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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-242

No. COA21-510

Filed 5 April 2022

Carteret County, Nos. 18 CRS 54528, 19 CRS 415

STATE OF NORTH CAROLINA

v.

CHRISTOPHER P. CLARK

Appeal by defendant from judgment entered 21 May 2021 by Judge Joshua W. Willey, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 22 February 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

W. Michael Spivey for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Christopher P. Clark ("defendant") appeals from judgment entered upon his convictions for assault by strangulation, assault on a female, and being a habitual felon. Defendant contends the trial court erred by instructing the jury on flight and by denying defendant's motion to dismiss the charge of assault on a female. Defendant further contends the trial court acted contrary to a statutory mandate in

sentencing on the assault charges. For the following reasons, we hold that defendant received a fair trial free from error, and the trial court did not err in sentencing or in its rulings at trial.

I. Background

¶ 2 On 11 March 2019, a Carteret County grand jury indicted defendant on charges of assault by strangulation, assault on a female, and common law robbery. The indictment charging defendant with assault by strangulation alleged that defendant inflicted "physical injury, soreness, scratches, and discoloration" about the neck of Deborah Ann Wade ("Wade"), "by strangulation, using his hands to squeeze her throat." The indictment charging defendant with assault on a female alleged that defendant assaulted Wade "by grabbing her arms, flinging her about, and striking her on the head multiple times with his fist." Two indictments were returned on 3 June 2019: a superseding indictment charging defendant with the same offenses as the earlier indictment, and an additional indictment charging defendant with being a habitual felon.

¶ 3 The matter came on for trial on 17 May 2021 in Carteret County Superior Court, Judge Willey presiding. The evidence adduced at trial tended to show as follows.

¶ 4 On 30 December 2018, Wade invited two people over to her apartment. The couple arrived with seven additional people, "six girls and a guy[,]" the latter of which

Wade identified as defendant. Although Wade was not expecting anybody else, the couple persuaded Wade to let everyone in. The group was "hanging out in the kitchen" for a period of time, but eventually "all left except for [defendant]" and Wade. Wade found defendant asleep with "his head on the stove[,]" at which point Wade told defendant that he needed to wake up and leave because she had dinner plans. Defendant attempted to find a ride, but was apparently unsuccessful and asked Wade, "Well, can't I stay here?" Wade told defendant that he could not stay, so defendant "made a couple of calls" on his cell phone and put the cell phone in his pocket. Defendant then accused Wade of stealing his cell phone and grabbed Wade's purse off her shoulder. Defendant ran to Wade's bedroom and pulled the wallet out of Wade's purse, taking a five-dollar bill from inside.

¶ 5 Defendant then threw Wade onto the bed, straddled her, and started choking her, saying "I'm going to kill you. I'm going to kill you." Wade asked defendant, "Why are you doing this to me?" as defendant continued to choke and hit Wade. Wade testified that defendant "threw [her] into the closet[,]" and also threw her into "an antique chest with a big glass, . . . thing on top." Wade testified that the assault "seemed like an eternity," but estimated that it probably lasted thirty or forty minutes.

¶ 6 At some point, defendant suddenly left Wade's apartment and Wade started screaming for help. Wade then heard her neighbor upstairs yell to her "Debbie, I

called the law. I already called the law. They're on their way." Wade also called 911 and told the dispatcher that she had been attacked by a man named "Chris."

¶ 7 Wade testified that Officer James Vaselovic ("Officer Vaselovic") responded to the call. Wade told Officer Vaselovic that defendant had assaulted her and made a visual identification of defendant after Officer Vaselovic "showed [her] some pictures[.]" On cross-examination, Wade agreed that she told Officer Vaselovic that the person who assaulted her was clean-shaven but that the person in the photograph she identified had a mustache and goatee. Wade stated that the facial hair "doesn't change the facial features or anything like that."

¶ 8 Officer Vaselovic testified that he was dispatched to Wade's apartment at approximately 10:22 p.m. on 30 December 2018. Officer Vaselovic described Wade as in "complete hysterics" while talking to her, also noting red marks on her face and around her neck, that her clothing was disheveled, and that it appeared that Wade had urinated on herself. After Wade provided Officer Vaselovic with defendant's name and a physical description, Officer Vaselovic broadcasted a request for officers to be on the lookout for defendant, describing him as "being tall and slender with blondish hair, clean-shaven, wearing a dark shirt and brown-looking cargo shorts." Officer Vaselovic received a call from a deputy sheriff that happened to be defendant's cousin; the deputy provided Officer Vaselovic with defendant's driver's license number, which Officer Vaselovic used to retrieve defendant's driver's license picture.

Wade confirmed that the person who assaulted her was the same person in the driver's license picture.

¶ 9 Defendant did not present any evidence at trial. At the close of the State's evidence and again at the close of all evidence, defendant moved to dismiss all charges for insufficient evidence. Both motions were denied.

¶ 10 During the charge conference, the State requested that the jury be instructed on flight as evidence of guilt. The trial court granted the State's motion over defendant's objection and gave the pattern jury instruction on flight.

¶ 11 On 21 May 2021, defendant was convicted of assault by strangulation and assault on a female and was acquitted of the charge of common law robbery. Defendant subsequently pled guilty to the charge of being a habitual felon.

¶ 12 The trial court consolidated defendant's convictions for assault by strangulation and being a habitual felon into a single judgment and sentenced defendant to a term of 108 to 142 months imprisonment. The trial court sentenced defendant to a concurrent sentence of 120 days imprisonment on the assault on a female conviction. Defendant gave oral notice of appeal in open court following sentencing.

II. Discussion

¶ 13 Defendant contends the trial court erred by instructing the jury on flight, denying defendant's motion to dismiss the charge of assault on a female, and in

sentencing defendant for assault by strangulation and assault on a female. Defendant also contends his conviction of being a habitual felon must be vacated. We address each issue in turn.

A. Jury Instructions

¶ 14 Defendant argues the trial court erred by instructing the jury that flight is evidence of guilt because the State offered no evidence that defendant took any steps to avoid apprehension. We disagree.

¶ 15 This Court conducts a *de novo* review of "[a]ssignments of error challenging the trial court's decisions regarding jury instructions . . . ." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). A trial judge is not required to instruct a jury on defendant's flight unless "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged[,]" which must include "some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 489-90, 402 S.E.2d 386, 392 (1991) (citation and quotation marks omitted). "Jury instructions based upon a state of facts not supported by the evidence and which are prejudicial to the defendant entitle the defendant to a new trial." *State v. Lee*, 287 N.C. 536, 540, 215 S.E.2d 146, 149 (1975) (citations omitted).

¶ 16 In this case, the evidence presented at trial reflected that after being in Wade's apartment for approximately two hours, defendant abruptly assaulted Wade. When

Wade attempted to scream for help, defendant quickly left Wade's apartment. Within moments of defendant's departure, Wade's neighbor yelled to inform Wade that authorities were on the way. This constitutes sufficient evidence that defendant fled after assaulting Wade. *See Thompson*, 328 N.C. at 490, 402 S.E.2d at 392.

¶ 17 Defendant argues that under the circumstances, there was a reasonable possibility that the trial court's instruction on flight, and only the instruction on flight, resulted in defendant's convictions. Much of defendant's argument focuses on "conflicting evidence about Ms. Wade's ability to correctly identify the person she alleged assaulted her." The record and transcript reflect, however, that there was ample and consistent evidence that defendant was the perpetrator. Wade identified the assailant as "Chris" during the 911 call and immediately confirmed defendant's identity when Officer Vaselovic showed her defendant's driver's license picture. Wade also identified defendant as the assailant in her testimony at trial. Although defendant notes Wade's neighbor's testimony that Wade was "a little crazy" and had been "partying to all hours" for the past "two nights[,]" Wade also testified that she does not keep alcohol in her apartment and was not drinking on 30 December 2018. There was sufficient evidence that defendant was in fact the person that assaulted Wade on 30 December 2018, and accordingly, defendant was not prejudiced when the trial court gave jury instructions on flight.

B. Assault on a Female

¶ 18 Defendant next argues the trial court erred by denying his motion to dismiss the charge of assault on a female because the State "offered no direct or circumstantial evidence that he was eighteen years of age." We disagree.

¶ 19 When considering a motion to dismiss for insufficient evidence, the trial court must determine "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." *State v. Tucker*, 2022-NCSC-15, ¶ 10 (citation and quotation marks omitted). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). A jury may not "determine the age of a criminal defendant beyond a reasonable doubt merely by observing him in the courtroom *without having the benefit of other evidence, whether circumstantial or direct*." *In re Jones*, 135 N.C. App. 400, 405, 520 S.E.2d 787, 789 (1999) (emphasis added).

¶ 20 "Assault on a female" is a Class A1 misdemeanor governed by N.C. Gen. Stat. § 14-33:

> Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he . . . [a]ssaults a female, he being a male person at least 18 years of age[.]

N.C. Gen. Stat. § 14-33(c)(2) (2021).

¶ 21 Defendant argues that, because the State did not offer any evidence concerning his age as related to the charge of assault on a female, the State failed to present evidence of an essential element of the offense. There was, however, circumstantial evidence that defendant was a male person at least eighteen years of age, primarily in the form of Wade's testimony. Wade testified that when the group was at her apartment, she offered "coffee, tea[,] or Coke[,]" but that she did not have alcohol, which supports the inference that Wade determined her guests, including defendant, were old enough to be served alcohol. Furthermore, Wade testified that defendant was able to throw her around her apartment and physically subdue her. This circumstantial evidence, together with the jury's observation of defendant in the courtroom, was sufficient to allow the jury to determine defendant's age and to overcome defendant's motion to dismiss.

C. Sentencing

¶ 22 Defendant next argues the trial court acted contrary to a statutory mandate in sentencing defendant for both assault by strangulation and assault on a female. We disagree.

¶ 23 "Issues of statutory construction are questions of law, reviewed de novo on appeal." *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014) (citation and quotation marks omitted). Pursuant to N.C. Gen. Stat. § 14-33(c),

"punishment for assault on a female" is barred "when the conduct at issue is punished by a higher class of assault." *Id.* at 239, 758 S.E.2d at 671.

¶ 24 "[T]he State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." *State v. Dew*, 2021-NCSC-124, ¶ 27. "[A] distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.*

¶ 25 Defendant contends his conviction for assault on a female must be arrested because defendant was also convicted for assault by strangulation, which is a higher class of assault. Contrary to defendant's argument, the indictments charging defendant with assault by strangulation and assault on a female were not based on the same conduct. Additionally, Wade's testimony established that the assaults took place in different rooms in her apartment, with lapses of time and changes in the momentum of the attack. Defendant began by throwing Wade across her bed and strangling her. After a period of time, defendant stopped strangling Wade, allowing her to stand up, and Wade asked defendant why he was attacking her. Defendant then threw Wade into a closet, pulled her into a hallway, and threw her into a piece of furniture. Defendant proceeded to drag Wade into the kitchen and began strangling her again. These interruptions and changes in method and momentum of

assault were sufficient to delineate between the end and beginning of each assault. Accordingly, defendant's argument is overruled.

D. Habitual Felon

¶ 26 Defendant finally argues his conviction of being a habitual felon should be vacated. This argument is predicated on the underlying felony also being vacated. Because we have determined that defendant was properly convicted of the underlying felony, we conclude that defendant was properly convicted of being a habitual felon.

III. Conclusion

¶ 27 For the foregoing reasons, we hold that the trial court did not err in denying defendant's motions and conclude that defendant received a fair trial.

NO ERROR.

Chief Judge STROUD and Judge WOOD concur.

Report per Rule 30(e).