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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1169

Filed: 5 November 2019

Guilford County, Nos. 17 CRS 24530, 76326-27, 76329

STATE OF NORTH CAROLINA

v.

JONATHAN EUGENE HAITH

Appeal by defendant from judgments entered 12 July 2018 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 2 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant.

ARROWOOD, Judge.

Jonathan Eugene Haith (“defendant”) appeals from judgment entered upon his conviction for attempted second-degree kidnapping. For the following reasons, we find no error.

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I. Background

On 24 July 2017, defendant was indicted on one count each of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted second-degree kidnapping, assault on a female, and obtaining habitual felon status. On 7 May 2018, defendant was indicted on one count of possession of a firearm by a felon. Defendant's case came on for trial in Guilford County Superior Court before the Honorable R. Stuart Albright on 9 July 2018.

At trial, the State's evidence tended to show the following. Tosha Gibbs ("Ms. Gibbs") and defendant had known each other for several years. On the night of 28 May 2017, Ms. Gibbs invited defendant over to her friend Delena Ferrell-Marable's ("Ms. Ferrell-Marable") apartment, where Ms. Gibbs was cleaning up after a Memorial Day party while Ms. Ferrell-Marable was at work. Defendant arrived at approximately 11:30 p.m. He and Ms. Gibbs talked for a while about problems he was experiencing in his family life.

At some point, Ms. Gibbs fell asleep. When she awoke, defendant had a "dull look on his face." Defendant began behaving in an erratic manner, such as rifling through drawers and looking through bedrooms in the apartment. Defendant was overly controlling of Ms. Gibbs. For instance, he would not allow Ms. Gibbs to briefly leave the apartment to take out the trash. Additionally, he blocked the apartment's door with a couch. Defendant said, "you're not going nowhere, you're going to stay in

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here.” Ms. Gibbs testified that she was “panicking” at this point and looking through drawers for an item with which she could protect herself “in case he did [] something.” As Ms. Gibbs cleaned up around the apartment, defendant followed behind her at every step, grabbing a large item in his pocket. Ms. Gibbs subsequently determined based on its outline that the item was a large handgun. Ms. Gibbs testified that she was “freaking out” at this point in the evening.

Ms. Ferrell-Marable eventually returned to her apartment with friends, including Jennifer Moore-Harriston (“Ms. Moore-Harriston”). Ms. Moore-Harriston testified that Ms. Gibbs “look[ed] nervous” when they entered the apartment. Ms. Ferrell-Marable and her friends attempted to converse with defendant to lighten the mood; however, he said little, refused to sit down, and “had this real stern, hard-core look on his face.” Ms. Ferrell-Marable noticed that defendant was continuously holding a large item in his pocket. Ms. Ferrell-Marable and her friends became unnerved when defendant refused their requests to remove his hand from his pocket, and directed him to leave. Defendant insisted that he would not leave without Ms. Gibbs accompanying him. At this time, he moved his hand deeper into his pocket, which Ms. Gibbs already suspected held a gun. Ms. Gibbs then agreed to walk defendant to his vehicle.

Upon reaching defendant’s vehicle, Ms. Gibbs repeatedly told defendant to “just go home.” Defendant responded, “You gonna take me home. . . . Get in the car,

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you're going to take me home." When Ms. Gibbs again refused and began to leave, defendant pressed a gun against her ribs and said, "No, you're getting in the car. You're going with me, you're going with me." Ms. Gibbs repeatedly begged him "[p]lease don't do this." Defendant again demanded that she get in his car. Ms. Gibbs asked where defendant intended to take them and why, to which he responded, "First of all, we're going to go upstairs and we're going to take care of your friends. I need to handle them because they thought they was being funny." Ms. Gibbs pleaded, "[p]lease don't do this[,] . . . [j]ust don't hurt nobody" and agreed to leave with him in his car on the condition that he permit her to retrieve her cell phone from the apartment.

Defendant led Ms. Gibbs back up to the apartment at gunpoint to retrieve her cell phone. Ms. Moore-Harriston testified that Ms. Gibbs "looked terrified" when she returned for her phone. Ms. Ferrell-Marable and Ms. Moore-Harriston retrieved Ms. Gibb's phone and handed it to her. Ms. Gibbs felt defendant move the gun away from her ribs and, fearing that defendant would shoot into the apartment, screamed at them to close the door. They then closed and locked the door. Defendant subsequently pushed Ms. Gibbs down the stairs, stated his intention to kill her several times, and proceeded to shoot her four times before leaving the scene in his vehicle.

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At the close of the State's evidence, defendant moved to dismiss all charges against him. The trial court denied the motion. Defendant did not present any evidence. On 11 July 2018, the jury returned verdicts finding defendant not guilty of attempted first-degree murder and assault on a female, and guilty of assault with a deadly weapon with intent to kill inflicting serious injury, attempted second-degree kidnapping, and possession of a firearm by a felon. Defendant subsequently pleaded guilty to having obtained habitual felon status. The trial court then entered judgment on each of defendant's three convictions, sentencing defendant to three consecutive sentences of 101-134 months incarceration. After entry of judgment, defendant's counsel gave oral notice of appeal.

II. Discussion

On appeal, defendant challenges the trial court's denial of his motion to dismiss his attempted second-degree kidnapping charge for insufficient evidence. Defendant argues that the State did not present sufficient evidence of his intent to terrorize Ms. Gibbs, as alleged in the indictment.

A. 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

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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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *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). “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, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss.” *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) (citation omitted).

B. Attempted Second-Degree Kidnapping

To obtain a conviction for attempted second-degree kidnapping under N.C. Gen. Stat. § 14-39(a), the State must prove that a defendant attempted to (1) confine, restrain, or remove to a different location any person, (2) unlawfully, (3) without consent, and (4) for one of the purposes listed in N.C. Gen. Stat. § 14-39(a). *State v. China*, 370 N.C. 627, 633, 811 S.E.2d 145, 149 (2018) (citing N.C. Gen. Stat. § 14-

39(a) (2017)). One such purpose is “[d]oing serious bodily harm to or terrorizing” the victim of the attempted kidnapping. N.C. Gen. Stat. § 14-39(a)(3). Because “kidnapping is a specific intent crime, . . . [t]he indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment.” *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) (citations omitted).

In the instant case, the indictment charged defendant with attempted second-degree kidnapping of Ms. Gibbs “by unlawfully restraining and removing her from one place to another without her consent and for the purpose of terrorizing her.” Thus, to survive defendant’s motion to dismiss, the State was required to put forth substantial evidence that defendant attempted to kidnap Ms. Gibbs in this manner for the purpose of terrorizing her. On appeal, defendant does not dispute that he attempted to unlawfully restrain and remove Ms. Gibbs from one place to another without her consent. Rather, defendant argues that the State failed to put forth substantial evidence that he did so for the purpose of terrorizing her.

C. Kidnapping for the Purpose of Terrorizing the Victim

Terrorizing is “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.” *Moore* at 745, 340 S.E.2d at 405 (internal quotation marks omitted) (citing *State v. Jones*, 36 N.C. App. 447, 244 S.E.2d 709 (1978)). Intent to terrorize the victim “may be

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inferred by the fact-finder from the circumstances surrounding the events constituting the alleged [attempted kidnapping].” *State v. Baldwin*, 141 N.C. App. 596, 605, 540 S.E.2d 815, 821 (2000) (citation omitted). “In determining the sufficiency of the evidence to support the jury’s verdict on that question, 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 her.” *Moore* at 745, 340 S.E.2d at 405. However, evidence that a defendant acted in spite of the victim’s outwardly apparent terror may be sufficient circumstantial evidence of his intent to terrorize the victim. *See State v. Williams*, 127 N.C. App. 464, 468, 490 S.E.2d 583, 586 (1997) (holding substantial evidence supported intent to terrorize where witnesses testified that defendant “pointed what appeared to be a gun in [victim’s] direction and threatened to kill her” and victim “was crying and hysterical throughout the encounter”).

Defendant argues that the evidence relevant to the interval in which he and Ms. Gibbs left the apartment and returned for her cell phone “demonstrates that he only intended to force her to give him a ride home.” However, terrorizing the victim need not be a defendant’s primary purpose in perpetrating a kidnapping. *See Moore* at 745-46, 340 S.E.2d at 406 (“Considered in the light most favorable to the State, the evidence would support a finding that the defendant intended by these actions and threats to put the victim in a state of intense fright or apprehension so that she would

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agree to stay with him [to repair their marriage], and that he removed her to the trailer and confined her there for that purpose.”). Thus, an intent to terrorize could be found if defendant attempted to kidnap Ms. Gibbs (a) with concurrent, independent intentions to both terrorize and obtain a ride home from her, or (b) if defendant intended to terrorize her into acquiescing to give him a ride home.

The State contends that “[t]here was substantial evidence in the instant case, including the totality of the circumstances surrounding defendant’s actions in and out of the apartment, and Ms. Gibb’s subjective feelings, from which the jury could determine that defendant’s purpose was to terrorize Ms. Gibbs.” We agree.

Viewed in a light most favorable to the State, the evidence showed that defendant came over to the apartment to visit Ms. Gibbs. At some point during his visit, defendant’s demeanor became strange and unusually serious. Defendant behaved in an erratic manner, rifling through drawers in the apartment and opening bedroom doors. Defendant became overly controlling of Ms. Gibb’s movement within the apartment, refusing to let her take out the trash and placing furniture in front of the door. As Ms. Gibbs moved around the apartment, defendant followed closely behind her while holding a gun in his pocket. At this point Ms. Gibbs began “panicking” and “freaking out.” Ms. Ferrell-Marable and Ms. Moore-Harriston subsequently entered the apartment, saw that Ms. Gibbs was nervous, and felt the need to ask her if she was in danger. When Ms. Ferrell-Marable insisted that

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defendant leave her apartment, he demanded that Ms. Gibbs come with him. Ms. Gibbs walked him to his car, at which point defendant held her at gunpoint and demanded she leave in his vehicle with him, over her repeated refusals. Ms. Gibbs pleaded with defendant to stop and repeatedly questioned why he was acting in this manner. Defendant persisted in attempting to force Ms. Gibbs into the car at gunpoint. Defendant then threatened to return to the apartment and kill its occupants for their perceived disrespect. It was only then that Ms. Gibbs agreed to leave with defendant, on the condition that she be permitted to retrieve her cell phone from the apartment. Defendant continued to hold her at gunpoint as she returned to the apartment to retrieve her phone. When Ms. Gibbs returned to the apartment for her phone, she “looked terrified” and screamed at the occupants to shut the door once she had received her phone.

Even assuming *arguendo* that defendant’s primary purpose in attempting to kidnap Ms. Gibbs was for her to drive him home, defendant persisted in ordering Ms. Gibbs to leave with him at gunpoint and threatened to kill her friends, in spite of her visible fear and desperate pleadings throughout the encounter. This evidence was sufficient for a reasonable juror to find beyond a reasonable doubt that terrorizing Ms. Gibbs was one of defendant’s purposes in attempting to kidnap her. Therefore, the trial court did not err in denying defendant’s motion to dismiss the charge of attempted second-degree kidnapping.

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III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges ZACHARY and DIETZ concur.

Report per Rule 30(e).