NO. COA05-574

NORTH CAROLINA COURT OF APPEALS

Filed: 21 February 2006

STATE OF NORTH CAROLINA

v. Moore County
Nos. 03CRS006364-66

STANLEY HENRI CRAWFORD

Appeal by defendant from judgments entered 15 September 2004 by Judge Ronald E. Spivey in Moore County Superior Court. Heard in the Court of Appeals 30 November 2005.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel D. Addison, for the State.*

*Kevin Patrick Bradley for defendant-appellant.*

HUNTER, Judge.

Stanley Henri Crawford ("defendant") appeals from judgments entered consistent with jury verdicts finding him guilty of first degree rape, first degree kidnapping, and assault with a deadly weapon inflicting serious injury. Defendant argues he received ineffective assistance of counsel, and that the trial court erred in denying his motion to dismiss the charge of kidnapping. Defendant further contends the trial court erred by imposing a prison sentence upon him not in accordance with the minimum and maximum ranges provided by sections 15A-1340.17(c) and (e) of the North Carolina General Statutes. For the reasons stated herein, we

find no error in defendant's convictions, but remand for resentencing.

The State presented evidence tending to show that on 2 June 2003, the prosecutrix ("D.M."), a maintenance worker, entered the basement of an apartment building where she was employed in Aberdeen, North Carolina. When she entered the basement, defendant, who was waiting behind the door, grabbed D.M. "in a bear hug," held her tightly, and asked her several questions. Defendant then shoved her down and struck her four to six times in the head with a flashlight. D.M.'s head began bleeding, and defendant forced D.M. to climb the stairs to his apartment. Once inside the apartment, defendant flung D.M. against the bathroom wall and forced her to lean over the side of the bathtub. Defendant bound D.M.'s hands behind her back with the cord of a heating pad and forced her into the hallway and onto the floor. He attempted to put a rag into D.M.'s mouth, but she spat it out. Defendant removed D.M.'s clothes and engaged in vaginal, oral, and anal intercourse with her. Defendant then forced D.M. into his bedroom, where he had sexual intercourse with her numerous additional times, for approximately two and one-half to three hours.

When defendant stopped, D.M. told him she had to leave. Defendant said, "'I made a big mistake[,]'" and "'I know you're going to turn me in.'" D.M. assured him that she would not. Defendant gave D.M. a clean shirt to wear, and D.M. left her own bloodstained t-shirt in defendant's apartment. Defendant allowed D.M. to leave.

D.M. immediately reported the incident to the police, who later took a statement from D.M. D.M. then sought medical attention for her injuries, which included multiple contusions, hematomas, and abrasions around her head and neck. The lacerations on the left side of D.M.'s head were deep, requiring eight staples to close. D.M. had severe migraine headaches for several weeks after the attack. D.M. also had significant bruising and abrasions which were inconsistent with consensual sexual relations. Linear bruise marks around D.M.'s wrists were consistent with being tied up with a significant amount of force.

Defendant testified he was in the apartment basement "[w]hen the door burst open [and] it scared me and I reacted and I swung the flashlight" and struck D.M. by mistake. When defendant realized his mistake, he apologized and invited D.M. upstairs to his apartment in order to treat the lacerations to her head. Defendant testified that, after D.M. cleaned the blood from her face, they began talking about sexual intercourse. Defendant stated they then engaged in consensual oral, vaginal, and anal intercourse. Defendant denied restraining D.M., and stated that the heating pad was in a drawer.

Upon consideration of the evidence, the jury found defendant guilty of first degree rape, first degree kidnapping, and assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to a term of 375 to 459 months on the first degree rape conviction. The trial court consolidated the other two

offenses and imposed a consecutive sentence of fifty to sixty-nine months imprisonment. Defendant appeals.

*I. Ineffective Assistance of Counsel*

By his first assignment of error, defendant contends he received ineffective assistance at trial when the State cross-examined him regarding his failure to mention his defense at any point prior to trial. Defendant contends that the State's cross-examination violated his Fifth Amendment right against self-incrimination, and that defense counsel's failure to object constituted ineffective assistance of counsel. We disagree.

A defendant's right to remain silent is protected by the Fifth Amendment to the United States Constitution, as well as by Article I, Section 23 of the North Carolina Constitution. *State v. McGinnis*, 70 N.C. App. 421, 424, 320 S.E.2d 297, 300 (1984). "[A]ny comment [by the State at trial] upon the exercise of this right, nothing else appearing, [is] impermissible." *Id.* "[I]t [is] fundamentally unfair to impeach defendants concerning their post-arrest silence after they had been impliedly assured through the *Miranda* warnings that their silence would not result in any penalty." *State v. Lane*, 301 N.C. 382, 384, 271 S.E.2d 273, 275 (1980).

However, "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris v. New York*, 401 U.S. 222, 226, 28 L. Ed. 2d 1, 5 (1971) (holding that the trial court did not err by allowing the prosecutor to

introduce into evidence prior inconsistent statements, made by the accused, for the purpose of impeaching the defendant's credibility). "When a defendant chooses to testify in his own behalf . . . his 5th amendment right to remain silent must give way to the state's right to seek to determine, by way of impeachment, whether a defendant's prior silence is inconsistent with his trial testimony." *McGinnis*, 70 N.C. App. at 424, 320 S.E.2d at 300. Under the Rules of Evidence, "a prior statement is considered inconsistent if it fails to mention a material circumstance presently testified to which would have been natural to mention in the prior statement. . . . [E]ven the failure to speak may be considered an inconsistent statement and proper for impeachment." *State v. Fair*, 354 N.C. 131, 157, 557 S.E.2d 500, 519 (2001) (citations omitted).

To determine whether a defendant's prior silence is an inconsistency, "[t]he test is whether, under the circumstances at the time of arrest, it would have been natural for [the] defendant to have asserted the same defense asserted at trial." *McGinnis*, 70 N.C. App. at 424, 320 S.E.2d at 300 (holding that "it would clearly have been natural for defendant to have told the arresting police officer that the shooting with which defendant was accused was accidental, if defendant believed that to be the case"); *see also Lane*, 301 N.C. at 386, 271 S.E.2d at 276.

As in *Lane*, "[t]he crux of this case is whether it would have been natural for defendant to have mentioned his . . . defense at the time" of his arrest. *Id.* Here, defendant faced accusations of

assault and rape. At the time of defendant's arrest, on the same day the victim alleges defendant assaulted and raped her, defendant was silent with regard to any defense. At trial, however, defendant testified as to the accidental nature of the assault and the consensual nature of the sexual encounter.

We conclude that it would have been natural at the time of defendant's arrest for defendant to have offered his explanation to the police that he struck D.M. with the flashlight by mistake and that she consented to the sexual intercourse with him afterwards. His claims to this effect at trial raised legitimate questions concerning his failure to offer these explanations at the time of his arrest, or any time prior to his trial. Under the facts of this case, the failure of defendant to state his defense at the time of his arrest or at any time prior to trial amounted to a prior inconsistent statement. The State's cross-examination concerning defendant's silence revealed that his silence was, in fact, inconsistent with his statements at trial. Therefore, the State's questions were within the proper scope of impeachment and did not violate defendant's Fifth Amendment right against self-incrimination.

As the evidence the State sought to admit was, in fact, admissible for purposes of impeachment as a prior inconsistent statement, defense counsel's failure to object did not constitute ineffective assistance of counsel. This assignment of error is overruled.

*II. Kidnapping*

Defendant next contends that the trial court erred in denying his motion to dismiss the kidnapping charge because there was insufficient evidence to show defendant restrained the victim for the purpose of doing serious bodily harm. Specifically, defendant argues that the evidence of serious injury (in this case, the lacerations to D.M.'s head) occurred *before* he bound her with the cord of the heating pad. Defendant contends this was the only evidence that he confined or restrained D.M., and that the serious bodily harm was therefore "the *means* rather than the *purpose* of the removal." *State v. Moore*, 315 N.C. 738, 749, 340 S.E.2d 401, 408 (1986). We disagree.

In ruling on a motion to dismiss, the issue before the trial court is whether there is substantial evidence of each element of the offense charged, and that the defendant was the perpetrator of the offense. *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992). "The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). If the trial court finds substantial evidence for each element, the motion is properly denied. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In reviewing a trial court's denial of a motion to dismiss, this Court must consider the

evidence in the light most favorable to the State, giving the State the benefit of all permissible favorable inferences. *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652-53.

Kidnapping is defined by section 14-39 of our General Statutes, which provides, in pertinent part, the following:

> (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 . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed . . . .

N.C. Gen. Stat. § 14-39 (2005). "Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute." *Moore*, 315 N.C. at 743, 340 S.E.2d at 404.

"The 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. Thus, one who is physically seized and held . . . is restrained within the meaning of this statute." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). "'Restraint does not have to last for an appreciable period of time[.]'" *State v. Washington*, 157 N.C. App. 535, 538, 579 S.E.2d 463, 466 (2003) (holding that the defendant restrained the victim by grabbing him

while he was seated inside his car, throwing him to the ground, and knocking him onto the hood of his car; this constituted restraint because the victim could not flee from the defendant while the defendant continued to hold the victim and assault him) (quoting *State v. Brayboy*, 105 N.C. App. 370, 375, 413 S.E.2d 590, 593 (1992)).

Here, the State presented evidence to support the charge of first degree kidnapping. Notwithstanding defendant's argument to the contrary, there was evidence from which a reasonable juror could conclude that defendant restrained D.M. for the purpose of inflicting serious bodily injury, and that some restraint occurred prior to defendant's striking D.M. with the flashlight. D.M. testified that the encounter began when defendant held D.M. in a "bear hug[.]" D.M. stated that as she entered the basement, defendant "was behind the door" and "holding onto a flashlight." D.M. testified that "he came at me[,]" "grabbed me up in a bear hug[,]" "clinched me real tight[,]" and asked her several questions as he held her. Thereafter, defendant "shoved [D.M.] down and started hitting [her] on the side of the head with that flashlight." D.M. stated that she "was crunched up on my side kind of in a fetal position" when defendant struck her head with his flashlight between four and six times, causing an injury that required eight staples.

When viewed in a light most favorable to the State, defendant's actions of grabbing D.M. and holding her tightly in a "bear hug" provide sufficient evidence to show restraint for the

purpose of doing serious bodily harm. We therefore overrule this assignment of error.

*III. Sentencing*

By his final assignment of error, defendant contends, and the State agrees, that the trial court erred by imposing a prison sentence for kidnapping and assault which was not in accordance with the presumptive range provided by sections 15A-1340.17(c) and (e) of the General Statutes for defendant's prior record level. We agree, and remand defendant's case for resentencing.

Defendant was a prior record level IV offender at the time of sentencing. The trial court expressed its intention to sentence defendant in the presumptive range, for prior record level IV offenders, class E. This would have permitted the court to sentence defendant to a minimum number of thirty-seven to forty-six months. *See* N.C. Gen. Stat § 15A-1340.17(c) (2005). Depending on the minimum number of months the court selected, the corresponding maximums would have been between fifty-four and sixty-five months. *See* N.C. Gen. Stat. § 15A-1340.17(e). The trial court erred by sentencing defendant to fifty to sixty-nine months.

We find no error in defendant's convictions, but we remand the judgments of kidnapping and assault with a deadly weapon inflicting serious injury (03CRS006365 and 03CRS006366) for resentencing.

No error, remanded for resentencing.

Judges McCULLOUGH and GEER concur.

Report per Rule 30(e).