these statements violated the court's pre-trial rulings and resulted in "substantial and irreparable prejudice" to him.

N.C. Gen. Stat. § 15A-1061 requires a trial court to declare a mistrial upon a 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 (2017). "[A] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982) (citation omitted). It is well established that "the decision of whether to grant a mistrial rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of

an abuse of discretion." *State v. Upchurch*, 332 N.C. 439, 453, 421 S.E.2d 577, 585 (1992) (citation omitted). An "[a]buse of discretion results where the court's 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) (citation omitted).

Defendant points to several statements made during trial as forming the basis for his contention on appeal. First, Defendant directs our attention to the following exchange between the prosecutor and Stuart McFarland, an EMT who responded to Reaves' 911 call:

> [PROSECUTOR]: Describe the scene when you got there.
>
> [McFARLAND]: I can't remember much because it was a while back, but I know it was at the gas station and *the victim* was in the bathroom.
>
> [PROSECUTOR]: Did you interact with *the victim*?

(Emphasis added.)

Defendant's counsel objected and asked to be heard outside the presence of the jury. After the jury left the courtroom, the trial court reminded the prosecutor of its pre-trial ruling barring the use of the word "victim," and the prosecutor apologized to the court.

The prosecutor subsequently examined Investigator Tyrone Blake of the Durham Police Department, who had been assigned to the case. In testifying with

regard to how he begins an investigation, Investigator Blake stated that "the first thing that would be done is to send out a letter notifying *the victim* of the assignment." (Emphasis added.) Defendant's counsel objected and made a motion to strike, which the trial court overruled.

Finally, Defendant directs us to another statement made during trial by a witness for the State. Officer John Wagstaff of the Durham Police Department responded to Reaves' report of vehicle larceny after Defendant drove away from the gas station in her car. Officer Wagstaff testified that after he informed Reaves that her DVPO against Defendant had yet to be served, Reaves responded to him that Defendant "had since gone to trial and he has been incarcerated and that the parole officer --." Before Officer Wagstaff could continue, Defendant's counsel objected and moved to strike. The trial court sustained the objection and allowed the motion to strike. Outside the presence of the jury, Defendant's counsel moved for a mistrial. Although the court denied the motion, it did provide a curative instruction when the jury returned to the courtroom, stating:

> [T]he last answer that you heard before I sent you out of the courtroom, last answer from this witness, as you heard me sustain an objection and struck the answer from the record, you are to disregard that answer in all forms. It plays no part in your decision, all right?

Defendant's counsel renewed the motion for mistrial after the jury retired to the jury room to deliberate, which the trial court again denied.

Defendant contends that the cumulative effect of these statements by witnesses and the prosecutor were so prejudicial to him that he could not be fairly tried by the jury. We disagree.

With regard to the references by McFarland and the prosecutor to Reaves as "the victim," we first note that Defendant's counsel did not take available steps to minimize any resulting prejudice as she did not move to strike the statements or request a curative instruction. *See State v. Williamson*, 333 N.C. 128, 139, 423 S.E.2d 766, 772 (1992) ("A trial court does not err by failing to give a curative jury instruction when, as here, it is not requested by the defense." (citation omitted)). Moreover, we believe any resulting prejudice was minimal in light of the evidence presented at trial.

In the related context of the trial court's use of the term "victim" in giving jury instructions, our Supreme Court has suggested that such usage is not erroneous where the State produces physical evidence that the prosecuting witness suffered injury. *See State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) ("[W]e hold in this case that the trial court did not err in using the word 'victim' in the pattern jury instructions to describe the complaining witnesses. We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions . . . to use the phrase 'alleged victim' or 'prosecuting witness[.]'").

In the present case, ample evidence was introduced showing Reaves' physical injuries, and there were no statements at trial by the State or any witnesses describing Reaves as the victim *of Defendant's assault*. The isolated references to Reaves as "the victim" cannot be said to have substantially altered the way the jury viewed the evidence in determining Defendant's guilt or innocence.

As to the other instance in which a witness spoke of "the victim," when read in context it is clear that Investigator Blake was referring to complaining witnesses generally rather than about Reaves specifically. Thus, this reference to "the victim" would have even less prejudicial effect. Therefore, Defendant cannot show that references to "the victim" made during trial rendered it impossible for him to receive a fair and impartial verdict.

Nor can Defendant demonstrate substantial and irreparable prejudice when these references to "the victim" are viewed in conjunction with Officer Wagstaff's testimony suggesting that Defendant had been incarcerated and had a parole officer in connection with an incident or incidents giving rise to a DVPO. With regard to Officer Wagstaff's testimony, the court allowed the motion to strike and *did* provide a curative instruction. *See State v. Walker*, 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987) ("When a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." (citation omitted)).

In support of his contention that Officer Wagstaff's reference to Defendant's extraneous criminal matters warranted a mistrial, Defendant relies upon *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967). In *Aycoth*, a deputy sheriff testifying at the defendant's trial for armed robbery referenced the fact that the defendant had been indicted for murder in an unrelated incident. *Id.* at 271-72, 154 S.E.2d at 60. Our Supreme Court determined that the prejudicial effect of this testimony was "emphasize[d] rather than dispel[led]" by subsequent references at trial to the defendant having been in prison and having a bad reputation with law enforcement. *Id.* at 273, 154 S.E.2d at 61. The Court held that the jury learning that the defendant had been indicted for murder "was of such serious nature that its prejudicial effect was not erased" by the trial court's curative instruction and concluded that a new trial was required. *Id.*

We believe *Aycoth* provides a useful contrast in demonstrating why a reference to an extraneous criminal matter did not warrant a mistrial in the present case. Here, Officer Wagstaff's reference to Defendant's previous involvement in the criminal justice system relating to the issuance of a DVPO was not as serious as the reference in *Aycoth* to an unrelated indictment for murder. Furthermore, Defendant points to no other instances during trial in which witnesses referenced Defendant's prior involvement with the criminal justice system as occurred in *Aycoth*. It is true that our appellate courts have recognized that "the serious character and gravity of

the incompetent evidence and the obvious difficulty in erasing it from the mind" can in some instances warrant a new trial. *State v. Smith,* 225 N.C. App. 471, 480, 736 S.E.2d 847, 853 (2013) (citation omitted). However, we hold that the trial court's ruling on Defendant's objection and ensuing instruction cured any prejudice in the present case.

Thus, Defendant has failed to demonstrate that the statements made at trial that he highlights were of such a serious nature as to make it impossible for him to receive a fair and impartial verdict. Therefore, we cannot say that the trial court abused its discretion in denying Defendant's motion for a mistrial. Accordingly, we hold that Defendant received a fair trial free from prejudicial error.

Conclusion

For the reasons stated above, we conclude Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges CALABRIA and BERGER concur.

Report per Rule 30(e).