NO. COA01-645

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Alexander County
Nos. 99 CRS 3022-23
99 CRS 3026-27

PLEAS MANUEL SMITH

Appeal by defendant from judgments entered 17 November 2000 by Judge Kimberly S. Taylor in Superior Court, Alexander County. Heard in the Court of Appeals 27 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for the State.

Carlton M. Mansfield, for the defendant-appellant.

WYNN, Judge.

Defendant appeals from his convictions for first-degree kidnaping under N.C. Gen. Stat. § 14-39 (1999), attempted first-degree rape under N.C. Gen. Stat. § 14-27.2 (1999), felonious larceny of a firearm under N.C. Gen. Stat. § 14-72(b)(4) (1999), and assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) (1999). We find no error.

The evidence at trial tended to show that on the evening of 8 September 1999, defendant knocked on the door of a female neighbor shortly after her husband left to go to work. Defendant had met the neighboring couple on a previous occasion when he came over to

use the phone. On this occasion, the female neighbor allowed him to use the phone but instead of placing his call, defendant sat on the couch beside his female neighbor and picked up her husband's pistol, which was in a holster on the table next to the couch. A struggle over the gun ensued between the two and the female neighbor tried to escape from the house; however, defendant pulled her back by her hair and began hitting her. The two fell to the floor and defendant continued to hit her; he also choked her to the verge of unconsciousness. Thereafter, defendant removed her to the bedroom and threw her onto the bed, but she rolled off the bed. The two continued to struggle and defendant hit her repeatedly with the pistol. Eventually, the female neighbor got up and ran outside with defendant chasing her; she managed to reach a neighbor's house, whereupon she called the police.

Following his convictions on charges of first-degree kidnaping, attempted first-degree rape, felonious larceny of a firearm, and assault with a deadly weapon inflicting serious injury, Judge Kimberly S. Taylor entered judgment on each offense. Defendant appeals.

Defendant argues that the trial court erred in denying his motions to dismiss the charge of first-degree kidnaping at the close of the State's evidence and again at the close of all the evidence on the basis of insufficient evidence. We disagree.

> In reviewing the sufficiency of the evidence needed to survive defendant's motion to dismiss, we are guided by several principles. The evidence is to be viewed in the light most

> favorable to the State. *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978). All contradictions in the evidence are to be resolved in the State's favor. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984).

State v. Reese, 319 N.C. 110, 138, 353 S.E.2d 352, 368 (1987), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997).

In the instant case, defendant contends that there was insufficient evidence of any confinement, restraint or removal of the female neighbor to support the kidnaping conviction, separate from the confinement, restraint or removal inherent in the underlying felony offenses of attempted first-degree rape, assault with a deadly weapon inflicting serious injury, and felonious larceny of a firearm. We disagree.

In *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), our Supreme Court stated that "certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim." 294 N.C. at 523, 243 S.E.2d at 351. "[A] restraint, which is an inherent, inevitable feature of such other felony," cannot also form the basis of a kidnaping conviction under G.S. § 14-39. *Id.* Nonetheless, "two or more criminal offenses may grow out of the same course of action," *id.*, and there is no barrier to convicting a defendant for kidnaping, "by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352. *See also*

State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979). Moreover, "[a]sportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987).

In the case at bar, the female neighbor testified that when she tried to escape out the back door, defendant grabbed her by her ponytail and threw her to the ground. He punched her repeatedly and choked her to the verge of passing out. While she was on the floor, defendant kissed her and licked her neck. Defendant then allowed her to stand and removed her to the bedroom, throwing her on the bed. While in the bedroom, defendant licked her thigh; he also ripped her shirt and grabbed her breasts. Viewed in the light most favorable to the State, we conclude that there was sufficient evidence at trial that defendant's confinement, restraint or removal of the female neighbor was a separate and complete act, independent and apart from the attendant felonies of attempted first-degree rape, assault with a deadly weapon inflicting serious injury, and felonious larceny of a firearm. This was sufficient to support defendant's conviction for first-degree kidnaping.

Defendant also contends that he should not have been convicted of first-degree kidnaping where the sexual assault was used to elevate the kidnaping from second-degree to first-degree under G.S. § 14-39(b). This contention is without merit.

Under G.S. § 14-39(b), a kidnaping under G.S. § 14-39(a) constitutes first-degree kidnaping if the victim "either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" To properly indict a defendant for first-degree kidnaping, the indictment must specifically allege the applicable element of G.S. § 14-39(b) that elevates the kidnaping to first degree.

In the instant case, the indictment for first-degree kidnaping alleges that the female neighbor was "seriously injured"; there is no assertion that she was sexually assaulted. Furthermore, there is ample evidence that the female neighbor was seriously injured during the encounter with defendant.

Defendant next argues that the trial court erred in denying his motions to dismiss the charge of attempted first-degree rape at the close of the State's evidence and again at the close of all the evidence on the basis of insufficient evidence. He contends that there was insufficient evidence of attempted first-degree rape as there was no evidence of an overt act going beyond mere preparation. He also argues that there was no evidence that he intended to engage in vaginal intercourse with the female neighbor. Again, we disagree.

"[T]here are two elements of attempted rape: the *intent* to commit the rape and an *overt act* done for that purpose which goes beyond mere preparation but falls short of the completed offense." *State v. Freeman*, 307 N.C. 445, 449, 298 S.E.2d 376, 379 (1983). While the State need not show that the defendant made "an actual

physical attempt to have sexual intercourse with the victim, there must be substantial evidence that defendant had the intent to gratify his passion upon the victim notwithstanding any resistance on her part." *State v. Nicholson*, 99 N.C. App. 143, 145, 392 S.E.2d 748, 750 (1990). Furthermore, "sexually motivated assaults may give rise to an inference that [a] defendant intended to rape his victim notwithstanding that other inferences are also possible." *State v. Hall*, 85 N.C. App. 447, 452, 355 S.E.2d 250, 253-54, *disc. review denied*, 320 N.C. 515, 358 S.E.2d 525 (1987). *See also State v. Dunston*, 90 N.C. App. 622, 369 S.E.2d 636 (1988).

In the present case, there is evidence that defendant kissed the female neighbor's ear and licked her neck; groped her breast; ripped her shirt; removed her to the bedroom; threw her on the bed; and kissed and licked her inner thigh. As in *Dunston*, "this constitutes sufficient evidence of overt sexual behavior from which the jury could properly infer, notwithstanding the possibility of other inferences, that defendant intended to engage in vaginal intercourse" with the female neighbor. *Dunston*, 90 N.C. App. at 626, 369 S.E.2d at 638. Furthermore, these acts constitute overt acts going beyond mere preparation but falling short of the completion of the offense of rape.

Defendant next contends that the trial court erred in allowing certain testimony over his objection in violation of N.C. Gen. Stat. § 1A-1, Rule 403 (1999). This contention is without merit.

The State's evidence at trial included testimony by a work colleague of the female neighbor, and a sexual abuse counselor who

treated the female neighbor. Their testimony concerned the female neighbor's mental and emotional state following the attempted rape by defendant. Both witnesses testified over defendant's objection that the female neighbor became extremely fearful, anxious and withdrawn following the attack. Defendant argues on appeal simply that this testimony was more prejudicial than probative, and therefore *may* have been excluded under N.C. Gen. Stat. § 8C-1, Rule 403 (2002).

We note that serious injury was an element of both the first-degree kidnaping and assault with a deadly weapon inflicting serious injury charges in this case. *See* G.S. § 14-32(b); G.S. § 14-39(a)(3). Furthermore, serious mental injury is included within the meaning and intent of "serious injury" as that term is used in G.S. § 14-32(b). *See State v. Everhardt*, 326 N.C. 777, 392 S.E.2d 391 (1990). The testimony of the two witnesses in this case was therefore relevant to the injury component of the charge of assault with a deadly weapon inflicting serious injury, and defendant has failed to demonstrate that the probativity of this testimony was "substantially outweighed by the danger of unfair prejudice[.]" G.S. § 8C-1, Rule 403. Furthermore, defendant has failed to show that the trial court abused its discretion in admitting this testimony. *See State v. Anderson*, 350 N.C. 152, 513 S.E.2d 296, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999).

Defendant further argues that the trial court erred in charging the jury on the offense of assault with a deadly weapon inflicting serious injury by including certain language pertaining

to mental injury. However, as noted above, serious mental injury may constitute "serious injury" for purposes of G.S. § 14-32. *See Everhardt*. Furthermore, "[w]hether serious injury has been inflicted must be determined according to the particular facts of each case and is a question for the jury." *State v. Hensley*, 90 N.C. App. 245, 248, 368 S.E.2d 208, 210 (1988). In the instant case, there was sufficient evidence to bring the case to the jury on the question of serious injury. This assignment of error is also without merit.

Lastly, defendant argues that the trial court erred in sentencing him on the offense of first-degree kidnaping as well as on the offense of attempted first-degree rape. He cites our Supreme Court's decision in *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986), arguing "that he was placed in double jeopardy by being convicted of first degree kidnapping where attempted rape of the victim was the only sexual assault which could have formed the 'sexual assault' element of first degree kidnapping." As noted above, however, the basis alleged for elevating the kidnaping charge under G.S. § 14-39(b) to first-degree kidnaping in the instant case is that the victim was "seriously injured"; there is no allegation therein that the victim was sexually assaulted. Defendant's argument is without merit.

No error.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).