NO. COA08-1499

NORTH CAROLINA COURT OF APPEALS

Filed: 17 November 2009

STATE OF NORTH CAROLINA

v.	Harnett County Nos. 07 CRS 6929 07 CRS 6930 07 CRS 50864
ROBERT DONNELL JOHNSON, JR., Defendant.	

Appeal by defendant from judgments entered 27 August 2008 by Judge Gregory A. Weeks in Harnett County Superior Court. Heard in the Court of Appeals 20 May 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

GEER, Judge.

Defendant Robert Donnell Johnson, Jr. appeals his convictions of attempted first degree rape, first degree kidnapping, and having attained violent habitual felon status. Defendant primarily contends that the trial court erred in denying his motion to dismiss the attempted rape and kidnapping charges for insufficient evidence, arguing that the State did not present evidence that he (1) intended to rape the alleged victim or (2) engaged in any restraint or removal of the victim that was separate from the restraint inherent in any attempted rape. We hold that when the

evidence is viewed in the light most favorable to the State, as our standard of review requires, a reasonable jury could find the necessary intent and restraint from the evidence that defendant forced the victim from her office into an adjoining bathroom, tried to lock the door to bar anyone from entering, straddled the victim, and struggled with her while pulling at her blouse, belt, and pants. The trial court, therefore, properly denied defendant's motion to dismiss.

Facts

The State's evidence tended to show the following facts. On 11 February 2007, "Ann" was working as a correctional officer at the Harnett County Correctional Institute.[1] On that particular day, Ann was assigned to work in the "L" dormitory, where she had an office that she regularly used. The office's door shut automatically and had a glass window so that the interior of the office could be viewed from the hall. There was a computer desk on the left-hand side of the office, a writing desk in the middle, and a locker on the right-hand side. Also, on the right, near the locker, there was a small adjoining bathroom. The bathroom was about five feet away from the writing desk.

Part of Ann's duties included talking with inmates about disputes and personal issues, including bereavement matters. Inmates who wanted to meet with Ann were required to notify the officer at the control desk, who would then call Ann to obtain

[1]The pseudonym "Ann" is used throughout the opinion to protect the prosecuting witness' privacy and for ease of reading.

permission to send the inmate to her office. Occasionally, however, inmates would simply walk back to her office, knock on the door, and enter.

Defendant, an inmate at the facility, had started going to talk with Ann after his mother died. The frequency of defendant's visits to Ann's office increased to the point that defendant was coming to her office almost every day that she worked in the "L" dormitory. About a month before 11 February 2007, Ann asked defendant to stop coming to her office, but offered to refer defendant to a psychiatrist or chaplain. She also instructed the other officers not to let defendant come back to her office.

On 11 February 2007, the light was burned out in the bathroom, and Ann asked one of the officers to call maintenance to replace it. Ann then sat down at her desk and began doing paperwork. She looked up when she heard her office door slam and saw defendant — who had not knocked on the door — standing in the office. When she asked him what he wanted, defendant said he needed a clothes hanger. Ann looked in her desk, but could not find one. As she walked around the corner of her desk to look in her locker, defendant charged her and pushed her into the bathroom.

Ann fell to the floor, hitting her head, shoulders, and back against the toilet. Each time Ann tried to stand up, defendant pushed her back down to the floor. Defendant straddled her legs and fumbled with the door, trying to lock it behind him. Defendant repeatedly pulled at the top of Ann's blouse and at her pants and belt. Ann fought back, stopping defendant from getting his hands

inside her blouse or pants. Ann yelled for help and tried to use her pepper spray, but it wafted back down into her face.

Officers Norman Smith and William Lucas heard Ann yelling for help, rushed into the office, and saw defendant on his knees straddling Ann and trying to control her. Officers Smith and Lucas grabbed defendant and pulled him off of Ann. They handcuffed him and sat him in a chair. Ann, who was crying, yelled at defendant, "[Y]ou tried to rape me." She then said, "[A]s much as I tried to help you, you do this to me?" Ann was taken to the facility's nurse; she had a cut on her chest and an injured toe and finger. Ann later had to have surgery on her finger and was given a five percent disability rating. As of trial, she was taking several medications for her back pain arising out of the incident and was being treated by a psychiatrist.

Defendant was indicted for attempted first degree rape, first degree kidnapping, and being a violent habitual felon. The jury convicted defendant of both charges and found defendant to be a violent habitual felon. The trial court consolidated the convictions into one judgment and sentenced defendant to life imprisonment without parole. Defendant timely appealed to this Court.

I

Defendant first argues on appeal that the trial court erred in denying his motion to dismiss the charges of attempted first degree rape and first degree kidnapping. A defendant's motion to dismiss must be denied if there is substantial evidence: (1) of each

essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). An appellate court "reviews the denial of a motion to dismiss for insufficient evidence *de novo*." *State v. Robledo*, ___ N.C. App. ___, ___, 668 S.E.2d 91, 94 (2008).

The State must prove two essential elements to obtain a conviction for attempted rape: (1) "that defendant had the specific intent to rape the victim" and (2) "that defendant committed an act that goes beyond mere preparation, but falls short of the actual commission of the rape." *State v. Schultz*, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855 (1987), *aff'd per curiam*, 322 N.C. 467, 368 S.E.2d 386 (1988). On appeal, defendant only challenges the sufficiency of the evidence that defendant had the necessary specific intent.

The intent to commit attempted rape is established "'if the evidence shows that [the] defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part.'" *State v. Farmer*, 158 N.C. App. 699, 702, 582 S.E.2d 352, 354 (2003) (quoting *Shultz*, 88 N.C. App. at 200, 362 S.E.2d at 855-56). "Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *State v. Murdock*, 225 N.C. 224, 226, 34 S.E.2d 69, 70 (1945).

This Court has held that an "overt act manifesting a sexual purpose or motivation on the part of the defendant is adequate evidence of an intent to commit rape." *State v. Dunston*, 90 N.C. App. 622, 625, 369 S.E.2d 636, 638 (1988). Phrased differently, evidence that an attack was "sexually motivated will support a reasonable inference of an intent to engage in vaginal intercourse with the victim even though other inferences are also possible." *Id.* at 625-26, 369 S.E.2d at 638.

Here, the State's evidence tends to show that defendant pushed Ann into the bathroom in her office and tried to lock the door behind the two of them. With Ann lying on the floor, defendant straddled her while he tried to pull her blouse loose and jerked on her belt and pants. Ann testified that she had to fight to keep defendant from "get[ting] his hands inside [her] shirt or [her] pants[.]" Defendant used enough force in trying to keep Ann pinned on the floor and in struggling with her over her clothes to cut her

chest and seriously injure her finger. When the officers pulled defendant off of Ann, her clothes were in disarray. We believe that a jury could reasonably infer from this evidence that the attack was sexually motivated and that defendant intended to rape Ann. *See State v. Mangum*, 158 N.C. App. 187, 193-94, 580 S.E.2d 750, 755 (finding sufficient evidence of intent to commit rape when defendant forced his way into victim's home at 4:00 a.m., pushed victim into bedroom, and pinned her on bed with his body; defendant removed duct tape from his pocket and threatened to tape her mouth; victim yelled to sister that defendant was trying to rape her; and defendant grabbed victim's breast and between her legs during struggle that continued until police arrived), *disc. review denied*, 357 N.C. 510, 588 S.E.2d 378 (2003); *Dunston*, 90 N.C. App. at 626, 369 S.E.2d at 638 (finding sufficient evidence of intent to commit rape when defendant "play[ed] with his pants zipper prior to the attack" and "during the attack he fumbled with the victim's shorts and then began rubbing her crotch"); *Schultz*, 88 N.C. App. at 201, 362 S.E.2d at 856 (holding evidence was sufficient to prove intent to commit rape where defendant dragged victim down hall toward bedroom, put his hand over her shoulder and down the front of her shirt, and grabbed her breasts).

In arguing that there is insufficient evidence of intent, defendant points to three decisions in which this Court found insufficient evidence of an intent to rape the victim: *State v. Brayboy*, 105 N.C. App. 370, 413 S.E.2d 590, *disc. review denied*, 332 N.C. 149, 419 S.E.2d 578 (1992), *State v. Nicholson*, 99 N.C.

App. 143, 392 S.E.2d 748 (1990), and *State v. Rushing*, 61 N.C. App. 62, 300 S.E.2d 445, *aff'd per curiam*, 308 N.C. 804, 303 S.E.2d 822 (1983). In each of these cases, however, the evidence showed only that the defendant was restraining the victim without engaging in any conduct that suggested a sexual intent. *See Brayboy*, 105 N.C. App. at 374, 413 S.E.2d at 593 (although defendant pinned victim to ground, straddling her, after her boyfriend had been killed, he did not attempt to touch her in any sexual manner); *Nicholson*, 99 N.C. App. at 144, 392 S.E.2d at 749-50 (defendant obtained entrance to victim's home by false pretense, threatened to kill victim with pistol, carried her across living room, dropped victim when she screamed, pinned her to the floor with his body, and allowed victim to escape after defendant started crying); *Rushing*, 61 N.C. App. at 62-63, 300 S.E.2d at 447 (defendant broke into house through window in bedroom where victim was sleeping, threatened to shoot victim if she screamed, ordered victim not to move, and put his hand over victim's mouth when she started screaming).

In contrast to *Brayboy*, *Nicholson*, and *Rushing*, the State presented evidence that went beyond just evidence of an attempt to restrain Ann and was sufficient to allow a jury to conclude that defendant had a sexual motivation. He entered Ann's office with no other apparent purpose, forced Ann onto the bathroom floor, and tried to lock the door behind them. His actions, after that point, could be viewed as an attempt to undo her pants and her blouse and as an effort — resisted by Ann — to get his hands inside her clothes. This evidence, missing in *Brayboy*, *Nicholson*, and

Rushing, supports a reasonable inference that defendant acted with the specific intent to rape Ann, notwithstanding Ann's resistence. The trial court, therefore, properly denied defendant's motion to dismiss the attempted rape charge.

Defendant also challenges the sufficiency of the evidence to support his first degree kidnapping conviction. The elements of first degree kidnapping are: "(1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person's consent; (4) if such act was for the purposes of facilitating the commission of a felony." *State v. Oxendine*, 150 N.C. App. 670, 675, 564 S.E.2d 561, 565 (2002), *disc. review denied*, 356 N.C. 689, 578 S.E.2d 325 (2003); N.C. Gen. Stat. § 14-39(a) (2007). "Kidnapping is of the first-degree when 'the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]'" *State v. Ly*, 189 N.C. App. 422, 428, 658 S.E.2d 300, 305 (quoting N.C. Gen. Stat. § 14-39(b)), *disc. review denied*, 362 N.C. 512, 668 S.E.2d 567 (2008).

Here, defendant contends that the evidence was insufficient to establish the first and fourth elements of kidnapping. Defendant acknowledges not only that the evidence was sufficient for the second and third elements, but also that Ann was seriously injured, as required for first degree kidnapping.

With respect to the fourth element, defendant reiterates his arguments regarding the attempted rape charge and contends that the evidence is insufficient to show that "at the time of the removal

into the bathroom [defendant's] purpose was to facilitate rape . . . ." We have, however, already held that the evidence, when viewed in the light most favorable to the State, was sufficient to permit a reasonable jury to find that defendant was acting with an intent to rape Ann.

As for the first element of the crime of kidnapping, defendant argues that there was no evidence that he confined, restrained, and removed the victim beyond that restraint inherent in the crime of attempted 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). Defendant maintains that "the removal shown by th[e] evidence is purely incidental to the force inherent in the assaultive conduct" in the bathroom.

This Court has explained, however:

> In determining whether the restraint is sufficient for a kidnapping charge: The court may consider whether the defendant's acts place the victim in greater danger than is inherent in the other offense, or subject the victim to the kind of danger and abuse that

> the kidnapping statute was designed to prevent. The court also considers whether defendant's acts cause additional restraint of the victim or increase the victim's helplessness and vulnerability.

State v. Simpson, 187 N.C. App. 424, 432, 653 S.E.2d 249, 254 (2007) (internal quotation marks omitted). Further, "[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).

Here, defendant could have committed a rape in the office, but instead removed Ann from her office into the bathroom. While the office had a glass window in the door and could be unlocked from the outside, the bathroom had no window through which defendant could be seen and could only be unlocked from the inside. This evidence permits the conclusion both that (1) defendant removed Ann to a more secluded location — the bathroom — to prevent others from witnessing or hindering the rape, and (2) this removal to the bathroom increased Ann's helplessness and vulnerability in that she could not as readily be rescued or escape from defendant.

As a result, the evidence is sufficient to support the kidnapping conviction as well as the attempted rape conviction. *See, e.g., Mangum*, 158 N.C. App. at 195, 580 S.E.2d at 756 ("[T]he evidence tended to show that defendant pushed the victim down the hallway of her residence, away from her sister's bedroom, into her

bedroom and 'pinned her' on her bed. We conclude that defendant's actions constitute evidence that he took the victim to a more secluded area to prevent others from witnessing or hindering the rape." (internal quotation marks omitted)); *Oxendine*, 150 N.C. App. at 676, 564 S.E.2d at 565 ("Defendant's act of forcing [the victim] to the bedroom at knifepoint in order to prevent her children from either witnessing or hindering the intended rape constituted a separate act and properly supports the charge of first or second-degree kidnapping."); *State v. Hill*, 116 N.C. App. 573, 583, 449 S.E.2d 573, 579 (holding that evidence of separate restraint was sufficient when defendant could have committed rape in front of store, but, before committing rape, defendant threatened victim with gun to force her to store restroom and tied her hands with telephone cable), *disc. review denied*, 338 N.C. 670, 453 S.E.2d 183 (1994). The trial court, therefore, properly denied the motion to dismiss the kidnapping charge.

II

Defendant next argues that the trial court erred in excluding evidence defendant sought to offer in his defense to show that he had a personal relationship with Ann and that the jury should, therefore, infer that the incident giving rise to the charges was consensual. The trial court allowed defendant to conduct a *voir dire* examination of Joseph Hall, the administrator at the Harnett County correctional facility, and Officer David Linthicum, who often worked with Ann in the "L" dormitory. Defendant contends that the trial court erred in excluding the testimony of Mr. Hall

and that the trial court's ruling as to Officer Linthicum improperly required defendant to choose between his constitutional right to remain silent and his constitutional right to present a defense.

During the *voir dire* examination, Mr. Hall testified that subsequent to the 11 February 2007 incident involving defendant and Ann, Captain Johnny Meeks told him that defendant had come to Captain Meeks after the incident claiming "some type of undue familiarity relationship" with Ann. Mr. Hall relayed the reported allegations to his superior, who ordered him to conduct an internal investigation. Mr. Hall explained that the internal investigation was unrelated to the criminal investigation into the 11 February 2007 incident and had still not been completed. Mr. Hall did not himself ever speak with defendant about his allegations.

Following this *voir dire*, the trial court found that any testimony regarding the ongoing investigation had "minimal probative value, if any," and it excluded the testimony under Rule 403 of the Rules of Evidence as being substantially outweighed by the danger of unfair prejudice, misleading the jury, and confusing the issues. Defendant claims that Mr. Hall's testimony was relevant to "the question of the character of the relationship between [defendant] and [Ann]" and probative of whether "[defendant's] presence and conduct in [Ann]'s office was unbidden." According to defendant, this probative value was not outweighed by any prejudice and, therefore, should not have been excluded pursuant to Rule 403.

Under Rule 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. 403. "Whether to exclude relevant evidence pursuant to Rule 403 is a decision within the trial court's discretion and will remain undisturbed on appeal absent a showing that an abuse of discretion occurred." *State v. Ward*, 354 N.C. 231, 264, 555 S.E.2d 251, 272 (2001).

We agree with the trial court that the probative value of Mr. Hall's testimony was minimal. Critically, Mr. Hall had no personal knowledge of defendant's allegations, he had never spoken with defendant about the allegations, and the internal investigation into whether there was any "validity of fact" to defendant's allegations was still pending at the time of trial. Mr. Hall would simply have been testifying to Captain Meeks' report of defendant's as yet unresolved allegations. While defendant argues that he "had a right to present evidence tending to show his version of the facts in his defense," Mr. Hall's testimony would not have tended to show a personal relationship between defendant and Ann, but rather would only have shown that defendant contended such a relationship existed. Setting aside the double hearsay concern, the trial court was entitled to view with skepticism the probative value of this testimony.

As for the unfair prejudice, given the fact that the internal investigation had not been completed, this testimony would have

done nothing more than allow defendant to place his allegations before the jury without subjecting those allegations to cross-examination by the State. The trial court could reasonably determine that allowing defendant to proceed in this manner — placing defendant's bare allegations before the jury without defendant's having to testify — amounted to unfair prejudice. The trial court, therefore, did not abuse its discretion in precluding Mr. Hall's testimony.

Turning to Officer Linthicum, he testified during the *voir dire* examination that every time Ann was assigned to work in the "L" dormitory, defendant would go back to her office and talk with her. Officer Linthicum, however, also saw other inmates with Ann about as often. In addition, Officer Linthicum testified that on one occasion he was walking past Ann's office and saw her typing at her computer, "paying no attention" to defendant who was also in the office. When Officer Linthicum noticed that defendant's zipper was down, he snapped his fingers and pointed, and defendant zipped up his pants. He testified that Ann was working on the computer and "didn't even know what was going on." On a second occasion, Officer Linthicum saw defendant leaving Ann's office, and defendant told him that she had "kicked [him] to the curb."

After hearing the *voir dire* testimony of Officer Linthicum, the trial court stated: "With regard to any testimony by Mr. Linthicum or the defendant, *I'm not ruling on that*. You're entitled to have your client put his contentions before the jury, and you're entitled to call Mr. Linthicum if you think that his

testimony either corroborates or supports your client's testimony." (Emphasis added.) Defendant contends that the trial court's ruling created a constitutional "Hobson's choice." According to his brief on appeal, defendant could either "[r]emain silent and forego presentation of Mr. Linthicum's testimony in his defense or forego his right to remain silent and exercise his right to present Mr. Linthicum's testimony in his defense."

The only part of Officer Linthicum's testimony that suggested a prior consensual relationship — defendant's intended defense — was the testimony that defendant told Officer Linthicum that Ann had "kicked [him] to the curb." Defendant does not, however, explain how that testimony would be admissible in the absence of testimony by defendant.

Defendant's statement to Officer Linthicum is an out-of-court statement by defendant offered to prove the truth of the matter asserted: that he had been "kicked . . . to the curb," thus suggesting defendant and Ann had been in a relationship. As such, the statement constitutes hearsay under N.C.R. Evid. 801(c). The trial court's ruling acknowledged that this testimony would possibly be admissible to corroborate testimony by defendant, but defendant has not shown that it would be admissible in the absence of defendant's testifying. *See State v. Roache*, 358 N.C. 243, 295, 595 S.E.2d 381, 414-15 (2004) (holding that defendant's out-of-court statements to two witnesses were inadmissible hearsay and could not be admitted under the corroboration rule to support a defense when defendant did not testify); *State v. Lee*, 348 N.C.

474, 484, 501 S.E.2d 334, 341 (1998) ("To be admissible, the prior consistent statement must first, however, corroborate the testimony of the witness.").

Officer Linthicum's remaining testimony did not, without other evidence, suggest that Ann and defendant were engaged in a consensual relationship. Officer Linthicum's testimony at most established that Ann met with defendant the same amount of time as various other inmates and that on one occasion, defendant had his fly open in Ann's presence, although she was unaware of that fact.

The Supreme Court has observed that "[l]ike all evidence offered at trial . . . evidence offered to support a defense must be relevant to be admissible." *State v. Fair*, 354 N.C. 131, 150, 557 S.E.2d 500, 515 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002). Evidence is relevant if it has "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.

We cannot say that the non-hearsay portion of Officer Linthicum's testimony, standing alone, made it more probable that defendant was engaging in a consensual relationship with Ann prior to the charged incident. His testimony may have been relevant had defendant testified, and, therefore, we hold that the trial court properly concluded that it could not rule on the admissibility of Officer Linthicum's testimony in the abstract.

No Error.

Judges ROBERT C. HUNTER and STEELMAN concur.

Report per Rule 30(e).