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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 23-220

Filed 6 February 2024

Mecklenburg County, Nos. 18 CRS 242372-73

STATE OF NORTH CAROLINA

v.

CORY VONSHELL ARMSTRONG

Appeal by Defendant from judgments entered 17 March 2022 by Judge Athena Fox Brooks in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Jarvis John Edgerton, IV, for the Defendant.

WOOD, Judge.

Cory Armstrong (“Defendant”) appeals from judgments entered upon a jury verdict of guilty of assault by strangulation and habitual misdemeanor assault. After careful review of the record and applicable law, we hold Defendant received a fair trial free of error.

I. Factual and Procedural Background

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On 3 December 2018, Defendant and Ms. McCallum traveled from Scotland County to Charlotte in order to visit Ms. McCallum's father, who had recently suffered a stroke. Ms. McCallum and Defendant were dating at the time. After visiting Ms. McCallum's father, the couple had dinner and returned to their hotel room at a Best Western hotel.

After returning to their room, Defendant began to question Ms. McCallum about a text message she had received and grabbed the phone from her hand while she was lying across the bed. The text message was sent by the father of Ms. McCallum's child, but his number was not saved in her phone. When Ms. McCallum responded that she did not know who sent the text, Defendant struck her in the right eye with his fist. Ms. McCallum "jumped back up against the headboard to get away from him," but Defendant came "around the side of the bed," placed his hands upon Ms. McCallum's neck, applied pressure and strangled her for several minutes until she lost consciousness. While Ms. McCallum was unconscious, Defendant released her neck from his grasp.

After regaining consciousness, Ms. McCallum "jumped off the bed" and hurried into the hotel room's bathroom to examine her eye. At some point after Defendant struck Ms. McCallum in the eye, Ms. McCallum retrieved some ice, held the ice to her eye, and returned to the hotel room's main area. After a brief exchange between them, Defendant struck Ms. McCallum in the jaw with an uppercut punch and knocked the bag of ice from her hand, spilling it onto the bed and floor. After this

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encounter, the couple eventually went to sleep. Ms. McCallum testified she did not try to get help because she was “scared to leave.”

The following morning, Defendant and Ms. McCallum went to the hotel cafeteria for breakfast. According to Ms. McCallum, Defendant told her to wear her sunglasses indoors in order to hide her black eye, but the glasses did not completely cover the injury to her eye. She received several stares from other hotel guests. After the couple finished breakfast, Ms. McCallum observed a boy following them to their hotel room and talking on his cellphone. Once they reached the room, Ms. McCallum “stepped into the bathroom to take a shower and not even five minutes after” officers from the Charlotte-Mecklenburg Police Department knocked on the hotel room door. Defendant answered the door. Officers had responded to the hotel after an individual requested a welfare check for a woman at the hotel with concerning injuries. Officers asked Defendant to identify himself and inquired whether there was a woman also in the room with him. Defendant provided his name, confirmed Ms. McCallum was also in the room and getting ready in the bathroom, and spoke with officers in the hallway outside the room. After Defendant moved out into the hallway to speak with officers, Ms. McCallum spoke with Officer Stuart inside the hotel room.

During his interaction with Ms. McCallum, Officer Stuart observed “very obvious injuries to her face” including her swollen right eye and “what appeared to be finger marks on [her] neck.” Officer Stuart also noted Ms. McCallum “had a very raspy voice.” Ms. McCallum told Officer Stuart she “was having trouble breathing”

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and, consequently, emergency medical personnel were called. Defendant was then placed under arrest.

On 13 May 2019, Defendant was indicted on the charge of assault by strangulation. On 8 March 2021, Defendant was indicted on the charge of assault on a female and the charge of habitual misdemeanor assault, referencing Defendant's conviction for two or more prior misdemeanor assaults. Defendant's case came on for a jury trial on 14 March 2022. On the day of trial, the trial court granted the prosecutor's motion for joinder of offenses for trial on the December 2018 charges of habitual misdemeanor assault, possession of firearm by felon, and assault by strangulation.

During her testimony at trial, Ms. McCallum recounted the incident that occurred between her and Defendant in the hotel room. She testified it was hard for her to talk or breathe after Defendant strangled her. Presented with photographs, Ms. McCallum confirmed she suffered from a bruised and swollen right eye, and marks on her neck. Ms. McCallum testified her injuries were caused by Defendant and did not exist before he assaulted her in the hotel room.

At trial, Officer Stuart testified he spoke with Ms. McCallum at the Best Western hotel and at the hospital, and he observed Ms. McCallum's swollen eye and the marks on her neck. Officer Stuart testified Ms. McCallum informed him that Defendant was angry about something that was on her phone, struck her and grabbed her throat such that she could not breathe. According to Officer Stuart, she recounted

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getting away from Defendant by running into the bathroom, but Defendant attacked her again once she exited the bathroom. Officer Stuart also testified to Ms. McCallum's injuries, noting "very obvious" injuries to her face, eye, neck, and that her voice was "very" raspy.

At trial, Nurse Torres, a registered nurse and sexual assault nurse examiner, testified she examined Ms. McCallum at the hospital. Nurse Torres took Ms. McCallum's history, obtained a narrative from Ms. McCallum, and documented her examination. During her examination, Nurse Torres observed "swelling and bruising to [Ms. McCallum's] right eye, swelling and tenderness to her right jaw, [and] she had some various size[s] of red marks on . . . the back of her neck." Nurse Torres testified her examination indicated Ms. McCallum had "small scratches," "swelling[,] and slight circular bruising" on the right side of her head. Additionally, Nurse Torres noted that Ms. McCallum had chest pain with breathing.

Nurse Torres testified to examining photographs of Ms. McCallum's injuries after receiving training on strangulation injuries and observing a "subconjunctival hemorrhage" in Ms. McCallum's eye, an injury that can occur from strangulation. Ms. McCallum had explained to Nurse Torres that Defendant struck her in the eye and strangled her before she was able to run into the bathroom. Nurse Torres was told Defendant did not attack Ms. McCallum while she was in the bathroom, but once she returned to the main room, Defendant again struck her. Based upon her training and observations, Nurse Torres testified there was nothing that gave her "pause to

question the account that [Ms. McCallum] gave” of what occurred in the hotel room.

On 17 March 2022, the jury found Defendant guilty of habitual misdemeanor assault and assault by strangulation. For the offense of assault by strangulation, Defendant was sentenced to an active sentence of 8 to 19 months. For the felony habitual misdemeanor assault offense, Defendant was sentenced to 9 to 20 months, suspended for 30 months of supervised probation, to run consecutively to the first sentence. Defendant gave notice of appeal in open court.

II. Analysis

Defendant contends the trial court erred by sentencing him for the offense of habitual misdemeanor assault when this sentencing was barred by statute. Defendant argues, “the State offered the exact same conduct as the basis for both its misdemeanor assault on a female charge,” the predicate assault for the habitual misdemeanor assault conviction, “and its separate assault by strangulation charge.” Defendant further contends the trial court was required to arrest judgment for the habitual misdemeanor assault because “N.C. Gen. Stat. § 14-33(c) bars the State from using any assault defined in N.C. Gen. Stat. § 14-33(c) as a predicate felony for misdemeanor assault when the same assaultive conduct could be charged as another offense with a greater punishment than an A1 misdemeanor.”

Although Defendant did not object to his sentences at trial, alleged sentencing errors are preserved for appellate review “even though no objection or motion has been made in the trial division.” N.C. Gen. Stat. § 15A-1446 (d)(18) (2023). Therefore,

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Defendant's arguments have been preserved for appellate review. Because Defendant contends the trial court violated a statutory mandate by sentencing Defendant for both assault by strangulation and habitual misdemeanor assault, "[i]ssues of statutory construction are questions of law, reviewed *de novo* on appeal." *State v. Jamison*, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014) (citation omitted).

Regarding assault by strangulation, N.C. Gen. Stat. § 14-32.4(b) states, "unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony." N.C. Gen. Stat. § 14-32.4(b). This Court has previously held "evidence that defendant applied sufficient pressure to [the victim's] throat such that she had difficulty breathing," was sufficient to constitute assault by strangulation. *State v. Braxton*, 183 N.C. App. 36, 43, 643 S.E.2d 637, 642 (2007). Additionally, we determined "cuts and bruises on [a victim's] neck" confirmed by photographic evidence served as sufficient evidence to fulfill the physical injury element of assault by strangulation. *State v. Little*, 188 N.C. App. 152, 157, 654 S.E.2d 760, 764 (2008).

The offense of habitual misdemeanor assault is set forth in N.C. Gen. Stat. § 14-33.2.

A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of [N.C. Gen. Stat. §] 14-33 and causes physical injury, . . . and has

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two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation. A conviction under this section shall not be used as a prior conviction for any other habitual offense statute. A person convicted of violating this section is guilty of a Class H felony.

N.C. Gen. Stat. § 14-33.2. Pertinent to Defendant, N.C. Gen. Stat. § 14-33(c)(2) provides that:

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

...

(2) Assaults a female, he being a male person at least 18 years of age; ...

N.C. Gen. Stat. § 14-33(c)(2). Thus, the misdemeanor offense charged as the predicate assault for Defendant's charge of felony habitual misdemeanor assault was assault on a female. Additionally, Defendant was previously convicted of two misdemeanor assaults which occurred no more than fifteen years prior to the date of the current violation. In 2011, Defendant was previously convicted of misdemeanor assault on a female, and in 2015, Defendant was convicted of misdemeanor assault on a government officer or employee.

Defendant contends the same assaultive conduct against Ms. McCallum serves as the basis for both the assault on a female offense and the assault by strangulation offense. In support of his argument, Defendant directs our attention to the language

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of the indictments. The record evidence shows that the indictment for assault on a female describes the conduct as “striking the victim in the face and grabbing her neck.” The indictment for assault by strangulation alleged Defendant “feloniously assault[ed] and inflict[ed] physical injury . . . by strangulation.”

Defendant is correct that an individual cannot be sentenced to an offense pursuant to N.C. Gen. Stat. § 14-33(c) if a greater punishment may be imposed for the same conduct. However, “the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults.” *State v. Dew*, 379 N.C. 64, 72, 864 S.E.2d 268, 275 (2021). In order to establish the occurrence of two separate assaults, the State must demonstrate that a “distinct interruption” occurred between them. *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000).

This distinct interruption may appear as “an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.” *Dew*, 379 N.C. at 72, 864 S.E.2d at 275.

In the present case, the evidence presented at trial established Defendant conducted two separate and distinct attacks against Ms. McCallum in the hotel room. During the first attack, Defendant became angry over the text message on Ms. McCallum’s phone, struck her right eye with his fist, strangled her until she lost consciousness, and thereafter, removed his hands from her neck. After a certain

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amount of time, Ms. McCallum regained consciousness, jumped off the hotel bed, and was “finally able to get away” from Defendant, at which point she ran into the bathroom to examine her eye. Although it is not clear what duration of time Ms. McCallum was in the bathroom, the record evidence establishes she had enough time to apply ice to her eye. During this momentary reprieve, Defendant did not enter the bathroom and did not attack her. After Ms. McCallum was finished examining her injuries and tending to her eye with ice, she returned to the main room while holding the ice to her face and “shaking uncontrollably.” Defendant and Ms. McCallum briefly exchanged words and again, Defendant attacked Ms. McCallum a second time by striking her with an “uppercut to [her] jaw” and knocking the ice out of her hand and onto the bed and floor. Thus, Ms. McCallum provided testimony about two distinct assaults at two different times: the first assault being assault by strangulation, and the second assault being assault on a female.

Further, both Officer Stuart and Nurse Torres offered testimony that Ms. McCallum reported to each of them two distinct attacks, separated by the period of time she retreated to the bathroom to examine and tend to her injuries. Their testimonies indicate that on the day after the attacks, Ms. McCallum reported that Defendant first strangled her, and later, struck her again. Because the State presented sufficient evidence of a separate and distinct interruption between these two assaults, we hold Defendant was properly sentenced for both assault by strangulation and felony misdemeanor habitual assault.

III. Conclusion

After a careful examination of the record and applicable law, we hold Defendant received a fair trial, free from prejudicial error and was properly sentenced.

NO ERROR.

Judges ARROWOOD and THOMPSON concur.

Report per Rule 30(e).