NO. COA06-66

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

CHRISTOPHER ONEAL BROWN,
Defendant.

Cleveland County
Nos. 04 CRS 5412
04 CRS 54120
04 CRS 54121

Appeal by defendant from judgments entered 19 August 2005 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 21 September 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen E. Long, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

GEER, Judge.

Defendant Christopher Oneal Brown appeals from his convictions for first degree rape, first degree sexual offense, and second degree kidnapping. On appeal, defendant primarily argues that (1) we should overrule *State v. Smith*, 110 N.C. App. 119, 429 S.E.2d 425, *aff'd per curiam*, 335 N.C. 162, 435 S.E.2d 770 (1993), and invalidate his sexual offense indictment, and (2) we should find error in the trial court's jury instructions after revisiting *State v. Langford*, 319 N.C. 340, 354 S.E.2d 523 (1987). Only the Supreme Court may, however, reconsider *Smith* and *Langford* and, consequently, we reject these arguments.

Defendant also contends that the trial court erred by failing to grant his motion to dismiss each charge for insufficient evidence. Based upon our review of the record, however, we conclude that there is sufficient evidence of every element of the charges to survive defendant's motion to dismiss. Accordingly, we find no error.

Facts

The State's evidence at trial tended to show the following facts. Billie Jo Brown and defendant married in 2002, but separated in May 2004. Their marriage had involved domestic violence, and Ms. Brown ultimately obtained a domestic violence protection order requiring defendant to stay away from her home.

On the evening of 19 June 2004, Ms. Brown had cooked dinner for her children, her sister, her sister's children, and a friend, Curtis McGuire, with whom Ms. Brown had once been romantically involved. After dinner, defendant arrived at Ms. Brown's house and told her that he was very angry over Mr. McGuire's presence. Although defendant knew he was not supposed to be at Ms. Brown's home, he told her that he needed to talk to her, grabbed her by the arm, and instructed her to come outside. Defendant refused to let Ms. Brown put on her shoes first.

Defendant told Ms. Brown that he was going to "get [her]" for having Mr. McGuire at her home and ordered her to go to the "bottom of the road." Ms. Brown testified that she complied because she was scared and did not know what defendant was going to do. As they walked down the road, defendant slapped Ms. Brown in the face

and told her he intended to kill her. After repeatedly telling Ms. Brown that she was going to die, defendant hit her again. She fell down and began crying. Ms. Brown testified she believed defendant's threats, both because of his tone and because "he had some tool with him" that she had not seen earlier. Outside in the dark, she could make out only that it was "black and long." When defendant held the "tool" up, however, it looked to Ms. Brown to be a "hatchet or some kind of wrench."

Defendant continued to hit Ms. Brown with his hands until they reached the end of a dead end road, where he grabbed her by the hair and commanded her to perform oral sex on him. After Ms. Brown did so, defendant told her to remove her clothes and lie down. Defendant then placed the "tool" on the ground, had vaginal intercourse with Ms. Brown, and again ordered Ms. Brown to perform oral sex on him. After she complied, defendant struck her and told her to get on her knees. Defendant then had vaginal intercourse with Ms. Brown from behind.

Following the sexual acts, defendant had Ms. Brown put her clothes back on and walk back with him toward her home. When they arrived, the residence was empty, and defendant asked her if she was ready to die. Defendant gave Ms. Brown permission to call her children while he looked for tape to wrap around the "tool." Ms. Brown eventually located her children at her sister's house and spoke briefly to her 12-year-old son, at which point defendant grabbed the phone and began hitting Ms. Brown on the shoulders with the "tool" that he had wrapped with tape and a shirt.

Ms. Brown's sister called the police, and a deputy sheriff soon arrived at the home. When defendant ran into nearby bushes to hide, Ms. Brown ran to the sheriff's car and told the officer that defendant had assaulted her. The officer stayed with Ms. Brown until her sister arrived. Ms. Brown later went to a local hospital where a rape kit was obtained.

On 9 August 2004, defendant was indicted for first degree rape, first degree sexual offense, and first degree kidnapping. The matter went to trial during the 8 August 2005 session of Cleveland County Superior Court, and, on 19 August 2005, the jury returned verdicts finding defendant guilty of first degree rape, first degree sexual offense, and second degree kidnapping. The trial court sentenced defendant to concurrent presumptive range sentences of 325 to 399 months for first degree rape, 325 to 399 months for first degree sexual offense, and 40 to 57 months for second degree kidnapping. Defendant timely appealed to this Court.

I

Defendant first argues that his indictment for first degree sexual offense was fatally defective. The State used a short-form indictment for this offense as allowed by N.C. Gen. Stat. § 15-144.2(a) (2005). "Both our legislature and our courts have endorsed the use of short-form indictments for rape and sex offenses, even though such indictments do not specifically allege each and every element." *State v. Harris*, 140 N.C. App. 208, 215, 535 S.E.2d 614, 619, *appeal dismissed and disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000).

With respect to a short-form first degree sexual offense indictment, our legislature has provided:

> In . . . the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law.

N.C. Gen. Stat. § 15-144.2(a). An indictment tracking this statutory language is sufficient. *See State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982) (indictment for first degree sexual offense was sufficient because it "complie[d] with the statutory language").

Here, the indictment substantially tracks the statutory language. Defendant, however, argues that the indictment's failure to include the phrase "with force and arms," as specified by N.C. Gen. Stat. § 15-144.2(a), renders the indictment inadequate. As defendant acknowledges, however, this Court rejected this very argument in *Smith*, 110 N.C. App. at 130-31, 429 S.E.2d at 430-31. *See also* N.C. Gen. Stat. § 15-155 (2005) ("No judgment upon any indictment . . . shall be stayed or reversed . . . for omission . . . of the words 'with force and arms,' . . . ."). Indeed, our Supreme Court has upheld first degree sexual offense indictments featuring nearly identical language to that used in defendant's indictment. *See State v. Kennedy*, 320 N.C. 20, 24, 357 S.E.2d 359, 362 (1987).

Although defendant urges us to reconsider *Smith*, as well as other case law upholding short-form indictments in sexual offense cases, we are not at liberty to do so. *See State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004) ("While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court."). *See also State v. O'Hanlan*, 153 N.C. App. 546, 551, 570 S.E.2d 751, 755 (2002) (declining to reconsider prior case law holding that short-form indictments for rape, sexual offense, and kidnapping are constitutional), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004). This assignment of error is, therefore, overruled.

II

Defendant next contends that the trial court erred by denying his motion to dismiss the charges of first degree rape, first degree sexual offense, and second degree kidnapping. In ruling on a defendant's motion to dismiss, the trial court must determine whether the State presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585,

587 (1984). When deciding a motion to dismiss, the trial court must view all of the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

With respect to the kidnapping charge, "[s]econd-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 [one of the purposes specified in N.C. Gen. Stat. § 14-39(a) (2005)]." *State v. Petro*, 167 N.C. App. 749, 752, 606 S.E.2d 425, 427 (2005) (third alteration added) (internal quotation marks omitted); *see also* N.C. Gen. Stat. § 14-39 (defining first and second degree kidnapping). Defendant challenges only the State's evidence as to unlawful confinement, restraint, or removal.

Although the indictment in the present case alleged kidnapping based on confinement and restraint, the trial court instructed the jury only on restraint. Consequently, the jury's verdict may be upheld only upon a showing of sufficient evidence of restraint. *See State v. Smith*, 162 N.C. App. 46, 53, 589 S.E.2d 739, 744 (2004) (trial court erred when indictment alleged removal, but

instructions allowed conviction based on "confining, restraining, or removing").

On the issue of restraint in the context of certain forcible felonies, 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). As a result, the question on appeal is "whether there was substantial evidence that the defendant[] restrained . . . the victim separate and apart from any restraint necessary to accomplish the act[] of rape." *State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255, *appeal dismissed and disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992).

"Restraint may be accomplished by restricting one's freedom of movement by confinement, or by restricting by force, threat, fraud, without confinement." *State v. Raynor*, 128 N.C. App. 244, 250, 495 S.E.2d 176, 180 (1998). Additionally, because unlawful removal necessarily involves unlawful restraint, the State may rely upon

evidence of removal even though it indicted only as to restraint. *Id.* at 249, 495 S.E.2d at 179.

Here, the State presented evidence tending to show that after Ms. Brown exited the home, defendant compelled her — under threat of death, with repeated battering, and while he was in possession of a weapon — to leave her home and accompany him to the end of a road. This evidence constituted evidence of restraint beyond that necessary to accomplish either first degree rape or first degree sexual offense. Consequently, we conclude that the State presented sufficient evidence from which a rational juror could conclude that defendant, by use of force and threat, restrained Ms. Brown's freedom of movement by removing her from her home and compelling her to walk with him to the bottom of the road. *See Harris*, 140 N.C. App. at 213, 535 S.E.2d at 618 (holding that State presented sufficient evidence of restraint apart from that of rape or sexual offense to support second degree kidnapping when defendant coerced victim to go to a cemetery where the sexual assault occurred); *State v. Carrillo*, 115 N.C. App. 674, 678, 446 S.E.2d 379, 382 (1994) (sufficient evidence of restraint beyond that required for assault with a deadly weapon when defendant dragged victim into a room to electrocute him, and victim was afraid to leave because defendant had a knife). This assignment of error is, therefore, overruled.

With respect to the charges of first degree rape and first degree sexual offense, both require that a defendant engage in a prohibited act "[w]ith another person by force and against the will

of the other person" and "[e]mploy[] or display[] a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon." N.C. Gen. Stat. § 14-27.2(a)(2) (2005) (first degree rape); N.C. Gen. Stat. § 14-27.4(a)(2)(a) (2005) (first degree sexual offense). Defendant argues, as to both charges, that the State failed to present substantial evidence that defendant employed or displayed a dangerous weapon.

The State need not show that defendant used a dangerous weapon in any particular manner, but, rather, merely that he "employed or displayed [the weapon] in the course of [the sexual act] *period*." *State v. Sturdivant*, 304 N.C. 293, 299, 283 S.E.2d 719, 724-25 (1981). Our Supreme Court has concluded that "a weapon has been 'employed' within the meaning of N.C.G.S. § 14-27.2 when the defendant has it in his possession at the time of the rape." *Langford*, 319 N.C. at 344, 354 S.E.2d at 526. *See also State v. Pruitt*, 94 N.C. App. 261, 268, 380 S.E.2d 383, 387 (applying *Langford*'s possession rule with respect to charge of first degree sexual offense), *disc. review denied*, 325 N.C. 435, 384 S.E.2d 545 (1989).

In the present case, the State presented evidence showing that defendant had a "hatchet or some kind of wrench" which he displayed prior to his attack, and which he placed on the ground nearby while sexually assaulting Ms. Brown. This is sufficient evidence from which a reasonable juror could conclude that defendant had a dangerous weapon in his possession, and, therefore, under *Langford*,

that defendant employed or displayed a dangerous weapon during both the rape and the sexual offense. *See id.* (upholding convictions for first degree rape and first degree sexual offense when perpetrator threatened victim with a knife and victim saw the knife lying nearby during the attack). This assignment of error is, therefore, overruled.

III

Finally, defendant argues that the trial court erred when, in response to a question from the jury, it provided additional instructions as to the employment or display of a dangerous weapon element of first degree rape and first degree sexual assault. After some deliberation, the jury sent a note to the trial judge asking the following question:

> In the case of first degree rape or first degree sexual assault, does having a ratchet (or similar tool) in your possession constitute "displaying or employing a dangerous — deadly weapon"?
>
> Even if you never brandished against the person?

The trial court heard arguments from counsel and, relying on *Langford*, instructed the jury as follows:

> With respect to the employment or the display of an object, I instruct you that the law . . . does not require a showing that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction . . . . Instead, the law requires only a showing that such a weapon was employed or displayed. Further, such a weapon or object has been employed, within the meaning of this law, when the Defendant has it in his position [sic] at the time of the alleged rape or the alleged sexual offense.

Defendant contends this instruction relieved the State of its burden of proof by creating a "mandatory conclusive presumption that if the jury found the defendant possessed a weapon, it must conclude the weapon was used or employed . . . ." In *State v. White*, 101 N.C. App. 593, 604, 401 S.E.2d 106, 112-13, *appeal dismissed and disc. review denied*, 329 N.C. 275, 407 S.E.2d 852 (1991), however, this Court, pointing to *Langford*, specifically rejected the argument made here by defendant. As noted above, *Langford* did in fact conclude that "a weapon has been 'employed' within the meaning of N.C.G.S. § 14-27.2 when the defendant has it in his possession at the time of the rape," 319 N.C. at 344, 354 S.E.2d at 526, and this Court has extended this analysis to first degree sexual offenses, *Pruitt*, 94 N.C. App. at 268, 380 S.E.2d at 387.

Defendant asks this Court to revisit the Supreme Court's holding in *Langford* and, on this basis, reverse his conviction. We are, however, bound by *Langford* and *White*. *See Jones*, 358 N.C. at 487, 598 S.E.2d at 134. This final assignment of error is, therefore, also overruled.

No error.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).