

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-261

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Gaston County  
Nos. 09 CRS 11249  
MICHAEL ANTHONY GRANT, 09 CRS 11251  
Defendant.

Appeal by defendant from judgment entered 23 September 2009 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 14 September 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.*

*William D. Auman for defendant-appellant.*

HUNTER, Robert C., Judge.

Michael Anthony Grant ("defendant") appeals from a judgment entered after a jury found him guilty of first degree sexual offense and assault inflicting serious bodily injury. Defendant argues on appeal that the trial court erred in denying defendant's motion to dismiss for insufficient evidence and failing to instruct the jury on the lesser included offenses of the crimes charged. After careful review, we find no error.

Background

At trial, the State's evidence tended to establish the following facts: Defendant and the victim, "Nancy," had an intimate

relationship for approximately two and a half years beginning in February 2006.<sup>1</sup> Nancy began using crack cocaine with defendant during the summer of 2006, which developed into a daily habit.

Nancy testified at trial that defendant physically assaulted her throughout their relationship. Nancy alleged that defendant, among other things: beat her with a metal flashlight; assaulted her with a screwdriver; struck her in the head; threatened to crush her skull with a baseball bat; threatened to peel her eyelids; forced her to remove her shoes and socks and place her foot on a brick while threatening to hit her toes; put exterminating powder on drug paraphernalia; kicked her knee to make her leg bend backwards; and put items in her mouth to prevent anyone from hearing her when he punched her in the stomach. Nancy testified that she continued the relationship despite the abuse because she cared about defendant and wanted to help him rehabilitate.

According to Nancy, on 17 July 2008, she and defendant were in his bedroom smoking crack cocaine, which they had purchased earlier that day. Nancy testified that defendant was "paranoid" and hit her with his fists throughout the night; however, she did not call out for help or attempt to leave. Nancy testified that defendant ordered her to perform fellatio, but she did not want to do so because in the past defendant, who was high on cocaine at the time, had physically assaulted her while she performed fellatio.

---

<sup>1</sup> The pseudonym Nancy is used to protect the anonymity of the victim.

Nevertheless, Nancy stated that she did perform fellatio as demanded by defendant.

On 21 July 2008, Nancy went to the hospital because she was in significant pain. Prior to entering the emergency room, Nancy called the police and claimed that defendant had threatened to kill her and her children and that she was afraid of him. Dr. Andrew Taylor ("Dr. Taylor") testified at trial as to the injuries Nancy suffered due to the alleged assault on 17 July 2008. Dr. Taylor initially met Nancy at the hospital and observed bruises on her abdomen and arms that did not appear to be fresh. Dr. Taylor noted that the victim was in pain, pale, and weak. Dr. Taylor determined that Nancy had a ruptured spleen, a condition he believed to be life-threatening. An emergency splenectomy was performed on Nancy and Dr. Taylor provided follow-up treatment for three months thereafter. At trial, Dr. Taylor could not say with certainty when the initial injury had occurred; however, Dr. Taylor testified that he believed Nancy's injury was consistent with a blunt force trauma to the rib cage, or the area under the rib cage.

Nancy's children, Elizabeth and Richard, testified at trial. Elizabeth, who had accompanied Nancy to the hospital on 21 July 2008, stated that she had seen defendant assault her mother in the past. Elizabeth testified that Nancy had previously told her that she did not want to leave defendant because she was scared of him. Elizabeth claimed that she had personally received threatening phone calls from defendant prior to the 17 July 2008 incident. After the 17 July 2008 incident, Elizabeth went to Nancy's house

and discovered that it had been vandalized and Nancy's dog had been killed.

Richard testified that he moved in with Nancy after the 17 July 2008 incident and that he too had been threatened by defendant. When Richard visited Nancy at the hospital, she told him that defendant had assaulted her. Richard also corroborated Elizabeth's testimony that Nancy's house had been vandalized and her dog killed.

Defendant did not offer any evidence at trial. On 22 September 2009, defendant was convicted of first degree sexual offense and assault inflicting serious bodily injury. Defendant was determined to be a prior record level V for felony sentencing purposes, and received a presumptive range sentence of 433 to 510 months imprisonment. On 11 December 2009, defendant returned to court and his sentence was modified to a term of 433 to 529 months imprisonment. Defendant was ordered to register as a sex offender and submit to lifetime satellite based monitoring. From his convictions and sentences imposed, defendant entered notice of appeal in open court on both occasions.

#### Discussion

##### I. Motion to Dismiss

Defendant argues that the State failed to provide substantial evidence of the offenses charged, and, therefore, the trial court erred in denying his motion to dismiss the charges. It is well established that

[u]pon defendant's motion for dismissal,  
the question for the Court is whether there is

substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

. . . .

The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

*State v. Powell*, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117 (1980)  
(internal citations omitted).

#### A. First Degree Sexual Offense

First, defendant was charged with first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(2)(b) (2009), which states:

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

. . . .

(2) With another person by force and against the will of the other person, and:

. . . .

b. Inflicts serious personal injury upon the victim or another person[.]

A sexual act is defined as cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. N.C. Gen. Stat. § 14-27.1(4) (2009). Defendant does not argue that there was insufficient evidence that he engaged in a sex act with Nancy on 17 July 2008. Rather, defendant primarily argues that there was insufficient evidence to prove that he physically forced Nancy to perform fellatio against her will.<sup>2</sup> We disagree.

"[U]nder our sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed 'by force and against the will' of the victim." *State v. Locklear*, 304 N.C. 534, 540, 284 S.E.2d 500, 503 (1981). "Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent." *Id.* (holding that the defendant forced the victim to perform fellatio on him because he "threatened him with a violent death if he did not perform the act"). Nancy testified that she "was afraid that defendant would kill [her]" if she refused to perform fellatio. The requisite force may be established either by physical force or by constructive force in the form of fear, fright, or coercion. *See State v. Hines*, 286 N.C. 377, 380, 211 S.E.2d 201, 203 (1975) ("The force necessary to constitute rape need not be physical force. Fear, fright, or coercion may take the place of force."). The evidence tended to show that Nancy was

---

<sup>2</sup> Defendant makes this argument in one sentence and does not cite any supporting case law in violation of N.C. R. App. P. 28(b)(6). Nevertheless, we will address the argument.

under the constructive force of defendant when she performed fellatio on him on 17 July 2008. Nancy testified that her fear was grounded in the fact that defendant had assaulted her repeatedly during their relationship. Nancy further testified that she was more afraid of defendant on the night of 17 July 2008 because they were alone in his house whereas many of his prior threats had occurred in public places. Additionally, Nancy testified that defendant's threats were more severe on 17 July 2008 and the violence had intensified. Moreover, defendant had already assaulted her that evening. Based on Nancy's testimony, a reasonable inference could be drawn that defendant constructively forced Nancy to perform fellatio on him against her will.

Defendant also argues that the State failed to present substantial evidence to prove that he inflicted serious bodily injury upon Nancy or that the alleged assault occurred contemporaneously with the sex act. These arguments are without merit.<sup>3</sup> Dr. Taylor testified that Nancy's ruptured spleen likely "stemmed from some sort of external blunt force" that occurred approximately a week prior to the rupture. Nancy presented to the hospital approximately four days after the assault allegedly perpetrated by defendant. A rational juror could find that four days fits within the one week approximation by Dr. Taylor and that

---

<sup>3</sup> We note that defendant incorporates these arguments into his general argument that the trial court erred in its jury instructions. These arguments, which pertain to sufficiency of the evidence, are more appropriately related to his claim that the trial court erred in denying his motion to dismiss the charges.

defendant's assault upon Nancy resulted in her ruptured spleen.<sup>4</sup> As to defendant's argument that the alleged assault did not occur contemporaneously with the sex act, Nancy testified that the assault and defendant's demand for fellatio occurred close in time. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002) ("[I]t is the province of the jury, not the court, to assess and determine witness credibility."), *cert. denied*, 123 S. Ct. 916, 154 L. Ed. 2d 823 (2003). In sum, we hold that there was substantial evidence of each element of first degree sexual offense and that defendant was the perpetrator.

#### B. Assault Inflicting Serious Bodily Injury

Defendant also was charged with assault inflicting serious bodily injury pursuant to N.C. Gen. Stat. § 14-32.4(a) (2009). "Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." *Id.* Defendant does not allege which element of the offense charged is not supported by substantial evidence, nor does he cite any supporting case law. Nevertheless, we hold that there was substantial evidence that defendant assaulted Nancy thereby inflicting serious bodily injury.

---

<sup>4</sup> Defendant does not explicitly argue that a ruptured spleen is not a "serious personal injury," as required by N.C. Gen. Stat. § 14-27.4(a)(2)(b), nor does he cite any case law to support such a claim.

The evidence showed that Nancy suffered serious bodily injury when her ruptured spleen created a substantial risk of death. Nancy was in extreme pain at the hospital, she underwent emergency surgery to remove the spleen, and she was under a physician's care for three months. Nancy testified that defendant assaulted her approximately four days prior to the day her spleen ruptured. As stated *supra*, this testimony is consistent with Dr. Taylor's testimony that Nancy's spleen ruptured as a result of blunt force trauma that occurred approximately a week before the spleen rupture. A rational juror could conclude that defendant assaulted Nancy and that the assault resulted in serious bodily injury – a ruptured spleen. Consequently, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of assault inflicting serious bodily injury.

## II. Jury Instructions

Finally, defendant argues that the trial court committed plain error by failing to instruct the jury on the lesser included offenses of the crimes charged. "The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal citation and quotation marks omitted). Rarely will an improper jury instruction justify the reversal of a criminal conviction when no objection was made at trial. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378

(1983). The plain error rule is only applied where, "after reviewing the entire record, . . . it can fairly be said the 'instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'" *Id.* at 660, 300 S.E.2d at 378 (quotation omitted).

N.C. R. App. P. 10(a)(4) requires defendant to "specifically and distinctly contend[]" plain error on appeal. Defendant has failed to do so in his brief. The closest defendant comes to arguing plain error is when he states that, "had the jury been told that second degree sexual offense and/or sexual battery were dispositional options, they may well have reached a different result." Defendant subsequently states, with regard to the charge of assault inflicting serious bodily injury, "[t]he jury could very well have found [defendant's] conduct to be more in line with misdemeanor assault on a female, or potentially assault inflicting serious injury." Defendant does not set out whether the offenses mentioned constitute lesser included offenses of the crimes charged, nor does defendant cite the applicable statutes, state the elements of these offenses, argue why the trial court should have instructed on these offenses, or argue how the failure to instruct on these offenses constitutes plain error. Moreover, in violation of N.C. R. App. P. 28(b)(6), defendant does not cite any authority to support his argument that the trial court should have instructed on the offenses mentioned and that its failure to do so was plain error. Consequently, defendant's argument as to this issue is subject to dismissal, *Marisco v. Adams*, 47 N.C. App. 196, 197, 266

S.E.2d 696, 698 (1980) (holding that appellate rules are mandatory and violation of these rules subjects defendant's appeal to dismissal); however, we have reviewed defendant's claim and we find no error, much less plain error, in the trial court's instructions to the jury.<sup>5</sup>

Conclusion

Based on the foregoing discussion, we hold that the trial court did not err in denying defendant's motion to dismiss the charges and we further hold that the trial court did not err in its jury instructions.

No Error.

Judges HUNTER, Robert N., Jr. and WALKER concur.

Report per Rule 30(e).

---

<sup>5</sup> We disapprove of defense counsel's multiple rule violations throughout the brief and his overall failure to adequately argue the merits of his general claims of error. Still, we have reviewed these claims and find them to be without merit.