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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-1106

Filed 16 September 2026

Union County, No. 22CR302580-890

STATE OF NORTH CAROLINA

v.

LUIS MIGUEL VAIL-LOPEZ, Defendant.

Appeal by defendant from judgments entered 11 February 2025 and 3 June 2025 by Judge Dawn M. Layton in Union County Superior Court. Heard in the Court of Appeals 25 August 2026.

Attorney General Jeff Jackson, by Special Deputy Attorney General Amanda J. Reeder, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

DILLON, Chief Judge.

Defendant Luis Miguel Vail-Lopez appeals from two judgments entered pursuant to a jury verdict finding him guilty of simple assault and second-degree forcible rape arising from a September 2022 incident in which he allegedly assaulted and raped a woman in Monroe. On appeal, Defendant argues he was improperly

sentenced and he received ineffective assistance of counsel. For the reasons stated herein, we vacate the judgment entered pursuant to the simple assault conviction, we find no error concerning the other judgment, and we dismiss the remaining arguments.

I. Background

In September 2022, Nina[1] was walking to work for her morning shift around 2 A.M. because her car had broken down. Her two-hour walk took her through the Dickerson Park area in Monroe. As she walked through the park, a man (later identified as Defendant) began chasing after her with a knife in his hand. Nina attempted to call 911. However, before Nina could complete the call, Defendant grabbed Nina's phone and threw it out of reach. He then dragged Nina into a bushy area on the side of an abandoned house. With the knife at Nina's neck and his other hand around her neck, Defendant ripped the private area of Nina's leggings, mounted her, and inserted his penis inside Nina's vagina. When Nina attempted to get Defendant off her, he pressed harder on her neck. Defendant eventually "finished," threw Nina's phone further away from her, and took off running. Nina eventually found her phone and called 911 around 2:24 A.M.

A grand jury indicted Defendant for one count each of first-degree forcible rape, first-degree kidnapping, assault by strangulation, and interfering with emergency

[1] A pseudonym.

communications. In February 2025, these charges came for trial, and a jury convicted Defendant of two lesser-included offenses which included second-degree forcible rape and simple assault. As a prior record level I offender, the trial court sentenced Defendant to serve a minimum of 73 months and a maximum of 148 months for the second-degree forcible rape, with a credit of 872 days for the time spent in confinement prior to the conviction. For the simple assault conviction, the trial court entered a judgment sentencing Defendant to 30 days to be served after completing his sentence for his second-degree forcible rape conviction. Defendant appeals.

II. Analysis

Defendant presents three arguments on appeal. We address each in turn.

A. Sentencing

Defendant argues the trial court erred in sentencing him to active prison time for the misdemeanor simple assault conviction. We agree.

Despite Defendant's failure to object at trial on this issue, sentencing errors are preserved without objection, N.C.G.S. § 15A-1446(d)(18);[2] *see also State v. Meadows*, 371 N.C. 742, 747 (2018).

The State concedes Defendant should have been sentenced to a community punishment under G.S. 15A-1340.23 for the misdemeanor simple assault charge.

[2] "[T]his Court has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court, subdivision (18) is not one of them." *State v. Meadows*, 371 N.C. 742, 747–48 (2018) (footnote omitted).

This statute states an individual without prior convictions (prior record level I) who is convicted of a class 2 misdemeanor is subject only to community punishment. *See* N.C.G.S. § 15A-1340.23(c).

Thus, we vacate Defendant's sentence and remand to the trial court for re-sentencing consistent with G.S. 15A-1340.23. *See* N.C.G.S. § 15A-1447(d).

Additionally, Defendant concedes the trial court has not established any post-release supervision or satellite-based monitoring ('SBM"). Nonetheless, Defendant requests this Court to direct any period of probation for the assault conviction to run concurrently with any period of post-release supervision pursuant to G.S. 15A-1346. The trial court has not sentenced Defendant to any probation or post-release supervision as it reserved judgment on any SBM closer to Defendant's release. Thus, we decline to address this issue. N.C. R. App. P. 10(a)(1).

B. Rule 2

Defendant argues he cannot be sentenced for both second-degree forcible rape and simple assault because simple assault is a lesser-included offense of second-degree forcible rape. Defendant did not object to the conviction or sentencing for the simple assault conviction. Thus, he failed to preserve this issue at trial. *See State v. Ricks*, 378 N.C. 737, 740 (2021) (citing N.C. R. App. P. 10(a)(1)) (stating a timely objection preserves an issue for appellate review).

Defendant, however, asks this Court to review his double jeopardy argument under Rule 2. *See* N.C. R. App. P. 2. Rule 2 suspends our appellate rules and should

only be invoked in "exceptional cases" to prevent "manifest injustice" or if the case presents an issue of public importance. *State v. Simpson*, 295 N.C. App. 425, 435 (2024) (citation omitted); *see Ricks*, 378 N.C. at 740. Whether a case merits suspension of the appellate rules is "always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603 (2017) (footnote omitted).

"Our appellate courts have long recognized that 'we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below[ ].' " *State v. Fuller*, 166 N.C. App. 548, 555 (2004) (citing *State v. Jones*, 242 N.C. 563, 564 (1955)). In *Fuller*, this Court declined to reach the issue of whether a defendant could be prosecuted for both first-degree statutory rape and second-degree forcible rape because the defendant's double jeopardy question was not raised at trial. *Id.* Similarly, here, Defendant did not raise this double jeopardy question before the trial court. Thus, in our discretion, we decline Defendant's request to invoke Rule 2 and dismiss his double jeopardy argument.

C. Ineffective Assistance of Counsel

Defendant additionally claims he received ineffective assistance of counsel ("IAC") when his trial counsel failed to object on double jeopardy grounds to the trial court's sentence on both simple assault and second-degree forcible rape when the convictions were based on a single act of sexual intercourse with Nina. We dismiss

this argument without prejudice to Defendant's right to file a motion for appropriate relief in the trial court. *See generally State v. Fair*, 354 N.C. 131, 166–67 (2001).

III. Conclusion

For the reasons stated above, we vacate Defendant's simple assault sentence and remand the matter for resentencing. We find no error in the judgment convicting Defendant of second-degree forcible rape. We dismiss Defendant's IAC claim.

NO ERROR IN PART; DISMISSED IN PART; VACATED IN PART AND REMANDED.

Judges CARPENTER and GRIFFIN concur.

Report per Rule 30(e).