NO. COA01-101

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 99 CRS 013097-013100

FREDDIE LEE WILSON

Appeal by defendant from judgments dated 23 May 2000 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 29 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Fred Lamar, for the State.

Lisa S. Costner, P.A., by Lisa S. Costner, for defendant-appellant.

GREENE, Judge.

Freddie Lee Wilson (Defendant) appeals judgments dated 23 May 2000 entered pursuant to a jury verdict finding him guilty of one count of second-degree rape, N.C.G.S. § 14-27.3(a) (1999), one count of second-degree sexual offense, N.C.G.S. § 14-27.5(a) (1999), two counts of first-degree kidnapping, N.C.G.S. § 14-39 (1999), and false imprisonment.

On 10 May 1999, Defendant was indicted for one count of second-degree forcible rape, one count of second-degree forcible sexual offense, and three counts of first-degree kidnapping. The evidence

at trial revealed that at approximately 8:00 p.m. on 20 March 1999, Bobbi Call (Call), her sister Jessie Breeden (Breeden), and Call's three-year-old daughter Kimberly Call (Kimberly) were traveling in an automobile on their way to pick up their friend Tay. Call was driving, Breeden was sitting in the front passenger seat, and Kimberly was seated in the back. Unable to find Tay, Call, Breeden, and Kimberly drove around the block a few times. When they returned to the expected meeting place, Defendant approached their vehicle and asked what they were looking for. Breeden responded they were looking for their friend Tay. When Defendant said "I gotcha," Breeden unlocked the door to allow Defendant to sit in the back seat of the vehicle.

Once seated, Defendant told Call to drive. Defendant again asked what they were looking for and subsequently began naming different kinds of drugs. Breeden explained once more that they were looking for Tay, and Defendant replied he had seen him and knew where he was. Breeden smelled alcohol on Defendant and also noticed a brown paper bag in his possession. Defendant then began to smoke a substance Breeden believed to be crack cocaine. Defendant's behavior angered Breeden because her niece, Kimberly, was sitting in the back seat beside Defendant. Breeden told Defendant "if he was going to smoke crack[,] he had to get out." Defendant did not leave, but instead asked for the telephone numbers of Call and Breeden. At this time, they had pulled into a dark location to which, according to Breeden's testimony, Defendant had directed them. At some point the vehicle stopped. Breeden got out of the

front seat of the vehicle and opened the back door in an effort to make Defendant leave. Defendant exited the back seat of the vehicle and told Breeden that if she did not get back in the vehicle, he would shoot her. Breeden did not see a gun, but Defendant "kept lifting up his shirt" as if he had a gun hidden beneath. Getting back into the vehicle, Defendant sat in the front passenger seat and Breeden sat in the back with Kimberly. By this time, Call was very upset and began to cry.

Defendant again told Call where to drive, and Call complied because she was afraid for her daughter's life. Defendant then began trying to touch Breeden's vaginal area and breasts. Breeden struggled with Defendant, but he did not appear to physically feel anything. At some point, Defendant told Call to pull into a park. Breeden yelled at Call not to do this, but Defendant grabbed the steering wheel, leaned over the driver's side, and pushed on the gas pedal with his right hand. Breeden grabbed the steering wheel from her rear seat, but let go after a while. Despite Call holding her foot on the brake, the vehicle continued to move. Eventually, Breeden escaped the vehicle while it was still in motion and ran to notify the police.

Defendant directed Call to drive to an abandoned apartment complex, where he told her to get out of the vehicle. Only after Defendant had removed the ignition key did Call step out of the vehicle. They then walked across the parking lot to a wooded area. Defendant told Call to lie down and take off her pants. Call, wanting to get back to Kimberly, who had been left behind in the

vehicle that was now out of sight, complied with Defendant's demand. After Call had removed her pants, Defendant burned Call with a cigarette and attempted to have sexual intercourse with her. When Defendant was unsuccessful, he told Call to get up, and they returned to the vehicle.

Upon their return, Defendant sat in the driver's seat and Call sat in the front passenger seat. Defendant then drove to the parking lot of an old apartment building where they encountered a crowd of people. Defendant bought some crack cocaine from a man after lowering his window and asking for "a twenty." Defendant then took Call and Kimberly to two more isolated places where he again attempted to have sex with Call. Subsequently, they drove to a convenience store. Defendant did not exit the vehicle but instead asked a "kid" to purchase a beer and two Philly blunts. Call did not attempt to get help at this point because she was afraid Defendant "might pull a gun on somebody else or [her] or Kimmie [Kimberly]." They then proceeded to drive to a park where Defendant drank the beer he had purchased. Afterwards, Defendant again told Call to pull down her pants. After Call complied, Defendant penetrated her vagina with his fingers and then with his penis. Call attempted to resist Defendant, but failed because he was considerably stronger. At no time during the course of the evening did Call consent for either herself or Kimberly to be driven around at Defendant's direction.

At some point, a police officer, who had been alerted by Breeden, stopped the vehicle in which Defendant, Call, and Kimberly

were driving. Defendant instructed Call to tell the police officer that she was Defendant's girlfriend. Call was taken to the hospital where she was examined by nurse Mary Reynolds (Reynolds). At trial, Reynolds testified she observed redness in Call's vaginal area and obtained a positive Wood's lamp reaction for semen in the crotch of Call's underwear and between her shoulder blades. The DNA analysis revealed that the semen found likely came from Defendant. Reynolds observed no bruises, cuts, or abrasions on Call. She also did not find any tearing or bruising of Call's vaginal area or her inner thighs and leg area. According to Reynolds, the physical findings were consistent with a person who had engaged in sexual intercourse, but she acknowledged there was nothing about the exam that definitely indicated a rape.

During the redirect examination of Breeden at trial, the State asked Breeden if Call "ever consent[ed] to [Kimberly] being taken anywhere with [Defendant] in the car." Breeden answered that Call had not. Defendant objected to the State's question but was overruled by the trial court.

Defendant moved for a dismissal of the charges at the close of the State's evidence. Defendant did not present any evidence. The trial court denied Defendant's motion. In addition, Defendant requested that the trial court include instructions to the jury on the lesser offense of felonious restraint. The trial court denied Defendant's request because the kidnapping indictments against Defendant did not allege that the victims were transported by a motor vehicle.

The issues are whether the trial court erred: (I) in denying Defendant's motion to dismiss the charges; (II) in overruling Defendant's objection to the State's question to Breeden on redirect; and (III) in denying Defendant's request to instruct the jury on the lesser offense of felonious restraint.

I

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator of the offense. *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). In ruling on a motion to dismiss, all evidence is to be considered in the light most favorable to the State. *Harding*, 110 N.C. App. at 162, 429 S.E.2d at 421.

A second-degree sexual offense is committed if a person "engages in a sexual act with another person . . . [b]y force and against the will of the other person." N.C.G.S. § 14-27.5(a) (1999). A person commits second-degree rape if he "engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person." N.C.G.S. § 14-27.3(a) (1999). In regard to kidnapping, N.C. Gen. Stat. § 14-39 states that:

> (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:
>
> . . . .
>
> (2) Facilitating the commission of any felony[.]

N.C.G.S. § 14-39(a) (1999).

In this case, Defendant does not contest that he "engage[d] in a sexual act" with Call or that he "engage[d] in vaginal intercourse" with Call. Defendant merely contends these acts were not against Call's will. There is, however, substantial evidence that Call did not consent. Call was in fear of her life as well as that of her daughter's life. Call previously had joined her sister in an attempt to regain control of the vehicle when Defendant grabbed the steering wheel and pressed his hand on the gas pedal. Furthermore, when Defendant engaged in sexual intercourse with Call, she attempted to resist him but failed because Defendant was considerably stronger.

As to the kidnapping charge, the evidence was sufficient to show that once Breeden told Defendant to leave the vehicle, Defendant restrained Breeden, Call, and Kimberly by threatening to shoot Breeden. *See State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978) ("[t]he term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement"). From that moment forward, Defendant controlled

where Call would drive, thereby unlawfully "remov[ing] [them] from one place to another." N.C.G.S. § 14-39(a). Breeden later escaped the vehicle, but Call and Kimberly remained restrained by the impact of Defendant's threats until the vehicle was stopped by the police. *See Fulcher*, 294 N.C. at 521, 243 S.E.2d at 351 (threats and intimidation are equivalent to the actual use of force or violence). Call testified that she at no time consented for either herself or Kimberly to drive around at Defendant's direction. Because the evidence was sufficient to establish that Defendant engaged in sexual acts and sexual intercourse with Call without her consent, there was also substantial evidence from which to conclude that Defendant kidnapped Call, Breeden, and Kimberly in order to facilitate the felony of rape. Consequently, the trial court properly denied Defendant's motion to dismiss.

II

Defendant next contends the trial court committed prejudicial error by allowing testimony on redirect examination that was unrelated to Breeden's testimony during direct and cross-examination. We first note that it is in the trial court's discretion to expand the scope of the redirect examination beyond that of the direct and cross-examination. *State v. Pearson*, 59 N.C. App. 87, 89, 295 S.E.2d 499, 500 (1982), *disc. review denied*, 307 N.C. 472, 299 S.E.2d 227 (1983). The trial court's decision to overrule Defendant's objection to this testimony will not be disturbed unless it constitutes an abuse of discretion causing prejudice to the defendant. *Id.* As Call testified she had not

consented for Kimberly to ride with Defendant, there was no prejudice to Defendant and thus no error.

III

Finally, Defendant argues the trial court should have instructed the jury on felonious restraint, a lesser-included offense of kidnapping. We disagree.

When charged with a criminal offense, a defendant may be convicted for a lesser-included offense only "'when the greater offense which is charged in the bill of indictment contains all the essential elements of the lesser.'" *State v. Wilson*, 128 N.C. App. 688, 689, 497 S.E.2d 416, 418 (1998) (citation omitted). An essential element of felonious restraint is that the victim is moved "from the place of the initial restraint by transporting him in a motor vehicle or other conveyance." N.C.G.S. § 14-43.3 (1999). In *Wilson*, this Court held that to be convicted of the lesser offense of felonious restraint when the original charge was for kidnapping, transportation by motor vehicle or other conveyance must be alleged by the State in a bill of indictment. *Wilson*, 128 N.C. App. at 694, 497 S.E.2d at 421. In this case, the indictment did not allege transportation by motor vehicle or other conveyance. Accordingly, the trial court committed no error.

No error.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).