NO. COA05-1360

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 03 CRS 213651-55

RAMONE CHRISTOPHER LANEY

Appeal by defendant from judgment entered 11 March 2005 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Reita Pendry for defendant appellant.

McCULLOUGH, Judge.

Ramone Christopher Laney ("defendant") appeals from conviction and judgment for second-degree rape, assault on a female, second-degree sexual offense, false imprisonment and communicating threats. We hold that he received a fair trial, free from prejudicial error.

Facts

The State presented evidence which tended to show that on 21 March 2003, defendant came to the house of the victim, Dimetra Turner at approximately 4:00 a.m. Defendant and Turner had an on-and-off relationship spanning ten years, and had been together for

six months prior to 21 March 2003. An argument ensued regarding her fidelity, and defendant became angry. He went to the kitchen and returned with a metal broomstick.

Defendant began striking Turner with the broomstick, his hands, and his fists. Turner attempted to fight back. Defendant pulled her to the floor and dragged her from the bedroom to the living room by her hair. He placed a knee on her throat and started choking her. After choking her, defendant resumed striking and kicking Turner as she lay on the floor. At some point, defendant knocked out one of her teeth. He then took Turner to the bathroom and tended to her bleeding, before leading her into the bedroom and ordering her to lay down.

Defendant got on top of Turner and removed her sweat pants. When Turner reacted to this, defendant raised his hand as if to indicate he would strike her again. Turner did not resist any further. Defendant stated that they would have sex. He inserted his penis into her vagina, and then withdrew. Defendant then forced the victim's head down and demanded oral sex. Thereafter, he began to have intercourse with her again. Defendant also attempted anal intercourse with Turner, but as he tried to penetrate her anus with his penis, she clenched her buttocks together to prevent full penetration, and pushed it out. Defendant then forced Turner to perform oral sex again, as well as intercourse.

Turner's sister and father arrived during the ordeal. Turner then attempted to flee, but found her door locked. The key which normally rested in the deadbolt had been removed. The key was not

found during an investigation of the scene. Turner opened a window and jumped through it, landing on the porch. She called to her sister to call the police.

Charlotte Mecklenburg Police Officer Robert Morrell testified that he had interviewed Turner at the scene, where she stated she had been raped numerous times by defendant. Morrell also testified that he had observed Turner with numerous bruises, as well as braids, hair beads, and a bloody tooth in the living room.

Turner submitted a rape kit, which was analyzed for DNA evidence by Kelly Smith. Smith testified that she found semen on both anal and vaginal swabs, and found the DNA to be consistent with defendant's DNA profile.

Defendant did not testify at his trial, but did present two witnesses who testified that Turner had made several prior inconsistent statements to them, saying she had not been raped that night.

At the close of the State's case and at the end of all the evidence, defendant moved to dismiss the indictments. Both motions were denied.

Defendant was convicted of second-degree rape, assault on a female, second-degree sexual assault, false imprisonment, and communicating threats. The trial court sentenced defendant to 133 to 169 months of imprisonment. Defendant now appeals.

I.

In his first argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss the charges of second-degree rape, second-degree sex offense, and false imprisonment for insufficient evidence. We disagree.

In deciding a motion to dismiss for insufficient evidence, a trial court must determine whether there is substantial evidence of each required element of the offense charged, and that the defendant is the perpetrator of such offense. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899 (2000), *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

When ruling on a motion to dismiss for insufficient evidence, a trial court must take the evidence in the light most favorable to the State and afford every reasonable inference from the evidence to the State. *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998).

The elements required for a conviction of second-degree rape relevant to this case are: (1) engaging in vaginal intercourse (2) with another person by force and against the will of the other person. N.C. Gen. Stat. § 14-27.3(a)(1) (2005); *see also State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994). The elements required

for a conviction of second-degree sexual offense relevant to this case are: (1) engaging in a sexual act (2) with another person by force and against the will of the other person. N.C. Gen. Stat. § 14-27.5(a)1 (2005). A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4) (2005). The jury was instructed on the offenses of first-degree rape and first-degree sexual offense, as well as the lesser included offenses of second-degree rape and second-degree sexual offense (absent the employment or display of a deadly weapon).

In the light most favorable to the State, the victim testified that defendant penetrated her vaginally without her consent. The victim also testified that defendant had beaten her and she had numerous bruises and marks consistent with such a beating. She further testified that immediately prior to the penetration, defendant had raised his hand to reinforce the beating, at which point the victim ceased resisting because she was hurt and afraid. The victim further testified that defendant made her perform oral sex, and attempted to penetrate her anally, but she resisted and "kept pushing it out." The State also presented medical evidence of the presence of semen in both the vagina and anus of the victim, and showed that the DNA of the semen was consistent with the DNA profile of defendant. This testimony and the corroborative physical evidence, when taken in the light most favorable to the State,

provide substantial evidence to sustain a conviction of each charge. The testimony of the victim alone covers each of the elements necessary to prove the offenses charged, and while defendant may allege inconsistencies or discrepancies in her testimony, such questions are a matter for the jury to resolve, and do not warrant dismissal. *State v. Jones*, 337 N.C. 198, 204, 446 S.E.2d 32, 35 (1994).

The elements of false imprisonment which are relevant to this case are as follows: (1) the intentional and unlawful (2) restraining or detaining of a person (3) without that person's consent. The jury was instructed on second-degree kidnapping, as well as the lesser included offense of false imprisonment. *See State v. Bynum*, 282 N.C. 552, 193 S.E.2d 725 (1973), *cert. denied*, 414 U.S. 869, 38 L. Ed. 2d 116 (1973) (stating that false imprisonment is a lesser included offense of kidnapping). In the instant case, the victim testified that she arose from her bed and went to the door. It is clear from the victim's testimony that she was attempting to escape through the door, but was unable to do so, and had to jump through a window. The evidence is sufficient to permit an inference that defendant had removed the key from its customary place in the deadbolt, which would have prevented the victim from escaping through the door. When taken in the light most favorable to the State, and affording all reasonable inferences from the evidence to the State, we hold that there was sufficient evidence to send the charge of false imprisonment to the jury. Thus, this assignment of error is overruled.

II.

Defendant next alleges that the trial judge erred in instructing the jury that it could base a conviction for first-degree sex offense on a finding that defendant had anal sex with the victim. The court instructed the jury as follows:

> The defendant has been charged with first-degree sexual offense. For you to find the defendant guilty of first-degree sexual offense, the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant engaged in a sexual act with the victim. A sexual act means fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another; or anal intercourse, which is any penetration, however slight, of the anus of any person by the male sexual organ of another.

Defendant objects to the instruction that any penetration, however slight, would be sufficient to sustain a charge of anal intercourse, claiming that the State cited no precedent for this instruction. Defendant further claimed that even if the instruction is correct, that there was insufficient evidence of anal intercourse to submit the matter to the jury.

The term "anal intercourse," as it is used in N.C. Gen. Stat. § 14-27.1(4), has been construed as requiring "penetration of the anal opening of the victim by the penis of the male." *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986). Further, N.C. Gen. Stat. § 14-27.1(4) defines "sexual act" to include "the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" Moreover, the term "any

object" has been construed by this Court to "embrace parts of the human body as well as inanimate or foreign objects." *State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981). As such, the jury instructions given by the judge were correct to include anal intercourse as falling within the term "sexual act," as well as giving the appropriate threshold for determining what constitutes anal intercourse.

Defendant's second argument, that there was insufficient evidence to present to a jury on this subject, falls under the same analysis as his earlier argument for dismissal. As we have held above, there was sufficient evidence, both in the victim's testimony and in the medical information submitted in the rape kit, to submit the issues of rape and sexual offense to the jury. In particular, we note the portion of the victim's testimony that she "kept pushing it out" as defendant attempted to have anal intercourse. To be pushed out, defendant's penis must have, at some point and to some degree, been in the victim's anus. We hold that there were sufficient grounds to include anal intercourse in the instructions given to the jury, and overrule this assignment of error.

III.

Defendant's third argument on appeal is that the trial court erred in permitting a police witness to testify regarding defendant's invocation of his constitutional right to remain silent, and in denying a motion to strike the testimony.

Defendant, after a short discussion with a detective from the

Domestic Violence unit about the incident, stated that he was finished. At trial the State proceeded along a line of questioning regarding defendant's statement. The prosecutor asked, "[w]hen he stopped with the words, 'Well, I am finished,' is that consistent with Right Number 5 [Miranda] on the form?" Then the prosecutor asked if, had defendant not ended the interview, "did [the detective] still have questions [the detective] would have asked him?" Defendant objected on relevancy grounds, and the objection was overruled. The detective answered "yes," and defendant moved to strike, and was overruled. There was no further direct examination, and at no time during the trial after this point did the prosecutor refer to the silence of defendant.

We note first that defendant did not make this argument at trial, and we generally will not consider a theory on appeal that differs from the theory argued at the trial court. *See State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988); *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Even so, defendant's argument lacks merit.

Defendant cites *State v. Bishop* for the proposition that it is a violation of his constitutional rights for the State to introduce evidence that he exercised his right to remain silent. This is a misunderstanding of *Bishop*, which states that "the exercise of [defendant's] constitutionally protected rights to remain silent and to request counsel during interrogation may not be introduced as evidence against [defendant] by the State at trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Simple

reference to an invocation of the right to remain silent is not a constitutional violation when it is not used to subvert the defense. *Greer v. Miller*, 483 U.S. 756, 97 L. Ed. 2d 618, *reh'g denied*, 483 U.S. 1056, 97 L. Ed. 2d 819 (1987). In the instant case, defendant's silence was not used to subvert the defense at trial. This assignment of error is overruled.

IV.

In his final argument, defendant claims that the trial court committed plain error in allowing the State to cross-examine two witnesses with respect to questions challenging their credibility.

At trial defendant produced two witnesses on his behalf who testified about statements related to them by the victim saying she had been beaten, but not raped. Defendant's mother and aunt testified these statements were made voluntarily by the victim, who approached the witnesses and made these statements. The State cross-examined the witnesses about their failure to speak to the authorities regarding this information, and impeached their credibility using their silence as a prior inconsistent statement. Defendant raised no contemporary objections to this line of questioning.

Plain error is a

> "'*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has '"'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'"' or where the error is such as to 'seriously affect the fairness, integrity or

> public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

We note that the line of questioning at issue was admissible in the trial court as a prior inconsistent statement on the part of the witnesses. "[A] prior statement is considered inconsistent if it fails to mention a material circumstance presently testified to which would have been natural to mention in the prior statement. . . . [E]ven the failure to speak may be considered an inconsistent statement and proper for impeachment." *State v. Fair*, 354 N.C. 131, 157, 557 S.E.2d 500, 519 (2001) (citations omitted), *cert. denied* 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Under the facts of this case, the failure to state such an important fact anytime prior to trial amounted to a prior inconsistent statement. The prosecution was well within the permissible bounds of cross-examination to impeach these witnesses with their silence. Accordingly, we overrule defendant's assignment of error.

For the reasons stated above, we find

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).