

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA10-400

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v.

New Hanover County
No. 07 CRS 065227

DOUGLAS JOB SMITH

Appeal by defendant from judgments entered 10 December 2009 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 30 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Richard E. Jester for defendant.

ELMORE, Judge.

Douglas Job Smith (defendant) was convicted of first degree kidnapping, first degree rape, and first degree sexual assault. He was sentenced to consecutive prison terms of 168 to 211 months, 480 to 585 months, and 480 to 585 months. He now appeals. After careful consideration, we hold that defendant received a trial free from error.

During the early hours of 9 December 2007, the victim was walking home from her friend's motel room when she saw defendant, whom she had met the previous week, in the parking lot. Defendant agreed to give the victim a ride home, and the victim got into

defendant's truck. Defendant drove to his camper, which was parked next to a business. He told the victim that he needed to stop at the camper to pick something up before he could take her home. The victim stated that she needed to use the restroom, and defendant told her that she could use the restroom in his camper. After the victim entered defendant's camper, she realized that it did not have a restroom.

Inside the camper, defendant pulled a knife out of a drawer, put the knife close to the victim's skin, and demanded that she undress. The victim undressed. Defendant shoved the victim onto a futon on her stomach, tied her hands behind her back with a rope, and covered the rope with duct tape. Defendant sexually assaulted the victim throughout the night. Defendant put his penis in the victim's vagina numerous times, in her anus twice, and in her mouth twice. The next morning, defendant attempted to smother the victim with a pillow. The victim managed to free herself from her restraints and escape. The victim ran naked to a business across the street and called the police.

On 7 December 2009, defendant was tried for first degree kidnapping, first degree rape, and first degree sexual offense. During cross-examination, the victim testified that she was afraid to be in public after the incident and that, since the assault, she never went anywhere alone. To impeach the victim, defense counsel attempted to introduce evidence that the victim had been charged with soliciting prostitution five months after the sexual assault occurred. Subsequently, the victim appeared in court on that

offense, resulting in a prayer for judgment continued. The trial court denied defendant's motion to introduce evidence of the victim's solicitation offense. The trial court explained that defense counsel was attempting an end run around Rule 609, see N.C. Gen. Stat. § 8C-1, Rule 609 (2009), and admission of the evidence would likely violate Rule 412, North Carolina's rape shield law, see N.C. Gen. Stat. § 8C-1, Rule 412 (2009). The jury returned verdicts of guilty for first degree kidnapping, first degree rape, and first degree sexual offense. The jury was not instructed on any lesser included offenses.

Defendant first argues that the trial court erred by refusing to admit evidence that, after the rape, the victim was charged with soliciting prostitution and "pled guilty" to the offense. Defendant contends that evidence of the victim's prostitution offense should have been admissible to impeach her credibility regarding the statements she made at trial that, after the rape, she was afraid to be alone or out in public.

The scope of cross-examination "lies within the 'sound discretion of the trial court, and its rulings thereon will not be disturbed absent a showing of abuse of discretion.'" *State v. Dorton*, 172 N.C. App. 759, 766, 617 S.E.2d 97, 102 (2005) (quoting *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988)). An abuse of discretion occurs when the ruling "is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "When cross-examination involve[s] the sexual behavior of the

complainant, our Rape Shield Statute further limits the scope of cross-examination by declaring such examination to be 'irrelevant to any issue in the prosecution' except in four very narrow situations." *Dorton*, 172 N.C. App. at 766, 617 S.E.2d at 102 (quoting N.C. Gen. Stat. § 8C-1, Rule 412). The sexual behavior of the complainant is inadmissible unless it

- 1) Was between the complainant and the defendant; or
- 2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
- 3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
- 4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C. Gen. Stat. § 8C-1, Rule 412(b) (2009).

Defendant sought to use evidence of the victim's prostitution offense for the purpose of impeaching her overall credibility. Impeachment of a complainant's credibility does not fall within any of the four exceptions set out in Rule 412(b). Furthermore, this Court has held that "simply want[ing] to attack [the victim's] credibility as a witness" does not "bring the sought testimony within any of the four exceptions to the Rape Shield Statute" *Dorton*, 172 N.C. App. at 766, 617 S.E.2d at 102 (quotations and

citations omitted). Accordingly, the trial court did not abuse its discretion by refusing to admit evidence of the alleged victim's prostitution offense.

Defendant next argues that the trial court violated his due process rights by failing to instruct the jury on false imprisonment as a lesser included offense to first degree kidnapping. "[A] constitutional question which is not raised and passed upon in the trial court will not be ordinarily considered on appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (quotations and citation omitted). An issue is preserved for appellate review when a party makes "a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2009). A party "may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto . . . stating distinctly that to which objection is made and the grounds of the objection" N.C.R. App. P. 10(a)(2) (2009).

The trial court provided each party with a copy of the proposed jury instructions. The court then asked each party if he wished to be heard about those instructions. Defendant's attorney stated, "Just a question, Judge. The kidnapping will be first degree kidnapping or second degree, and no lesser included?" The court responded, "That's correct," and added, "Does the defendant wish to be heard about that?" Defendant's attorney responded, "No

sir." Defendant's counsel made no other relevant comments during or after the jury charge.

Defendant failed to make a proper objection to the proposed jury instructions. Defendant therefore failed to preserve the issue for appellate review. Accordingly, we do not review this issue on appeal.

We hold that defendant received a trial free from error.

No error.

Judges JACKSON and THIGPEN concur.

Report per Rule 30(e).