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NO. COA05-1047

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v.

Guilford County  
No. 04 CRS 93602

REGINALD LEE ROGERS

Appeal by defendant from judgment entered 26 January 2005 by Judge Judson D. DeRamus, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 19 June 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Susan R. Lundberg, for the State.*

*Brian Michael Aus for defendant appellant.*

McCULLOUGH, Judge.

Reginald Lee Rogers (defendant) appeals from his conviction for habitual misdemeanor assault. For the reasons stated below, we find no error.

On 8 November 2004, the Guilford County grand jury indicted defendant on charges of misdemeanor assault on a female and habitual misdemeanor assault. At trial beginning on 24 January 2005, the State introduced evidence tending to show the following:

Defendant and Tabitha Lynn Rogers (victim) were married on 28 November 1995. Because the victim was working at a second job on the night of 24 September 2004 (a Friday), defendant's parents kept

the couple's two children that weekend. The victim then worked on the following day at her regular job and returned home between two and three o'clock in the afternoon. She testified defendant wanted to go out with her that evening, but she declined because she was mad at him. The victim instead played games on her cell phone in their bedroom while defendant played video games in their living room. Defendant accused the victim that same evening of sending text messages to people on her cell phone, and they began arguing at around five or six o'clock. The victim went to bed before defendant, who continued playing video games in the living room that night.

At approximately six o'clock on Sunday morning, the victim awakened and began getting ready for work. She said defendant noticed a missed call on her cell phone which came from a private number at about 2:00 a.m., and they began arguing over the missed call. Both of them were yelling, throwing things and breaking things. As she was standing in front of her dresser, they also argued over which of them would take the truck that morning. When the victim saw defendant coming through the door, she tried to get away. Defendant started punching her and struck her on the side of her head. She fell to the floor, and defendant began kicking her in her back. The victim told him to stop and let her get ready for work because she could not afford to stay out of work. She "probably tried to hit him a couple of times . . . trying to get him off of me." Defendant stopped, but they continued arguing as both of them were getting ready.

The victim was in the bathroom brushing her teeth when defendant pushed her into the bathtub and broke a plastic mouthwash bottle over her. A button was ripped off the front of her shirt when defendant tried to get her up one time. The victim attempted to leave the house, but defendant would not allow her to leave because he said she would call the police. While at the backdoor, the victim hit defendant underneath his eye and scratched him with her ring. Defendant then began hitting her again. The victim ran to the front door but was unable to unlock it. Defendant eventually told the victim to straighten up so that she could get ready for work, and she reapplied her makeup and pulled her hair back up. As defendant drove her to work, they were "kind of arguing in the truck," and she "just kept promising that [she] wouldn't call the police."

After arriving at work, the victim called police and told two officers what had occurred. The victim then called a friend to come get her, and the victim left with her. She went before a magistrate before lunch that day and took out a warrant for the assault. Later that same day, officers arrested defendant at the family residence. Because she could not hear out of her left ear where defendant had struck her, the victim went to the emergency room that evening. On Monday morning, the victim obtained a domestic violence protection order.

Out of the jury's presence, defendant admitted two prior convictions for misdemeanor assault on a female. Both convictions occurred on 12 September 2003. An assistant clerk of Guilford

County Superior Court subsequently testified as to court records of prior convictions for assault on a government official, for resisting and obstructing a public officer, and for simple assault. The court records contained discrepancies as to the spelling of defendant's name, the year of his birth, and his residence at the time of the offenses.

At the close of the State's evidence, defendant moved to dismiss the charges of assault on a female and habitual misdemeanor assault. The trial court denied the motions, and defendant then testified on his own behalf. Defendant said the victim's cell phone rang at about 6:00 o'clock on the morning of 26 September 2004, and he answered it as the victim was getting dressed. A man asked defendant if the victim was around, but hung up when defendant identified himself as her husband and asked if the man wanted to leave a message. The victim complained about defendant answering her cell phone, and she said she did not know who the caller was because it was a private number. Defendant told her that he was tired of trying to make it work and that he was leaving.

According to defendant, as he was leaving, the victim said, "You're not leaving me with two kids," and she ripped all the buttons off her own work shirt. Defendant had no contact with the victim because he was on the other side of their bed. The victim then threw the bottle of mouthwash at him while he was leaving. While defendant was walking down the street away from their house, the victim drove up in the truck and was blowing the horn. She

told him that it would never happen again and that she was sorry. The victim asked him to take her to work, and defendant "gave in again" and dropped her off at work.

Defendant returned to their home and parked the truck behind their house near the hose spigot so that he could wash the truck before church. He then got into the shower. The next thing that defendant knew, the victim came in with two police officers and they arrested him on an assault charge. Defendant renewed his earlier motion to dismiss at the close of all the evidence, and the trial court again denied the motion.

The trial court instructed the jury that it could convict defendant of habitual misdemeanor assault and assault on a female, and also gave an instruction on self-defense. The jury convicted defendant of habitual misdemeanor assault, the trial court sentenced him to a term of ten to twelve months' imprisonment. Defendant now appeals.

In his first argument, defendant contends the trial court was without jurisdiction to hear the charge of habitual misdemeanor assault because the indictment was defective. He argues the indictment did not properly allege five previous misdemeanor convictions because two of those convictions occurred on the same date. This argument lacks merit.

At the time of the offense, the applicable statute stated that "[a] person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor

convictions, two of which were assaults." N.C. Gen. Stat. § 14-33.2 (subsequently amended effective 1 December 2004). The statute, however, "contains no language which could be reasonably construed as requiring that any of the prior misdemeanor convictions either occur on separate dates or arise from separate incidents." *State v. Forrest*, 168 N.C. App. 614, 623, 609 S.E.2d 241, 247 (2005). Accordingly, we reject defendant's argument.

Defendant next contends the trial court erred by denying his motion to dismiss based on insufficiency of the evidence. He argues the evidence shows that the victim assaulted him. We disagree.

"In ruling on a motion to dismiss based on the insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each element of the crime charged and that defendant was the perpetrator." *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). "Whether the evidence presented is substantial is a question of law for the court." *State v. Siriguanico*, 151 N.C. App. 107, 109, 564 S.E.2d 301, 304 (2002). The motion to dismiss must be denied if the evidence, viewed in the light most favorable to the State, would allow a jury to reasonably infer that the defendant is guilty. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002).

"A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) . . . and has been convicted of five or more prior misdemeanor convictions, two of which were assaults." N.C. Gen. Stat. § 14-

33.2. "The elements of assault on a female [codified at N.C. Gen. Stat. § 14-33(c)(2) (2005)] are (1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). Defendant here only challenges the element of assault, which is defined as "'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.'" *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (citation omitted).

The victim testified that as she and defendant were arguing, yelling and throwing things, defendant struck her on the side of her head and then kicked her in her side and back after she had fallen to the floor. He later pushed her into the tub while she was brushing her teeth and "busted" a plastic bottle of mouthwash over her. When viewed in the light most favorable to the State, the victim's testimony provided substantial evidence of the disputed element of assault. Accordingly, the trial court properly denied defendant's motion to dismiss the charges.

No error.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).