

NO. COA12-117

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Orange County
No. 10 CRS 50792-94

LARRY JOHNSON EDWARDS

Appeal by defendant from judgment entered 26 August 2011 by Judge Craig Croom in Orange County Superior Court. Heard in the Court of Appeals 22 May 2012.

Attorney General Roy Cooper, by Assistant Attorney General K.D. Sturgis, for the State.

Thomas, Ferguson & Mullins, LLP, by James H. Monroe, for defendant-appellant.

STEELMAN, Judge.

The State presented substantial evidence of constructive force sufficient to warrant the submission of the charge of second-degree sexual offense as to Sherri Burch to the jury. Defendant's ineffective assistance of counsel claim is premature, and it is dismissed without prejudice.

I. Factual and Procedural Background

On the evening of 10 March 2010, Sherri Burch visited Larry Johnson Edwards ("defendant") at his home with plans to party that night. They had first met the previous night at defendant's

house, and Burch had given defendant oral sex and smoked crack cocaine with him.

When Burch arrived at defendant's house that night, he spoke to her in a hostile manner, and when she attempted to leave, he locked the front door. Defendant then lectured Burch that he was the boss and she was not to touch the door. Defendant and Burch then went to defendant's bedroom with another man, and the three prepared to smoke crack cocaine. Burch's cell phone kept ringing, and defendant slapped her face and took her phone, prohibiting her from contacting her family. Defendant told the other man to watch the door, then forced Burch to provide oral sex repeatedly for the rest of the night, interspersed with breaks to smoke crack cocaine.

Burch remained in defendant's house for roughly forty-eight hours. She was allowed to move about the house, but only upon receiving defendant's express permission to do so. She was initially allowed to use the bathroom, but was not allowed to shut the door. She was allowed very little food. Burch testified at trial that she was forced to comply with defendant's demands for oral sex, because she felt that she was a captive, had already been slapped once, and feared further physical violence if she refused.

More people came to defendant's house, and he became increasingly angry and periodically wielded a loaded shotgun in front of Burch. At that point, she was no longer allowed to use the bathroom, but instructed to use a jar in the bedroom. Defendant ordered Burch to remove her shirt and then her pants, and when she finally did, he struck her in the head with a steel step stool. When she regained consciousness, defendant stated that he had hit her because she had been too slow in removing her pants. Then, defendant began swinging a wooden crutch at her and breaking things in the bedroom, after which he ordered Burch to clean up the mess. Defendant then began walking around the house with a rifle.

Eventually, Burch was able to remove rods from a window in the bedroom and flee into the night wearing nothing but her bra. Neighbors summoned law enforcement, who found bruising around Burch's head and neck.

Deputies came to defendant's house on 16 March 2010 to arrest him and execute a search warrant. They found defendant in the hall of the residence yelling angrily. Deputies recovered a loaded shotgun and a metal step stool with a red stain on it. Subsequent DNA testing positively identified the stain on the stool to be Burch's blood.

On 7 June 2010, defendant was indicted for first-degree kidnapping, second-degree sexual offense, keeping or maintaining a dwelling house for the use of controlled substances, and assault with a deadly weapon. He was also indicted for an additional count of second-degree sexual offense as well as assault inflicting serious bodily injury relating to a similar incident involving another victim.¹ The court joined the offenses for trial. On 26 August 2011, defendant was found guilty of two counts of second-degree sexual offense, one count of assault inflicting serious injury, one count of false imprisonment, and one count of assault with a deadly weapon. Defendant was sentenced to consecutive active terms of imprisonment of 86 to 113 months.

Defendant appeals.

II. Second-Degree Sexual Offense

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of second-degree sexual offense against Burch because the State did not prove that the offense was committed by force. We disagree.

¹ We do not include the facts involving the second victim as they are not relevant to defendant's appeal.

A. Standard of Review

We review the denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C.App. 57, 62, 650 S.E.2d 29, 33 (2007). On a motion to dismiss, the question for this Court is “whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations omitted) (internal quotation marks omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Furthermore, this Court must consider “all evidence admitted . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

B. Analysis

To uphold a conviction for second-degree sexual offense, there must be substantial evidence that, *inter alia*, the defendant used force sufficient to overcome any resistance of the victim. N.C. Gen. Stat. § 14-27.5(a)(1) (2011); *State v.*

Jones, 304 N.C. 323, 330, 283 S.E.2d 483, 487 (1981).

The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion. Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts. Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat.

State v. Etheridge, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987) (citations omitted); see also *State v. Primus*, 226 N.C. 671, 674, 40 S.E.2d 113, 114 (1946) ("Fear, fright, or duress, may take the place of [actual physical] force.").

Defendant argues that this case is controlled by *State v. Alston*, in which the Supreme Court held that the State had failed to produce sufficient evidence of force to sustain a second-degree rape conviction. 310 N.C. 399, 408, 312 S.E.2d 470, 476 (1984). The *Alston* Court concluded that the defendant's use of force was distinct from the sexual act both in time and place: the "threat by the defendant and his act of grabbing [the victim] at the school, although they may have induced fear, appeared to have been unrelated to the act of sexual intercourse." *Id.* The Court continued, "[A]bsent evidence that the defendant used force or threats to overcome the will of the

victim to resist the sexual intercourse alleged to have been rape, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape." *Id.* at 409, 312 S.E.2d at 476.

We hold that the facts of *Alston* are distinguishable from the instant case. Defendant's use of constructive force was contemporaneous with the sexual acts, since he held Burch in extended captivity while regularly forcing her to perform fellatio. On similar facts, the Supreme Court in *State v. Scott*, 323 N.C. 350, 372 S.E.2d 572 (1988), reinstated the defendant's second-degree rape conviction. The opinion in *Scott* distinguished *Alston* on the grounds that, *inter alia*, the victim in *Scott* "was trapped inside a mobile home and could not escape." *Id.* at 354, 372 S.E.2d at 575. Furthermore, *Scott* reiterated that *Alston's* precedential value is limited to cases that are factually similar. *Id.* at 354, 372 S.E.2d at 575-76; accord *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681; *State v. Strickland*, 318 N.C. 653, 656, 351 S.E.2d 281, 282-83 (1987).

Taken in the light most favorable to the State, the evidence shows the existence of constructive force from the moment Burch entered defendant's home. When she initially attempted to leave, defendant locked the front door to the

residence. Defendant subsequently displayed a loaded shotgun by his bed and slapped her. He restricted her access to the rest of the house and only allowed her to use the bathroom with the door open. As time passed, defendant became increasingly coercive and controlling; he deprived Burch of food and drink, forced her to urinate in a jar in his bedroom, and constantly ordered her to perform fellatio. She was forced to submit to defendant's commands and felt that she had no choice but to comply with his sexual demands. Finally, defendant struck her head with a metal stool because she did not remove her pants as quickly as he wanted. When Burch ultimately escaped, she fled into the night wearing only a bra.

Considering the totality of the circumstances of Burch's captivity by defendant, and viewing the evidence in the light most favorable to the State, defendant used constructive force to compel Burch's submission to sexual acts.

This argument is without merit.

III. Ineffective Assistance of Counsel

In his second argument, defendant contends that he received ineffective assistance of counsel because his attorney was unaware of critical evidence turned over by the State, and as a result, was unable to prepare a proper defense. We find this

claim to be premature and dismiss it without prejudice.

A. Standard of Review

[I]neffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations omitted) (internal quotation marks omitted). On direct appeal, this Court limits its review to material included in "the record on appeal and the verbatim transcript of the proceedings, if one is designated." N.C.R. App. P. 9(a) (2011); *see also State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001).

If we determine that the material included in the record and transcript is sufficient to decide an ineffective assistance of counsel claim on the merits, we apply the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), as interpreted by our Supreme Court in *State v.*

Allen, 360 N.C. 297, 626 S.E.2d 271 (2006). Briefly, to prevail on an ineffective assistance of counsel claim, the defendant must "show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *Id.* at 316, 626 S.E.2d at 286 (citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

B. Analysis

Defendant contends that his trial counsel went to trial without having seen the State's DNA evidence from the metal stool. This evidence had been delivered by the State to defendant's prior counsel before trial. We hold that there is not sufficient evidence in the record to rule upon defendant's ineffective assistance of counsel claim. This claim is dismissed without prejudice to defendant filing a motion for appropriate relief with the trial court.

NO ERROR IN PART; DISMISSED IN PART.

Judges MCGEE and ERVIN concur.

Report per Rule 30(e).