NO. COA01-1325

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 00 CRS 14498

WAYNE DOUGLAS LENEAU

Appeal by defendant from judgment entered 13 July 2001 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey B. Parsons, for the State.

William D. Auman, for defendant-appellant.

TYSON, Judge.

Wayne Douglas Leneau ("defendant") appeals from the trial court's entry of judgment after a jury returned a verdict finding defendant guilty of attempted second-degree rape. We find no error.

I. Facts

In January of 1999, defendant began renting a room from Jean Richardson ("Jean") in her home. Jean was sixty-three years old. On the evening of 17 March 1999, Jean reluctantly loaned defendant money after his request. Defendant informed Jean that he was going out and would not return to the house that night. Jean did not

double bolt lock the front door or turn off her bedroom television. Jean fell asleep on her bed wearing her nightgown. Jean awoke and saw that defendant was nude and approaching her. Jean identified defendant as the man in her bedroom using the light from the television and an illuminated bedside lamp. Jean screamed at defendant to "get out of here," but defendant continued to approach. Defendant jumped on top of Jean and began hitting her in the head with a telephone. Jean resisted by defending herself with her hands, which sustained bruising and bleeding injuries. Defendant unsuccessfully attempted to insert his flaccid penis into Jean's vagina. Jean scratched defendant's face with her fingernails and defendant lifted himself off of her. Jean crawled onto the floor. Defendant stood over her, and Jean grabbed and pulled his penis. Jean stood up, feigned choking, escaped out of the house, and ran to her neighbor's house where she telephoned the police. Jean testified that she "never" had a "romantic relationship" with defendant.

After the State presented its evidence, defendant did not testify or offer any evidence. Defendant's motion to dismiss for insufficiency of the evidence was denied. The jury returned a guilty verdict against defendant for attempted second-degree rape. Defendant was sentenced to a term of seventy-six months minimum and one hundred and one months maximum. Defendant appeals.

II. Issues

Defendant assigns as error the trial court's (1) overruling defendant's objection to the State's use of a peremptory challenge

to a prospective black juror, (2) allowing hearsay into evidence, (3) failing to dismiss the charge of attempted second-degree rape for insufficiency of the evidence, and (4) failing to instruct the jury on misdemeanor offense of assault on a female.

III. Dismissal of Potential Juror

Defendant contends that he is entitled to a new trial and argues that the State's peremptory challenge was based on race.

Our courts use a three-step process to evaluate claims of racial discrimination in the prosecution's use of peremptory challenges. *State v. Cummings*, 346 N.C. 291, 307-08, 488 S.E.2d 550, 560 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998) (citing *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed.2d 395, 405 (1991)). The three steps are: (1) defendant must establish a prima facie case that the peremptory challenge was exercised on the basis of race, (2) if established, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's prima facie case, and (3) the trial court must decide whether the defendant proved purposeful discrimination. *Id.* "Because the trial court is in the best position to assess the prosecutor's credibility, we will not overturn its determination absent clear error." *Id.* at 309, 488 S.E.2d at 561 (citing *Hernandez*, 500 U.S. at 369, 114 L. Ed.2d at 412).

Here, the trial court found that the defendant made the requisite *prima facie* showing that the State's peremptory challenge of one black juror was based on race. The prosecutor offered the following explanation for removing the black juror:

> Mr. Brice, the last gentleman, I didn't feel from looking at his eyes that he was being a hundred percent honest with me. When I asked the question about any dealings with the police officers where you felt like you weren't treated fairly he raised his hand or answered yes. I asked him to describe and then he described his traffic tickets but then he indicated no, he was treated fairly. I believe he thinks he was not treated fairly. And for whatever reason I don't think he wanted to be entirely honest with us. In general I did not get a good feeling for him.

The trial court "concluded that the racially neutral explanation furnished by the prosecutor concerning the State's exercise of a peremptory challenge as to Mr. Brice has not been shown to be inadequate nor has it been shown as a pretext for discrimination." Based on the reasons given by the prosecutor and the evidence in the record, we conclude that the trial court did not commit error by holding that the State met its burden of showing a neutral, nonracial explanation for its peremptory challenge. The excusal of prospective juror Price was not racially motivated and not clearly erroneous. This assignment of error is overruled.

IV. Hearsay

Defendant contends that the trial court erred in allowing an out of court statement into evidence to prove the truth of the matter asserted. Defendant claims that the statement "was unduly prejudicial to the defendant as it suggested wrongdoing on his part." We disagree.

The victim, Jean, testified during direct examination as follows:

> Q: You got a phone call when?

A: That same morning.

Q: Did you answer it and say hello?

A: Yes.

Q: What did the person on the other end say?

[DEFENSE]: Objection, Judge

COURT: Sustained at this point.

Q. Whatever the person said after hearing that person speak did you recognize that person's voice?

A. Yes; I did.

[DEFENSE]: Objection.

COURT: Overruled.

Q. Had you heard that voice before?

A. Yes.

Q. Whose voice did you recognize that as being?

A. It was Wayne's [defendant's] voice.

Q. What did Wayne tell you on the phone?

A. My brother will be there for my things.

The "matter asserted" was that defendant's brother would be retrieving defendant's belongings at some point in the future. Nothing in the record suggests that the statement was offered to prove the truth of the matter asserted. By definition, the statement was not hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). Presuming the statement was hearsay, it falls squarely within an exception to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d) (2001) ("Admissions by a Party Opponent" are

exceptions to hearsay); *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988) (statements of a defendant in a criminal trial amount to admissions and are admissible under Rule 801(d)(A)). This assignment of error is overruled.

V. Sufficiency of the Evidence

Defendant contends that "[w]hatever happened was not equivalent to vaginal intercourse, and there was no substantial evidence that the defendant's acts were against the will of [Jean]."

The trial court determines whether substantial evidence exists for each essential element of the offense charged, and whether defendant is the perpetrator of the offense when ruling on a motion to dismiss for insufficiency of the evidence. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "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) (citations omitted).

"In ruling on a motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence." *State v. McAllister*, 138 N.C. App. 252, 259, 530 S.E.2d 859, 864, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000) (citation omitted). "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner,* 248 N.C. 342, 344-45, 103 S.E.2d 694,

696 (1958). "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986) (citing *State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973) (other citations omitted)). Once substantial evidence is before the jury, any conflicts and discrepancies are for the jury to resolve. *Id.* (citing *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972)).

Our courts define attempted rape as follows: (1) an intent to commit rape, and (2) an overt act done for that purpose which goes beyond mere preparation but which falls short of the completed offense. *State v. Moser*, 74 N.C. App. 216, 219, 328 S.E.2d 315, 317 (1985), *cert. denied*, 319 N.C. 408, 354 S.E.2d 724; *State v. Morrison*, 84 N.C. App. 41, 50, 351 S.E.2d 810, 815 (1987).

Contrary to defendant's argument, evidence of vaginal intercourse is not a required element of attempted second-degree rape. Vaginal intercourse is required to show second-degree rape. *See* N.C. Gen. Stat. § 14-27.3 (2001).

Here there is substantial evidence to show that defendant intended to commit rape and committed an overt act toward committing a rape. Defendant, while naked, approached Jean, who was asleep in her bed. Jean awoke and screamed. Defendant jumped

on top of her and began hitting her in the head with a telephone. Jean attempted to defend herself by hitting and scratching defendant. Defendant attempted sexual intercourse with Jean but failed to consummate the act. Jean scratched defendant's face, rolled off the bed and onto the floor, pulled defendant's penis to avoid further attack, stood up, and ran out of the house to a neighbor's house while screaming for help. This assignment of error is overruled.

VI. Jury Instructions

Defendant contends that the trial court erred by failing to instruct the jury on the crime of misdemeanor offense of assault on a female. Defendant argues that the jury "may" have found defendant guilty of assault on a female rather than attempted second-degree rape if the court had so instructed. Defendant admits that assault on a female is not a lesser included offense of attempted second-degree rape. This assignment of error is without merit and is clearly controlled by *State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987). "Assault on a female not being a lesser included offense of attempted second degree rape for which defendant was indicted and defendant not having been otherwise charged with such an assault, the trial court had no jurisdiction to try, convict or sentence defendant for that offense." *Id.* at 673, 351 S.E.2d at 297. This assignment of error is overruled.

Having reviewed the record, we hold that defendant received a trial by a jury of his peers before an able judge free from errors he assigned.

No error.

Judges MARTIN and THOMAS concur.

Report per Rule 30(e).