NO. COA09-1719

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Wake County
Nos. 07 CRS 41352-54

BILLY ANTHONY TRAPP

Appeal by Defendant from judgments entered 10 July 2009 by Judge Henry W. Hight, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Mark Montgomery for Defendant-Appellant.

McGEE, Judge.

Billy Anthony Trapp (Defendant) was convicted of first-degree kidnapping, robbery with a dangerous weapon, and attempted first-degree rape on 10 July 2009. The trial court determined Defendant's prior record level to be a level VI, and sentenced Defendant to consecutive prison sentences of 168 to 211 months, 146 to 185 months, and 313 to 385 months. Defendant appeals.

I. Factual Background

The State's evidence at trial tended to show that M.M., a nineteen-year-old woman at the time of trial, was walking through Edna Metz Wells Park (the park) in Raleigh about 6:00 a.m. on 8

June 2007. M.M. testified that, while walking through the park and listening to Romanian music on her CD player, she "thought [she] was lost[.]" She walked by a man she had never seen before and, as she passed the man, he "attacked [her] from the back" and put her in a "bear hug[.]" M.M. testified that she "shriek[ed] once" and tried to scream for help again, but the man covered her mouth. M.M. testified further that the man "kept beating [her] in the back of the head many times[,] pulling [her] hair," and "telling [her] to shut up or he [would] kill [her]." M.M. said that the man "mentioned that he want[ed] to have sex with [her]" and began to pull down her pants and put his knee between her legs. During the struggle, M.M. bit the man's finger and the man then bit M.M.'s arm.

M.M. also testified that her attacker "got [her] up" and tried to drag her across a bridge "in[to] a deeper place, more bushes and trees." Her attacker was "holding [her] by force . . . [holding her] neck and . . . [with a] very tight grip [was] pulling [her] along." During the struggle, the man held something to M.M.'s neck. The object "looked like a Juicy Fruit gum. . . . [with] yellow paper and the silver on the piece of a gum." M.M. was able to break free when the man reached a "hill that goes up kind of steep and somehow he released his grip and [M.M.] twisted around" and ran away from the park. At some point during the struggle, M.M. dropped her CD player.

Mike Beatty (Mr. Beatty) testified he was walking near the park with his two children on 8 June 2007. Mr. Beatty testified

that he saw a young woman, later identified as M.M., running away from the park and looking back over her shoulder. Mr. Beatty said M.M. seemed scared and had bruises, scratches and "some gouges taken out of her neck." He also testified that M.M. told him not to go down into the park. M.M. told Mr. Beatty someone had attacked her and asked him not to call the police because she feared her attacker would kill her. However, Mr. Beatty did call the police and waited with M.M. until the police arrived.

Officer Douglas Taylor (Officer Taylor) of the Raleigh Police Department testified that he responded to Mr. Beatty's call. He took a description of M.M.'s attacker and broadcast it to other officers. After receiving Officer Taylor's description of the suspect, Officer Haywood Alexander (Officer Alexander) found Defendant near the park later that morning. As Officer Alexander approached Defendant, Defendant put his hand into his pocket. Because of the "violent nature of the crime" that had been reported to have occurred, Officer Alexander drew his own weapon and ordered Defendant to remove his hand from his pocket, and Defendant complied. Officer Alexander then approached Defendant in order to interview him. As Officer Alexander did so, Defendant struck him, and a struggle ensued.

Defendant was taken into custody and was found to have in his possession a silver box cutter with a yellow handle and a CD player containing a disc of Romanian music. Defendant was driven back to the park for a show-up identification. M.M. identified Defendant as her attacker. M.M. was taken to a hospital for treatment of her

injuries, where a swab was taken from the bite wound on her arm. The wound contained DNA that matched Defendant's DNA.

Defendant testified at trial that he had previously sold drugs to M.M. and had once sold her drugs on credit. Defendant further testified that, on the morning of 8 June 2007, M.M. asked him for more drugs, but Defendant refused to provide any more drugs on credit. Defendant testified that M.M. grew angry and attacked him. The two struggled and, during the struggle, Defendant fell to the ground. Defendant grabbed M.M. but then panicked, and M.M. got up and left. Defendant testified that he was not attempting to rape M.M., nor kidnap her. Defendant also testified that, though he had possession of a box cutter, he did not wield it during the struggle. He said that M.M. dropped her CD player on the ground during the struggle and left it there when she walked away. Defendant testified that he picked up the CD player from the ground as payment for the drugs he had previously given M.M. on credit. Further facts will be introduced as required in the opinion.

II. Kidnapping - Restraint

Defendant argues that the trial court erred in: (1) denying Defendant's motion to dismiss the charge of first-degree kidnapping and (2) entering judgment for both kidnapping and attempted rape because there was no evidence of restraint separate from the restraint inherent in attempted rape. The State counters that there was evidence of two separate instances of restraint: first, when Defendant unsuccessfully attempted to rape M.M., then second, when he attempted to remove M.M. to a place farther into the park

to carry out the rape. Defendant responds that, because the jury instructions on kidnapping were limited to restraint, the jury could only consider restraint and not removal. Defendant argues that the only restraint that occurred was that which occurred during the alleged attempted rape.

We review *de novo* a trial court's ruling on a motion to dismiss to determine whether there was substantial evidence of each element of the crime charged, or of a lesser included offense, and of Defendant's being the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). The State is given the benefit of all reasonable inferences that can be drawn from the evidence. *Id.* at 378-79, 526 S.E.2d at 455. "However, 'a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury.'" *State v. Helton*, 79 N.C. App. 566, 568, 339 S.E.2d 814, 816 (1986) (citation omitted).

We first address Defendant's motion to dismiss. In the present case, Defendant was indicted for first-degree kidnapping in violation of N.C. Gen. Stat. § 14-39. The indictment stated that:

> [D]efendant . . . unlawfully, willfully, and feloniously did confine or restrain or remove from one place to another, M.M., without her consent for the purpose of facilitating the commission of a felony, or terrorizing her, and did not release the victim in a safe place.

"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).

Our Supreme Court has held that the restraint, removal, or asportation involved in a kidnapping must be a part of a separate and distinct transaction from the underlying felony in order to justify punishment for both offenses:

> Additionally, we hold a trial court, in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

State v. Ripley, 360 N.C. 333, 340, 626 S.E.2d 289, 293-94 (2006).

In this case, because Defendant was charged with attempted rape, we must review the evidence to determine if there was substantial evidence of a separate and distinct incident of restraint, removal, or asportation other than that which is inherently involved in an attempted rape. Our Courts have held that, in determining whether the restraint in a case merits an additional kidnapping charge, we must determine whether the victim is exposed to greater danger than that inherent in the underlying felony or whether the victim was subjected to the kind of danger

and abuse the kidnapping statute was designed to prevent. *State v. Newman and State v. Newman*, 308 N.C. 231, 302 S.E.2d 174 (1983). For example, our Supreme Court has held that the "removal of [a victim] from her automobile to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape." *Newman*, 308 N.C. at 239, 302 S.E.2d at 181. The Supreme Court found the removal in *Newman* distinct because it was "designed to remove [the victim] from the view of a passerby who might have hindered the commission of the crime." *Id.* Our Court has articulated this distinction as follows:

> Asportation 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) (citation omitted).

In the present case, the State contends first that there was sufficient evidence of two separate incidents of restraint: first, when Defendant grabbed M.M. and wrestled her to the ground; and second, when Defendant, unsuccessful so far in his attempt to have sex with M.M., stood up and began dragging her across the bridge and deeper into the park. Although Defendant argues that the jury could not consider this second incident of restraint because it was instructed solely on restraint and not on "removal" as a theory of guilt, in reviewing a motion to dismiss, we determine only whether there was substantial evidence of each element of the crime

charged. Viewing the evidence presented at trial in the light most favorable to the State, we find that there was substantial evidence of two separate instances of restraint, removal, or confinement sufficient to satisfy the elements of kidnapping in addition to attempted rape. We therefore find no error in the trial court's denial of Defendant's motion to dismiss.

We next address Defendant's arguments concerning the trial court's entry of judgment for first-degree kidnapping. The jury was instructed that it must determine whether Defendant "unlawfully restrained" M.M. Defendant contends that, because the jury instruction did not include the word "removal," the evidence of Defendant's attempt to drag M.M. farther into the park could not properly be considered in the jury's determination of whether Defendant restrained M.M. As stated above, "'a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury.'" *Helton*, 79 N.C. App. at 568, 339 S.E.2d at 816 (citation omitted).

The trial court's instruction to the jury on restraint was that the jury must find, "[f]irst, that the defendant unlawfully restrained a person. That is, restricted her freedom of movement." Our Court has stated that "'unlawful removal from one place to another must involve unlawful restraint, [hence,] in any kidnapping case the State may confine the charge against the defendant to kidnapping by unlawful restraint.'" *State v. Raynor*, 128 N.C. App. 244, 249, 495 S.E.2d 176, 179 (1998); *see also State v. Brown*, 180 N.C. App. 691, 639 S.E.2d 141, 2006 WL 3717771, *4 (2006)

(unpublished opinion) ("Additionally, because unlawful removal necessarily involves unlawful restraint, the State may rely upon evidence of removal even though it indicted only as to restraint."); *State v. Robinson*, 153 N.C. App. 813, 571 S.E.2d 88, 2002 WL 31461229, *4 (2002) (unpublished opinion)("Although this movement is necessarily a 'removal,' this fact does not forestall the possibility that the movement also had separate elements of restraint. We have consistently held that '[r]estraint may be accomplished . . . by force' or threat of force."). Thus, though Defendant's attempt to drag M.M. across the bridge might better be described a "removal," we hold that, under these facts, there was inherent in this action a "restraint" for the purposes of a charge of kidnapping. *Raynor*, 128 N.C. App. at 249, 495 S.E.2d at 179. Therefore, there was sufficient evidence to support the jury's verdict in light of the instruction on restraint. Thus, the trial court did not err by entering judgment on Defendant's conviction for kidnapping.

III. Kidnapping - Jury Instruction

Defendant argues that the trial court erred in its instruction on the elements of kidnapping. Specifically, Defendant contends that the trial court erred by instructing the jury that it must find that the restraint inherent in the kidnapping was separate from the underlying felony of rape rather than attempted rape. Defendant contends this was error because it required the jury to find that the restraint was separate from "a rape that was never charged and never occurred." We must review jury charges

contextually, and "'it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.'" *State v. Hall*, 187 N.C. App. 308, 316, 653 S.E.2d 200, 207 (2007)(citation and emphasis omitted).

The trial court gave the following instruction:

> Under count number one, the defendant has been charged with first degree kidnapping.
>
> For you to find the defendant guilty of first degree kidnapping, the State must prove five things beyond a reasonable doubt:
>
> First, that the defendant unlawfully restrained a person. That is, restricted her freedom of movement.
>
> Second, that the person did not consent to this restraint.
>
> Third, that the defendant restrained that person for the purpose of facilitating his commission of a felony. Rape is a felony. Rape is vaginal intercourse with another without that person's consent by force or threat of force.
>
> Fourth, that this restraint was a separate, complete act independent of and apart from the felony.
>
> And fifth, that the person was not released by the defendant in a safe place.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant unlawfully restrained [M.M.] and that she did not consent to this restraint, and that this was done for the purpose of facilitating the defendant's commission of rape, and that this restraint was a separate complete act independent of and apart from the rape, and that [M.M.] was not released by the defendant in a safe place, it would be your duty to return a verdict of guilty of first degree kidnapping.

The trial court then instructed the jury on common law robbery and attempted rape.

Viewing this instruction in context, and considering the trial court's subsequent instruction on attempted rape, we disagree with Defendant's contention that this instruction was confusing. Rather, the jury was instructed to consider whether the restraint occurred for the purposes of facilitating the commission of a rape, and not whether the rape itself actually occurred. We therefore find no error in the trial court's instruction on first-degree kidnapping.

IV. Larceny

Defendant next argues that the trial court erred by failing to instruct the jury on the lesser included offense of misdemeanor larceny with respect to his charge of robbery with a deadly weapon. Defendant contends that, viewing the evidence in the light most favorable to him, there was evidence that Defendant took M.M.'s CD player after she dropped it on the ground, and that Defendant did not take it from her person through the use of force. The State concedes that there was sufficient evidence to warrant an instruction on larceny as a lesser included offense, but argues that the trial court's error was harmless beyond a reasonable doubt. We disagree.

Due process requires a trial court to instruct the jury on a lesser-included offense when the evidence supports it. *State v. Bellamy*, 159 N.C. App. 143, 150, 582 S.E.2d 663, 668 (2003). A trial court is not required to submit a lesser included offense to

the jury when the State's evidence as to every element of the greater offense is positive, and there is no contradictory evidence presented. *Id.* "Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged." *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). A violation of a defendant's constitutional rights is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2009). The State bears the burden of proving that such error was harmless beyond a reasonable doubt. *Id.*

Defendant was charged with robbery with a dangerous weapon. The elements of robbery with a dangerous weapon are: "'(1) the unlawful taking or attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is engangered or threatened.'" *Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667 (citation omitted). "[T]he essential elements of larceny are: (1) taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property[.]" *State v. Cathey*, 162 N.C. App. 350, 353, 590 S.E.2d 408, 410 (2004). Larceny is a lesser included offense of robbery with a dangerous weapon. *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988).

At trial, Defendant testified that he took M.M.'s CD player after she dropped it on the ground. Defendant asserted that M.M.

sought to obtain free drugs from him and that she attacked him during their conversation. Defendant also testified that, though he was in possession of a box cutter, he did not use the weapon during the confrontation with M.M. Defendant testified that M.M. left, leaving her CD player on the ground. After she left, Defendant asserts that he took the CD player from the ground and kept it. Defendant argues that the foregoing evidence was sufficient to support an instruction on larceny as a lesser included offense. We find, and the State concedes, that this evidence would support an instruction on larceny. Thus, the trial court committed error by failing to provide an instruction on larceny as a lesser included offense of robbery with a dangerous weapon. *Whitaker*, 316 N.C. at 520, 342 S.E.2d at 518.

However, the State argues that the trial court's error in failing to instruct the jury on misdemeanor larceny was harmless beyond a reasonable doubt. In arguing that the trial court's failure to instruct was harmless beyond a reasonable doubt, the State merely re-asserts the evidence presented at trial. The State cites only to *Bellamy*, and argues that the "overwhelming evidence of [D]efendant's having committed robbery with a dangerous weapon" rendered the trial court's instruction error harmless. In *Bellamy*, our Court held that the trial court's refusal to instruct the jury on the lesser included offense of misdemeanor larceny in relation to a robbery with a dangerous weapon charge was harmless beyond a reasonable doubt. *Bellamy*, 159 N.C. App. at 150, 582 S.E.2d at 668. In so holding, we noted that the defendant did not deny

threatening the use of force during his escape from the store he allegedly robbed. *Id.*, 582 S.E.2d at 668-69. In contrast, in the present case, the State concedes that Defendant's version of the events contradicts each element of robbery with a dangerous weapon and warrants an instruction on larceny. We do not find that the State has satisfied its burden of proving that the trial court's refusal to instruct on larceny was harmless beyond a reasonable doubt. Defendant is therefore entitled to a new trial as to the charge of robbery with a dangerous weapon.

V. Assault On a Female

Defendant contends that the trial court erred by failing to instruct the jury on assault on a female as a lesser included offense of attempted rape. The State contends assault on a female is not a lesser included offense of attempted rape. We agree with the State but find, for the reasons discussed below, that the trial court erred by failing to instruct the jury as Defendant requested.

Our Supreme Court has recognized that assault on a female is not a lesser included offense of rape. *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) (concluding that "assault on a female is not a lesser included offense of rape, because assault on a female contains elements not present in the greater offense of rape."). Our Courts, however, have recognized that, pursuant to N.C. Gen. Stat. § 15-144.1, a short-form indictment is sufficient to support a charge of rape, attempted rape, or the lesser alternative charge of assault on a female.

Our Court addressed this issue recently in *State v. Thomas*,

196 N.C. App. 523, 676 S.E.2d 56 (2009), where the defendant was convicted of second-degree kidnapping and first-degree rape. *Thomas*, 196 N.C. App. at 524, 676 S.E.2d at 57. On appeal, the defendant argued that he was entitled to a jury instruction on assault on a female. *Id.* The defendant in *Thomas* did not dispute that vaginal sex had occurred, but argued that it was consensual. *Id.* at 528, 676 S.E.2d at 59. In arguing that the jury should have been instructed on assault on a female, the defendant contended that the jury could have believed that the sex was consensual, but found that any of the following separate actions taken by the defendant warranted a conviction for assault on a female: pointing a rifle at the victim, spraying mace in the victim's face, or dragging the victim back to the defendant's vehicle as the victim tried to escape. *Id.*

Our Court held in *Thomas* that the defendant was not entitled to an instruction on assault on a female because the conduct on which the State relied to prove rape was unrelated to the conduct on which the defendant relied to argue assault on a female. *Id.* at 533, 676 S.E.2d at 62. We recognized that "[t]he effect of N.C. Gen. Stat. § 15-144.1 is that, even if the conduct that is the subject of the indictment is not sufficient to constitute rape, the State may still obtain a conviction, with respect to that conduct, for assault on a female." *Id.* at 527, 676 S.E.2d at 59. However, we concluded that the conduct that was the subject of the indictment, i.e. the act of vaginal intercourse, would not support a conviction for assault on a female because the action was either

rape, as the State contended, or consensual intercourse, as the defendant contended. *Id.* at 532-33, 676 S.E.2d at 62. In *Thomas*, because the conduct the defendant relied on in his argument concerning assault on a female was separate from that which was addressed in his indictment for second-degree rape, we held the defendant was not entitled to a jury instruction on assault of a female. *Id.* We noted, however, that

> [a] defendant contending that no penetration occurred could, depending on the precise nature of the evidence, seek instructions on the lesser offenses of attempted rape or assault on a female. Under those circumstances, there would be evidence of 'lesser offenses embraced within the indictments' warranting submission to the jury of those offenses.

Id. at 532, 676 S.E.2d at 62 (citation omitted).

Thus, though assault on a female is not a lesser included offense of rape, a defendant who is indicted under a short-form indictment pursuant to N.C.G.S. § 15-144.1 is entitled to a jury instruction for assault on a female provided the evidence supports such an instruction. In the case before us, Defendant contends the fight between himself and M.M. was completely unrelated to sex. Defendant testified that he and M.M. were engaged in a physical altercation arising from M.M.'s confronting Defendant about drugs. Given that there was evidence presented at trial that Defendant, a male, engaged in a physical fight with M.M., a female, and that the confrontation was not carried out in the furtherance of a rape or attempted rape, there was sufficient evidence to warrant an instruction on assault on a female as supported by the short-form

indictment. Thus, the trial court committed prejudicial error by failing to instruct the jury on assault on a female and Defendant is entitled to a new trial as to the charge of second-degree rape.

VI. Conclusion

The trial court did not err in denying Defendant's motion to dismiss the charge of first-degree kidnapping. Likewise, the trial court did not err in instructing the jury regarding the elements of kidnapping. Thus, we find no error as to Defendant's kidnapping conviction. However, the trial court did commit prejudicial error with respect to Defendant's conviction for robbery with a dangerous weapon by failing to instruct the jury on the lesser included offense of larceny. Likewise, the trial court erred with respect to Defendant's conviction for attempted rape by failing to provide an instruction for assault on a female, which was supported by both the indictment and the evidence. Therefore, Defendant is entitled to a new trial for the charges of robbery with a dangerous weapon and attempted first-degree rape.

No error in 07 CRS 41352; new trial in 07 CRS 41353 and 07 CRS 41354.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).