IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-909

Filed: 21 August 2018

Watauga County, No. 16 CRS 50635

STATE OF NORTH CAROLINA

v.

DANIEL WOLFE

Appeal by defendant from judgment entered 24 February 2017 by Judge Marvin P. Pope, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 3 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant.

DAVIS, Judge.

Daniel Wolfe ("Defendant") appeals from his conviction for first-degree kidnapping with intent to terrorize. On appeal, he contends that the trial court erred by (1) denying his motion to dismiss; and (2) refusing to instruct the jury on the right of a private person to detain another person who has committed in his presence a crime involving theft pursuant to N.C. Gen. Stat. § 15A-404. After a thorough review

of the record and applicable law, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

I. State's Evidence

The State presented evidence at trial tending to establish the following facts: In 2014, Julien Wolfe ("Julien") and his mother, Kerry McCaffrey, gave Julien's used iPhone 4 to an individual named Tre Grubb. Julien and Grubb were close friends, and the phone was given as a gift after Julien upgraded to a new cell phone. Julien's father and McCaffrey's ex-husband, Daniel Wolfe ("Defendant"), had originally purchased the iPhone 4 for Julien and continued making service payments on the phone after Julien gave it to Grubb.

At approximately 8:00 p.m. on the evening of 2 May 2016, Grubb drove with his girlfriend Savanna Greene to McCaffrey's home in Boone, North Carolina. The pair went to McCaffrey's residence in order for Grubb to retrieve a snowboard that Julien had recently borrowed from him.

Upon arriving at the residence, Grubb spoke to McCaffrey, and she asked him to remain outside the house because she was recovering from pneumonia and did not want him to get sick. McCaffrey told Grubb that Julien was searching his bedroom for the snowboard. Greene remained in the car while Grubb and McCaffrey stood on

the porch talking for about thirty minutes as they waited for Julien to retrieve the snowboard.

At some point during their conversation, McCaffrey went inside the house. Shortly thereafter, a van pulled up to the residence, and Defendant got out of the passenger seat. Grubb recognized Defendant and greeted him. Defendant responded by pointing a silver handgun at Grubb and ordering him to enter the house. Grubb walked inside McCaffrey's home with Defendant's gun pressed against his back. Defendant led Grubb to McCaffrey's bedroom and pushed him onto the bed. McCaffrey was also present in the bedroom at this time.

After pushing Grubb onto the bed, Defendant accused him of having stolen $1,600 worth of marijuana from him. As he did so, Defendant pressed his gun to Grubb's chin and chest and told him "he would not hesitate to pull the trigger." Defendant then ordered Grubb to empty his pockets. Grubb complied and handed Defendant his wallet and the iPhone 4 that had been given to him by Julien and McCaffrey. Defendant stated that the iPhone 4 "was his cell phone and that he was gonna take it back" because "he'd been paying on it for two years." He also took $90 from Grubb's wallet, telling Grubb that "[s]omeone's gonna start paying the [$1,600]. You might as well start now."

At that point, Defendant and McCaffrey exited the bedroom and walked out of the house. Upon hearing the front door shut, Grubb followed the pair outside. He

saw McCaffrey approach his vehicle and shout at Greene, who had remained inside the car since Defendant's arrival. Greene then exited the vehicle, ran away from the premises, and hid behind a fence on a neighboring property.

After Greene ran away, Defendant approached Grubb with a Taser that he had retrieved from the van he had arrived in and "zapped it a couple of times to get [Grubb] to back up." Defendant then forced Grubb to place his hands behind his back and handcuffed Grubb's wrists. He ordered Grubb to remain on the porch while he went inside to get Julien.

Defendant entered the home and reemerged shortly thereafter, accompanied by Julien. They walked over to the van, and Julien got in the passenger seat. The van belonged to Rob Taylor, a friend of Defendant who had driven him to McCaffrey's home and had remained inside the van throughout Defendant's altercation with Grubb. Taylor was visiting from out of town and needed directional assistance from Julien to drive back to Defendant's home. Once Julien entered the vehicle, Taylor drove away.

Following Julien's departure with Taylor, Defendant and McCaffrey walked past Grubb — who remained handcuffed — and entered the house once more. Upon being left alone, Grubb managed to bring his cuffed hands under his legs so that his hands were cuffed in front of him rather than behind him. At that point, he ran from

McCaffrey's house to the same neighboring property where Greene had hidden herself.

Greene used her cell phone to call Grubb's grandmother, Kathy Earp, and asked her to come and pick them up. When she arrived about ten minutes later, Earp saw that Grubb was "crying and . . . was all to pieces." Earp began driving the couple to the Watauga County Sheriff's Office to make a report. On the way there, however, she noticed two Sheriff's Office vehicles in the parking lot of a local business and parked beside them. Grubb exited Earp's car and asked Sergeant Toby Ragan to remove the handcuffs from his wrists. He then recounted the events of that evening involving Defendant and himself.

On 3 October 2016, Defendant was indicted by a Watauga County grand jury for robbery with a dangerous weapon and first-degree kidnapping. A jury trial was held beginning on 21 February 2017 before the Honorable Marvin P. Pope, Jr. in Watauga County Superior Court.

II. Defendant's Evidence

Defendant testified at trial and presented a different account of the events of 2 May 2016. He testified that he became aware in late April of 2016 that Julien no longer possessed the iPhone 4 that Defendant had purchased for him and for which Defendant still paid the bills. When Defendant asked Julien if he had given the phone to anyone, his son responded that he had not done so. Based on text messages

exchanged between Grubb and McCaffrey, Defendant believed that Grubb had stolen the phone.

On 2 May 2016, Defendant rode to McCaffrey's house in Taylor's van to pick up Julien. Upon their arrival, Defendant saw Grubb in the front yard and confronted him about the cell phone. Grubb denied possessing it. The pair argued at the base of the porch for about ten minutes. Defendant testified as follows on direct examination regarding his use of the Taser:

> [DEFENDANT]: Well, Tre maintained that he did not have the cell phone so I proceeded to go . . . to the van that I had the handcuffs and the Taser in, and when I brought the Taser out I flashed it about 15 to 20 feet away from him, and he backed up, he says, "Okay, I have it," and he pulled the cell phone out and gave it to me.[1]

After Grubb handed over the phone, Defendant told Grubb that he was going to call the police and "put the handcuffs on him until the police arrived and then they could determine whether he would be released or not." Defendant placed Grubb in handcuffs and told McCaffrey to call the police. He then instructed Julien to get in the van with Taylor and to help Taylor drive back to Defendant's house.

Immediately after Julien and Taylor left, Defendant reentered the house to confirm that McCaffrey was calling the Sheriff's Office. After doing so, Defendant "went to go back outside to stay with [Grubb] to make sure that everything was okay

[1] Defendant further testified that he did not own a gun of any kind and that the handcuffs and Taser belonged to Taylor.

until [law enforcement] got there and that's when [Defendant] noticed that [Grubb] had left." Upon realizing that Grubb was gone, Defendant told McCaffrey "to hang up with the Sherriff's Department and immediately call 911."

* * *

At the close of the State's evidence, Defendant moved to dismiss both charges. The trial court denied this motion. Defendant did not renew his motion to dismiss following the close of all the evidence.

During the charge conference, Defendant submitted a written request to the trial court for a jury instruction based on N.C. Gen. Stat. § 15A-404 stating that a private person may detain another person whom he believes has committed in his presence a crime involving the theft of property. After hearing the arguments of counsel, the trial court denied Defendant's requested instruction.

On 24 February 2017, the jury convicted Defendant of first-degree kidnapping with intent to terrorize but found him not guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to a term of 60 to 84 months imprisonment. Defendant filed a timely notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred by (1) denying his motion to dismiss the first-degree kidnapping charge; and (2) refusing to give his requested jury instruction. We address each argument in turn.

I. Motion to Dismiss

Defendant first contends that the trial court erred by denying his motion to dismiss the first-degree kidnapping charge because the State did not introduce substantial evidence that he intended to terrorize Grubb at the time that he confined, restrained, or removed him. We disagree.

We note at the outset that Defendant failed to renew his motion to dismiss at the close of all the evidence. *See State v. Fraley*, 202 N.C. App. 457, 461, 688 S.E.2d 778, 782 ("Generally, if a defendant failed to renew his motion to dismiss after he presented evidence, he is precluded from challenging the denial of his motion to dismiss on appeal." (citation omitted)), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010). However, even had Defendant properly renewed his motion to dismiss, his argument would still lack merit.

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

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). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citation and quotation marks omitted).

N.C. Gen. Stat. § 14-39 provides, in pertinent part, as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other 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[.]

N.C. Gen. Stat. § 14-39 (2017).

This Court has held that "[k]idnapping is a specific intent crime, and therefore the State must prove that defendant unlawfully confined, restrained, or removed the victim for one of the specified purposes outlined in the statute." *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008) (citation omitted). In the present case, the State contended that Defendant confined Grubb for the purpose of terrorizing him, and the jury was instructed on this theory.

"Terrorizing is defined as more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (1995) (citation and quotation marks omitted). In determining the sufficiency of the evidence, "the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize the victim." *Id.* (citation and quotation marks omitted). Furthermore, "[a] defendant's intent is rarely susceptible to proof by direct evidence; rather, it is shown by his actions and the circumstances surrounding his actions." *State v. Boozer*, 210 N.C. App. 371, 375, 707 S.E.2d 756, 761 (2011) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 543, 720 S.E.2d 667 (2012).

In *State v. Barnes*, 110 N.C. App. 473, 429 S.E.2d 765 (1993), this Court upheld the trial court's denial of a motion to dismiss a kidnapping with intent to terrorize charge where the defendant kidnapped the victim in an attempt to compel him to

settle a debt. *Id.* at 474, 429 S.E.2d at 766. In that case, the defendant and his accomplices tackled the victim, threatened to shoot him, and forced him into a limousine at gunpoint. The defendant then "accused [the victim] of breaking into his son's home and said that he was taking [the victim] to Durham to make him find the stolen property." *Id.* We held that the State presented sufficient evidence "to show that the defendant intended to and in fact did put the victim in an intense state of fright or apprehension[.]" *Id.* at 477, 429 S.E.2d at 767; *see also Rodriguez*, 192 N.C. App. at 188, 664 S.E.2d at 661 (holding sufficient evidence was presented of intent to terrorize where defendant threatened kidnapping victim with death and told him "that if he did not tell [him] where the drugs were 'it was going to go bad for him'").

In the present case, Defendant argues that the State presented insufficient evidence that he formed an intent to terrorize Grubb at the time that he confined, restrained, or removed him. At most, he contends, the evidence "showed [Defendant's] intent to retrieve stolen property and detain Grubb for eventual arrest by law enforcement." However, the State's evidence shows that Defendant forced Grubb into McCaffrey's home by holding a gun to his back. Once inside, Defendant pressed the gun to Grubb's chin and chest and told him he "would not hesitate to pull the trigger." In order to prevent Grubb from escaping, Defendant subsequently threatened him with a Taser and handcuffed him.

Viewing the evidence in the light most favorable to the State — as we must — we are satisfied that the State presented sufficient evidence of Defendant's intent to terrorize Grubb at the time he forced him into McCaffrey's home at gunpoint. Therefore, the trial court did not err in denying Defendant's motion to dismiss.

II. Jury Instruction

Defendant next argues that the trial court erred in denying his requested jury instruction regarding the right of a private person to detain another person pursuant to N.C. Gen. Stat. § 15A-404 where the other party has committed a crime involving theft in his presence. A jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation omitted).

Defendant submitted a written request that the jury be instructed as to the applicability of N.C. Gen. Stat. § 15A-404, which provides, in pertinent part, as follows:

> (b) **When Detention Permitted.** — A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence:
>
> (1) A felony,
>
> . . . .
>
> (4) A crime involving theft or destruction of property.
>
> (c) **Manner of Detention.** — The detention must be in a reasonable manner considering the offense involved and the circumstances of the detention.
>
> (d) **Period of Detention.** — The detention may be no longer than the time required for the earliest of the following:
>
> (1) The determination that no offense has been committed.
>
> (2) Surrender of the person detained to a law-enforcement officer as provided in subsection (e).
>
> (e) **Surrender to Officer.** — A private person who detains another must immediately notify a law-enforcement officer and must, unless he releases the person earlier as required by subsection (d), surrender the person detained to the law-enforcement officer.

N.C. Gen. Stat. § 15A-404 (2017).

Defendant contends that the trial court's refusal to give the requested instruction constituted reversible error because "the jury could have found [Defendant] had probable cause to believe that Grubb had committed the felony of

possessing stolen property in his presence" and lawfully detained him. Once again, we disagree.

Even assuming, without deciding, that the trial court erred by failing to instruct the jury on this issue, we hold that any such error was harmless in light of the verdict returned by the jury. With regard to the kidnapping charge, the trial court instructed the jury, in pertinent part, as follows:

> [THE COURT]: The defendant has been charged with first-degree kidnapping by terrorizing an individual. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt: First, that the defendant unlawfully confined a person, that is, imprisoned the person within a given area, or restrained a person, that is, restricted a person's freedom of movement, or removed a person from one place to another; second, that the person did not consent to this confinement, restraint, or removal. Consent obtained or induced by fraud or fear is not consent. *Third, that the defendant did this for the purpose of terrorizing that person.* "Terrorizing" means more than just putting another in fear; it means putting that person in some high degree of fear, a state of intense fright or apprehension. And fourth, that the person was not released by the defendant in a safe place.

(Emphasis added.)

However, the court also instructed the jury on the lesser-included offense of false imprisonment, stating in relevant part as follows:

> [THE COURT]: [F]alse imprisonment . . . is the unlawful detention of a human being against his will. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that the defendant unlawfully restrained and/or detained a person,

> and second, that such restraint was against that person's will, that is, that the person did not consent to such restraint and/or detention.

Thus, if the jury had found Defendant's version of the 2 May 2016 incident to be credible but nevertheless believed he had committed a crime due to its failure to receive an instruction on N.C. Gen. Stat. § 15A-404, it could have convicted Defendant of the lesser-included offense of false imprisonment — which lacks the "intent to terrorize" element. However, the jury instead convicted him of kidnapping *with intent to terrorize*. In so doing, it necessarily rejected Defendant's testimony that he confined, restrained, or removed Grubb merely for the purpose of detaining him until law enforcement arrived and did so in a reasonable manner.

Therefore, Defendant was not prejudiced by the trial court's refusal to give the requested instruction. Accordingly, this argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).