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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-85

No. COA20-429

Filed 16 March 2021

Onslow County, No. 17CRS055741

STATE OF NORTH CAROLINA

v.

CHRISTOPHER B. ROBINSON, II, Defendant.

Appeal by Defendant from judgment entered 31 October 2019 by Judge Stephan R. Futrell in Onslow County Superior Court. Heard in the Court of Appeals 24 February 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kyla Wonder, for the State.*

*William D. Spence for the Defendant.*

DILLON, Judge.

¶ 1 Christopher B. Robinson, II, (“Defendant”) appeals from judgment entered upon jury verdicts finding him guilty of assault by strangulation and assault on a female.

I. Background

¶ 2 The evidence at trial tended to show as follows: Ms. Perry (the “victim”) met

Defendant in 2016, and they began a romantic relationship. Defendant was married but separated from his wife at the time. The victim moved into Defendant's home in Jacksonville. At some point his wife moved back into the family home.

¶ 3 On the victim's twenty-first birthday, Defendant and the victim got into a heated argument. During the course of the argument, Defendant punched a pregnant friend of the victim who was attempting to defend the victim. Defendant then threw the victim onto the bed, threatened her and choked her neck. The victim testified that during this attack she thought she was dying, she could not breathe, and she felt she was blacking out during the time Defendant was on top of her. The State introduced photographs of bruises on the victim's neck during the trial.

¶ 4 Defendant was charged with assault by strangulation, a Class H felony, and assault on a female, a misdemeanor. The jury convicted Defendant of both charges.

## II. Analysis

¶ 5 Defendant has petitioned our Court to review his case. We hereby grant Defendant's petition for writ of *certiorari* in order to address his appeal. On appeal he makes two arguments, which we address in turn.

### A. Motion to Dismiss

¶ 6 Defendant argues that the trial court erred in denying his motion to dismiss the charge of assault by strangulation at the close of all evidence. We disagree.

¶ 7 We review a trial court's denial of a motion to dismiss *de novo*. *State v. Barnett*,

368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). “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 (2000). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, 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).

¶ 8

The statute under which Defendant was convicted is N.C. Gen. Stat. § 14-32.4(b) (2017), which provides: “Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony.” For the crime of assault by strangulation, the State must prove that a defendant: “(1) assaults another person (2) and inflicts physical injury (3) by strangulation.” *State v. Williams*, 201 N.C. App. 161, 170, 689 S.E.2d 412, 416 (2009).

¶ 9

“Strangulation” is not defined by the statute, but our caselaw has illustrated what constitutes strangulation. In *State v. Braxton*, we considered the sufficiency of the evidence to constitute strangulation. 183 N.C. App. 36, 643 S.E.2d 637 (2007). In that case, there was evidence which showed that the defendant threw the victim

onto the bed, that he grabbed her throat five different times, that the victim had difficulty breathing during the attack, and that she had bruises around her neck, chest, and arms. *Id.* at 37, 643 S.E.2d at 639. The defendant argued that “strangulation” should be interpreted according to a dictionary definition requiring “proof of a complete closure of one’s airway causing an inability to breathe.” *Id.* at 42, 643 S.E.2d at 641. We disagreed, holding that the evidence was sufficient to survive the motion to dismiss. *Id.* at 43, 643 S.E.2d at 642.

¶ 10 Here, Defendant argues that (1) because the victim did not seek medical attention, (2) because the victim did not fully lose consciousness, and (3) because it was not conclusively proven that strangulation caused the victim’s injuries, his motion to dismiss should have been granted. However, our case law does not mandate any of these findings. Rather, evidence that a defendant placed hands around a victim’s throat and squeezed until the victim’s airway was restricted, coupled with some physical manifestation of the assault on the victim, has been considered sufficient to survive a motion to dismiss in other strangulation cases. *See State v. Lowery*, 228 N.C. App. 229, 230, 234, 743 S.E.2d 696, 698, 700 (2013); *see also Braxton*, 183 N.C. App. at 38, 43, 643 S.E.2d at 639, 642.

¶ 11 We, therefore, conclude that the trial court did not err in denying Defendant’s motion to dismiss the charge of assault by strangulation at the close of all evidence.

#### B. Detective’s Testimony

¶ 12 Defendant also argues that the trial court committed plain error in allowing a detective to testify that, in his opinion, the injuries on the victim's neck appeared to be consistent with strangulation. We disagree.

¶ 13 Because Defendant did not object to the detective's testimony at trial, we review only for plain error. N.C. R. App. P. 10(a)(4). Plain error is defined as a "fundamental error . . . where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted).

¶ 14 The State argues that the detective's testimony was rationally based upon his personal observation of the victim's neck injuries and his training and experience in law enforcement. The State cites Rule 701 of our Rules of Evidence, which allows lay witness opinion testimony that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2017).

¶ 15 But assuming that the testimony was incompetent, and the trial court did err by not intervening on its own to strike the testimony, we conclude that such error did not rise to the level of plain error. There was other evidence which tended to show that Defendant strangled the victim. For instance, the jury saw photographs of the

victim's injuries and heard her testimony of the incident. Therefore, we conclude that the trial court did not commit plain error in allowing the detective to testify that the injuries on the victim's neck appeared to be consistent with strangulation.

### III. Conclusion

¶ 16 The trial court did not err in denying Defendant's motion to dismiss the charge of assault by strangulation at the close of all evidence. Further, the trial court did not commit plain error in allowing the detective to testify that the injuries on the victim's neck appeared to be consistent with strangulation.

NO ERROR.

Judges INMAN and JACKSON concur.

Report per Rule 30(e).