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NO. COA07-1351

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

STATE OF NORTH CAROLINA	Buncombe County
v.	Nos. 06 CRS 231
	06 CRS 50988
LEON NMN JACKSON,	06 CRS 50989
Defendant.	06 CRS 50990

Appeal by defendant from judgments entered 11 December 2006 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 13 May 2008.

Court of Appeals

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Slip Opinion

Glenn Gerding for defendant-appellant.

GEER, Judge.

Defendant Leon Jackson appeals from his convictions of first degree burglary, first degree rape, and attempted first degree sexual offense. Defendant primarily contends that he was seized without probable cause in violation of the Fourth Amendment, and, therefore, the trial court erred in failing to suppress physical evidence that the police collected from defendant after that seizure. Defendant has not, however, challenged on appeal the victim's identification of him that provided the basis for the search warrant obtained in order to seize the physical evidence. Because defendant has failed to establish that the police would not

have obtained the physical evidence but for any unlawful seizure, the trial court properly denied the motion to suppress that evidence. We, therefore, find no error.

Facts

The State's evidence tended to show the following facts. At approximately 4:00 a.m. on 22 January 2006, "Ms. H." who was 80 years old, woke up when she heard a door open in her house.[1] She had left a door unlocked so that her grandson could come in during the night. Instead of her grandson, however, another man entered her room. He immediately got on top of her in bed, removed Ms. H.'s clothing and adult diaper, and inserted his penis partially inside her vagina. He then tried to put his penis in Ms. H.'s mouth, but she put her hands over her mouth to stop him. The two struggled, and Ms. H. fell out of the bed, sustaining serious injuries. With Ms. H. now on the floor, the man again tried to put his penis in her mouth, but she was able to block him with her hands. The man then grabbed and yanked Ms. H. back onto the bed. He threatened to suffocate her if she did not stop yelling. He tried once more to put his penis in her mouth, but again, Ms. H. prevented him with her hands. Eventually, the man got up, said "I'm going," and left the house.

Ms. H. noticed that the man had a scar on his forehead, that he was missing a tooth from the side of his mouth, and that his hair looked as if it had not been combed. The man was wearing

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[1]"Ms. H." is used in order to protect the privacy of the victim of the charged offenses.

black shoes, white socks, black pants, and a jacket that had a beige or white front and a black back. Ms. H. called her son and described her assailant to her family when they arrived.

When the police responded to the call around 6:00 a.m., they initially encountered Ms. H.'s son and other male family members approaching defendant's mother's house, which was down the street from Ms. H.'s home. Based on statements made by the men, Sergeant Sean Pound and Detective Diana Loveland knocked on the door of defendant's mother's house and were let in by his mother. Detective Loveland stated that when she first saw defendant, who was lying on the couch, she noticed some clothing behind his back and, fearing it might be concealing a weapon, asked him to remove it. Defendant showed her a black jacket with white sleeves. Detective Loveland told defendant that they were investigating a nearby incident and asked him if he had been outside earlier that morning. Defendant responded that he had, in fact, been out earlier with an acquaintance.

Sergeant Pound then asked Detective Loveland to interview Ms. H. at her home down the street. When Detective Loveland asked Ms. H. if she could describe her assailant, she stated, among other things, that the man had been wearing a jacket that was part black and part beige or white. Ms. H. also told Detective Loveland that she recognized her assailant from the neighborhood, but she could not remember his name at that moment. Detective Loveland then called Sergeant Pound who was still with defendant and relayed the description to Sergeant Pound. Less than an hour passed from the

time Detective Loveland first encountered defendant to the time she called Sergeant Pound with Ms. H.'s description of her assailant.

Ms. H. was taken to Mission Hospital and examined by Joanne Eikenberry Latta, a nurse certified to perform sexual assault examinations. Ms. Latta found some torn and peeled skin, and some areas of redness, but did not find any active bleeding in Ms. H.'s vaginal area.

After approximately 75 to 90 minutes at his mother's house, defendant was placed in a patrol car and driven to the police station. Detective Anthony Johnson took defendant into "investigative custody" and informed him of his rights. Defendant waived his rights and denied the allegations Detective Johnson explained to him. Defendant was then taken to the Buncombe County detention center.

Detective Johnson prepared a photographic lineup of eight pictures, including defendant's. When he showed Ms. H. the lineup at the hospital, she identified defendant as her assailant. Based on Ms. H.'s identification, Detective Johnson formally arrested defendant and secured a search warrant to collect hair, blood, and DNA samples, as well as defendant's clothes. A cutting from his shirt was tested by the SBI and a small blood stain on the swatch contained DNA that matched Ms. H.'s DNA.

Defendant was charged with first degree burglary, first degree rape, first degree sexual offense, and being a habitual felon. The State gave notice that it intended to present evidence that the victim was "very elderly" as an aggravating factor for the

burglary, rape, and sexual offense charges. Prior to trial, defendant moved to suppress Ms. H.'s pre-trial identification of defendant, contending that the photo lineup was impermissibly suggestive. He also moved to suppress all the physical evidence collected from him, arguing that it was obtained as a result of an unlawful arrest in violation of his Fourth Amendment rights. The trial court conducted a suppression hearing, during which it heard testimony from Detective Johnson and arguments from both the prosecutor and defense counsel. At the conclusion of the suppression hearing, the trial court denied defendant's motions to suppress. At his 6 December 2006 trial, defendant renewed his motions to suppress, but they were again denied. Defendant presented no evidence in his defense.

On 11 December 2006, the jury found defendant guilty of first degree rape, first degree burglary, and attempted first degree sexual offense. The jury also found the existence of the aggravating factor as to each offense. Defendant pled guilty to being a habitual felon. The trial court sentenced defendant to an aggravated-range sentence of life imprisonment without parole for the rape conviction. As for the attempted sexual offense charge, the court sentenced defendant to a consecutive aggravated-range term of 353 to 433 months, followed by a presumptive-range term of 133 to 169 months for the burglary conviction. Defendant timely appealed to this Court.

Motion to Suppress

Defendant's principal argument on appeal is that the trial court erred in denying his motion to suppress the shirt he was wearing on the morning of the alleged offenses, a swatch from his shirt containing a blood stain, and the DNA test results identifying the blood as Ms. H.'s. Defendant argues that at some point during his encounter with the police he was unlawfully seized, either when (1) the police made him remain sitting on the couch at his mother's house for 75 to 90 minutes, (2) the police involuntarily transported him to the police station, or (3) the police held him at the detention center in "investigative custody" for almost four hours before he was formally arrested. Defendant maintains that "but for" his unlawful arrest, the police could not have obtained the search warrant to seize his clothing, including his shirt with Ms. H.'s blood on it.

It is well established, as defendant argues, that "Fourth Amendment rights are enforced primarily through the 'exclusionary rule,' which provides that evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation. In short, evidence obtained in violation of an individual's Fourth Amendment rights cannot be used by the government to convict him or her of a crime." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) (internal citation omitted). "The 'fruit of the poisonous tree doctrine,' a specific application of the exclusionary rule, provides that '[w]hen

evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the "fruit" of that unlawful conduct should be suppressed.'" *Id.* (quoting *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992)). A critical caveat is that "[o]nly evidence discovered *as a result of* unconstitutional conduct constitutes 'fruit of the poisonous tree.'" *Id.* (emphasis added).

Our Supreme Court has repeatedly held that an unlawful arrest does not necessarily render an identification resulting from that arrest *per se* inadmissible as fruit of the poisonous tree. *See State v. Matthews*, 295 N.C. 265, 283-84, 245 S.E.2d 727, 738-39 (1978) (holding that even assuming that defendants were under illegal arrest at time of showup identification, identification was admissible because defendants had no right to avoid being viewed and identification, therefore, was not "poisonous fruit"), *cert. denied*, 439 U.S. 1128, 59 L. Ed. 2d 90, 99 S. Ct. 1046 (1979); *State v. Finch*, 293 N.C. 132, 139, 235 S.E.2d 819, 823 (1977) ("[W]e find no merit in defendant's contention that an 'unconstitutional' arrest *requires* the exclusion of identification testimony that is *otherwise competent*.").

Here, however, defendant does not even challenge the identification or argue that it was the result of the allegedly unconstitutional seizure. Further, the trial court determined, and defendant does not dispute, that the unchallenged identification of defendant by Ms. H. resulted in the search warrant that led to the seizure of defendant's clothing. Defendant has not, therefore,

demonstrated that the State obtained the clothing as a result of the allegedly unconstitutional seizure. He, therefore, has not established that the clothing constituted fruit of the poisonous tree. *See Segura v. United States*, 468 U.S. 796, 816, 82 L. Ed. 2d 599, 616, 104 S. Ct. 3380, 3391 (1984) ("[E]vidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' cause of the discovery of the evidence. Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.'" (quoting *United States v. Crews*, 445 U.S. 463, 471, 63 L. Ed. 2d 537, 545, 100 S. Ct. 1244, 1250 (1980))). As the photo lineup identification itself was not obtained through unconstitutional means, the trial court properly denied defendant's motion to suppress the evidence obtained pursuant to the search warrant based on that identification because any unconstitutional arrest was not the "but for" cause of the discovery of the evidence.

Aggravated Sentences

Defendant also argues that the trial court erred in sentencing him within the aggravated range for his first degree rape and attempted first degree sexual offense convictions. Defendant claims, based on the trial judge's statements during sentencing, that the judge mistakenly believed that he did not have the discretion to impose a presumptive-range sentence once the jury had found the aggravating factor.

In *Blakely v. Washington*, 542 U.S. 296, 301, 159 L. Ed. 2d 403, 412, 124 S. Ct. 2531, 2536 (2004) (quoting *Apprendi v. New*

Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455, 120 S. Ct. 2348, 2362-63 (2000)), the United States Supreme Court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" N.C. Gen. Stat. § 15A-1340.16 (2007) was amended to comport with *Blakely's* holding and now requires that a jury must find any aggravating factors beyond a reasonable doubt and that the trial court may find any mitigating factors by a preponderance of the evidence. It is the responsibility of the trial court to then weigh the aggravating factors against the mitigating factors and determine whether to deviate from the presumptive-range sentence. N.C. Gen. Stat. § 15A-1340.16(a), (b). Although the trial court is required to "consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, . . . the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a).

Here, the jury found beyond a reasonable doubt the aggravating factor that Ms. H., the victim of the crimes, was "very elderly." On Administrative Office of the Courts form AOC-CR-605 (Rev. 10/05), the trial judge found no mitigating factors and determined that "the factors in aggravation outweigh the factors in mitigation and that an aggravated sentence is justified."

When the trial judge sentenced defendant to life imprisonment on the rape conviction, he said:

> The jury has also found beyond a reasonable doubt the existence of an aggravating factor that the victim in this case, Ms. [H.], was at that time very old. The Court finds no existence of any mitigating factor; therefore, the sentence will be in the aggravated range.

Imposing an aggravated-range sentence for the attempted sexual offense, the trial judge said:

> The jury has . . . unanimous[ly] found the existence of an aggravating factor, at that [sic] time of that offense, Ms. [H.], the victim, was very elderly.
>
> The Court makes no findings in mitigation.

Defendant contends that the trial judge's statements reveal a mistaken belief that he lacked discretion to impose a presumptive-range sentence because the jury had found an aggravating factor justifying aggravated sentences.

In *State v. Anderson*, 177 N.C. App. 54, 63, 627 S.E.2d 501, 506, *disc. review denied*, 360 N.C. 578, 635 S.E.2d 899 (2006), the defendant similarly argued that the trial court had erred by failing to exercise its discretion under N.C. Gen. Stat. § 15A-1340.16(a) when, immediately before imposing an aggravated sentence, the court stated: "'I'm not going to defeat what the jury said here so I'm going to do something.'" This Court, however, declined to construe that statement as indicating a belief that an aggravated sentence was required. *Anderson*, 177 N.C. App. at 63, 627 S.E.2d at 506.

Similarly, here, we do not believe that the trial judge's statements suggest that he believed he could not impose a sentence

inconsistent with the jury's finding. Instead, the trial judge's remarks indicate only that he was walking through the procedure mandated by N.C. Gen. Stat. § 15A-1340.16, addressing first the jury's findings on aggravating factors, then addressing mitigating factors and finding none, followed by the result of his weighing. Indeed, although the jury found the same aggravating factor with respect to defendant's burglary conviction, the trial court nonetheless decided to impose a presumptive-range sentence. The fact that the trial judge made this distinction indicates that he was fully aware of his authority under N.C. Gen. Stat. § 15A-1340.16(a) and was exercising that discretion when he imposed aggravated sentences for two of defendant's convictions, but not the third. Accordingly, we find no error.

No Error.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).