NO. COA13-206
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v. Craven County
Nos. 09 CRS 2984-86, 54179, 54180, 54182; 12 CRS 104

BRIAN EVIN GARRETT,
Defendant.

Appeal by defendant from judgments entered 22 August 2012 by Judge Paul L. Jones in Craven County Superior Court. Heard in the Court of Appeals 26 August 2013.

Roy Cooper, Attorney General, by Thomas O. Lawton III, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Paul M. Green, Assistant Appellate Defender, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Brian Evin Garrett appeals from judgments entered upon jury verdicts finding him guilty of attempted first-degree murder, first-degree rape, first-degree kidnapping, robbery with a dangerous weapon, felonious breaking and entering, and two counts of first-degree sexual offense. After arresting judgment

on the first-degree kidnapping charge, the trial court sentenced defendant for second-degree kidnapping. In all, defendant was sentenced to a minimum of 989 to a maximum of 1,233 months imprisonment. We find no error in defendant's trial but remand to correct a clerical error with regard to defendant's conviction for felonious breaking and entering.

The State's evidence at trial tended to show the following: at about 9:00 or 9:30 a.m. on 27 August 2009, Jane Roe[1] was home alone in her Wind Hill Apartment while her husband was at work when she was awakened by her cat jumping off the bed and growling. Ms. Roe stood up and walked toward the cat and saw a man later determined to be defendant standing in her kitchen. She yelled at defendant and told him to leave. Defendant responded that her husband had been cheating on her and sleeping with his wife and he had pictures to prove it. Defendant kept Ms. Roe engaged in conversation in the living room for about five minutes. Defendant claimed he had seen Ms. Roe's husband's car, but when she asked him what color and make the car was, defendant pulled out a "big butcher knife" with a black handle and said that if Ms. Roe "[does] what he says that he would not have to hurt [her]."

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[1] We have used a pseudonym to protect the victim's identity.

Defendant then started "backing" Ms. Roe down the hallway to her bedroom. Ms. Roe testified that it was dark in her bedroom at the time. He ordered Ms. Roe to remove her clothes and he performed oral sex on her; he then forced her to perform oral sex on him. Defendant asked Ms. Roe if she and her husband used condoms. After Ms. Roe replied that they did and told him that they were in the nightstand next to the bed, he walked her at knifepoint around the bed to the night stand to retrieve them. Defendant then forced Ms. Roe to have sexual intercourse with him.

Defendant got dressed and asked Ms. Roe, still at knifepoint, about her wedding rings and other jewelry. She brought over her jewelry box and defendant looked through it. He then stabbed Ms. Roe in the chest with enough force to knock her onto the bed. Defendant told her to say "God Our Father" and stated that whether or not she died was "up to God." Defendant told Ms. Roe that he needed to make sure she was dead because "he did not want to go back to prison," and grabbed a belt to loop around her neck. After Ms. Roe resisted defendant's attempt to strangle her, he picked up the knife again and tried to slit her throat. In the process defendant cut her wrists, but was unable to slit her throat because the

knife was dull. He then told her to lay on her stomach "so all the blood would drain out," but she told him she could not do that.

Defendant continued to search through Ms. Roe's apartment, taking items such as a camcorder, jewelry, rolls of change, a cell phone, and prescription medication. He wiped down various objects and surfaces, including doors, door handles, and jewelry boxes. Eventually defendant left the apartment after being there for approximately an hour to an hour and a half.

Ms. Roe waited approximately fifteen to twenty minutes and then wrapped herself in a blanket and went downstairs where she found a neighbor, who called EMS. Ms. Roe was initially treated at a hospital in Craven County but was later flown to the East Carolina University Vidant Medical Center in Pitt County. She spent a total of seven days in the hospital with serious injuries, including the stab wound to her chest which missed her heart by only "a centimeter."

The New Bern Police Department investigated but found no identifiable prints or DNA evidence. They initially issued a press release describing the suspect, but included no details about the crime. Ms. Roe described the perpetrator as a black man about six feet tall, 190 pounds with a muscular build,

wearing a yellow shirt and jean shorts. She was unsure as to whether he had facial hair, but thought he may have had a small goatee; Ms. Roe was also unsure as to whether the man had tattoos, as it was dark in her bedroom where he had been undressed. At trial, Ms. Roe identified defendant in the courtroom and testified that she was "100 percent" certain he was the person who had assaulted her.

On 14 September 2009, Jennifer McGovern, defendant's then-girlfriend, told her father what defendant had done. At that point, she and her father went to the New Bern Police Department together, and Ms. McGovern gave a written statement. Ms. McGovern told police that in August 2009 she and defendant had been sharing a bedroom in his grandmother's residence, which was located close to Ms. Roe's apartment in Wind Hill Apartments. Ms. McGovern said she woke up on 27 August 2009 around 9:00 a.m. and noticed that defendant was not in bed. She woke up again later when he returned around 10:00 a.m. and noticed he was sweating, nervous, and had blood spots on his yellow Tommy Hilfiger shirt. Defendant told her that he broke into a Wind Hill apartment and stabbed a woman, telling the woman it was her fault because her husband had been sleeping with his wife. Defendant then produced items stolen from Ms. Roe's residence,

including a cell phone, rolls of change, and various pieces of jewelry. Defendant said he had also taken a camcorder, but threw it away when he could not carry it. While undressing, he pulled a knife with a black handle out of his shorts. Defendant then shaved his head and face completely bare except for his eyebrows. Meanwhile Ms. McGovern looked through the cell phone and saw pictures of a woman and a cat and contact information for Lowe's, where Ms. Roe was employed. Defendant and Ms. McGovern then drove to a bridge nearby and threw the cell phone and knife into the water. They disposed of defendant's bloodied clothes in a convenience store dumpster. Thereafter, they drove to "The Jewelry Store" where Ms. McGovern sold the jewelry for cash; she did not keep the receipt.

Although Ms. McGovern did not initially admit to her involvement in the disposal of the stolen items and other evidence, she corroborated many details of the crime including the time, stolen items, Ms. Roe's injuries, and defendant's statement to Ms. Roe that his action was in retaliation for her husband sleeping with his wife. She claimed that defendant told her she was the only person who knew about the crime and that if she told anyone, he would kill her and her family.

Defendant did not testify but offered evidence tending to show that he and Ms. McGovern had a volatile relationship and had a big fight on or about 2 September 2009. At that point Ms. McGovern moved back in with her parents and defendant moved in with his Aunt, Stephanie Gaskins. Defendant and Ms. McGovern had another fight over the phone on 14 September 2009 related to defendant's relationship with another woman named Sheila. Detective Carillo testified at trial that Ms. McGovern's father, who Ms. McGovern admitted did not like defendant, was allowed to sit in the room with Ms. McGovern while she wrote out her statement.

On appeal, defendant contends (I) the trial court abused its discretion by not declaring a mistrial, (II) the evidence was insufficient to support the kidnapping conviction, and (III) the trial court erred by entering a written judgment which imposed a more severe sentence than was rendered in open court.

I.

Defendant contends the trial court abused its discretion by refusing to declare a mistrial after the lead detective, Angela Cherry, testified in response to a question by defense counsel

on cross-examination, that defendant had committed multiple prior crimes:

> Q: Aside from interviewing the witness, and talking to Jennifer McGovern, what else did you do in this investigation?
>
> A: I started pulling up all the sexual assaults, breaking and entering reports, and all the larcenies that [defendant] had committed.

Defense counsel immediately objected and moved to strike the testimony. The trial court sustained the objection and instructed the jury to disregard the witness's response. Defendant moved for a mistrial outside the presence of the jury, but the court denied the motion.

"Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008); *see also* N.C. Gen. Stat. § 15A-1443(c) (2011).

Here, defendant's counsel asked Detective Cherry an open-ended question and received a responsive answer. Thus, defendant invited the error and is not entitled to a new trial. *See State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) ("Invited error is not ground for a new trial.").

Consequently, we find no error with the court's failure to declare a mistrial based on Detective Cherry's testimony.

II.

Defendant next contends the evidence at trial was insufficient to support his conviction for first-degree kidnapping. Defendant made a motion "for directed verdict" at the close of the State's evidence and again at the close of all the evidence. Because motions for directed verdict are essentially motions to dismiss, and "[t]his Court reviews the trial court's denial of a motion to dismiss *de novo*," *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007), we review the court's denial of defendant's motion "for directed verdict" *de novo*. *See State v. Russell*, 15 N.C. App. 277, 279, 189 S.E.2d 800, 802 (1972).

"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 . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of" "facilitating the commission of any felony . . . ." N.C. Gen. Stat. § 14-39(a)(2) (2011). "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 . . . ." N.C. Gen. Stat. § 14-39(b).

"[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." *State v. Ripley*, 360 N.C. 333, 340, 626 S.E.2d 289, 293–94 (2006) (internal quotations marks omitted). This Court has found that "[a]sportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetuated 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). A defendant is guilty of kidnapping, as opposed to simply a related felony, "if the defendant takes acts that cause additional restraint of the victim or increase the victim's helplessness and vulnerability." *State v. Smith*, 359 N.C. 199, 213, 607 S.E.2d 607, 618, *cert. denied*, 546 U.S. 850, 163 L. Ed. 2d 121 (2005).

In *State v. Blizzard*, 169 N.C. App. 285, 291, 610 S.E.2d 245, 250 (2005), this Court found that evidence that defendant

forcibly moved the victim from the front of the house at knifepoint to her bedroom was sufficient to meet the asportation requirement of the kidnapping charge. Although the defendant "could have continued the assault there," he "moved her under knife point away from the front door to the bedroom to engage in non-consensual sexual intercourse." *Id.*

Here, defendant could have raped and sexually assaulted Ms. Roe in the living room, but instead he pulled out a knife, backed her down the hallway, and raped her on her bed in the bedroom. Defendant increased Ms. Roe's feeling of helplessness by moving her into her dark bedroom. *See State v. Key*, 180 N.C. App. 286, 290, 636 S.E.2d 816, 820–21 (2006) (holding that the evidence was sufficient for kidnapping conviction when defendant removed the victim from the bedroom to kitchen to further restrain her by taping her eyes shut and then again to the living room to rape her), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 399 (2007). For these reasons, we find that defendant's action in backing Ms. Roe down the hallway prior to the rape was sufficient to meet the asportation requirement of the kidnapping charge, and that therefore, the trial court did not err in denying defendant's motion for directed verdict.

III.

Defendant also contends the trial court erred by entering written judgments which imposed a more severe sentence than was rendered in open court, thereby necessitating correction or resentencing. Specifically, defendant argues that the sentence for breaking and entering was erroneously entered as consecutive and that the sentences for kidnapping and armed robbery were improperly made consecutive to the sentence before them rather than with the initial sentence.

"[We review alleged sentencing errors for] whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (internal quotation marks omitted).

In open court, the trial court orally described the sentences as follows:

> [I]n this matter defendant having been found guilty by a jury of Class B2 felony of attempted first degree murder . . . Court sentences the defendant of [sic] active prison term 225 to 279 months for the Department of Corrections.
>
> For the charge of first degree rape . . . Court's [sic] sentences the defendant for a consecutive 300 to 369 months in Department of Corrections *consecutive to the first degree murder case*.
>
> First degree kidnapping, Court arrests judgment . . . [and] sentence [sic] the defendant to second degree kidnapping. . . .

> [A] *consecutive* 40 to 57 months in the Department of Corrections.
>
> For the two counts of first degree sex offense, B1 felony, Court consolidates the two first degree sex offense cases into one judgment of 300 to 365 months. *This is consecutive to the previous sentence*.
>
> [For the] Class D felony of armed robbery . . . . Court sentences the defendant to a *consecutive term* of 100 to 129 months in the Department of Corrections.
>
> For the breaking and entering . . . . Court sentences the defendant to a term of 10 to 12 months in the Department of Corrections.

The written judgments entered by the court, however, list each sentence as "begin[ning] at the expiration of" one of the other sentences, specified by the file number.

"When multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently." N.C. Gen. Stat. § 15A-1354(a) (2011). A judgment is "rendered" when announced in open court, but not "entered" until it is written, signed by the judge, and filed with the clerk. *See State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999).

The order in which the trial court pronounced the sentences, all of which were specified as "consecutive" except the last conviction for breaking and entering, was the same order indicated on the judgment forms, e.g., the form for the first-degree rape indicated the sentence should begin at the expiration of the sentence imposed in the case referenced below, the attempted first-degree murder charge. In pronouncing the sentence, the trial court read the sentence for attempted first-degree murder first, then first-degree rape next. They were not merely read in descending order of seriousness and class level. Thus, we believe that the trial court's oral designation labeling these sentences as consecutive and the order in which the sentences were read demonstrates an intent for each sentence to run consecutive to the one before it, as specified on the form. Accordingly, we find no error with these sentences.

However, with regard to the breaking and entering sentence, the court did not specify that the sentence should run consecutively when orally pronouncing it. By failing to do so when rendering it in open court, "the legal effect of the oral judgment was that the [sentence] would run concurrently." *Id.* at 67, 519 S.E.2d at 99. The written judgment specifying that the breaking and entering sentence was to be consecutive to the

robbery sentence would have improperly increased the overall sentence as it was rendered orally by ten to twelve months. Because "[t]his substantive change in the sentence could only be made in the [d]efendant's presence, where he and/or his attorney would have an opportunity to be heard," but it was done after the pronouncement of defendant's sentence in open court, we must remand for correction of the breaking and entering sentence to reflect that it will run concurrently with the other sentences. *See id.*

No error in defendant's trial; remand to correct clerical error in judgment, Case Number 12 CRS 000104.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).