NO. COA14-618
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. New Hanover County
No. 13 CRS 058149

WILLIAM PATTERSON

Appeal by defendant from judgments entered 9 April 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 10 November 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General M. A. Kelly Chambers, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

ELMORE, Judge.

A jury found defendant guilty of common law robbery and two counts of second degree kidnapping. The trial court imposed consecutive prison sentences of 25 to 39 months for the robbery and 50 to 72 months for each of the two kidnappings. Defendant gave notice of appeal in open court.

The evidence at trial showed that Donna Sue Jordan and Annetta Jenkins were employed at the Baymont Inn in August 2013. Jordan was approximately 55 years old and worked as the hotel's night auditor from 11:00 p.m. until 7:00 a.m. Jenkins, who was in her early 80's, worked in the breakfast area from 3:30 to 10:00 a.m.

On the morning of 9 August 2013, Jordan saw defendant at the door to the hotel. She had spoken to defendant four or five times during the preceding six months, including a 30-to-45-minute conversation during one of their initial meetings. Thereafter, when Jordan saw defendant at the hotel, "he would just ask [her] if he could have some washcloths."

After Jordan "buzzed him in" on 9 August 2013, defendant again asked her for washcloths. Suspecting that he was not staying at the hotel, Jordan "asked him what room he was in." Defendant seemed "irritated or angry" by the question but gave Jordan a room number. After verifying that the room was unoccupied, Jordan refused defendant's request. Defendant appeared to exit the hotel, and Jordan returned to her office.

Defendant instead proceeded to the hotel's breakfast area. Jenkins, believing defendant to be a hotel guest, invited him to eat. Jenkins assumed that defendant left the hotel after eating

but discovered him hiding behind a washing machine in the laundry room. Startled, she told defendant "he had to leave, he wasn't allowed back there." Jordan overheard this exchange and emerged from her office to find defendant walking behind Jenkins toward the hotel exit.

Defendant grabbed both women by the wrist and pushed them down, "trying to get [them] into the back office[.]" As Jordan and Jenkins "were screaming to let [them] go," defendant dragged them around the corner and into the office doorway. He continued "trying to pull [Jordan and Jenkins] into the office and trying to close the office door[,]" as they "were on top of each other trying to scramble to get out and get away." Defendant took Jenkins' cell phone when she tried to call 911. As the two women continued to struggle, "he asked, 'Do you want me to shoot you?'" Defendant also struck Jenkins on the side of her head. Jenkins got free of defendant's grasp, grabbed a can of bug spray, and sprayed him. When defendant "came back at [her] again," Jenkins sprayed him in the eyes, causing him to flee. Jordan ran to the front desk and called the police. Jordan estimated that the assault lasted for ten minutes. Jenkins, who described the incident as "so terrifying" and "scary," sustained bruising to her temple and face, pain and

soreness in her ribs, abrasions to her elbow and finger, and a broken sinus bone.

Defendant offered no evidence. The trial court denied his motion to dismiss the charges at the conclusion of the evidence.

On appeal, defendant claims the trial court committed plain error in failing to instruct the jury on false imprisonment as a lesser included offense of each charge of second degree kidnapping. *See, e.g.*, *State v. Surrett*, 109 N.C. App. 344, 350, 427 S.E.2d 124, 127 (1993) (False imprisonment is a lesser included offense of kidnapping.). In assigning plain error, defendant concedes he failed to request an instruction on the lesser included offense during the charge conference or object to the jury instructions as given. *See* N.C. R. App. P. 10(a)(2), (4).

Our Supreme Court has defined the plain error standard of review as follows:

> [A] defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. The

> necessary examination is whether there was a *probable* impact on the verdict, not a *possible* one. In other words, the inquiry is whether the defendant has shown that, absent the error, the jury probably would have returned a different verdict.

State v. Carter, 366 N.C. 496, 500, 739 S.E.2d 548, 551 (2013) (quotations and citations omitted) (alteration in original).

A "trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Petro*, 167 N.C. App. 749, 752, 606 S.E.2d 425, 427 (2005) (citation and quotation marks omitted). The mere prospect that "the jury could possibly believe some of the State's evidence but not all of it" does not warrant an instruction on a lesser included offense. *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). Rather,

> when the State seeks a conviction of only the greater offense and the case is tried on that all or nothing basis, the State's evidence is not regarded as evidence of the lesser included offense unless it is conflicting; and that the lesser included offense must be submitted only when a defendant presents evidence thereof or when the State's evidence is conflicting.

State v. Bullard, 97 N.C. App. 496, 498, 389 S.E.2d 123, 124 (1990).

Second degree kidnapping is defined, *inter alia*, 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, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony . . .; or
>
> (3) . . . [T]errorizing the person so confined, restrained or removed or any other person.
>
> . . .
>
> (b) . . . If the person kidnapped was released in a safe place . . ., the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39 (2013). "Kidnapping is a specific intent crime[.]" *Surrett*, 109 N.C. App. at 348, 427 S.E.2d at 126. Therefore, "[w]]hen an indictment for kidnapping alleges an intent to commit a particular felony, the state must prove the particular intent alleged." *State v. Whitaker*, 316 N.C. 515, 519, 342 S.E.2d 514, 517 (1986) (citations and quotation marks omitted). "Although an indictment may allege multiple purposes, the State need only prove one of the alleged purposes in order to sustain a conviction of kidnapping." *Surrett*, 109 N.C. App. at 348-49, 427 S.E.2d at 126.

"[W]hether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment depends upon whether the act was committed to accomplish one of the purposes enumerated in our kidnapping statute." *Whitaker*, 316 N.C. at 520-21, 342 S.E.2d at 518 (citations and quotation marks omitted). Defendant thus was entitled to an instruction on false imprisonment only if "'there was evidence from which the jury could have concluded that the defendant, although restraining . . . the victim, [did so] for some purpose other than'" to terrorize Jordan and Jenkins or to commit the felony of common law robbery, as alleged in the indictment and submitted to the jury. *State v. Pigott*, 331 N.C. 199, 211, 415 S.E.2d 555, 562 (1992) (quoting *Whitaker*, 316 N.C. at 520-21, 342 S.E.2d at 518). As used in N.C. Gen. Stat. § 14-39(a), "terrorizing" denotes "putting that person in some high degree of fear, a state of intense fright or apprehension." *Surrett*, 109 N.C. App. at 349, 427 S.E.2d at 127 (citation and quotation marks omitted). "Intent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury." *Whitaker*, 316 N.C. at 519, 342 S.E.2d at 518 (citations and quotation marks omitted).

In claiming error by the trial court, defendant relies on

our Supreme Court's ruling in *State v. Whitaker*. In *Whitaker*, however, the defendant made a statement during his restraint of the victim that was suggestive of an intent to engage in oral sex, rather than to rape her as alleged in the kidnapping indictment. *Id.* at 517, 342 S.E.2d at 518. In light of this evidence, the Court ruled that an instruction on false imprisonment was warranted. *Id.* at 522, 342 S.E.2d at 519.

Here, we find no evidence that defendant restrained his victims for a purpose other than to terrorize them or to commit the felony of common law robbery. Nor do we find conflicting evidence of defendant's purpose, or evidence that he committed his actions for no purpose. While not dispositive on the question of defendant's intent, we note that Jenkins' testified, "Oh I was terrified, yes. . . . I thought this was my last day on earth. Especially when he mentioned a gun." Accordingly, we hold the trial court did not err in failing to instruct the jury on the lesser included offense of false imprisonment.

No error.

Judges STEELMAN and DILLON concur.

Report per Rule 30(e).