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NO. COA09-1641

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v.

Edgecombe County
No. 08 CRS 54095

TYRELL MAURICE DRAUGHN

Appeal by defendant from judgments entered 7 July 2009 by Judge Walter H. Godwin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 19 July 2010.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Elder, for the State.

Winifred H. Dillon for defendant-appellant.

BRYANT, Judge.

Tyrell Maurice Draughn ("defendant") appeals from judgment entered upon convictions for second-degree kidnapping, assault on a female, and assault by pointing a gun. We find no error.

The State's evidence tended to show that defendant and Natea Tapper were dating in 2008. On the evening of 2 November 2008, Ms. Tapper called defendant and informed him that she was cheating on him. Defendant became angry and wanted to see Ms. Tapper in person to talk to her. Defendant arrived at Ms. Tapper's house around nine o'clock at night, having been driven there by Maranda Battle. Ms. Tapper met defendant outside because she did not want her

mother to know defendant was there, and they walked around the side of the house. Defendant grabbed Ms. Tapper and pushed her up against the wall, pulled out a silver handgun, pointed the gun at Ms. Tapper's face, and told her he was going to kill her for cheating on him. He then pointed it at her back and they went behind the house. Defendant pushed her down, pulled her hair, slapped her, and put the gun in her mouth and told her to taste it. He told Ms. Tapper to call the person with whom she was cheating. She made the phone call, but she was breathing hard and didn't say anything. The other person asked what was wrong, and then hung up.

Defendant led Ms. Tapper back to Ms. Battle's car, they got in, and defendant instructed Ms. Battle to drive to a lake. Ms. Tapper stated she was crying in the back seat, but she was too scared to try anything, although she did not see the gun while they were in the car. When they got to the lake, defendant made her get out of the car, and as they walked away from the car, he pointed the gun at her back. They went down a path where they couldn't see the car anymore.

Defendant began hitting Ms. Tapper and threatening to kill her. He told her he could do it because no one would find her there, and he pointed the gun in her face. Ms. Tapper ran away from defendant and into the lake, where she waded in up to her neck. From the shore, defendant yelled at her to come back and told her he wouldn't do anything to her. Ms. Tapper stated she did not know what to do, so she got out of the water and returned to

defendant. He grabbed her coat and hit her again. He pointed the gun at her and they walked back toward the car.

When they got in sight of the car, defendant told Ms. Tapper to stop and take her shirt off, which she did. Defendant gave her his T-shirt to put on since she was wet and cold. They got back in the car and defendant instructed Ms. Tapper to call someone to get some pants she could wear. Defendant directed Ms. Battle to drive to the house of a friend of Ms. Tapper's, and the friend came outside with jogging pants which she handed to defendant through the car window. Ms. Tapper put the pants on in the back seat of the car, and then they drove back to Ms. Tapper's house. Defendant told Ms. Tapper to get out of the car. He told her to tell her mother that she had been "jumped" by some girls to explain the appearance of her face. Ms. Tapper went into her house and told her mother everything that had happened.

Ms. Tapper's mother called the police, and Ms. Tapper gave a statement of what happened. While the police were present, defendant called Ms. Tapper on her cell phone. Officer Ricky Mann testified that Ms. Tapper turned on the speaker so the officers could hear the call. Defendant was yelling and stated that he should have killed Ms. Tapper, and that he could have done so. Thereafter Officer Mann took Ms. Tapper to the hospital where she received pain medication for her injuries, which included bruises on both cheeks of her face, swollen eyes, and swollen and bleeding lips and nose. She also had scratches on her forehead and nose, and on her arms and legs.

Ms. Battle was interviewed as a potential suspect and her car examined by the police. She related the events of the evening, and stated that she had not seen defendant with a gun, nor had she witnessed an assault. No gun was ever recovered.

Defendant testified that he and Ms. Tapper had been bickering on the phone when he made arrangements with Ms. Battle to take him to Ms. Tapper's house on the night of 2 November 2008. When he got there, Ms. Tapper was waiting outside the house. He and Ms. Tapper walked around the house, and they were still bickering and he was calling her names. They walked back to the car, where defendant told Ms. Tapper to get in. He stated he did not have a gun, nor did he strike Ms. Tapper in any way up to that point. Ms. Battle then drove them to the lake. Defendant and Ms. Tapper walked around, still arguing, and defendant stated that he "physically assaulted Natea" by "slapping her with overhands." He said he hit her five or six times before she took off running and starting wading into the lake. He convinced her to get out of the water, gave her his shirt to wear, and they went back to Ms. Battle's car. He suggested Ms. Tapper call someone to get pants, they went to get the pants, and then they drove back to Ms. Tapper's house.

After deliberations, the jury convicted defendant of the offenses of second-degree kidnapping, assault on a female, and assault by pointing a gun. The trial court sentenced defendant to the following consecutive terms of imprisonment: (1) a minimum of 34 to a maximum of 50 months for the kidnapping offense; (2) 150

days for assault on a female; and (3) 150 days for assault by pointing a gun. From the judgments entered, defendant appeals.

Defendant raises two issues on appeal: (1) whether the trial court committed plain error by allowing the introduction of impermissible hearsay evidence; and (2) whether the trial court erred in denying defendant's request to instruct the jury on the lesser included offense of false imprisonment.

I

Defendant first contends the trial court erred by allowing Officer Mann to relate hearsay statements made to him by Maranda Battle when he questioned her about the events of 2 November 2008. Defendant points to the following testimony of Officer Mann:

A. Ms. Battle said that she went to Tyrell's house and Tyrell said that he would give her some gas money to take him to Ms. Tapper's house. And he did. He took her over there. She said Tyrell got out and approached her.

She did say they went around the vehicle or stayed in plain view. But she did say shortly, a couple of minutes later, they come back and they got into the vehicle and Tyrell told her to go to the pond and give [sic] her directions.

. . .

A. Speaking about line number 4 [of Ms. Battle's statement] says, got in the car. He was kind of upset. So she was shivering, but I think she was cold. Then he said let's go to the by-pass and go by the pond.

Officer Mann also related that Ms. Battle told him she stayed in the vehicle once they got to the pond, and that she did not see a gun that night, although she had known defendant to carry a gun in

the past. With regard to defendant's behavior that night, Officer Mann described Ms. Battle's version of events as follows:

A. When Tyrell got in the vehicle initially from when they were at the residence, Ms. Tapper's residence, and they got in the vehicle Ms. Battle stated that she could tell, her exact words were that Tyrell seemed pissed off.

And that his behavior became aggressive and demanding, trying to give her directions to the pond. And she could tell something was bothering him at that time and he was upset.

Defendant contends this hearsay evidence was inadmissible and should not have been used for corroborative or any other purpose, and that the trial court committed plain error by allowing it into evidence. We do not agree.

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2009).

Where a defendant has failed to object to the admission of evidence at trial, the matter is reviewed for plain error in the appellate courts. *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (2000). 'Plain error' is not simply obvious or apparent error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). To show plain error, defendant must demonstrate either "that a different result probably would have been reached but for the error," or "that the error was so fundamental as to result in

a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

At trial, defendant did not object to the statements he now challenges on appeal. Therefore, we review the matter for plain error. Ms. Battle's statements, as related by Officer Mann, were for the most part merely corroboration of testimony given not only by Ms. Tapper but also by defendant himself. Ms. Battle's statements confirmed that she drove defendant to Ms. Tapper's house, that they went to the lake, and that defendant seemed upset. Defendant testified that he and Ms. Tapper had been arguing and that he assaulted her at the lake. The only difference in Ms. Battle's statements from those of Ms. Tapper were that Ms. Battle stated she did not see defendant with a gun that night. This portion of the statement is admissible because it corroborates defendant's own statement that he did not have a gun that night. Moreover, in reviewing all the statements in the context of the totality of the evidence, we conclude that the admission of Officer Mann's testimony regarding Ms. Battle's observations does not constitute a fundamental error that resulted in depriving defendant of a fair trial. Nor has defendant demonstrated that but for the hearsay, a different result likely would have occurred. This argument is overruled.

II

By defendant's second argument, he contends the trial court erred by denying his request to instruct the jury on the lesser included offense of false imprisonment. "An instruction on a

lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant. *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994).

The offense of kidnapping is set forth in the North Carolina General Statutes as follows:

(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, or any other person under the age of 16 without the consent of a parent or legal custodian 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 or any other person;

. . .

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39 (2009).

With regard to the relationship between the offenses of kidnapping and false imprisonment, this Court has stated,

Our courts have long held that false imprisonment is a lesser-included offense of the crime of kidnapping. 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. Jacobs, 172 N.C. App. 220, 225, 616 S.E.2d 306, 310 (2005) (internal quotations and citations omitted).

Here, defendant was charged with kidnapping for purposes of terrorizing the victim. Terrorizing has been defined to mean causing a person to be in a "high degree of fear, a state of intense fright or apprehension." *Id.* (citation omitted). The dispositive issue is whether defendant intended to terrorize the victim, a determination which may be made by analyzing the circumstances surrounding the incident in question. *Id.* at 226, 616 S.E.2d at 311. Defendant contends that the evidence was conflicting regarding whether he had a gun on the night of 2 November 2008, thereby undermining the particular theory of kidnapping that defendant restrained the victim for the purpose of terrorizing her. We do not agree.

Evidence was presented that defendant pointed a gun at Ms. Tapper outside her house, put the gun in her mouth and told her to taste it, held her to the ground and hit her several times and told

her he would kill her for cheating on him. He then forced her to get in the car and they went to a lake. Defendant again pointed a gun at Ms. Tapper, made her walk toward the lake, and physically assaulted her, along with threatening to kill her. She attempted to get away by running into the lake up to her neck, and she stated that she was afraid the whole time.

After examining the evidence related above, we conclude that it sufficiently supports a finding that defendant intended to terrorize Ms. Tapper and that her restraint and removal was effected for that purpose. Since the evidence was sufficient to support each element of the crime of kidnapping, including the element that Ms. Tapper was restrained for the purpose of terrorizing her, the trial court did not err in refusing to instruct the jury on the lesser-included offense of false imprisonment.

No error.

Judges HUNTER, Robert C. and STEELMAN concur.

Report per Rule 30(e).