NO. COA03-951

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2004

STATE OF NORTH CAROLINA

v. Orange County
No. 02 CRS 52506

DEREK MARSHALL JONES

Appeal by defendant from judgment entered 12 November 2002 by Judge Steve A. Balog in Orange County Superior Court. Heard in the Court of Appeals 27 April 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Jill B. Hickey, for the State.

Rudolf, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

CALABRIA, Judge.

Derek Marshall Jones ("defendant") was convicted of second-degree kidnapping and attempted abduction of a child. We find no error.

On 8 May 2002 at approximately one o'clock p.m., M.N. (the "victim") and E.H., two ten-year-old girls, were walking from their elementary school cafeteria to their classroom. E.H. was carrying the victim's lunch, since the victim had injured her ankle and walked with the aid of crutches. Due to the cafeteria line and the victim's injury, the two girls had fallen behind their classmates. As instructed by their teacher, they took a path running behind the

school to enter their class from the rear of the building. As the girls started along the path, the only person they saw was a man standing on an adjacent sidewalk, who looked at the girls. As the girls proceeded behind the school building, the man walked up behind the girls and, without warning, grabbed the victim from behind, covered her eyes, nose, and mouth with his hands, pinned her against his chest, and began to drag her up a small rise and toward some woods behind the school.

E.H. screamed for help. A teacher ("Ms. Norwood"), reacting to E.H.'s scream, rushed to her classroom window and saw defendant moving away quickly with the victim pinned against his chest. Ms. Norwood banged on the window, yelled at defendant, and ran outside. As Ms. Norwood exited the building and looked toward the woods, she saw defendant push the victim to the ground just inside the woods, and run up a trail toward an apartment complex. Ms. Norwood continued yelling as she pursued him for a short distance before returning to the victim who was on the ground crying.

The victim testified that during the incident she was very scared but was unable to scream because defendant's hand over her mouth and nose made it difficult for her to breathe. She also tried to move and escape but could not because he held her tightly. The victim testified that, after the incident, she remained shocked and very scared because she "was thinking [that the man] could have taken [her] away . . . [from her] home and everything." She further testified that she needed the assistance of a counselor and

was seeing one to help her with the fear, sadness, and anger she had been feeling since the incident.

On 17 May 2002, investigators from the Chapel Hill Police Department interviewed defendant. Defendant told the investigators that on 8 May he left his apartment for a jog. On his return, he decided to take a shortcut through the school grounds to his apartment. As he rounded the corner of a school building, he accidentally bumped into the victim from behind and grabbed her to prevent her from falling. He further attested his momentum forced him to drag her up the path approximately forty feet. When he heard E.H. screaming and saw Ms. Norwood running after him yelling, he moved to help the victim up and considered asking her if she was alright but became scared and ran from the scene. Defendant's testimony at trial supported his statements to the investigators with two variances: (1) he testified that his jog originated from a bus stop near a friend's apartment, where he had stayed the night before the incident and (2) he omitted his thoughts of helping the victim up from the ground and inquiring if she was alright.

On appeal, defendant asserts the trial court erred by: (I) denying his motion to dismiss; (II) denying his request for an instruction on accident; (III) denying his request to reopen the examination of a juror; and (IV) overruling his objections to the victim's testimony about her fear, sadness, and anger, which persisted long after the incident.

I. Motion to Dismiss

Defendant assigns error to the trial court's denial of his motion to dismiss the charge of second-degree kidnapping for lack of evidence of an intent to terrorize the victim. We disagree.

"In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom." *State v. Grooms*, 353 N.C. 50, 78, 540 S.E.2d 713, 731 (2000). "If there is substantial evidence -- whether direct, circumstantial, or both -- to support[] [each element of] the offense charged . . . and that the defendant committed [the offense], the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). "'Substantial evidence' consists of 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Williams*, 127 N.C. App. 464, 467, 490 S.E.2d 583, 586 (1997) (quoting *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E.2d 285, 289 (1995)).

Second-degree kidnapping is defined under N.C. Gen. Stat. § 14-39 (2003), which in pertinent part states:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, . . . 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:
> . . .
> (3) . . . terrorizing the person so confined, restrained or removed or any other person[.]
> . . .
> (b) . . . 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. . . .

N.C. Gen. Stat. § 14-39(a)(3), (b). "'Terrorize' is defined as 'more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension.'" *State v. Surrett*, 109 N.C. App. 344, 349, 427 S.E.2d 124, 127 (1993) (quoting *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986)). "In determining the sufficiency of the evidence, 'the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize' the victim." *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (1995) (quoting *Moore*, 315 N.C. at 745, 340 S.E.2d at 405). "The presence or absence of the defendant's intent or purpose to terrorize [the victim] may be inferred by the fact-finder from the circumstances surrounding the events constituting the alleged crime." *State v. Baldwin*, 141 N.C. App. 596, 605, 540 S.E.2d 815, 821 (2000). "[T]he victim's subjective feelings of fear [during the incident], while not determinative of the defendant's intent to terrorize, are relevant." *Id.* at 604, 540 S.E.2d at 821.

In *Surrett*, this Court held the State's evidence was sufficient to show the requisite intent to terrorize the victim necessary for a conviction of second-degree kidnapping. *Surrett*, 109 N.C. App. at 350, 427 S.E.2d at 127. This Court summarized the facts and reached its conclusion as follows:

> The evidence herein tends to show that defendant forced Ms. Brooks into his car

> despite her screams, fighting, and struggling with him. He demanded that she lie down and be quiet. Ms. Brooks' screams were heard by others in the parking lot and she stated that she was "scared to death." Ms. Brooks was so frightened that she crawled out of the window of defendant's moving vehicle. Defendant attempted to prevent her escape by driving the vehicle at a speed of between fifteen and twenty miles per hour and struggling to hold the victim in the car. *Considered in the light most favorable to the State, this evidence would support a finding that the defendant intended by his actions and commands to put the victim in a state of intense fright or apprehension and that he grabbed her and threw her into his car for that purpose*.

Id. (emphasis added).

Similarly, in the instant case, the evidence, taken in the light most favorable to the State, tends to show that without warning defendant grabbed the victim from behind, firmly pinned her against his chest preventing her attempts to escape, and covered her eyes preventing her from seeing his face or where he was taking her. Furthermore, he tightly covered her nose and mouth, which prevented her attempts to scream and made it difficult for her to breathe. Then he dragged the victim approximately forty feet up a trail away from her friend, her teachers, and the safety of her school. When he realized a teacher was coming to the victim's aid, he pushed the victim to the ground and fled. The evidence further tends to show that the victim was extremely scared during the incident and began crying immediately after landing on the ground. "The fact that [defendant] did not have the opportunity to fully carry out his intentions because of [Ms. Norwood's quick intervention and the victim's] fortunate and speedy escape is of no

avail." *Id.* When viewed in the light most favorable to the State, the evidence was sufficient to submit the charge of second-degree kidnapping to the jury.

Defendant also argues that the acts supporting the restraint element of kidnapping must be complete and separate from the acts supporting the terrorization element. For this proposition, defendant refers us to several cases decided under N.C. Gen. Stat. § 14-39(a)(2), which defines kidnapping as the "restraint or removal [of another] for the purpose of . . . [f]acilitating the commission of any felony. . . ." These cases stand for the proposition that the acts supporting the restraint element of kidnapping must be complete and separate from the restraint inherent in the commission of any other felony with which the defendant is charged. *See State v. Beatty*, 347 N.C. 555, 558-59, 495 S.E.2d 367, 369-70 (1998) (holding the restraint involved was "not [an] inherent, inevitable part[] of the robbery" and "constituted sufficient additional restraint" for a conviction of second-degree kidnapping); *State v. Ackerman*, 144 N.C. App. 452, 456-57, 551 S.E.2d 139, 143 (2001) (holding that "[t]he restraint [involved] was an inherent part of the commission of the sexual offense, and [could not] be used to convict defendant of kidnapping"). There is no prohibition against using defendant's acts to prove two elements of the same charge, here the second-degree kidnapping elements of restraint and terrorization. Evidence of the manner in which defendant restrained the victim, "[t]he victim's subjective feelings of fear[,]" *Baldwin*, 141 N.C.

App. at 604-05, 540 S.E.2d at 821, and other circumstances surrounding the restraint may serve as the basis for a finding of an intent to terrorize. *Surrett*, 109 N.C. App. at 349, 427 S.E.2d at 127.

II. Instruction on Accident

Defendant asserts the trial court failed to instruct the jury on all substantial features of the case by denying to include his requested instruction on accident. The trial court "has a duty to instruct the jury on all substantial features of the case arising on the evidence[,]" *State v. Garrett*, 93 N.C. App. 79, 82, 376 S.E.2d 465, 467 (1989), and "to instruct the jury in such a way as to 'declare and explain the law arising on the evidence.'" *State v. Ward*, 300 N.C. 150, 155, 266 S.E.2d 581, 584 (1980). "Failure to instruct upon a substantive or 'material' feature of the evidence and the law applicable thereto will result in reversible error. . . ." *Id.* at 155, 266 S.E.2d at 585. "All defenses arising from the evidence presented during trial, including the defense of accident, are substantial features of a case and therefore warrant instructions." *Garrett*, 93 N.C. App. at 82, 376 S.E.2d at 467. The trial court is allowed wide discretion in instructing the jury on the issues of a case "so long as the law is adequately explained." *State v. Mustafa*, 113 N.C. App. 240, 244, 437 S.E.2d 906, 908 (1994).

Defense counsel requested an instruction on the defense of accident similar to N.C.P.I. – Crim. 307.11 (2003), which in pertinent part states:

> When evidence has been offered that tends to show that the alleged assault was accidental and you find that the injury was in fact accidental, the defendant would not be guilty of any crime even though his acts were responsible for the victim's injury. An injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. . . . The State must satisfy you beyond a reasonable doubt that the victim's injury was not accidental before you may return a verdict of guilty.

Defense counsel's only suggested variation in the accident instruction was to replace the word "assault" and the references to "injury" with the word "act."

Prior to handing the requested instruction to the trial court, defense counsel and the court agreed that an instruction encompassing accident was required and agreed that one approach to incorporating accident would be to insert the phrase, "that is without justification or excuse[,]" into the pattern instructions. This phrase was taken from a footnote to the first element of the second-degree kidnapping instruction. Accordingly, the court, in its discretion, inserted the footnote language in the first element of second-degree kidnapping and the first element of the lesser included offense of false imprisonment, "that the defendant unlawfully -- *that is without justification or excuse* -- restrained a person[,]" and the third element of child abduction, "that the defendant, *without justification or excuse*, abducted the minor child." *See* N.C.P.I. - Crim. 210.30 (2003) (second-degree kidnapping); N.C.P.I. - Crim. 210.15 (2003) (false imprisonment); N.C.P.I. - Crim. 210.60 (2003) (child abduction). Therefore, the

trial court properly incorporated accident into the jury instructions under the more general concept of "justification or excuse."

III. Reopening Juror Examination

Defendant asserts the trial court abused its discretion by denying his request to reopen the examination of a particular juror and denying him the ability to exercise his remaining peremptory challenge. We disagree.

"[A]fter a jury has been impaneled, further challenge of a juror is a matter within the trial judge's discretion." *State v. McLamb*, 313 N.C. 572, 576, 330 S.E.2d 476, 479 (1985). "A ruling committed to a trial court's discretion is to be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* *See also State v. Blakeney*, 352 N.C. 287, 298, 531 S.E.2d 799, 809 (2000).

In *McLamb*, the morning "after the jury was impaneled, the assistant district attorney made his opening statement, and the jury was given preliminary instructions[,]" the trial judge learned "that one of the seated jurors was a receptionist at a dental office where . . . the State's chief witness[] was a patient." *McLamb*, 313 N.C. at 574, 330 S.E.2d at 478. The judge questioned the juror concerning her relationship to the witness and whether that relationship "would make it difficult for [her] to be fair and impartial in [the] case." *Id.* The juror responded that the witness had been to her office, and her relationship with the witness would not make it difficult for her to be fair and

impartial. *Id.* Reversing this Court's decision, our Supreme Court held that "the judge's denial of defendant's request to exercise his remaining [peremptory] challenge [was not] an abuse of discretion." *Id.* at 576, 330 S.E.2d at 479. In so doing, our Supreme Court noted that

> Before denying defendant's motion, the court questioned the juror about her relationship with the State's witness . . . [and] received assurances that the juror would have no difficulty in rendering a fair and impartial verdict despite that relationship.

Id.

The facts defendant argues here are less compelling than those in *McLamb*. On the first day of defendant's trial, the jury was impaneled and the victim began her testimony. On the morning of the second day, the trial court indicated that after the recess on the previous day a juror informed the court she recognized the victim's mother. The following exchange took place:

> COURT: Why don't you restate what you told me.
> JUROR 6: I did not realize that this little girl, you know, had a sibling. And I'm -- I think that her brother may have gone to [middle school] with my son is my guess.
> COURT: All right.
> JUROR 6: That might be -- I just -- you know, I had no idea.
> COURT: All right.
> JUROR 6: Because it wasn't the same -- my children went to [a different elementary school]. So just when I -- I thought I might recognize -- you know, that I had recognized her mother maybe. I mean, you know, it seemed like it looked familiar. But I have lived in Chapel Hill a lot long time. . . .
> COURT: All right. All right. Is there anything about any of that situation that would affect your ability to be fair and impartial in the trial of this okay. Case.

> JUROR 6: I don't think so, no. I just felt like I needed to reveal that there might be familiarity with people in the courtroom --
> COURT: Yes, ma'am.
> JUROR 6: -- involved in the trial that I was not aware of during the jury selection process.

The juror had only a vague familiarity with the victim's mother and brother, and neither one was called as a witness. In addition, the juror was questioned and responded that her familiarity with the victim's mother and brother would not impair her ability to be fair and impartial. Accordingly, we find no abuse of discretion.

Nonetheless, defendant argues *Simmons v. Parkinson*, 119 N.C. App. 424, 458 S.E.2d 726 (1995), stands for the proposition that a trial court abuses its discretion when it refuses to reopen jury examination to give a party the opportunity to question a juror, who reveals information suggesting she might have difficulty being fair and impartial. In *Simmons*, this Court found an abuse of discretion in a medical malpractice case based on the trial court's failure to reopen the examination of a juror, who was passed by counsel for plaintiff, when it was learned, while defense counsel's voir dire was ongoing, that the wife of the potential juror had been treated by the defendant doctor and that "the juror had been satisfied with defendant's services." *Id.* at 427, 458 S.E.2d at 728. Thus, in *Simmons*, the juror had personal knowledge of the defendant, namely his satisfaction with the defendant's skill in treating his wife, which bore directly on the central issue of the case. In contradistinction, the instant case does not involve any personal knowledge of the defendant by the juror, which bore

directly on the central issue of the case. Rather, the instant case involves a juror's vague familiarity with the victim's mother and brother, not realized by the juror until after the jury had been impaneled and the trial begun.

Defendant also argues that the trial court's questioning reopened the examination of the juror, and "once the trial court reopens the examination of a juror, each party has the absolute right to exercise any remaining peremptory challenges to excuse such a juror." *State v. Womble*, 343 N.C. 667, 678, 473 S.E.2d 291, 297 (1996). However, this absolute right only exists prior to the jury being impaneled. *McLamb*, 313 N.C. at 576-77, 330 S.E.2d at 479. *Cf.* N.C. Gen. Stat. § 15A-1214(g) (2003) (allowing use of a remaining peremptory challenge "after a juror has been accepted by a party, and *before the jury is impaneled*, [when] it is discovered that the juror has made an incorrect statement during voir dire[,] . . . [but] the judge determines there is no basis for challenge for cause") (emphasis added). Accordingly, defendant's argument is without merit.

IV. The Victim's Testimony on Continuing Emotional Effects

Defendant asserts the trial court erred in allowing the victim to testify about the continuing emotional effects of the incident, because this testimony was not relevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). It is well established

that "[e]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Wingard*, 317 N.C. 590, 597, 346 S.E.2d 638, 643 (1986). The victim's testimony concerning the continuing emotional effects of the incident tended to prove that defendant's acts put the victim in a high degree of fear during the incident, which was relevant to the issue of defendant's intent.

In the alternative, defendant argues that, even if relevant, the probative value of the evidence was outweighed by its unfair prejudicial effect. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2003). "The determination to exclude evidence on these grounds is left to the sound discretion of the trial court." *State v. Mickey*, 347 N.C. 508, 518, 495 S.E.2d 669, 676 (1998). The long-term emotional effects expressed by the victim were important to understanding the degree of fear experienced by the victim during the incident. We, therefore, conclude the trial court did not abuse its discretion by admitting the testimony.

Defendant's remaining assignment of error is contained in a footnote to his statement of the facts. We have carefully considered the assignment of error and find it to be without merit. For the foregoing reasons, we determine that the defendant received a fair trial free from error.

No error.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).