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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-955

Filed: 18 August 2020

Cabarrus County, Nos. 17 CRS 53000–01

STATE OF NORTH CAROLINA

v.

DEREK LEE HELMS

Appeal by defendant from judgments and orders entered 26 February 2019 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 26 May 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brian D. Rabinovitz, for the State.

Mark Montgomery for defendant.

DIETZ, Judge.

Defendant Derek Lee Helms appeals his criminal convictions for forcible rape and kidnapping. He also challenges corresponding civil orders requiring him to enroll in lifetime satellite-based monitoring.

As explained below, we reject Helms's challenges to his criminal judgments. Helms failed to show that the occasional use of the term "victim" by the prosecutor

and two witnesses at trial was plain error, or that his counsel's failure to object to those "victim" references constituted ineffective assistance of counsel. Likewise, the State presented sufficient evidence of a separate restraint supporting the kidnapping charge and thus Helms failed to show that the trial court erred by denying his motion to dismiss.

With respect to the satellite-based monitoring, we agree with Helms that, under recent precedent from this Court, the monitoring order is unconstitutional. Because Helms has a meritorious argument, and because of the evolving nature of our satellite-based monitoring jurisprudence in recent months, we exercise our discretion to issue a writ of certiorari, review this unpreserved issue, and reverse the imposition of satellite-based monitoring under newly decided precedent from this Court.

Facts and Procedural History

In 2015, Defendant Derek Lee Helms began a relationship with Beth[1] and they moved in together. Beth later became pregnant with Helms's child, and their relationship deteriorated during the pregnancy. After the child was born in December 2016, Beth's relationship with Helms improved for a short period of time before deteriorating again. On 26 May 2017, Beth called Helms and told him she was leaving him. When Helms arrived home, he was angry. Helms grabbed the child from Beth

[1] We use a pseudonym to protect the identity of the complaining witness.

and put him in his car seat. Afraid Helms was going to take their child away, Beth picked up the car seat and took it into the bathroom. Helms followed her, screaming and pounding on the door. Helms entered the bathroom, pushed Beth, pulled the car seat away from her, and left with the child.

Early the next morning, Beth woke up and found that Helms and the child were in the bed with her. Helms tried to kiss Beth, but she told him to stop and that she was done with their relationship and wanted him to move out. Helms became agitated and told Beth he was going to leave with their child again. Helms then took Beth's food stamp card from her and "smashed" her foot with his boot. Beth testified that she was terrified. Helms took the child and left. Beth went to the Sheriff's Department, explained what had happened, and asked about a restraining order. Officers told her she could not file for one right away because it was a holiday weekend. She declined to cooperate in a criminal investigation at the time because she was worried it would make Helms angry and endanger her child.

Around 1:00 a.m. on 28 May 2017, Helms returned home looking for clothes and asked Beth to sign a handwritten custody agreement for their child. Beth refused. Later that day, Helms texted Beth that he would bring the child back to her if she signed the agreement. Beth repeatedly texted Helms asking him to bring the child back. Helms eventually agreed on the condition that Beth meet him at their home. On her way to the house, Beth called 911 to ask if an officer would meet her at the

house. She was told that law enforcement could not assist her because it was a civil matter.

After Beth arrived at the house, she fell asleep while waiting for Helms. Around 9:30 p.m., she woke up and saw Helms crouched down on the side of the bed. Beth asked Helms what he was doing and Helms jumped on top of her, holding her arms down. Beth told Helms to "stop it" and "get off me." Helms responded by kissing Beth's neck and telling her, "You're not doing this to me. You're not walking away from our family." Helms began touching Beth's pelvic area and she "just kept saying 'Stop. Just get off me.'" Helms ripped off Beth's underwear and vaginally penetrated her with his penis. Beth testified that she was "screaming, 'Stop,' and he just wouldn't, and he said 'You're gonna take this.'" Beth continued screaming "Stop" and "Help me," hoping that someone would hear her. She kicked her legs all around and eventually was able to kick Helms off of her.

Beth ran to the living room and found the child in his car seat. She wanted to call 911 but realized her phone was still in the bedroom. Beth returned to the bedroom holding the child. Helms tried to grab the child from Beth, squeezing the child so hard that he threw up on Beth and she fell back onto the bed. Beth tried to grab her phone, but Helms yanked it out of her hand. As soon as Beth was able to get her phone back from Helms, she called 911. When Helms heard the operator answer, he fled.

After officers responded to Beth's 911 call, she drove herself to the hospital and

underwent a sexual assault exam, including the collection of a rape kit. The exam showed a fresh laceration to her vaginal area. Beth then went to the Sheriff's Office to give a statement. A DNA analysis of the rape kit matched Helms's DNA profile.

Helms was indicted for second degree forcible rape and first degree kidnapping, and the case went to trial. The jury convicted Helms of both charges. The trial court sentenced Helms to consecutive sentences of 73 to 148 months in prison for each charge. The trial court also entered two orders, corresponding to each of the charges, requiring Helms to enroll in lifetime satellite-based monitoring upon his release from prison. The court did not hear any evidence or arguments regarding the imposition of satellite-based monitoring, and Helms's counsel did not raise any objections.

Helms gave oral notice of appeal following sentencing, but he did not file a written notice of appeal from the satellite-based monitoring orders. Helms later filed a petition for a writ of certiorari seeking review of the satellite-based monitoring orders.

Analysis

I. References to Helms's accuser as "the victim"

Helms first argues that the trial court committed plain error by allowing the State and two of its witnesses to refer to Beth as "the victim." Alternatively, Helms argues that he received ineffective assistance of counsel because his trial counsel failed to object to those "victim" references. Helms contends that, by referring to Beth

as a victim, the prosecutor and the witnesses implicitly suggested that her accusations were true and, as a result, vouched for her credibility. We reject these arguments.

We begin with the plain error argument. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* In other words, the defendant must show that "absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Moreover, plain error applies "only in the exceptional case" where the error calls into question "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334.

Applying this standard, Helms faces an insurmountable initial hurdle: "Our Supreme Court has held that a trial court referring to the prosecuting witness as 'the victim' does not constitute plain error." *State v. Jackson*, 202 N.C. App. 564, 568–69, 688 S.E.2d 766, 769 (2010). Specifically, the Supreme Court held that referring to a prosecuting witness as "the victim"—whether it was error or not—was not "so basic and lacking in its elements that justice could not have been done" and thus did not

rise to the level of plain error. *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994).

We must follow that precedent here. This lengthy criminal trial produced a 1,200-page trial transcript. There are roughly fifty sporadic references to Beth as the "victim" by the prosecutor and two law enforcement witnesses over the course of the trial. Even assuming this was error—and we are not persuaded that it was—it is simply not the sort of fundamental error that calls into question the integrity of our criminal justice system. Thus, as our Supreme Court held in *McCarroll*, we hold that the use of the term "victim" at trial was not plain error.

In any event, to show plain error, a defendant also must establish prejudice—that "absent the error, the jury probably would have returned a different verdict." *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. Here, the prosecutor and the two witnesses who used the term "victim" did *not* do so in a manner meant to convey that Beth was credible or that her account was true. Instead, they used the term "victim" to indicate that Beth was the individual who reported to law enforcement that she had been the victim of the crimes at issue in this case, triggering their involvement. As even Helms concedes in his appellate brief, this usage "was simply jargon used by police officers (and sometimes lawyers) to designate the complaining witness in a criminal case." Given the strength of the State's evidence in this case, Helms has not come close to showing that, had the prosecutor and the witnesses used Beth's name

or a different term instead of "the victim" during the trial, the jury probably would have reached a different verdict. Thus, even if Helms could show that this was the sort of fundamental error that can constitute plain error, Helms cannot overcome the prejudice prong of the plain error test.

Helms's alternative claim for ineffective assistance of counsel likewise fails for lack of prejudice. "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). This analysis involves a two-part test that examines whether "counsel's performance was deficient" and whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, this Court need not determine whether counsel's performance was deficient." *State v. Gillespie*, 240 N.C. App. 238, 243, 771 S.E.2d 785, 788–89 (2015).

For the same reasons Helms failed to show prejudice under the plain error test, he fails to satisfy the prejudice prong of this test: Helms has not shown any reasonable probability that, but for the references to Beth as "the victim," the jury would have reached a different verdict. Accordingly, we reject Helms's ineffective assistance claim.

II. Denial of motion to dismiss kidnapping charge

Helms next argues that the trial court erred by denying his motion to dismiss the first degree kidnapping charge. He contends that there was insufficient evidence of restraint separate from the restraint inherent in the forcible rape charge. We reject this argument.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon 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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "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). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Helms challenges only the sufficiency of the evidence for the restraint element of the kidnapping charge. As our Supreme Court has observed, "certain felonies (e.g.,

forcible rape and armed robbery) cannot be committed without some restraint of the victim." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Thus, to avoid double jeopardy concerns, when one of these felonies is charged together with a kidnapping the Supreme Court has interpreted the kidnapping statute to require "a restraint separate and apart from that which is inherent in the commission of the other felony." *Id.*

But importantly, this "independent and separate restraint need not be, itself, substantial in time." *State v. China*, 370 N.C. 627, 634, 811 S.E.2d 145, 149–50 (2018). The "key question" is whether there is evidence that the restraint used for the kidnapping exposed the victim "to greater danger than that inherent" in the restraint for the underlying crimes or separately subjected the victim "to the kind of danger and abuse the kidnapping statute was designed to prevent." *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992).

Here, the State presented evidence that, before restraining Beth in order to rape her, Helms held Beth down to kiss her neck and touch her pelvic area against her will. Then, after the rape occurred, Beth was able to kick Helms off of her, get out of the bed, and leave the bedroom, but she was unable to leave the house or call 911 because her phone was still in the bedroom with Helms. When Beth returned to the bedroom with the child, Helms tried to grab the child away from her, squeezing so hard that the child threw up on Beth, and Beth fell back onto the bed. When Beth

tried to grab her phone, Helms yanked it away from her. As soon as Beth regained possession of her phone, she called 911, and Helms fled.

Viewing this evidence in the light most favorable to the State, there was substantial evidence of "a restraint separate and apart from that which is inherent in the commission" of the forcible rape. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. Helms "took additional action, which had the effect of increasing [the victim's] helplessness and vulnerability beyond the initial [restraint] that enabled defendant to commit the sex offense." *China,* 370 N.C. at 635–36, 811 S.E.2d at 150–51. Accordingly, the trial court properly denied Helms's motion to dismiss.

III. Satellite-based monitoring orders

Finally, Helms challenges the trial court's imposition of lifetime satellite-based monitoring, arguing that the trial court erred in imposing that monitoring without conducting a *Grady* hearing and requiring the State to present any evidence that the monitoring was reasonable under the Fourth Amendment.

Helms concedes that he failed to file a written notice of appeal from the trial court's satellite-based monitoring orders and that he did not preserve his constitutional challenge to the imposition of monitoring by raising an objection in the trial court. Helms has petitioned for a writ of certiorari seeking review of the orders and also has asked this Court to invoke Rule 2 of the Rules of Appellate Procedure to excuse his waiver of the argument.

"This Court has discretion to allow a petition for a writ of certiorari 'to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.' N.C. R. App. P. 21(a)." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017). "[A] petition for the writ must show merit or that error was probably committed below." *Id.*

Issuing a writ of certiorari confers appellate jurisdiction on this Court, but it does not cure other procedural violations that prevent appellate review, such as the failure to properly preserve an issue in the trial court. To excuse the failure to preserve an issue, this Court must invoke Rule 2. *Id.* Rule 2 permits this Court to "suspend or vary the requirements" of the appellate rules in order "[t]o prevent manifest injustice to a party." N.C. R. App. P. 2. "As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because inconsistent application of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not." *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370.

In *Bishop*, we declined to issue a writ of certiorari and declined to invoke Rule 2 in order to reach the defendant's unpreserved challenge to satellite-based monitoring because "the law governing preservation of this issue was settled at the time [the defendant] appeared before the trial court" and "[defendant] is no different

from countless other defendants whose constitutional arguments were barred on direct appeal because they were not preserved." *Id.* at 769–70, 805 S.E.2d at 369.

This case is distinguishable from *Bishop* because, within the last year or so, the law governing imposition of satellite-based monitoring has been anything but settled. Most relevant here, after the monitoring orders in this case were entered, this Court issued its opinion in *State v. Gordon*, __ N.C. App. __, 840 S.E.2d 907 (2020).

In *Gordon*, this Court reversed the imposition of lifetime satellite-based monitoring, imposed at the time of criminal sentencing, for a defendant who would first serve time in prison. *Id.* at __, 840 S.E.2d at 913–14. The Court held that the State failed to meet its burden to show reasonableness under the Fourth Amendment because there was "a lack of knowledge concerning the unknown future circumstances relevant to that analysis" such as whether "the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison." *Id.* at __, 840 S.E.2d at 913. Thus, *Gordon* held that imposition of satellite-based monitoring at the time of sentencing, for a defendant who would first serve considerable time in prison, was unreasonable under the Fourth Amendment.

Here, as in *Gordon*, the trial court imposed lifetime satellite-based monitoring on Helms at criminal sentencing and that monitoring will not begin until Helms is released from prison roughly a decade from now. Accordingly, under *Gordon*, the

imposition of satellite-based monitoring in this case was unreasonable and therefore violated the Fourth Amendment. Given the seriousness of a violation of one's constitutional rights and the rapidly evolving jurisprudence on satellite-based monitoring in our State, in our discretion, we issue a writ of certiorari, invoke Rule 2 to excuse any failure by Helms to preserve this issue for appellate review, and reverse the imposition of satellite-based monitoring for the reasons discussed in *Gordon*.

Conclusion

We find no plain error in part and no error in part in the trial court's criminal judgments. We reverse the imposition of lifetime satellite-based monitoring.

NO PLAIN ERROR IN PART; NO ERROR IN PART; REVERSED IN PART.

Chief Judge McGEE and Judge COLLINS concur.

Report per Rule 30(e).