NO. COA09-98

NORTH CAROLINA COURT OF APPEALS

Filed: 1 September 2009

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 05 CRS 57050, 52

CHRISTOPHER LEE

Appeal by defendant from judgments entered 11 June 2008 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 July 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Dorothy Powers, for the State

Russell J. Hollers, III, for defendant-appellant.

ELMORE, Judge.

Defendant Christopher A. Lee appeals from judgments entered upon his convictions for second degree rape and attempted second degree sex offense. After careful review, we find no error.

On 9 March 2001, the victim, D.W. was alone in her home sewing. Sometime around midnight, D.W. got up and went down the hallway of her house towards her kitchen. As she passed her bedroom, she saw defendant standing in her bedroom pointing a gun at her. Defendant turned his flashlight towards her and she saw that he was going through her jewelry and her dresser drawers. Defendant told D.W., "Don't go, Bitch. I'm going to shoot you,

Bitch." D.W. slowly started walking towards her kitchen and eventually outside into her carport, while defendant followed her with the gun. D.W. testified that she went outside because she was hoping somebody would pass by and help her. Defendant grabbed hold of her by the waist, dragged her back into the house, and back into her bedroom. Once inside, defendant locked the door so D.W. could not get out of the house, and told her to take her clothes off. D.W. unbuttoned the top of her pants, but then stopped undressing. Defendant then undressed her, undressed himself, and ordered D.W. to lay on the bed. Defendant first attempted to have anal intercourse with D.W. He then turned her over and had vaginal sexual intercourse with her. After finishing, defendant went to the bathroom, put lotion on himself, and returned to have sexual intercourse with D.W. a second time. After having sex with D.W., defendant ransacked the house and D.W.'s car looking for money and valuables. Eventually, defendant saw the lights of a car that was approaching the home, and he ran out the back door and into the woods. D.W.'s daughter then entered the house, D.W. told her what had happened, and the daughter called the police.

D.W. was taken to the hospital where she was examined by Amber Stepp, a registered nurse in the emergency department. At trial, Stepp testified that D.W. told her she had been raped. Stepp examined D.W. and observed two small rectal tears and a small tear at the base of her vagina. Stepp testified that the results of the physical examination were consistent with D.W.'s claim of being sexually assaulted. Aby Moeykens, an employee of the Charlotte

Mecklenburg Police crime lab, testified that the DNA profile obtained from vaginal swabs taken from D.W. matched the DNA profile obtained from buccal swabs taken from defendant.

Defendant testified at trial and denied raping D.W. Defendant testified that he went to D.W.'s home to see her daughter, whom he claimed to have met while an inmate in Brown Creek Correctional Facility. Defendant stated that the purpose of his visit was so he could tell D.W.'s daughter that he was moving to Fayetteville, North Carolina. Defendant testified that while he waited inside the house with D.W. for D.W.'s daughter to come home, D.W. came onto him sexually and they engaged in consensual sexual intercourse. Defendant denied engaging in anal intercourse with D.W. Defendant testified that after they had finished, D.W.'s daughter arrived home, and she and D.W. started arguing, at which time he left.

Defendant was convicted of second degree rape and attempted second degree sex offense. The trial court sentenced defendant to consecutive terms of 133 to 169 and 94 to 122 months imprisonment. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by not instructing the jury on the lesser included offenses of assault on a female and misdemeanor assault. Defendant asserts that his indictments, and the evidence at trial, supported instructions on these lesser offenses. Defendant concedes that he did not request jury instructions on the lesser included offenses, nor did he object to the jury instructions as given. Accordingly,

we review the trial court's failure to instruct on the lesser-included offenses only for plain error. See N.C.R. App. P. 10(c)(4).

"A plain error is one 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002)(*quoting State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied,* 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003). It is to be applied cautiously and only in the exceptional case where the error is so prejudicial, that justice cannot have been done. *State v. Baldwin*, 161 N.C. App. 382, 388, 588 S.E.2d 497, 503 (2003)(*citing State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Furthermore, "[e]ven when the 'plain error' rule is applied, 'it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *State v. Bell*, 359 N.C. 1, 23, 603 S.E.2d 93, 109 (2004) (quoting *Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005).

"'The law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense.'" *State v. Petro*, 167 N.C. App. 749, 752, 606 S.E.2d 425, 427 (2005)*(*quoting *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984)). However, assuming

without deciding that assault on a female and misdemeanor assault are lesser included offenses of rape and first degree sexual offense, defendant was not entitled to a jury instruction on these offenses. Where "the State presents evidence of every element of the offense, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, then no lesser-included offense need be submitted." *State v. Mangum*, 158 N.C. App. 187, 197, 580 S.E.2d 750, 757, *disc. review denied*, 357 N.C. 510, 588 S.E.2d 378 (2003). Furthermore, "[a] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it." *State v. Annadale*, 329 N.C. 557, 568 (1991)(citing *State v. Brewer*, 325 N.C. 550, 576, 386 S.E.2d 569, 584 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). Here, defendant claimed that the sex between him and the victim was consensual. Therefore, in accordance with *Mangum* and *Annandale*, we conclude that defendant was not entitled to an instruction on the lesser included offenses. Accordingly, we hold that defendant had a fair trial, free from reversible or plain error.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).