NO. COA01-1405

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA	Gaston County Nos. 00 CRS 16904 00 CRS 58386 00 CRS 58387 00 CRS 58389 00 CRS 58392
v.	
JOSHUA JOEL LEE JOHNSON	

Appeal by defendant from judgments entered 15 December 2000 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals 17 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

David Childers for defendant-appellant.

EAGLES, Chief Judge.

Defendant Joshua Joel Lee Johnson appeals from judgment entered upon a jury verdict finding him guilty of first-degree kidnapping, false imprisonment and one count each of assault with a deadly weapon, assault inflicting serious injury and simple assault.

The State's evidence tended to establish the following. On 13 June 2000, defendant was living with his girlfriend, Carey Beth Davis ("Davis"), in Kings Mountain, North Carolina. That evening, "out of the blue," defendant began accusing Davis of having been

unfaithful to him. When Davis denied the accusations, defendant accused her of lying and said "he wasn't putting up with that." Defendant grabbed Davis by the neck, pulled her from the couch to the floor and began choking her. Davis begged defendant to stop and told him that she wanted to leave. Defendant slapped Davis, grabbed her by the hair and began dragging her toward the bathroom. Defendant told Davis she would "never leave" and that he was going to "crucify" her "to teach [her] a lesson" for lying to him.

Once in the bathroom, defendant held Davis' wrists on the floor with his knees while he made several unsuccessful attempts to drive a nail through her hand with a hammer. However, Davis was able to move her hand each time defendant tried to drive the nail. Following each failed attempt, defendant slapped Davis. Defendant then took Davis into the bedroom where he bound her wrists and ankles with "thick white hospital tape," stuffed toilet paper in her mouth, and left her on the bed. Defendant again told Davis she was "not going to leave him." Once defendant fell asleep, Davis freed herself and left the house.

Defendant convinced Davis to return home the following morning, 14 June 2000. Defendant was apologetic and the day passed without further incident. However, later that evening, defendant locked himself and Davis in the house and told Davis to go into the bathroom. Davis, seeing that defendant was again agitated and fearful that she was about to be killed, refused. When defendant came at Davis, she began throwing things at him in an effort to stave off an attack. This seemed only to infuriate the defendant.

Defendant threw Davis down on the couch, grabbed her hair and began dragging her toward the bathroom. Davis tried to prevent defendant from dragging her into the bathroom by grabbing a doorway. Defendant responded by striking Davis with his hands on her face and abdomen approximately 20 times. Defendant told Davis "this was going to be [her] final resting place." Once Davis was in the bathroom, defendant locked both bathroom doors and resumed beating her with his fists. This assault ended when defendant knocked Davis into one of the bathroom doors. The impact of Davis' body against the door caused the door to come off of its hinges and rendered Davis unconscious. Davis fell through the doorway and landed in the bedroom floor.

Defendant picked Davis up off the floor, put her face down on the bed and bound her wrists and ankles together with wire. Defendant then made a noose from a piece of twine and put it around Davis' neck, saying Davis had taken her "final breath" because he was going to hang and kill her. Defendant pulled the noose until Davis could no longer breathe and then released the tension, only to repeat this process approximately nine more times. Defendant then tied Davis to the bed, took a belt from the closet and beat Davis with it. Defendant next retrieved a metal curtain rod from another part of the house, which defendant broke in order to make one end sharp so it would cut Davis. Then defendant proceeded to beat and cut Davis with the curtain rod. After defendant finished beating Davis, he untied her from the bed and forced her to crawl back into the living room with her wrists and ankles bound. Once

back in the living room, defendant repeatedly told Davis she would never leave him. About one and one-half hours later, when Davis began to complain that her feet and hands were going numb, defendant removed the wire from her wrists and ankles. However, before defendant removed Davis' bindings, he made her assure him that she was not going to leave. Davis agreed out of fear.

The next day, 15 June 2000, several of defendant's friends came to the house. Defendant would not allow Davis to leave the bedroom while his friends were in the house. Defendant would not allow Davis to go to work. For the next four days defendant made Davis call her workplace with an excuse for why she could not come to work. During this period, Davis devised a plan to gain defendant's trust by acting as if nothing was wrong. Once she was allowed to return to work, she planned to seek help. On Monday, 19 June 2000, defendant drove Davis to work and dropped her off at the front of her building. Davis went inside and immediately sought the assistance of her co-workers, who contacted police. Defendant was arrested the same day.

For the events that occurred on 13 June 2000, defendant was indicted for first-degree kidnapping and was convicted of the lesser included offense of false imprisonment. For the events that occurred on 14 June 2000, defendant was indicted for first-degree kidnapping, assault with a deadly weapon, assault with a deadly weapon with intent to kill and assault with a deadly weapon inflicting serious injury. Defendant was convicted of first-degree

kidnapping, assault with a deadly weapon, assault inflicting serious injury and simple assault. Defendant appeals.

Defendant first assigns error to the trial court's denial of his motion to dismiss the charges of first-degree kidnapping, based on insufficiency of the evidence.

"It is well established that a motion to dismiss should be denied if there is substantial evidence of each essential element of the crime and defendant is the perpetrator." *State v. Duncan*, 136 N.C. App. 515, 518, 524 S.E.2d 808, 810 (2000). "In ruling on the motion, the court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference which may be drawn from the evidence and resolving all inconsistencies in the State's favor." *State v. Hinson*, 85 N.C. App. 558, 564, 355 S.E.2d 232, 236, *disc. rev. denied*, 320 N.C. 635, 360 S.E.2d 98 (1987).

Our General Statutes provide:

> 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 . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of . . . [d]oing serious bodily harm to or terrorizing the person . . . .

N.C. Gen. Stat. § 14-39(a)(3) (2001).

Defendant argues that the evidence was insufficient because of the limited separation of time and distance between the acts of assault and restraint. Defendant contends this compels the conclusion that the restraint was inherent in the assault and cannot form the basis for a charge of kidnapping. After careful review of the record, we disagree.

"It is self-evident that 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). In order to support a separate conviction for kidnapping in cases where restraint is inherent in the underlying offense, the element of "restraint" must be a "separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352. However, where this separateness is established, there is no barrier to two or more criminal charges arising from the same course of action, even though the acts may be "closely related . . . in time." *Id.* at 524, 243 S.E.2d at 352.

Here, when viewed in the light most favorable to the State, the evidence tended to show that on 13 June 2000, defendant restrained Davis after the initial assault was completed, to prevent her escape. Further, on 14 June 2000, defendant procured Davis' submission by assaulting her until she was rendered unconscious. Then defendant restrained Davis for a total of four days. The initial physical restraint which involved binding Davis' hands and feet, served both to prevent further resistance and to facilitate the commission of the subsequent felonious assaults. The remaining three days of restraint, when defendant would not allow Davis to leave the house, served to prevent Davis' escape. Therefore, we conclude that even though closely related in time, the acts of restraint occurred independent of and apart from the other offenses and were sufficient to support a separate conviction of kidnapping.

Defendant also argues the evidence was insufficient to support a conviction of first-degree kidnapping because the evidence showed that the victim was released in a safe place. We disagree.

Kidnapping is elevated to the first-degree "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted." N.C. Gen. Stat. § 14-39(b) (2001). "While it is true that G.S. 14-39(b) does not expressly state that defendant must *voluntarily* release the victim in a safe place . . . a requirement of 'voluntariness' is inherent in the statute." *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983). Therefore, where the State's evidence reasonably supports the inference that the victim escaped, the evidence is sufficient to go to the jury on the question of first-degree kidnapping. *Id.* at 263, 307 S.E.2d at 352.

Here, Davis testified that on 13 June 2000, she freed herself from her restraints and escaped while defendant was asleep. Davis' testimony also showed that even though defendant removed the wire from her ankles and wrists on 14 June 2000, she remained a captive in her own home until she devised a plan to trick defendant into allowing her to go back to work so she could seek help. We conclude that this evidence, when viewed in the light most favorable to the State, reasonably supports an inference that the victim was not voluntarily released. Therefore, the trial court properly denied defendant's motion to dismiss.

Defendant next assigns error to the trial court's acceptance of Carol Stradley as an expert witness in the area of domestic violence. Defendant argues that the witness lacked the qualifications to testify as an expert, that the witness's testimony was irrelevant and unfairly prejudicial, and that the testimony resulted in unfair surprise.

Defendant first argues that Carol Stradley lacked the qualifications to testify as an expert witness in the area of domestic violence. We disagree.

> The determination of admissibility of expert opinion testimony is within the sound discretion of the trial court, and the admission of such testimony will not be reversed on appeal unless there is no evidence to support the finding that the witness possesses the requisite skill. 'Once expertise is demonstrated, the test of admissibility is helpfulness.' If the witness is better qualified than the trier of fact to form an opinion, that witness may render an opinion regarding the subject matter.

McLean v. McLean, 323 N.C. 543, 556-57, 374 S.E.2d 376, 384 (1988)(citations omitted). A witness is not required to be a specialist or licensed in a particular field to testify as an expert. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). A witness may qualify as an expert either through "knowledge, skill, experience, training, or education," or any combination thereof. N.C. Gen. Stat. § 8C-1, Rule 702(a) (2001).

Here, Ms. Stradley's qualifications included a bachelor's degree in both social work and sociology; five years of work experience as a social worker in a battered woman's shelter; and specific training in domestic violence through seminars and workshops. Stradley also testified that she had handled

approximately 1,000 cases involving victims of domestic violence and worked with the North Carolina Coalition Against Domestic Violence. We conclude there was sufficient evidence to support the trial court's finding that the witness possessed the requisite qualifications to testify as an expert in the area of domestic violence. Therefore, we cannot say the trial court abused its discretion.

Defendant next argues that Stradley's testimony was irrelevant and resulted in unfair prejudice because Stradley had not personally "worked with the victim, Carrie Davis, and did not render an opinion as to whether or not Davis was a battered woman."

We note that "[t]he appellate court will not consider arguments based upon issues which were not presented [to] or adjudicated by the trial tribunal. Further, the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect." *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980)(citation omitted). *See also*, N.C.R. App. P. 10(a).

Here, defendant failed to object to or challenge the proffered testimony during the trial either on grounds of relevance or undue prejudice. Likewise, there are no assignments of error with respect to either relevance or undue prejudice contained in the record on appeal. Therefore, defendant has waived appellate review of these issues by failing to properly preserve them for review.

Finally, defendant argues that admission of the testimony resulted in unfair surprise because defendant "had no idea that the

State was going to call an expert witness." Defendant argues that this lack of notice deprived him of the "opportunity to prepare" or call his own expert and this, coupled with the unduly prejudicial nature of the testimony, required its exclusion.

As we have already noted, defendant waived review on the issue of unfair prejudice. Further, it is the general rule that "'the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him.'" *State v. Spaulding*, 288 N.C. 397, 413, 219 S.E.2d 178, 188 (1975)(quoting *State v. Hoffman*, 281 N.C. 727, 734, 190 S.E.2d 842, 847 (1972))(emphasis omitted), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). *See also*, N.C. Gen. Stat. §§ 15A-903, -904 (2001). However, there is no prohibition against voluntary disclosure by the prosecutor, made in the interest of justice. N.C. Gen. Stat. § 15A-904.

The record in this case reveals that the District Attorney for the 27th Judicial District maintained an "open file" discovery policy. Further, the State "listed" Kathy Cloninger, who was employed by the same shelter as Carol Stradley, as a potential witness in the case. Ultimately, Ms. Cloninger was unable to testify at the time of trial because she was recovering from surgery. Stradley was subpoenaed to testify instead, six days before commencement of the trial.

It is unclear from the record whether defendant ever actually saw the witness list during his review of the State's files. During jury selection, the State, at the request of the trial

court, orally read a list of potential witnesses to the jury. Both Stradley and Cloninger were identified by the State as potential witnesses at that time. Moreover, even after concluding there had been no violation of the discovery statutes, the trial court, in an abundance of caution, afforded defendant an opportunity for a recess in the trial in order to obtain his own expert witness in the field of domestic violence. On this record we are unable to conclude that the testimony resulted in any surprise to defendant. Accordingly, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges MARTIN and THOMAS concur.

Report per Rule 30(e).