NO. COA07-1548

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

STATE OF NORTH CAROLINA

v. Pitt County
No. 06 CRS 61286

JAMES ARRENHIOUSA GARDNER

Appeal by defendant from judgment entered 17 August 2007 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 13 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for the State.

John Keating Wiles, for defendant.

ELMORE, Judge.

Defendant appeals from judgment entered consistent with a jury verdict finding him guilty of statutory rape and taking indecent liberties with a child. For the reasons stated herein, we find no error.

The State's evidence tends to show that on or about the evening of 19 August 2005, defendant asked his fourteen year old daughter to accompany him on a drive. After a short drive, defendant pulled over and had sex with his daughter in the backseat of the car. Approximately two weeks later, defendant told his daughter not to tell anyone what had happened. Prior to his

arrest, defendant spoke to Sergeant K.S. Stewart (Stewart) and stated, "I never had sex with her. . . . If I have done what my daughter said that I did, I have no recollection of it because of the drugs I was on, crack cocaine. . . . The drugs had me on a blackout. . . . I have never messed with my daughter intentionally . . . . If I did, I have no recollection of it." Defendant testified that he never had sex with his daughter, that he was using drugs in August 2005, and that he suffered from blackouts when using crack cocaine and alcohol.

After deliberating for approximately two and a half hours, the jury informed the court that it could not come to a consensus, at which point the court emphasized the duty of the jury to do whatever it could to reach a verdict. The jury resumed deliberations and forty minutes later returned with a verdict finding defendant guilty of statutory rape and taking indecent liberties with a child. The court sentenced defendant to imprisonment for a minimum term of 384 months to a maximum term of 470 months with credit for time served in pre-judgment custody. Defendant appeals.

In his first assignment of error, defendant argues the trial court committed plain error by failing to instruct the jury on the affirmative defense of unconsciousness or automatism. We note that the plain error rule is to be "applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice

cannot have been done' . . . ." *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)).

Unconsciousness is a complete, affirmative defense to a criminal charge and the burden rests upon the defendant to prove its existence, unless it arises out of the State's own evidence, to the jury's satisfaction. *State v. Boyd*, 343 N.C. 699, 714, 473 S.E.2d 327, 334 (1996) (citing *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975), *cert denied*, 519 U.S. 1096, 136 L. Ed. 2d. 722 (1997)). The defense of unconsciousness, or automatism, requires that the person "though capable of action, is not conscious of what he is doing. It is to be equated with unconsciousness, involuntary action [and] implies that there must be some attendant disturbance of conscious awareness." *State v. Fields*, 324 N.C. 204, 208, 376 S.E.2d 740, 742 (1989) (citation and quotations omitted). Whether the defendant or State offers such evidence, the jurors are to determine if they are satisfied beyond a reasonable doubt that defendant voluntarily committed the act. *Caddell*, 287 N.C. at 297, 215 S.E.2d at 367.

A "trial court must instruct on all 'substantive' or 'material' features arising on the evidence and the law applicable thereto without a special request." *State v. Jackson*, 139 N.C. App. 721, 724, 535 S.E.2d 48, 50 (2000), *overruled on other grounds*, 353 N.C. 495, 546 S.E.2d 570 (2001). This Court has previously held that, "[f]or a particular defense to result in a required instruction, there must be substantial evidence of each

element of the defense when viewing the evidence in a light most favorable to the defendant." *State v. Brown*, 182 N.C. App. 115, 118, 646 S.E.2d 775, 777, *disc. review denied*, 361 N.C. 431, 648 S.E.2d 848, *cert. denied*, ___ U.S. ___, 169 L. Ed. 2d 373 (2007).

After carefully reviewing the transcript, we conclude that there is no substantial evidence that defendant was unconscious during the incident or that his actions were involuntary. There is evidence that the offense occurred during defendant's twelve-year addiction to crack cocaine, that "maybe [he] did suffer a blackout," and that he experienced blackouts when mixing crack cocaine and alcohol. However, there is no corroboration of defendant's blackouts and there is insufficient evidence that defendant was unconscious at the time of the offense. Even taking the evidence in the light most favorable to defendant, defendant failed to produce substantial evidence that he suffered from a blackout at the time of the offense or that his actions were involuntary. Defendant and his attorney engaged in the following colloquy:

> Q. All right. Let me cut right to the chase, Mr. Gardner. Did you have sex with your daughter?
> A. No, I did not.
> Q. Any time?
> A. Not any time.
> Q. Any place?
> A. Not any place.
> Q. Any where?
> A. Not any where.
> Q. All right. Do you have some explanation as to why you are here facing these charges?
> A. Yes, sir.

> Q. Would you please tell this jury what those reasons are or what those facts are?
> A. To get me out of the way, sir, because of my drug habit and my continuous assault I guess I could say on my wife when I was on drugs.

Because defendant argued that the rape never occurred, there was no evidence he was unconscious at the time of the rape, immediately before the rape, or immediately after the rape. Thus, the trial court did not err in failing to instruct the jury on the defense of unconsciousness or automatism. Furthermore, assuming arguendo that defendant did present substantial evidence giving rise to the defense of unconsciousness or automatism, he was not prejudiced by the trial court's failure to so instruct the jury. Our Supreme Court has previously held that instruction on the defense of unconsciousness is not warranted when the unconsciousness is a result of defendant's voluntary consumption of intoxicants. *State v. Fisher*, 336 N.C. 684, 705, 445 S.E.2d 866, 877 (1994) (citing *State v. Boone*, 307 N.C. 198, 209, 297 S.E.2d 585, 592 (1982)), *cert. denied*, 513 U.S. 1098, 130 L. Ed. 2d 665 (1995). Defendant admitted to his drug addiction and there is no evidence indicating that the drug and alcohol use was involuntary.

We conclude that the trial court's failure to instruct the jury on the defense of unconsciousness or automatism was not plain error. Accordingly, this assignment of error is overruled.

In his final assignment of error, defendant argues the trial court committed plain error in its instruction to the jury on reaching a verdict when it failed to instruct the jury that no

juror should change his or her position for the mere purpose of returning a verdict. Because defendant neither preserved this issue by objecting at trial, nor specifically and distinctly asserted plain error in his assignment of error, defendant has waived review of this assignment of error. N.C.R. App. P. 10(b)(3); *State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003). However, even if this Court were to review this assignment of error under the plain error standard, as argued by defendant, we would not find the trial court's alleged error reaches the level of plain error. This assignment of error is dismissed.

Defendant's remaining assignments of error asserted in the record on appeal, but not argued in his brief to this Court, are deemed abandoned. N.C.R. App. P. 28(b)(6).

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).