An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-223

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Martin County
No.99-CRS-1792

WILLIAM TYRONE BLAND

Appeal by defendant from judgment entered 2 August 2000 by Judge J. Richard Parker. Heard in the Court of Appeals 11 February 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Charles A. Moore, for defendant.

BIGGS, Judge.

Defendant appeals his convictions of first-degree burglary, second-degree rape and second-degree sexual offense. For the reasons herein, we find no error.

The State's evidence may be summarized as follows: William Tyrone Bland (defendant) and DP first met in December, 1997. They began a romantic and sexual relationship which sometimes became violent. In 1999, defendant began to accuse DP of seeing other men and in July of that year, DP ended the relationship. On 31 July 1999, following termination of the relationship, defendant went to DP's apartment, along with his mother, to retrieve various

household items. DP later left her apartment to buy replacement items and returned home around midnight. Trial testimony differs as to what happened next.

DP testified that around 2 a.m., she noticed defendant's unoccupied van parked across the street from her apartment. When she turned around, she saw defendant standing in the doorway of her apartment. DP was startled by defendant's presence and asked him how he got into her apartment. Defendant told her that as a former police officer, "he had a way of getting keys." While accusing her of "cheating", defendant then grabbed DP by the arm, and began hitting her. He pulled DP into an empty bedroom, pushed her down, grabbed her by the hair, and forced her to perform fellatio. He then pulled her onto a bed, and forced her to engage in sexual intercourse.

Defendant, on the other hand, testified that at around 2:30 a.m. on 1 August 1999, he was at a gas station across the street from DP's apartment complex, and noticed lights on in the apartment. He parked his van directly across from DP's apartment and then saw her front door open, and a man, whom he did not recognize, leaving the apartment. At that point, defendant decided to confront DP. He knocked on the door and DP opened the door wearing a robe. As defendant walked inside the apartment, he questioned her about the man he had just seen leaving her apartment; DP denied any involvement with the man. Defendant became upset, and he and DP continued to argue for several hours, until they both left the apartment later that morning. Defendant

denied having any sexual contact with DP on this occasion.

Defendant was convicted of first-degree burglary, second-degree rape and second-degree sexual offense. From these convictions, defendant appeals.

I.

At the outset, we note that while defendant sets forth six assignments of error in the record on appeal, those assignments not addressed in his brief are deemed abandoned, pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure.

Moreover, defendant has violated Rule 10(c)(1)(1999) of the North Carolina Rules of Appellate Procedure which reads, in pertinent part, that "[e]ach assignment of error shall . . . be confined to a single issue of law; and shall state plainly, [and] concisely[,] . . . the legal basis upon which error is assigned." In defendant's first assignment of error, he argues multiple issues of law which must should have been separately addressed. We will, however, exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure, and review the merits of this assignment.

Defendant first contends that the trial court erred in denying his request to instruct the jury on assault on a female as a lesser included offense of second-degree rape and second-degree sexual offense. We disagree.

"[A] defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts." *State v. Thomas,* 325 N.C. 583,

594, 386 S.E.2d 555, 561 (1989) (quoting *State v. Palmer,* 293 N.C. 633, 643-44, 239 S.E.2d 406, 413 (1977)). This Court has held, however, that assault on a female is not a lesser-included offense of second-degree rape, *State v. Hatcher,* 117 N.C. App. 78, 83, 450 S.E.2d 19, 23 (1994); thus, defendant was not entitled to such instruction and the court properly denied this request.

In addition, assault on a female is not a lesser included offense of second-degree sexual offense. This Court has long held that "the definition accorded the crimes determine whether one offense is a lesser included offense of another crime." *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378 (1982), *overruled on other grounds, State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). If the lesser crime has an essential element which is not completely covered by the greater offense, it is not a lesser-included offense. *State v. Hudson,* 345 N.C. App. 729, 733, 483 S.E.2d 436, 439 (1997).

The elements of second-degree sexual offense are (1) a person engages in a sexual act, (2) with another person, *and* (3) the act is . . . by force and against the person's will. . . . N.C.G.S. § 14-27.5(a) (1999). However, the elements of assault on a female are (1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old. N.C.G.S. § 14-33(c)(2) (1999). Neither the elements that the defendant be a male, eighteen years of age nor that the victim be a female are elements of the crime of second-degree sexual offense. N.C.G.S. § 14-27.5 (1999). We, therefore, conclude that assault on a female is not a

lesser included offense of second-degree sexual offense, because assault on a female contains elements not present in the greater offense of sexual offense. *See State v. Weaver,* 306 N.C. 629, 295 S.E.2d 375. Thus, the court properly denied defendant's request that the court instruct on assault on a female as a lesser included offense of second-degree sexual offense.

Defendant contends next that the trial court erred in refusing to submit instructions on the charge of misdemeanor breaking and entering as the lesser included offense of first-degree burglary. Defendant asserts that the evidence shows that he entered DP's apartment with her consent and that he wanted only to talk to her about his suspicions that she was "cheating" on him. The trial court denied defendant's request to submit to the jury instructions on the lesser included offense of misdemeanor breaking and entering. Instead, the trial court instructed the jury that it could find defendant guilty of first-degree burglary or not guilty. We find no error in the jury instructions.

It is well settled that a trial court must instruct the jury on a lesser-included offense only if there is evidence of defendant's guilt of the lesser-included offense. *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). However, "a lesser offense should not be submitted to the jury if the evidence is sufficient to support a finding of all the elements of the greater offense and there is no evidence to support a finding of the lesser offense." *State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995). Thus, a defendant "is entitled to an instruction on lesser

included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *State v. Leazer,* 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation omitted). In addition, the defendant's denial that he committed the crime is not sufficient to submit a lesser included offense. *State v. Nelson*, 341 N.C. at 697, 462 S.E.2d at 226.

The elements of first-degree burglary are "(1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or . . . a sleeping apartment [of another] (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein." *State v. Person*, 298 N.C. 765, 768, 259 S.E.2d 867, 868 (1979); *See* N.C.G.S. § 14-51 (1999). "The intent to commit a felony following a breaking and entering distinguishes burglary from the lesser included offense of misdemeanor breaking and entering. . . ." *State v. Dawkins,* 305 N.C. 289, 290, 287 S.E.2d 885, 887 (1982).

In the case *sub judice,* the State offered the testimony of DP which can be summarized as follows: that defendant, who once had a key to DP's apartment before DP changed the locks, obtained a key without DP's knowledge; that he entered the apartment, unbeknownst to DP; that it was during the early morning hours, while it was still dark outside; that she had earlier ended the relationship with defendant because he accused her of "cheating" on him; and that upon entering, he began hitting her and forced her to engage in fellatio and sexual intercourse.

We conclude that the State presented sufficient evidence from which a jury could find every element of first-degree burglary.

Moreover, even if, assuming *arguendo*, the jury believed defendant's testimony rather than DP's, we conclude that such testimony would not support an instruction of misdemeanor breaking and entering. Defendant contends that DP voluntarily admitted him into her apartment; that it was DP who made sexual advances toward him; and that no further sexual activity occurred between the two of them. If the jury accepted defendant's account of the events, he is neither guilty of first-degree burglary, nor of misdemeanor breaking and entering.

We are unable to discern a scenario, based on the evidence presented, that would entitle defendant to an instruction on misdemeanor breaking and entering. Thus, we hold that the trial court did not err in refusing to instruct the jury on the lesser included offense of misdemeanor breaking and entering. Accordingly, this assignment of error is overruled.

II.

Defendant contends next that the trial court committed reversible error by excluding Juror Number 5, Barbara J. Freeman. We disagree.

At the outset, we note that defendant has not preserved objection to the trial court's decision to exclude Juror Number 5 from the trial. Pursuant to Rule 10(b)(1999) of the North Carolina Rules of Appellate Procedure, "a party must have presented . . . a timely request, objection or motion, stating the specific grounds

for the ruling the party desired the [trial] court to make. . . ." When asked by the trial court if either attorney had questions concerning Juror Number 5, each responded that they did not have any questions. Defendant did not object to the exclusion of this juror from the trial; thus, he may not challenge the trial court's decision on appeal. We will nevertheless exercise our discretion pursuant to Rule 2 of the North Carolina Appellate Procedure, and review the merits of this assignment.

Our Supreme Court has held that the trial court "has broad discretion in supervising the selection of the jury . . . [and that i]t is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel." *State v. Nobles,* 350 N.C. 483, 513, 515 S.E.2d 885, 903 (1999) (citation omitted). Additionally, "[t]he trial court's discretion in supervising the jury continues beyond jury selection and extends to decisions to excuse a juror and substitute an alternate." *State v. Davis,* 325 N.C. 607, 628, 386 S.E.2d 418, 429 (1989) (holding that no abuse of discretion in judge's decision to replace juror who had child-care problems, after both parties had presented all their evidence in guilt-innocence phase), *cert. denied,* 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Its decisions regarding the competency and service of jurors are not reviewable on appeal, absent a showing of abuse of discretion. *Id.*

In the case *sub judice*, before final submission of the case to the jury, the trial court received a letter from the University

Family Medicine Center requesting that Juror Number 5 be excused for medical and emotional reasons. The trial court excused Juror Number 5 and replaced her with an alternate juror. Defendant has not demonstrated, nor do we find, any prejudice to defendant by virtue of this decision. We hold that the trial court did not abuse its discretion; accordingly, this assignment of error is overruled.

Defendant received a fair trial free of any error.

No error.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).