NO. COA00-1462

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Gaston County
Nos. 99 CRS 3778, 3779,
TEREYTON LAYELL LEWIS 3781, 3782, 3783

Appeal by defendant from judgments entered 29 June 2000 by Judge Beverly T. Beal in Gaston County Superior Court. Heard in the Court of Appeals 18 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.

David Childers for defendant appellant.

McCULLOUGH, Judge.

Defendant Tereyton Layell Lewis was tried before a jury at the 26 June 2000 Criminal Session of Gaston County Superior Court after being charged with two counts of crime against nature, two counts of first-degree sexual offense, two counts of first-degree kidnapping, one count of aiding and abetting first-degree sexual offense, and two counts of indecent exposure. Evidence for the State showed that two young girls, KN and CH, lived at a group home and attended an alternative school. The two girls ran away from the group home after school on 2 December 1998. At all times relevant to the case, CH was eleven years old and KN was thirteen

years old. The girls planned to go to KN's mother's home in Kings Mountain, North Carolina. Along the way, the girls walked along the railroad tracks, smoked, and talked.

As they continued their journey, the girls encountered a group of five teenage boys: defendant, his brother Jeremy, Marquis Feaster, Richard Davis, and Demarius Wilson. Defendant was fourteen years old; all of his cohorts were under the age of sixteen years, except for Richard Davis, who was sixteen. KN knew Jeremy from school, but did not know defendant. The boys asked the girls for cigarettes; KN had cigars, and gave one to each of the boys. As the girls and boys walked together, the boys began talking about sex and asked the girls if they were virgins. The boys then asked the girls if they had ever performed fellatio. When they said no, one of the boys stated, "Well you're going to today." Richard Davis and defendant asked CH and KN direct sexual questions; at that point, KN testified she knew the discussion "was going to lead to something else[]" and she told CH, "Let's go."

The girls began running away from the group of boys. Jeremy Lewis grabbed CH by her jacket, and she called out for KN. KN testified she was afraid the boys would "really hurt her. So I just -- I had to turn around." The boys warned CH and KN that if they ran again, they would be caught. KN testified defendant told her and CH that "[y]'all can go in here and suck our dicks, then we'll let you go." Defendant told his brother to retrieve a cell phone, and he told KN and CH that he would "call the cops" on them unless they did as they were told. When Jeremy Lewis returned with

the cell phone, Richard Davis dialed "9" and repeated defendant's statement that the girls would have to perform fellatio if they wanted to leave without the police being called.

The five boys took the girls to a bonded warehouse and indicated that the girls had to go inside a transfer truck. Defendant, Richard Davis, KN and CH went into the transfer truck while the other boys remained outside. KN got down on her knees and performed fellatio on defendant; as she did so, he kept his hand on her head. Defendant ejaculated, and KN spit the substance on the floor. As this occurred, CH was crying, and Richard Davis was awaiting his "turn." Richard Davis indicated he wanted CH to touch him, but she stood still. He then told her to perform fellatio, but she was too frightened to do so. KN told Davis to leave her friend alone, and agreed to act in CH's place, though she stated she did so because she was scared. KN began to perform fellatio on Richard Davis, but then stopped after a few seconds and became angry. She grabbed CH and the two left the warehouse and began running. KN testified Marquis Feaster chased them for a time, calling them "bitches and sluts and whores" and threatening to kill them.

The girls ran to a convenience store where two uniformed police officers were standing. KN told the officers that a black male wearing dark clothes was chasing them and was threatening to kill them, but she did not tell them about the sexual activity. The officers left to look for the suspect and instructed the girls to remain at the convenience store. Instead, CH and KN decided to

go to a friend's house to spend the night. The girls told their friend what happened, but did not tell the girl's mother what had occurred. When the officers returned to the convenience store with Marquis Feaster, the girls were gone.

The next day, the girls continued walking to KN's mother's home. On the way, they were picked up by two police officers and returned to their school. The girls did not tell the officers about the previous day's sexual assault. Later, KN told the school secretary and Ms. Patricia Massey (a staff member at the school) about the sexual assault, and later spoke with Officer M.A. Chambers. She also gave a statement to Detective Steve Hallgren.

Officer Chambers of the Gastonia City Police testified that KN told him she and her friend were walking on the railroad tracks and met defendant and his friends. She admitted that she and her friend talked with them for a while, then tried to leave. As they attempted to leave, KN said one boy grabbed her friend and threatened to rape her; KN performed fellatio on one of the boys so the boys would not hurt her friend. KN also told Officer Chambers that a second boy approached her and said he would cut her throat if she did not perform fellatio on him. She then performed fellatio on the second boy.

Defendant was initially charged as a juvenile. On 22 January 1999, the trial court conducted a probable cause hearing and determined there was enough evidence to try defendant as an adult. On 2 February 1999, the trial court transferred defendant to superior court. The grand jury indicted defendant on 1 February

1999.

During the three-day trial, the State presented nine witnesses. After the State rested, defendant made several motions to dismiss the sex offense charges against him, based on what he believed was a failure by the State to show the use of force. Defendant also asked that the trial court dismiss the first-degree kidnapping charge against him. The trial court denied the motions to dismiss, but did dismiss one count of first-degree sexual offense in 99 CRS 3780 and both counts of indecent exposure. Thus, at the conclusion of the State's case, there remained two indictments for crime against nature, one indictment for first-degree sexual offense, two indictments for first-degree kidnapping, and one indictment for aiding and abetting sexual offense.

After receiving instructions from the trial court, the jury found defendant guilty of one count of crime against nature, one count of first-degree sexual offense, one count of second-degree kidnapping of CH, one count of first-degree kidnapping by sexual assault of KN, and one count of aiding and abetting first-degree sexual offense. Because the jury found defendant guilty of first-degree sexual offense and also convicted defendant of first-degree kidnapping based on sexual assault, the trial court reduced the first-degree kidnapping conviction to second-degree kidnapping. The trial court determined defendant had a prior record level of I, and sentenced him to concurrent active terms of 145-183 months' imprisonment for the first-degree sexual offense and aiding and abetting first-degree sexual offense convictions. The trial court

sentenced defendant to suspended sentences, which were to run at the expiration of the active prison terms, for his two second-degree kidnapping convictions and his crime against nature conviction. Defendant appealed.

On appeal, defendant argues the trial court committed reversible error by (I) denying his motions to dismiss the charges of first-degree sexual offense and aiding and abetting first-degree sexual offense; (II) submitting two counts of first-degree kidnapping to the jury; (III) denying his attorney the opportunity to discuss, in his closing argument, the possible sentences to which defendant was exposed; and (IV) erroneously reinstructing the jury on first-degree kidnapping and sending to the jury room a printed copy of the jury instruction that did not contain the additional instruction. For the reasons set forth herein, we disagree with defendant's arguments and discern no prejudicial error in his trial.

Motions to Dismiss

By his first assignment of error, defendant argues the trial court erred by denying his motions to dismiss the charges of first-degree sexual offense and aiding and abetting first-degree sexual offense because the State failed to present sufficient evidence of force. The State contends it provided ample evidence of force, such that the two charges were properly presented to the jury. We agree with the State.

First-degree sexual offense is codified by N.C. Gen. Stat. § 14-27.4 (2001), which states:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
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> . . . .
>
> (2) With another person by force and against the will of the other person, and:
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> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
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> b. Inflicts serious personal injury upon the victim or another person; or
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> c. The person commits the offense aided and abetted by one or more other persons.

In the present case, defendant moved to dismiss the charges of first-degree sexual offense and aiding and abetting first-degree sexual offense. When considering a motion to dismiss,

> all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). Moreover,

> [o]nce the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then "'it is for the

> jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.'"

State v. Barnes, 334 N.C. 67, 75-76, 430 S.E.2d 914, 919 (1993), (quoting *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965))). In making this determination,

> the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. . . . When ruling on a motion to dismiss, the trial court should only be concerned about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56 (citations omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

In the present case, defendant urges this Court to conclude there was insufficient evidence of force, an essential element of first-degree sexual offense. He asserts the only force used upon the girls occurred when his brother grabbed CH's jacket and prevented her from running away. Defendant argues the threat of calling the police constituted a threat to perform a lawful act -- calling the police about runaways -- rather than a threat of violence or bodily harm. Defendant states no cases hold that a threat to do a lawful act constitutes an action done "by force and against the will" of the victim. *See* N.C. Gen. Stat. § 14-27.4(a)(2). Defendant believes neither KN nor CH feared force or

bodily harm from him; rather, they only feared the police taking them back to Warlick School. Defendant also maintains the girls were able to leave whenever they wished; there was no evidence the girls feared defendant would physically harm them and there were no threats or acts of violence by defendant. Defendant argues KN consented to sexual activity when given the choice between performing fellatio and being reported to the police.

The State argues it provided ample evidence of force to allow the charges of first-degree sexual offense and aiding and abetting first-degree sexual offense to be submitted to the jury. During the trial, the State's evidence showed that the two girls were approached by five teenage boys who made explicit sexual comments, stating that the girls were going to be performing fellatio soon. Knowing the girls were runaways, the boys threatened to call the police. When the girls did try to run away, one of the boys grabbed CH and held her, causing her to cry out for help. KN only returned in order to help CH and prevent her from being seriously hurt. The girls were then taken by defendant and Richard Davis to the rear of a transfer truck parked at a warehouse, while the other boys stood outside to prevent the girls from leaving before they got their "turns."

Before performing fellatio on defendant, KN made him promise she and CH would be released. While she performed fellatio, defendant placed his hand on her head. CH was crying and unable to comply when directed to perform fellatio. KN then began to perform fellatio on Richard Davis in CH's place so he would leave CH alone.

While KN did so, defendant stayed within arm's reach of her.

We believe the foregoing presentation of evidence by the State shows both physical force and constructive force by threats and displays of force. These actions combined to compel KN to perform fellatio on both defendant and Richard Davis. We note that

> under 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. 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.

State v. Locklear, 304 N.C. 534, 540, 284 S.E.2d 500, 503 (1981). As even defendant admits, constructive force can be shown in the form of fear, fright, or coercion; violent physical force or threats of serious bodily harm need not be proven by the State to show force sufficient to establish the element of force in sexual offense cases. *See State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987); *State v. Hines*, 286 N.C. 377, 211 S.E.2d 201 (1975); and *State v. Burns*, 287 N.C. 102, 214 S.E.2d 56, *cert. denied*, 423 U.S. 933, 46 L. Ed. 2d 264 (1975). "Once the victim of one of these [sexual] acts has been forced against his or her will to submit, the degradation to his or her person, the real evil against which the statutes speak, has been accomplished." *State v. Ludlum*, 303 N.C. 666, 673, 281 S.E.2d 159, 163 (1981).

We conclude the State presented sufficient evidence of force to withstand defendant's motions to dismiss the charges of first-degree sexual offense and aiding and abetting first-degree sexual

offense. Defendant's first assignment of error is overruled.

Kidnapping Charges

By his second assignment of error, defendant contends the trial court erred in submitting two counts of first-degree kidnapping to the jury because the State did not provide sufficient evidence of force, nor did it present sufficient evidence that KN and CH were unlawfully confined, restrained, or removed from one place to another without their consent. We disagree.

As previously noted, the State provided sufficient evidence of force to submit the crimes of first-degree sexual offense and aiding and abetting first-degree sexual offense to the jury. The same evidence also supported submission of the two counts of first-degree kidnapping to the jury.

N.C. Gen. Stat. § 14-39 (2001) defines first-degree kidnapping as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
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> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
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> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

In the present case, the State presented evidence showing that the group of boys first encountered KN and CH outdoors at the railroad tracks; the boys caught the girls when they ran away. Defendant and Richard Davis took them to the back of the transfer truck where the sexual activity occurred while the other boys maintained watch outside the truck and prevented the girls from leaving. This evidence is sufficient to show that KN and CH were "unlawfully confine[d], restrain[ed], or remove[d] from one place to another" without their consent.

Defendant's second assignment of error is overruled.

Closing Argument

By his third assignment of error, defendant contends the trial court erred in denying his attorney the opportunity to discuss possible sentences defendant was exposed to during the course of the closing argument. We disagree.

At the outset, we note that the closing arguments were not recorded; our review is based upon the attorneys' recollection as presented in the record. During his closing argument, defendant's attorney described the serious nature of the case and pointed out where the offenses fell on the punishment charts. When defendant's attorney began to describe the number of months defendant would face upon conviction, the State objected, and the trial court sustained the objection. Defendant's attorney later asked the trial court to reopen the closing arguments so they could be recorded, and he told the trial court he feared he hurt defendant's appellate issue when he withdrew his earlier motion to have the closing arguments recorded. The trial court reviewed the cases defendant's attorney tendered for it's consideration, as well as defendant's arguments. It then denied defendant's motion to reopen closing arguments and to record them, stating:

> I'm going to deny your motion to reopen your closing argument. The jury has commenced its deliberations. The Court exercised its authority to control closing argument. The Court feels that there is no reason to revisit the matter. The Court controls closing arguments, and even though this is a hotly contested case, the Court feels that the Court extended the bounds of propriety on argument to a substantial degree and cannot see that any manifest injustice occurs here.

"While it is true that in jury trials 'the whole case as well as of law as of fact may be argued to the jury,' and counsel's freedom of argument should not be impaired without good reason, argument is not without limitation." *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 274 (1983). *See also* N.C. Gen. Stat.

§ 7A-97 (2001); and *State v. Crisp*, 244 N.C. 407, 412-13, 94 S.E.2d 402, 406 (1956). Defendant argues the trial court's actions were serious because the jury may have reached a different result had it known the severity of the sentence the young defendant was facing.

The State, on the other hand, contends the trial court did not err by preventing defendant's attorney from discussing possible sentences during his closing argument. The State did not object to defendant's description of the serious nature of the crime, nor did it object to defendant pointing out where the crimes fell on the punishment charts. However, the State did object when defendant's attorney began discussing the exact number of months of imprisonment defendant would face upon conviction. The State argues that the trial court's ruling should not be disturbed absent a gross abuse of discretion, which is lacking here.

> Wide latitude is given to counsel in argument. The judge hears the argument, knows the atmosphere of the trial and has the duty to keep the argument within proper bounds. His rulings will not be disturbed unless abuse of privilege is shown and the impropriety of counsel was gross and well calculated to prejudice a jury.

State v. Maynor, 272 N.C. 524, 526, 158 S.E.2d 612, 613 (1968). "Further, appellate courts do not ordinarily interfere with the trial court's control of jury arguments, unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Hunt*, 37 N.C. App. 315, 322, 246 S.E.2d 159, 164 (1978). "When a portion of the argument of either counsel is omitted from the record on appeal, the

arguments are presumed proper." *Id.*; *see also State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976); and *State v. Dew*, 240 N.C. 595, 83 S.E.2d 482 (1954).

Attorneys are permitted to inform the jury of the punishment prescribed for the offenses for which a defendant is being tried. "It is proper for defendant to advise the jury of the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration." *State v. McMorris*, 290 N.C. 286, 288, 225 S.E.2d 553, 554 (1976). This tactic is not to be used for the purpose of achieving jury nullification, nor is one allowed to argue that the statutory punishment is too severe and thus advocate a verdict of not guilty. *See State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). We believe defendant's attorney was able to sufficiently convey to the jury the punishment prescribed, and the severity of the offenses.

Finally, if such was error, it was not prejudicial. *See State v. Peoples*, 141 N.C. App. 115, 539 S.E.2d 25 (2000) (defendant's inability to inform jury of punishment deemed non-prejudicial and unlikely to have achieved a different outcome). Defendant's third assignment of error is overruled.

Reinstruction

In his final assignment of error, defendant argues the trial court erred in its reinstruction on first-degree kidnapping, and further erred by sending a printed copy of the jury instruction that did not contain the additional instruction. The State

maintains the trial court did not err, or if there was error, that it was harmless.

The trial court initially instructed the jury regarding the charge of first-degree kidnapping and recited the elements of the crime. Of particular relevance to this case were elements three and four, which state:

> Third, that the defendant removed that person for the purpose of facilitating defendant's commission of a felony sexual assault.
>
> Fourth, that this removal was a separate, complete act, independent of and apart from the sexual assault.

The jury began its deliberations, then sent out a question asking the trial court to "[p]lease clarify the subpoints under 1st Degree Kidnapping, especially the 4th point regarding 'separate from sexual assault.'" The trial court then repeated the original instruction, but also added the following statement:

> Now, Members of the Jury, if you find from the evidence and beyond a reasonable doubt that the removal of the victim is an inherent, inevitable feature of the felony intended; that is, the sexual assault, then you would not be entitled to find that this element of kidnapping had been satisfied. If on the other hand you find beyond a reasonable doubt that the removal was not an inherent feature nor incident of the sexual assault, then that element would be satisfied, even though these events might be closely related in time.

Defendant argues the reinstruction constituted an "additional charge" which set upon defendant a burden that was not his to carry. He also argues the State had no reason to prove beyond a

reasonable doubt an element that would help defendant in some way. Defendant also contends the jury was confused because the trial court sent in a written instruction which did not contain the reinstruction.

The State, on the other hand, maintains the additional language given by the trial court did not dilute the State's burden of showing that removal was a separate, complete act independent of and apart from the sexual assault. The instructions, as a whole, repeated the burden the State had to carry. The State also maintains the additional instruction was a minor part of the overall instructions throughout the trial, and that it may actually have helped defendant because its mention of "reasonable doubt" reminded the jury that it could not find defendant guilty if they harbored a reasonable doubt.

After the jury retires for deliberation, the trial court may give additional instructions to respond to an inquiry of the jury made in open court. N.C. Gen. Stat. § 15A-1234(a)(1) (2001). Furthermore, the instructions must be read as a whole, and not in detached fragments. *State v. McGuire*, 49 N.C. App. 70, 77, 270 S.E.2d 526, 531, *appeal dismissed, disc. review denied*, 301 N.C. 529, 273 S.E.2d 457 (1980). In the present case, the trial court sent written instructions into the jury room, at the jury's request. These written instructions did not contain the "additional" instruction of which defendant complains. Since defendant had no objection to the pattern instruction, and since only the pattern instruction appeared in the document given to the

jury, we conclude that any error in this case was harmless.

After careful review of the record below and the arguments of the parties, we conclude defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge BIGGS concur.

Report per Rule 30(e).