NO. COA05-944

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Catawba County
No. 04 CRS 52374

THOMAS JOSEPH BERGHELLO,
Defendant.

Appeal by defendant from judgments entered 12 January 2005 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 7 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

James N. Freeman, Jr., for defendant-appellant.

GEER, Judge.

Defendant Thomas Joseph Berghello appeals from his convictions for one count of attempted second degree rape and one count of second degree kidnapping based on events that took place in a convenience store in Newton, North Carolina. Defendant first argues that the trial court erred by admitting an excerpt from a surveillance videotape from the convenience store. Defendant's arguments, however, go to the weight of the evidence, and defendant has failed to demonstrate that the trial court abused its discretion under N.C.R. Evid. 403 in admitting the videotape. We also find no merit in defendant's contention that the trial court

should have granted his motion to dismiss the kidnapping charge for insufficient evidence of restraint beyond those inherent in the crime of attempted forcible rape. For these reasons, we uphold defendant's convictions.

Factual and Procedural History

The State's evidence tended to show the following. At around noon on 24 March 2004, defendant entered the J&L Run-In convenience store in Newton, North Carolina. Marie Thompson was working behind the counter at the register when defendant entered. Defendant looked at adult magazines in the back of the store and engaged in a short conversation with Thompson, asking her about her family. In response to a question from defendant, Thompson confirmed that J&L cashed out-of-town checks.

Defendant continued to look at magazines while Thompson waited on other customers. When everyone else had left, defendant approached Thompson, told her that the restroom needed cleaning, and explained that he was going to go out to his car to get an out-of-town check for her to cash. Defendant started toward the outside door, while Thompson came out from behind the counter and headed towards the back of the store to clean the men's restroom.

Thompson testified that as she entered the restroom, something hit her in the back of the head with sufficient force to slam her against the restroom's back wall. She immediately felt a knife at her throat and heard defendant say, "Take your clothes off, bitch." When Thompson said, "Oh, no, God, please don't do this," defendant

continued to hold the knife to her throat while attempting to rip off her shirt and telling her that he was going to rape her.

Thompson tried to convince defendant to let her go, telling him that her husband and the store manager would both be back momentarily and that the store would soon be filling up with customers because it was almost lunch time. In response, defendant slammed Thompson's face against the wall. Thompson struggled and fought with defendant, and, at one point, she broke free and started to run out the door. Defendant grabbed her hair, pulled her back inside the restroom, and beat her in the face. When defendant demanded that Thompson tell him where the store's videotapes were kept, she told him that they were underneath the cash register.

Defendant then told Thompson that he was not finished with her yet and that she should face the wall in the restroom and count to 200. Defendant left the restroom, and the victim started counting. When she reached 50, she heard the buzzer on the front door of the convenience store, so she looked out the restroom door in time to see defendant backing out of the parking lot in a black Jeep Cherokee. Thompson ran out of the restroom and called 911. She was able to tell the dispatcher defendant's license plate number, which she read directly off the Jeep as it sat behind several other cars at a red light on the street next to the store. Using the license plate number, the police tracked defendant to his home, and Thompson later identified him in a photographic lineup and in court.

A jury convicted defendant of second degree kidnapping and attempted second degree rape. He received a sentence of 64 to 86 months for the attempted rape conviction followed by a consecutive sentence of 25 to 39 months for the kidnapping conviction. Defendant timely appealed to this Court.

Admissibility of the Videotape

Defendant's first argument on appeal is that the trial court improperly allowed the jury to see a short excerpt of the surveillance videotape from the convenience store. We note that defendant has failed to file a copy of this exhibit with this Court, even though the parties stipulated in the record on appeal that "[a]ny designated exhibits which either party deems necessary for the understanding of errors assigned on appeal may be filed with the Court by that party pursuant to Rule 9(d)[.]"

The trial transcript indicates that a small portion of the convenience store's surveillance tape recording from the day of the crime was transferred from the convenience store surveillance equipment onto a videotape that was eventually offered into evidence by the State. It appears from statements of the attorneys at trial that the original full recording from the convenience store was no longer in existence. The transcript suggests that the brief 15-second sequence that was preserved on the State's proffered videotape showed a heavyset white male reaching over the store counter to retrieve something behind it.

At the time the video was introduced, the State argued that it served to corroborate the victim's testimony that defendant wanted

to remove the videotape of himself from the store's recording equipment. Defendant's written pre-trial motion to exclude the videotape was addressed at the point in the trial when the State sought to introduce the tape. The hearing included a viewing of the challenged tape and testimony as to its contents and origins.

Defendant argued in his written pre-trial motion that "[t]he recording is negligible at best. The images are too distorted for anyone to positively identify the defendant or anyone else as the individual inside the store. There is no sound. . . . Any showing of the recording of the tape to a jury would be highly prejudicial and would violate the defendant's rights to a fair trial. The recording would be highly suggestive to the jury without positive identification beyond a reasonable doubt." At the hearing, defendant additionally argued that the video from the remainder of the time defendant was allegedly in the store should also be played and that, if the remainder was no longer available, it would be unfair to allow the State to present only the portion showing a white male reaching behind the counter.[1] Following the hearing, the trial court denied defendant's motion, concluding that his arguments went to the weight of the evidence rather than its admissibility. At the time the State played the video for the jury, defendant also made a general objection that the court overruled.

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[1]Defendant reiterates this last argument on appeal, but cites no authority for his proposition that the failure to produce the remainder of the video should have precluded the admission of the 15-second portion. In the absence of any cited authority, we decline to consider this argument. N.C.R. App. P. 28(b)(6).

Defendant on appeal repeats his arguments made at trial that the trial court should have excluded the video on the grounds of relevance and undue prejudice. In addition, defendant contends that the videotape should have been excluded based on insufficient authentication.

A. Authentication

We first address defendant's argument that the State did not properly authenticate the video. Defendant did not raise the issue of authentication before the trial court, and, therefore, has not preserved this argument for appellate review. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988) (noting that the Court cannot consider new arguments raised for the first time on appeal because "[d]efendant may not swap horses after trial in order to obtain a thoroughbred upon appeal").

Even in the absence of a proper and specific objection below, however, this Court may still review an evidentiary issue for plain error. N.C.R. App. P. 10(c)(4) ("In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly

contended to amount to plain error."). Here, however, defendant has not asserted plain error regarding the State's authentication of the video in his assignments of error, nor has he argued it in his brief. Our Supreme Court has held that, in these circumstances, a defendant is "not entitled to plain error review of [the] issue." *State v. Dennison*, 359 N.C. 312, 313, 608 S.E.2d 756, 757 (2005). Accordingly, we decline to address defendant's arguments regarding authentication.

B. Relevance

We next turn to a consideration of defendant's arguments regarding the relevance of the tape. "Evidence which is not relevant is not admissible." N.C.R. Evid. 402. "Relevant evidence" is 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.R. Evid. 401.

The 15-second videotape in this case was relevant because it tended to corroborate the victim's testimony that defendant asked her where the surveillance tape for the store was kept. It showed a person meeting defendant's general description searching for something under the counter where the victim told defendant the videotape was kept, on the pertinent date, at the pertinent time of day. *See State v. Wilds*, 133 N.C. App. 195, 208-09, 515 S.E.2d 466, 477 (1999) (audiotape of 911 call properly admitted as corroborative of witness' testimony).

Defendant argues that the video's fuzziness and the limited time frame made it impossible to identify defendant on the tape. The trial court ruled, and we agree, that the jury could properly consider these arguments in assessing the weight of the evidence, but that they did not necessitate exclusion of the tape from the jury's consideration for lack of relevance. *See State v. Collins*, 64 N.C. App. 656, 662, 308 S.E.2d 353, 358 (1983) (holding that alleged inaccuracy of photographs went to their weight, not their admissibility).

C. Overly Prejudicial Effect

Finally, we address defendant's argument that the videotape's prejudicial effect substantially outweighed its probative value. *See* N.C.R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). The decision whether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

In arguing unfair prejudice, defendant contends generally that the videotape "obviously carried much weight with the jury" and "the prejudicial impact was great," although he also concedes that the video was only a few seconds long. Since defendant has not supplied this Court with the videotape, despite the stipulation in

the record on appeal, we are not in a position to fully assess any prejudice from the videotape. Nevertheless, considering the description of the videotape in the materials in the record, defendant has failed to demonstrate any abuse of discretion under Rule 403 in admitting the 15-second video, especially given the testimony of the victim, including her identification of defendant, the identification of defendant's license plate, and other evidence. In short, when the video is considered in the context of the rest of the evidence introduced at trial, it does not appear likely to have had the significant impact on the jury's deliberations that defendant claims.

Defendant also argues that the video's probative value was substantially outweighed by its potential to confuse and mislead the jury. In support of this argument, defendant references questions that the trial judge asked during voir dire regarding why the video appeared to repeat itself several times and whether it was slowed down for viewing purposes. We note that at trial the State limited the portion of the video that the jury saw in order to eliminate any repetitiveness, and the trial court required the State to explain to the jury that the video was not being shown in real time. Thus, the two possible bases for confusion identified by defendant were eliminated.

We note defendant also argues in his appellate brief that the trial court should have instructed the jury to consider the video for corroborative purposes only rather than for substantive purposes. Since no such instruction was requested at trial, we do

not address this issue on appeal. *State v. Byrd*, 67 N.C. App. 168, 172, 312 S.E.2d 528, 531 (1984) (holding that defendant could not complain on appeal of trial court's error in failing to give limiting instruction where defendant did not request limiting instruction at trial). Defendant's assignment of error with respect to the videotape is, therefore, overruled.

Motion to Dismiss

Defendant also argues on appeal that the State failed to meet its burden of proof with respect to the kidnapping charge, and, therefore, the trial court should have granted defendant's motion to dismiss. "Second-degree kidnapping occurs when the victim is released in a safe place without having been sexually assaulted or seriously injured and the following elements, in relevant part, are met: '(1) [unlawful] confinement, restraint, or removal from one place to another; (2) of a person; (3) without the person's consent; (4) for the purpose of [terrorizing the victim].'" *State v. Petro*, 167 N.C. App. 749, 752, 606 S.E.2d 425, 427 (2005) (quoting *State v. Lucas*, 353 N.C. 568, 582-83, 548 S.E.2d 712, 722 (2001), *overruled in part on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005)); *see also* N.C. Gen. Stat. § 14-39 (2005) (defining first and second degree kidnapping).

Here, defendant contends that the State presented insufficient evidence of the first element of kidnapping because there was no evidence that he confined, restrained, and removed the victim beyond that inherent in the crime of attempted second degree rape. Our Supreme Court has held:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

State v. Fulcher, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978); *see also State v. Weaver*, 123 N.C. App. 276, 281, 473 S.E.2d 362, 365 (holding that a kidnapping conviction violates double jeopardy principles unless "'the victim is exposed to greater danger than that inherent in the [separately punished crime] itself or subjected to the kind of danger and abuse the kidnapping statute was designed to prevent'" (quoting *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994) (internal quotation marks omitted))), *disc. review denied and cert. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996).

The question on this appeal is "whether there was substantial evidence that the defendant[] restrained or confined the victim separate and apart from any restraint necessary to accomplish the act[] of [attempted] rape." *State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992). It is well-established that "[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). This principle applies equally in instances of attempted rape. *State v. Mangum*, 158 N.C. App. 187, 195, 580 S.E.2d 750, 755-56, *disc. review denied*, 357 N.C. 510, 588 S.E.2d 378 (2003). Removal accomplished by fraud or trickery is the equivalent of removal by force. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351.

In this case, by telling the victim that the restroom was dirty, the defendant tricked her into entering a more secluded area to prevent others from witnessing or hindering the intended rape. This fact pattern indicates an act of removal by trickery under *Fulcher*, independent of the act of attempted rape. Moreover, defendant's actions in violently restraining the victim (grabbing her by her hair when she tried to flee the restroom) also support an independent act of restraint. Finally, telling the victim he was not finished with her and ordering her to stay in the restroom and count to 200, while defendant tried to make his escape, also constitutes an act of confinement that is independent of the attempted rape. The State has thus presented evidence of acts of removal, restraint, and confinement, any one of which would be sufficient to support the kidnapping charge independent of the attempted rape charge.

No error.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).