An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1305

Filed: 21 August 2018

Cumberland County, Nos. 15 CRS 55431-32

STATE OF NORTH CAROLINA,

v.

JOHNNY JERMAINE MCMILLAN, Defendant.

Appeal by defendant from judgments entered 29 July 2016 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 17 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary Padget, for the State.

Mark Montgomery for defendant-appellant.

BERGER, Judge.

A Cumberland County jury found Johnny Jermaine McMillan ("Defendant") guilty of first-degree burglary, second-degree kidnapping, and assault by strangulation in July 2016. Following his conviction, Defendant pleaded guilty to having attained habitual felon status, and the trial court sentenced him to two consecutive terms of ninety to one-hundred-twenty months in prison. Defendant

appeals, alleging the trial court erred by (1) denying his motion to dismiss and (2) refusing to instruct the jury on simple assault. We find no error.

Factual and Procedural Background

The evidence presented at trial tended to show that Defendant and Katara Brown ("Brown") were involved in a relationship for more than two years. Defendant had a history of domestic violence directed toward Brown, including one incident where Defendant choked Brown to the point of unconsciousness.

On May 5, 2015, Defendant went unannounced to Brown's home at approximately 4:00 a.m. Defendant went into Brown's bedroom, woke her up, and told her to get her phone. As she left her room, Brown attempted to knock on the door of her roommate, Ashley Mays ("Mays"), but Defendant grabbed Brown by the neck and took her to the kitchen. Defendant instructed Brown to climb out of a window, which she did. Brown was screaming for Mays while she ran to her window. Brown banged on Mays' window until it eventually broke. Defendant grabbed Brown by the neck, lifted her off the ground, and she lost consciousness. Brown subsequently told Detective Jessica Lewis with the Fayetteville Police Department that Defendant had choked her until she passed out. Brown was unable to recall any additional details of the attack, but she remembered waking up in a motel room.

Mays attempted to call Brown on her cell phone. Many of the attempts to contact Brown were unsuccessful, but one call did go through, in which Mays heard

Brown struggling and telling Defendant to get off of her. Mays contacted law enforcement, and Fayetteville Police Department officers were able to use cell phone data to determine that Brown's cell phone was in a local motel. Motel records confirmed that Defendant had rented the motel room.

Brown was still in pain when she was located, and she was transported to a local hospital where she was examined by Dr. Jason Collins ("Dr. Collins"). Dr. Collins testified that Brown's injuries included contusions and a ruptured blood vessel in her right eye, also known as petechiae. Dr. Collins testified that one cause of petechiae is strangulation. Even though there was no bruising around Brown's neck, Dr. Collins testified as an expert witness that the injuries Brown suffered could have been caused by strangulation.

Defendant was arrested and subsequently indicted for first-degree burglary, assault by strangulation, first-degree kidnapping, and having attained habitual felon status. Defendant was found of guilty by a jury of first-degree burglary, second-degree kidnapping, and assault by strangulation. Defendant also pleaded guilty to having attained habitual felon status, and was sentenced to two consecutive terms of ninety to one-hundred-twenty months in prison. Defendant timely appeals, alleging the trial court erred by denying his motion to dismiss and refusing to instruct the jury on simple assault. We disagree.

I. Motion to Dismiss

Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the 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) (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"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). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

Analysis

Defendant initially contends the trial court erred in denying his motion to dismiss for sufficiency of the evidence. Specifically, Defendant asserts the State did not offer sufficient evidence of every element of assault by strangulation. We disagree.

The crime of assault by strangulation is committed when an individual "assaults another person and inflicts physical injury by strangulation." N.C. Gen. Stat. § 14-32.4(b) (2017). "[W]rapping one's hands around another's throat and applying pressure until the person loses consciousness certainly falls within the boundaries of the term ['strangulation']." *State v. Little*, 188 N.C. App. 152, 157, 654 S.E.2d 760, 764 (2008). However, loss of consciousness is not necessary to prove strangulation. This Court has found sufficient evidence of assault by strangulation upon a showing that the defendant "applied sufficient pressure to [the victim's] throat such that she had difficulty breathing." *State v. Braxton*, 183 N.C. App. 36, 43, 643 S.E.2d 637, 642 (rejecting defendant's definition of strangulation that would require a showing that "a defendant strangled his or her victim to the point of death or close to it, in order to prove assault by strangulation"), *disc. review denied*, 361 N.C. 697, 653 S.E.2d 4 (2007); *see also State v. Lanford*, 225 N.C. App. 189, 195, 736 S.E.2d 619, 624 (2013).

Here, Brown testified that Defendant grabbed her by her neck when she attempted to knock on Mays' door while inside the residence. After Defendant followed her out of the residence, Brown testified that Defendant grabbed her by the neck again and lifted her off the ground. Brown eventually lost consciousness due to Defendant's actions. Even though there were no markings on her neck, Brown, in addition to losing consciousness, suffered petechiae. Dr. Collins testified that

Brown's injuries could have been caused by strangulation. Thus, substantial evidence exists for the jury to conclude Defendant had committed the offense of assault by strangulation. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

II. Instruction for Simple Assault

Standard of Review

"A trial court's decision not to give a requested lesser-included offense instruction is reviewed *de novo* on appeal." *State v. Matsoake*, 243 N.C. App. 651, 657, 777 S.E.2d 810, 814 (2015), *disc. review denied*, 368 N.C. 685, 781 S.E.2d 485 (2016).

Analysis

Defendant argues the trial court was required to instruct the jury on simple assault, asserting that simple assault is a lesser-included offense of assault by strangulation. However, we decline to address Defendant's argument because "[t]he test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements." *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322 (citation omitted), *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990).

As noted above, the State's evidence tended to show Defendant grabbed Brown by the neck and lifted her off the ground. The pressure Defendant applied to her neck caused her to lose consciousness and rupture a blood vessel in her right eye. The State satisfied every element of the offense of assault by strangulation, and there was no contradictory evidence. Therefore, even if we assume simple assault is a lesser-included offense of assault by strangulation, the instruction requested by Defendant was not required.

Conclusion

The trial court did not err in denying Defendant's motion to dismiss the assault by strangulation charge. In addition, the trial court did not err when it declined Defendant's request for an instruction to simple assault. Defendant received a fair trial, free of error.

NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).