IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-124

Filed: 18 December 2018

Cabarrus County, No. 16CRS53970

STATE OF NORTH CAROLINA

v.

ROBERT PAUL DELAIR, Defendant.

Appeal by Defendant from judgments entered 14 August 2017 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 1 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.

Tin Fulton Walker & Owen, PLLC, by C. Melissa Owen and Cheyenne N. Chambers, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Robert Paul Delair ("Defendant") appeals following jury verdicts convicting him of second-degree kidnapping and misdemeanor sexual battery. On appeal, Defendant argues the trial court erred in denying his motion to dismiss because the

State failed to present sufficient evidence in support of second-degree kidnapping. We find no error.

I. Factual and Procedural Background

On 3 October 2016, a Cabarrus County Grand Jury indicted Defendant for second-degree kidnapping and sexual battery. On 7 August 2017, the court called Defendant's case for trial.

The State called Tracy.[1] Tracy knew Defendant because he is Tracy's friend's father. Tracy and this friend, Chase, often spent time at Chase and Defendant's home.

On 27 August 2016, Defendant texted Tracy and said, "Hey, are you busy." Tracy told Defendant she was grocery shopping. Defendant replied, "Well, I'm at the baseball game with [Chase] . . . . [Chase's mother, Kathy] is at home, but she hasn't been answering her phone." Defendant asked Tracy to check on Kathy.

After bringing her groceries home, Tracy drove to Defendant's home. Tracy went to the front door and rang the doorbell, but no one answered. Nonetheless, Tracy knew Kathy was at home because she saw Kathy's car in the driveway. Tracy slid under the "not quite halfway open" garage door and entered the home. Tracy

[1] We use this pseudonym to protect the victim's identity and for ease of reading. N.C. R. App. P. 3.1(b), 4(e) (2017). Rule 4(e) requires "the identities of all victims of sexual offenses the trial court record shows were under the age of eighteen when the trial division proceedings occurred . . . shall be protected pursuant to Rule 3.1(b)." N.C. R. App. P. 4. At the time of the acts and at the time of trial, Tracy was a minor. We also use pseudonyms for the other actors in these occurrences.

found Kathy "passed out in front of the refrigerator white as a ghost." Tracy "nudged" Kathy and called Defendant to tell him she found Kathy. Kathy woke up, and Tracy realized Kathy was drunk. Tracy told Defendant Kathy was okay, just drunk, and she would stay until he got home.

Tracy and Kathy went to Kathy and Defendant's bedroom on the second floor. Using Tracy's phone, both Tracy and Kathy texted Chase and called Defendant. During one phone call, Defendant asked Tracy to send him a picture of Kathy in bed and said, "But you have to be in it without a top on." She told him he was "being ridiculous" and hung up.

Kathy fell asleep in her bed. Tracy sat in a chair nearby, waiting for Defendant and Chase to come home. Tracy heard the garage door open and shut and listened for voices. At first, she waited in Kathy and Defendant's bedroom but then went to the staircase landing. Defendant met her there and stood on a step. Defendant thanked Tracy and gave her "a big hug to where his like face is in -- is like -- the side of his face is in [her] stomach and he kind of like just pulls away." Tracy told Defendant that Kathy was in the bedroom. Tracy walked to the bedroom, and Defendant followed Tracy.

Once in the bedroom, Defendant rubbed Tracy's neck. He pushed her towards the bed, asking her to wake up Kathy. When Tracy moved to wake up Kathy, Defendant pushed her "all the way down." Defendant used his hips to pin Tracy and

started to rub her back. As Defendant lifted the back of her shirt and her sports bra, Tracy began to cry. Defendant poked Tracy's sides, and she tried to lift herself up. However, her back hurt, so she went back down on the bed. Defendant moved his hands underneath her when she lifted herself up and grabbed her chest.

Defendant whispered, "You're so beautiful" and "I'm never gonna stop. Doesn't this feel so good?" Defendant rubbed her neck again and touched her pant line, "toying with that." Defendant pulled Tracy's shorts down a little, "halfway down [her] butt."[2] Tracy thought "he was gonna fully do everything" and rape her.[3] Tracy screamed, "no," and Defendant pulled her shorts back up. Defendant again rubbed her back and neck. Defendant began to swing his hips back and forth.

Tracy waited for Defendant to "pull[ ] back[,]" so she could "slip through." When Defendant did pull back, she curled up in a ball so "he c[ould]n't get to [her] again." Defendant sat on the ground, with his back against the bed. Defendant pulled Tracy into his lap, apologized, and asked for her forgiveness. Tracy told him "what he want[ed] to hear" and said she would forgive him. Defendant asked what she wanted, and Tracy replied she wanted to go home. However, Defendant held her

[2] This portion of testimony is taken from Tracy's interview with Deedra Elliot, a nurse. Tracy read this portion of the interview into evidence.

[3] This portion of testimony is also taken from Tracy's interview with Deedra Elliot. Later in her testimony at trial, Tracy testified Defendant did not try to rape her, but "[t]hat was just a thought[.]"

in his lap "for a couple of minutes." Because Defendant had his arms around her, she could not get up.

Once Defendant let go of Tracy, she sat up and pulled down her bra and shirt. She grabbed her phone and went downstairs to the kitchen to get her keys and wallet. As she put on her shoes, Defendant "pushe[d]" her onto a bench. It did not "take much" to sit Tracy down, due to her bad back. Tracy looked down because she was too scared to look at Defendant. Defendant got on his knees and held Tracy's hands. He apologized while Tracy cried. He kissed her knee, but Tracy "didn't really do much" and "kinda just pushed him away."

Tracy walked outside to her car. Defendant followed her outside. Tracy sat in her car and went to shut the car door, but Defendant "kinda" held her door open and stood outside her car. Defendant again apologized and asked Tracy if she needed anything. Tracy shut her door and drove away. The next morning, Defendant texted Tracy, asking if she was okay. Tracy replied, "I'll be fine."

The State called J.D. Barnhardt, a detective with the Cabarrus County Sheriff's Office.[4] On 2 September 2016, Barnhardt went to Defendant's home. He asked to speak with Defendant, and the two went on the front porch. Barnhard summarized the interview:

> [Tracy] came, she checked on -- . . . stayed with [Kathy], checked on [Kathy], stayed with her and then, when he got

[4] The State also called Tracy's father, nurse Deedra Elliot, Dr. Amy Morgan, and Deputy Adam Ellington. Their testimonies are not dispositive to the issue on appeal.

> home, [Tracy] just left . . . . [Then] he admits, it was far more that occurred moving forward. He admits to touching [Tracy], admits to having her on the -- that she was on the bed, that he's standing behind her, that he pulls up her shirt, that he pulls up her bra, that he touches her bare breasts. He admits that -- to touching her butt region. He admits that her shorts did come down, that he pulled them up when she said no. He admits that during this time he was aroused and then became erect.

Defendant told Barnhardt Tracy was a virgin, and he did not want to be her first sexual partner. When Barnhardt asked Defendant about Tracy's demeanor during the incident, Defendant described her as "distraught." Defendant also said he was not "done sexually [but] could tell she seemed distraught" and he was not sure why.

The State rested. Defendant moved to dismiss both charges. The court denied Defendant's motion.

Defendant called his son, Chase.[5] On 27 August 2016, Chase and Defendant went to a baseball tournament. During one of his games, Tracy texted Chase. After the game, Chase responded. Tracy told Chase she was at his home. Tracy would not tell Chase why she was there and instructed him to ask Defendant why she was at their home. When Chase asked Defendant, Defendant said "he was worried about [Chase's] mom 'cause she wasn't answering the phone, so he called [Tracy] back to the house to check on her to see what was going on."

[5] Defendant also called Nathan Broderick, who saw Defendant on 27 August 2016 at a Darius Rucker concert. However, his testimony is not dispositive to the issue on appeal.

Around 4:30 p.m., Chase and Defendant left the tournament. During the drive home, Defendant told Chase to tell Tracy she could leave, as they were close to home. At 4:57 p.m., Chase texted Tracy, telling her she could leave. Tracy said she would stay and not leave Chase's mom alone. Around 6:30 p.m., Defendant dropped Chase off at a Buffalo Wild Wings.

Defendant testified on his own behalf. On 27 August 2016, Defendant and Chase went to a baseball tournament in Burlington. During his ride to Burlington and throughout the day, Defendant called and texted Kathy. When she did not answer, Defendant became "nervous." He texted a neighbor, but the neighbor was not at home. He also called friends, but no one could go check on Kathy.

Around 2:30 in the afternoon, Defendant texted Tracy. Defendant hoped Tracy could "let [him] know if [Kathy] lost her phone, she's had too much to drink, she's not in the house." Defendant was also concerned Kathy had a seizure. Tracy responded and told Defendant she was grocery shopping but would go check on Kathy. After Tracy arrived at Defendant's home and checked on Kathy, she called Defendant. Tracy told Defendant Kathy drank too much, but was otherwise okay. After the first phone call, Tracy called Defendant three more times, updating him on Kathy's condition.

During one of the phone calls, Tracy told Defendant she was in bed with his wife.[6] Defendant replied, "Ooh, why don't you take a picture." Defendant "was totally joking and [he thought] she understood [he] was joking."

Around lunchtime, Defendant left the tournament and went to a restaurant, where he drank one beer. Defendant returned to the tournament after lunch and watched more baseball games. Before leaving the tournament, Defendant called Tracy. However, while driving home, Defendant only communicated with Tracy through Chase. Defendant told Chase to tell Tracy to go home.

When Defendant arrived home, Tracy was in the kitchen. Defendant "hugged her, showed [his] appreciation, told her how wonderful she was." Defendant used the restroom, went back to the kitchen, and hugged Tracy again. Defendant started to go upstairs to check on Kathy and thought Tracy was going to leave. However, Tracy followed him upstairs. When Defendant got to the master bedroom, he saw Kathy lying in bed. Defendant walked over the side of the bed, and Tracy followed him.

Tracy told Defendant she carried his wife around earlier and said, "Oh, my back." Defendant offered to give her a back rub because "[s]he had done something special for [him], and [he] thought if her back hurt, if [he] could help her, that would be something good for [him] to do to her." Defendant said, "Why don't you lie on the bed, I'll rub your back." Tracy bent over the bed, with her feet on the floor and her

[6] Later in his testimony, Defendant said he thought he asked for a picture of Tracy in bed with his wife in a text message. In his text, he asked for Tracy to be "[t]opless, naked" in the photo.

stomach and chest on the bed. Defendant first rubbed "at her shoulders up top, rubbing over her shirt for awhile." Defendant thought rubbing underneath her shirt "might work better[,]" so he "pushed her shirt up as [he] was rubbing her." Defendant rubbed "her shoulders, sides, back, general area." Defendant's hands "went under her bra[,]" although he did not "take [her bra] off per se[,]" but he may have pushed her bra up. When Defendant moved his hands to Tracy's lower back, he "tried to go even lower around her pant line[.]" Tracy said, "No, not there[,]." and Defendant replied, "Whoops." Because Tracy's shorts were down, he could see an "inch or so of her underwear[.]" Defendant pulled up her shorts, so her underwear did not show.

During the backrub, Tracy "appeared relaxed[,]" and he "thought she was enjoying it." At first, the back rub was "an ordinary back rub[.]"[7] However, "it got weird [a] couple times[.]" As Defendant rubbed under Tracy's bra and his hands were on her side, "she picked up a little." His hands slid down, and he "felt a twinge in [his] pants and [he] was like, whoa, this is getting weird." By "weird[,]" Defendant meant "sexual." Defendant backed away, and stopped rubbing her back. Defendant stopped "[b]ecause it was inappropriate. [His] wife was right there on the bed, and it was -- [he] just got caught up in it and [he] -- when it got to that point where [he] was crossing the line, [he] was like, whoa, this isn't right." When Defendant backed away, he stepped aside, and Tracy got up from the bed.

[7] This phrasing is from defense counsel's question, to which Defendant answered affirmatively.

The backrub lasted five to six minutes. During the backrub, Tracy did not indicate she did not want him to rub her back. "Everything [that] happened was consensual[,]" and Tracy "gave [him] no reason to believe otherwise." Tracy did not cry. The only time she said "no" was when he "went down towards her lower back or tailbone or wherever." Defendant denied Tracy ever fell on the floor, he fell on the floor, he wrestled Tracy's shirt off of her, or he dragged her by her elbows and put her in his lap.

Once Tracy got off the bed, she and Defendant went downstairs and into the kitchen. Defendant leaned against the refrigerator, and Tracy leaned "against the bench on the island." Defendant denied pushing or touching Tracy in the kitchen. Although Tracy was "quiet[,]" he thought she was quiet because he did something "inappropriate" or she thought she "might have done something inappropriate." He thought she was worried about how it would impact their relationship, his son, or her parents would be upset. To make her feel better, he said, "Don't worry about it. Nothing happened. You made an old man's day." However, he did not think Tracy was scared; he thought she was "worried." That night, Defendant texted Tracy and asked if she was okay.

On 2 September 2016, police officers came to Defendant's home and "banged on the door." Defendant initially thought police were there to discuss something else. When officers said, "We heard there was an incident with your wife Saturday[,]"

Defendant thought his wife did something while drunk. Defendant answered questions about Tracy, but officers did not tell him they were investigating anything to do with Tracy. Approximately five minutes into the interview, "the light bulb went on" and he realized they were questioning him about Tracy. Once the light bulb went on, he "was curious, shocked, just [he] didn't know why they were there." During some parts of the interview, Defendant did not answer accurately because "[t]here was a lot going on. [He] was confused and [he] didn't know where they were going with this, and [he] just didn't tell the truth." Defendant did not want to answer officers' questions because he knew he "acted inappropriately."

Defendant told officers he gave Tracy a backrub prior to 27 August 2016, even though he had not, because "it's kinda creepy and [he] was embarrassed, and [he] thought it'd sound better if [he] had said [he] had done it before." Defendant also told officers he did not intend for the backrub to be sexual. However, he clarified, "It's sexual to a point." He told officers it was sexual to a point because "rubbing somebody's back on their skin is sexual to a point." When it did become sexual, he stopped. Defendant was "shocked" by Tracy's version of events. When officers asked him about falling on the floor, he replied "not that I recall[.]"

Defendant rested and renewed his motion to dismiss both charges. The court denied Defendant's motion. The jury found Defendant guilty of second-degree kidnapping and misdemeanor sexual battery. The court sentenced Defendant to

consecutive terms of 25 to 42 months and 60 days imprisonment and suspended the sentences. The court ordered Defendant to register as a sex offender for thirty years. Defendant gave timely notice of appeal.

II. Jurisdiction

Defendant has an appeal of right under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Standard of Review

"This 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) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is 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 of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "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) (citations omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable

inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted).

IV. Analysis

Defendant argues the court erred in denying his motion to dismiss the second-degree kidnapping charge "because the State failed to present sufficient evidence that [Defendant] restrained [Tracy] for the purpose of facilitating the commission of attempted rape or other felony sex offense." (All capitalized in original).

"[T]o obtain a conviction for second-degree kidnapping the State is required to prove that a defendant (1) confined, restrained, or removed from one place to another any other person, (2) unlawfully, (3) without consent, and (4) for one of the statutorily enumerated purposes." *State v. China*, 370 N.C. 627, 633, 811 S.E.2d 145, 149 (2018) ("*China II*"). However, many crimes of sexual assault—one of the enumerated purposes for second-degree kidnapping—require an act of restraint. With that in mind, our Supreme Court addressed the requirements for second-degree kidnapping and the possible violation of a defendant's constitutional right against double jeopardy. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). In *Fulcher*, our Supreme Court explained:

> It is self-evident that certain *felonies* (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other *felony*, also kidnapping so as to permit the

> conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. . . . [W]e construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other *felony*.

Id. at 523, 243 S.E.2d at 351 (emphases added). However, "[s]uch independent and separate restraint need not be, itself, substantial in time[.]" *Id.* at 524, 243 S.E.2d at 352.

Our Court and the Supreme Court recently addressed this issue in *State v. China*. ___ N.C. App. ___, 797 S.E.2d 324 (2017), *rev'd*, 370 N.C. 627, 811 S.E.2d 145 (2018) ("*China I*"). The Supreme Court summarized the relevant facts:

> In 2008 defendant began a romantic relationship with Nichelle Brooks. At some point thereafter, defendant was sent to prison. During his incarceration, until the summer of 2013, defendant continued to talk occasionally with Ms. Brooks by telephone. On one of these phone calls, Ms. Brooks, who was then involved with Mark, informed defendant that she had begun a new relationship. Nonetheless, defendant called Ms. Brooks after his release from prison seeking to resume their prior relationship. Ms. Brooks agreed to meet with defendant at her apartment, hoping to make clear that their relationship was over. Later that day, defendant met Ms. Brooks at her apartment, spent the night, and then left the following morning.
>
> During this time, Ms. Brooks asked Mark not to visit her for a few days so that she could "get things in order" with defendant. Believing that she had successfully ended her relationship with defendant, Ms. Brooks told Mark that he could return to her apartment. Mark visited Ms. Brooks on 14 October 2013 and spent the night at her apartment.

The following morning, 15 October, Mark was still asleep when Ms. Brooks left to take her daughter to the bus stop and to go to school at Durham Beauty Academy.

Mark awoke when he heard people outside of the apartment. He looked out the window and, not seeing anything of concern, returned to bed. Moments later, Mark heard a knock; he went to the door, looked through the peephole, and saw two men he did not recognize. At trial, Mark identified one of these men as defendant. As Mark made his way back to the bedroom, he heard banging on the door, enough to cause the door to shake. Mark began to dress in his work uniform, when he heard a loud boom as the door was kicked in.

Defendant rushed into the apartment and ran towards the bedroom, cursing at Mark. Before Mark had a chance to defend himself, defendant punched him in the face, knocking him sideways onto the bed. Defendant then got on the bed and on top of Mark, continuing to curse and strike Mark in the face with his fist. Defendant was hitting Mark solely in the face up to this point, and the last blow caused Mark to roll over completely onto his stomach. At that point, defendant punched Mark in the back of the head, stunning him. Defendant then pulled down Mark's pants and anally penetrated him three times with his penis.

Mark then swung his right arm to get defendant off of him, and defendant "jumped off of" Mark. While Mark was "kicking away" at defendant, defendant grabbed him by the ankles, yanking him off the bed and causing the back of Mark's head to hit the floor. Defendant called to his companion, who came into the room; together they began "kicking and stomping" Mark, who was on the floor with his back pressed against a dresser. Mark testified that the two men were kicking and stomping "[m]y face, my head, my back, my ribs, my legs, my knees. . . . It was everywhere." During this time, Mark "was balling [his body] up" trying to protect himself. Eventually, defendant

> and the other man stopped kicking, and Mark quickly got up and ran out of the apartment. Mark still had his keys in his pocket, and although he was dizzy and bleeding badly, he ran to his car and was able to drive to his place of employment for help. Mark woke up at Duke Hospital in a significant amount of pain. In addition to the injuries to his face, Mark testified that his "ribs were really sore" and his knees were "really messed up," that he "couldn't walk, really," and that he was forced "to crawl to the bathroom at home to go to the bathroom" for the next two to three weeks. Mark also suffered emotional injuries as a result of the incident.

Id. at 628-29, 811 S.E.2d at 146-47 (footnote omitted).

The jury found China guilty of felonious breaking or entering, misdemeanor assault inflicting serious injury, second-degree kidnapping, first-degree sexual offense, and intimidating a witness. *Id.* at 630, 811 S.E.2d at 147. The trial court arrested judgment on the misdemeanor assault inflicting serious injury conviction.

China appealed. He argued "that the trial court erred in denying his motion to dismiss the kidnapping charge because the evidence was insufficient to prove that any confinement or restraint was separate and apart from the force necessary to facilitate the sex offense." *Id.* at 631, 811 S.E.2d at 148. The State argued China's removal of the victim from the bed to the floor and the subsequent stomping and kicking of Mark was an action separate from the assaults themselves. *China I*, ___ N.C. App. at ___, 797 S.E.2d at 329.

This Court, in a split decision, held the State failed to produce substantial evidence to support the kidnapping charge. The majority noted the quickness of the

attack—"no more than a few minutes[.]" *Id.* at ___, 797 S.E.2d at 329. The Court held all restraint was a part of the commission of first-degree sex offense. Accordingly, the Court concluded the trial court erred in denying China's motion to dismiss.

Judge Dillon dissented and wrote:

> I conclude that there was sufficient evidence to sustain the jury's finding that Defendant restrained the victim beyond the restraint inherent to the sexual assault. Specifically, as the majority concedes, the evidence showed that after Defendant completed his sexual assault of the victim on the bed, he dragged the victim onto the floor. Then, while the victim was on the floor, Defendant restrained the victim by beating and kicking the victim, preventing the victim from getting up. Granted, this separate restraint did not last long. But this restraint which occurred while the victim was on the floor was not inherent to the sexual assault which was completed while the victim was on the bed. The restraint was a separate act.

Id. at ___, 797 S.E.2d at 330 (Dillon, J., concurring in part and dissenting in part).

The North Carolina Supreme Court reversed this Court's decision. *China II*, 370 N.C. 627, 811 S.E.2d 145. The Supreme Court stressed in determining whether there is a separate act of restraint the "key question" is "whether there is sufficient evidence of restraint, such that the victim is ' "exposed . . . to a greater danger than that inherent in the [other felony] itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." ' " *Id.* at 634, 811 S.E.2d

at 150 (all alterations and ellipses in original) (quoting *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992)).

The Supreme Court stated the restraint necessary and inherent to the sex offense was "exercised" when China got on the bed, got on top of Mark, and punched Mark in the face and head. China's "additional action" "which had the effect of increasing [Mark's] helplessness and vulnerability" was when he "grabbed Mark by the ankles and yanked him off the bed[.]" *Id.* at 635, 811 S.E.2d at 150-51 (first alteration in original). While Mark was on the floor, China and another kicked and stomped Mark. *Id.* at 635-36, 811 S.E.2d at 150-51.

At the Supreme Court, China focused on "whether there was evidence of restraint separate and apart from that inherent in the commission of the misdemeanor assault[,]" not whether the State produced sufficient "evidence of restraint separate and apart from that inherent in the sex offense[.]" *Id.* at 636, 811 S.E.2d at 151. China argued *Fulcher*, although limited in its language to *felonies*, should apply equally to misdemeanor offenses. *Id.* at 636, 811 S.E.2d at 151. The Supreme Court did not decide this issue and instead stated, "Assuming *arguendo*, however, that *Fulcher* applies equally to misdemeanor offenses, here there was no double punishment, and no violation of the prohibition against double jeopardy, because judgment was arrested on the misdemeanor assault conviction." *Id.* at 637, 811 S.E.2d at 151 (citation omitted)..

At the outset, it is unclear whether the *Fulcher* rule applies to misdemeanors. By its plain language, *Fulcher* limited itself to *felonies*. 294 N.C. at 523, 243 S.E.2d at 351. Defendant cites to this Court's language in *China I*, which stated "that there is no evidence in the record that Mark was subjected to any restraint beyond that inherent in defendant's commission of first-degree sex offense and misdemeanor assault inflicting serious injury." ___ N.C. App. at ___, 797 S.E.2d at 329. In its review, the Supreme Court addressed the "separate and apart" requirement for the kidnapping and felony sex assault charges, but declined to determine whether the State presented sufficient evidence of restraint separate and apart from the misdemeanor charge, because the trial court arrested judgment on the misdemeanor. *China II*, 370 N.C. at 636-37, 811 S.E.2d at 151.

Even if *Fulcher* applied, taking all evidence here in the light most favorable to the State, we hold the State presented substantial evidence of an additional act of restraint beyond the restraint inherent in misdemeanor sexual battery. The restraint on the bed was the restraint inherent in the commission of sexual battery. However, after the commission of sexual battery on the bed, Defendant again restrained Tracy when they were on the floor. This restraint was separate and apart from the commission of sexual battery, as the commission of sexual battery ended when Tracy got off the bed. *See id.* at 635-36, 811 S.E.2d at 150. After the sexual battery ended, Defendant pulled Tracy onto his lap. Even after Tracy told Defendant she wanted to

go home, Defendant held her in his lap "for a couple of minutes." Tracy testified because Defendant had his arms around her, she could not get up. While the separate restraint in *China* involved far more violence than the restraint in the case *sub judice*, this restraint subjected Tracy "to the kind of danger and abuse the kidnapping statute was designed to prevent." *Pigott*, 331 N.C. at 210, 415 S.E.2d at 561 (quotation marks and citation omitted). Furthermore, taking all evidence in the light most favorable to the State, we conclude the State presented sufficient evidence this restraint was for the purpose of attempted rape or other sexual offense. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

V. Conclusion

For the foregoing reasons, we find no error in the judgments.

NO ERROR.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).