An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-511

Filed: 21 November 2017

Beaufort County, Nos. 09 CRS 001295, 09 CRS 052281

STATE OF NORTH CAROLINA

v.

GREGORY ANTHONY GARDNER, Defendant.

Appeal by defendant from judgment entered 14 November 2011 by Judge J. Carlton Cole in Beaufort County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Mark D. Montgomery, for defendant-appellant.

INMAN, Judge.

A person who voluntarily commits the first in a series of criminal activities is not entitled to a jury instruction on the affirmative defense of coercion or duress regarding later crimes in the same series of activities.

Gregory Anthony Gardner ("Defendant") appeals from a judgment entered following a jury verdict finding him guilty of two counts of first degree sexual offense,

one count of robbery with a dangerous weapon, and one count of first degree burglary. Defendant contends the trial court erred in refusing to instruct the jury on the affirmative defense of duress or coercion. After careful review, we conclude Defendant has failed to demonstrate error.

I. Factual and Procedural History

The evidence at trial tended to show the following:

On 14 August 2009, Chelsea Sanders ("Sanders")[1] and her boyfriend Terry Cress ("Cress") traveled to Washington, N.C. for a weekend getaway at a hotel. After drinking at the hotel bar, the couple returned to the hotel room at approximately 2:00 a.m. An hour or two later, Sanders had undressed and was lying in bed when she heard a knock at the door. Cress got up to answer the door, and Sanders overhead Cress say, "You don't have to do that" to someone in the hall.

Two men, Defendant and McMurren, entered the hotel room and McMurren forced Cress at gunpoint to sit in a chair while both men began rummaging through Sanders's and Cress's personal belongings. Sanders identified one of the men rummaging through her items as Defendant. Defendant repeatedly asked Sanders where she was hiding a gun, and in response told Defendant and McMurren she had nothing because she was naked.

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[1] Consistent with our practice in cases involving sexual assault, we refer to the victims in this case by pseudonyms to protect their privacy. *See, e.g., State v. Gordon*, ___ N.C. App. ___, ___, 789 S.E.2d 659, 661 n 1 (2016).

After learning Sanders was naked, Defendant put his fingers in Sanders's vagina several times, despite repeated attempts by Sanders to stop him. Defendant then asked McMurren for the gun but McMurren did not give him the gun. Defendant then grabbed Sanders's throat, pushed her down to the bed, and penetrated her vagina with his penis. Simultaneously, McMurren inserted his penis in Sanders's mouth, which he forced open with his gun. After the sexual assault, Defendant and McMurren took $300 from Cress and left the hotel room. Cress did not hear McMurren threaten Defendant and never saw McMurren point the gun at Defendant. Cress immediately reported the incident to the hotel and called the police, who arrived minutes later.

Sanders went to the hospital and had a rape kit performed and was examined and interviewed by a nurse.

Detective Ronald Black ("Detective Black") interviewed McMurren after he was arrested for an unrelated probation violation. McMurren confessed to his involvement and implicated Defendant. Defendant was arrested later that day and charged with first degree rape, robbery with a dangerous weapon, first degree burglary, first degree kidnapping, and second degree kidnapping.

Detective Black and Jesse Dickenson interviewed Defendant at the police station. During the interview, Defendant was crying, shaking, and extremely upset, and said, "A girl got raped." Defendant said McMurren had threatened him while

they were in the hotel room, Defendant was fearful of McMurren, McMurren pointed the gun at Defendant and McMurren told him to "play with" Sanders. Defendant told police the reason he initially walked into the room was that McMurren told him to and he was scared. Defendant stated that when Sanders resisted his sexual advances he tried to leave, but McMurren pointed the gun at him. Defendant told police that after he and McMurren left the victims' hotel room, they took off running back to Defendant's hotel room.

Defendant pleaded not guilty to all charges and the case proceeded to trial on 14 November 2011. At the close of all evidence, during a charge conference, counsel for Defendant requested jury instructions on the defense of coercion and duress; the trial court denied this request. On 18 November 2011, the jury found Defendant guilty of two counts of first degree sexual offense, robbery with a dangerous weapon, and first degree burglary. Defendant gave notice of his appeal in open court.

II. Analysis

Defendant contends that the trial court erred in denying his requested jury instruction on the affirmative defense of duress or coercion. Specifically, he argues that because he presented sufficient evidence as to all elements of the defense, the court's refusal to provide the instruction violated his constitutional right to due process and right to establish a defense in criminal cases. We disagree.

A trial court's ruling regarding jury instructions is reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A] trial court is required to comprehensively instruct the jury on a defense to the charged crime when the evidence viewed in the light most favorable to the defendant reveals substantial evidence of each element of the defense." *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000) (internal quotation marks and citation omitted). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Gray*, 337 N.C. 772, 777–78, 448 S.E.2d 794, 798 (1994). "The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

The defense of coercion or duress requires "a defendant . . . to show that his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act." *State v. Cheek*, 351 N.C. 48, 62, 520 S.E.2d 545, 553 (1999) (internal quotation marks and citation omitted). "Duress, however, cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *State v. Brown*, 182 N.C. App. 115, 118, 646 S.E.2d 775, 778 (2007) (internal quotation marks and citation omitted). Such exposure "must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily

harm if the act is not done." *State v. Smith*, 152 N.C. App. 29, 39, 566 S.E.2d 793, 800 (2002). Finally, and most significantly in this case, "[w]here [a] defendant begins to participate in a crime or series of crimes as a willing participant, *later threats do not retroactively allow him a defense of duress*." *State v. Sanders*, 201 N.C. App. 631, 636, 687 S.E.2d 531, 536 (2010) (emphasis added) (citation omitted).

Defendant and McMurren engaged in a series of crimes, initiating a robbery of the victims and then sexually assaulting Sanders. Defendant does not argue that he was coerced into engaging in the robbery, but only that he engaged in the sexual assault under duress after McMurren pointed a gun at him. Indeed, Defendant concedes that his argument on appeal "is over whether, *having gone along with the robbery*, [Defendant] was then forced to commit a sex act." (emphasis added). Because Defendant did not argue that he was coerced into participating in the robbery, he was not entitled to a retroactive defense of duress, and the trial court did not err in denying a jury instruction as to the defense.

III. Conclusion

Because Defendant did not deny voluntarily engaging in the crime of robbery, the trial court did not err in denying Defendant's request to instruct the jury on the affirmative defense of duress or coercion related to sexual assaults committed in the course of the robbery.

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).