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NO. COA06-940

NORTH CAROLINA COURT OF APPEALS

Filed: 01 May 2007

STATE OF NORTH CAROLINA

v.

Richmond County
No. 05 CRS 50364-66
05 CRS 50390

MICHAEL CURTIS MANESS

Appeal by defendant from judgments entered 20 January 2006 by Judge David S. Cayer in Richmond County Superior Court. Heard in the Court of Appeals 9 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Brandon L. Truman, for the State.

Kevin P. Bradley, for defendant-appellant.

STEELMAN, Judge.

Defendant has not demonstrated that the trial court's alleged error of failing to instruct the jury on a lesser included offense resulted in plain error, thus we hold defendant received a fair trial, free from error.

The State presented evidence that tended to show that on 30 December 2004, defendant and the prosecuting witness (hereinafter "victim") were cohabitating together. On that date defendant accused victim of infidelity. The next day defendant beat victim, inflicting bruises all over her body and face. Victim testified that defendant told her that if "[she] left, or told anybody, that

he would find [her] and hurt [her]...that he'd kill [her], that he'd find [her], that there was no safe place for [her]...That he knew where [she'd] be, and he'd get [her]." During the course of the next thirty days, defendant assaulted her almost daily. Defendant seldom let her out of his sight, and defendant forced her to accompany him whenever he traveled away from their residence. She could not call for help because defendant retained possession of the only telephone, a cell phone. Defendant also threatened to kill members of her family. Her ordeal finally came to an end on 29 January 2005, when she escaped from defendant at his mother's residence while he was in another room. She ran to a neighbor's house and dialed 911 for assistance. She talked to a sheriff's deputy who came to the neighbor's residence. Her father arrived and transported her to a hospital emergency room. A physician who examined victim on 29 January 2005, testified that victim had "several different bruises in various stages and ages" and that she had a recent fracture of a finger. Victim testified that on 13 January 2005, defendant threw her to the floor and she broke a finger.

Defendant's mother testified that she saw victim on 14 January 2005, and that she did not observe any injuries to victim's person. She also testified, and victim agreed, that victim attended church with her one Sunday morning during this time frame while defendant remained at a friend's house. Defendant's mother also disputed victim's assertion that defendant shot holes in the floor of their residence. Defendant's mother testified that she cleaned

defendant's residence subsequent to his arrest and that she could not find any bullet holes in the floor.

A jury found defendant guilty of one count of second degree kidnapping, three counts of assault with a deadly weapon, two counts of communicating threats, one count of assault on a female, and one count of assault by pointing a gun. Defendant appeals.

In his sole assignment of error, defendant contends that the trial court committed plain error by failing to instruct the jury as to false imprisonment, a lesser included offense of first degree kidnapping. We disagree.

At the jury instruction conference, the trial court inquired of defendant's counsel as to whether he desired an instruction as to any lesser offense. Counsel responded in the negative.

When a defendant has failed to preserve his right to appellate review of a jury instruction issue, he may contend that the alleged error amounted to "plain error." See N.C. R. App. P. 10(c)(4) (2006). Plain error only applies in exceptional cases. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Under plain error, this Court must examine the whole record to determine whether any instructional error had any probable impact on the jury's finding of guilt. *Odom*, at 661, 300 S.E.2d at 379.

In the instant case, we are not persuaded that the jury probably would have reached a different verdict had the instruction been given in the case at bar. "The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another

person. If the purpose of the restraint was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. However, if the unlawful restraint occurs without any of the purposes specified in the statute, the offense is false imprisonment." *State v. Claypoole*, 118 N.C. App. 714, 717-18, 457 S.E.2d 322, 324 (1995). The indictment at hand charged defendant with kidnapping the victim for the purpose of terrorizing her. The evidence is overwhelming that the restraint or confinement, if any, was for that purpose.

Upon the record as a whole, we are not persuaded that the trial court's failure to instruct the jury on a lesser included offense would have had a probable impact on the jury's finding of guilt. See *Odom*, at 661, 300 S.E.2d at 379.

Defendant has failed to argue his remaining assignments of error in his brief and they are deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

NO ERROR.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).