IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1141

Filed: 6 October 2020

Wake County, No. 18CRS204802, 18CRS003279

STATE OF NORTH CAROLINA

v.

STACEY COOLEY, Defendant.

Appeal by Defendant from judgment entered 1 May 2019 by Judge Vinston M. Rozier in Wake County Superior Court. Heard in the Court of Appeals 26 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Orlando L. Rodriguez, for the State.

Joseph P. Lattimore for Defendant-Appellant.

INMAN, Judge.

Stacey Cooley ("Defendant") appeals from a judgment following a jury verdict finding him guilty of second-degree kidnapping, assault by pointing a gun, and assault on a female. Defendant asserts the trial court erred in denying his motion to dismiss the second-degree kidnapping charge when the State failed to introduce substantial evidence of restraint or removal separate and apart from that inherent

in the commission of the underlying assault convictions. Defendant also asserts that the trial court erred in admitting evidence underlying Defendant's prior conviction for communicating threats and injury to real property involving the same victim. Finally, Defendant asserts the trial court erred by instructing the jury on the kidnapping theory of confinement when the State presented no evidence of confinement at trial.

After careful review, we overrule all of Defendant's arguments and hold that he has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

The evidence presented at trial discloses the following:

A. Background Facts

Defendant and Sade Dunn were involved in a romantic relationship for over ten years. They had two children who lived with Ms. Dunn full-time. There was no formal custody arrangement regarding the children. By March 2018, the couple had been separated for at least a year and Ms. Dunn had denied Defendant contact with his children for months.

Early in the morning on 13 March 2018, after Ms. Dunn arrived at her place of work, Alsco, in Raleigh, her manager alerted her that Defendant was waiting for her in the front of the office building. When Ms. Dunn came to the front office,

Defendant was waiting for her and immediately started "fussing" at her. Ms. Dunn walked outside with Defendant so as not to disrupt her place of work.

According to Ms. Dunn, Defendant was upset about her relationship with another man. Defendant admitted during his testimony that he questioned Ms. Dunn about her new relationship, but he testified that his primary reason for going to Ms. Dunn's place of work was to discuss visiting their children.

Once outside, Defendant grabbed Ms. Dunn, turned her around, pointed something hard into her back, and then pushed her across the sidewalk and around the corner of the building. At first, Ms. Dunn resisted and tried to go back inside the building, until Defendant said "bitch go that way." Defendant then pushed Ms. Dunn from the front of the office building to the nearby parking lot out of the view of the building's cameras. All the while, Defendant continued to "fuss" and "argue" with Ms. Dunn and kept her "hemmed up, so [she] really didn't want to do anything." Ms. Dunn did not know what sharp object Defendant had on him or whether he had a weapon that could harm her. At trial, Defendant admitted to pointing a "B.B." gun at Ms. Dunn's head. At some point during the altercation, Ms. Dunn's supervisor came outside to check on her and heard voices in the parking lot.

Eventually, Defendant allowed Ms. Dunn to walk back to the building without impeding her. Defendant walked off and Ms. Dunn re-entered the building. Ms.

Dunn was crying, was visibly upset, and "scared of what [Defendant] would do to [her]." After speaking with Ms. Dunn, her manager called the police.

B. Procedural Facts

Nearly a year later, on 11 March 2019, Defendant was indicted on three charges arising from the incident: (1) second-degree kidnapping, (2) assault by pointing a gun, and (3) assault on a female. Defendant was also charged with attaining habitual felon status.

Defendant's case came on for trial the following month in Wake County Superior Court. On cross-examination, the prosecutor asked Defendant, "You also have been convicted of communicating threats and injury to real property with Sade Dunn; is that also correct?" At the close of evidence, the jury was instructed to return a guilty verdict on the second-degree kidnapping charge if Defendant "unlawfully confined Sade Dunn, or restrained Sade Dunn, or removed Sade Dunn."

The jury convicted Defendant on all three counts. The trial court accepted Defendant's admission of attaining habitual felon status, consolidated the convictions, and gave Defendant an active sentence of 101 to 134 months in prison. Defendant's counsel gave oral notice of appeal.

II. ANALYSIS

A. Motion to Dismiss Kidnapping Charge

Defendant contends that the trial court erroneously denied his motion to dismiss the charge of second-degree kidnapping because the State failed to introduce substantial evidence of restraint or removal separate from that which was inherent in the commission of the assaults. For the reasons explained below, we disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). To overcome a motion to dismiss for insufficient evidence, the State must present "substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense." *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988). The appellate court must consider all admitted evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

In *State v. Fulcher*, our Supreme Court held that the second-degree kidnapping statute, N.C. Gen. Stat § 14-39, does not allow a "restraint, which is an inherent, inevitable feature" of another felony, such as armed robbery or forcible rape, as the basis for a kidnapping conviction. 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Therefore, the restraint or removal involved in a kidnapping must be "separate and apart" from the conduct involved in the commission of another felony. *Id.*

Kidnapping contemplates an additional element of "asportation" that exposes the victim to "a greater degree of danger than that which is inherent" in another crime. *State v. Ripley*, 360 N.C. 333, 340, 626 S.E.2d 289, 294 (2006).

Defendant was convicted of three different crimes: assault on a female, assault by pointing a gun, and second-degree kidnapping. Second-degree kidnapping is the "unlawful confinement, restraint, or removal from one place to another of any person sixteen years of age or over without that person's consent for the purposes of . . . terrorizing the [victim]." *Id.* at 337, 626 S.E.2d at 292; *see* N.C. Gen. Stat. § 14-39(a)(3) (2019). Assault on a female requires the State prove the Defendant is at least eighteen years of age and that he assaulted a female. *See* N.C. Gen. Stat. § 14-33(c)(2). Assault by weapon requires the State show that Defendant pointed a gun at someone without justification. *See id.* § 14-34.

The assault on a female charge is supported by Ms. Dunn's testimony that Defendant grabbed, pushed, and shoved her in front of the office building. Defendant admits to pushing Ms. Dunn and pointing a B.B. gun at her head. Based on this evidence, the trial court instructed jurors to find Defendant guilty if they found that he "intentionally assaulted Sade Dunn by pushing and shoving her and grabbing her by the head." On the assault by pointing a weapon charge, Defendant admitted to pointing a gun at Ms. Dunn, she felt a hard object in her back, and the trial court

instructed jurors to find him guilty if they determined he intentionally pointed the gun at her.

The question remains whether Defendant engaged in any distinct conduct sufficient to support the second-degree kidnapping charge. Though putting a gun in Ms. Dunn's back along with pushing and shoving her may have operated as the *initial* means to gain control over the victim, the subsequent restraint or removal to the parking lot constitutes a "separate and apart" act.

First, Defendant's removal and restraint demonstrate something more than the initial assaults—an additional element of asportation. After the initial assault, Defendant removed Ms. Dunn from the front of the office building and restrained her in a dark parking lot. The distance Defendant moved Ms. Dunn from the entrance of the building to the lot and the amount of time he kept her restrained there is immaterial. *See Fulcher*, 294 N.C. at 522, 243 S.E.2d at 351 ("[T]he Court of Appeals erred in its holding that 'substantiality' in terms of distance or time is an essential [element] of kidnapping . . ."). In the parking lot, Defendant had her "hemmed up" as they "argued" and "fussed" so Ms. Dunn "really didn't want to do anything." She was restrained until Defendant allowed her to return to the office where she was visibly upset and crying.

Second, the kidnapping is separate and distinct conduct because it increased the danger of the initial assaults. Defendant intentionally removed Ms. Dunn from

her office's entrance to an area with less visibility and out of the view of the building's cameras. In fact, the office manager came down to check on Ms. Dunn and could not see them but could only hear voices. Defendant's removal or restraint was separate and apart from the assaults and exposed her to a greater degree of danger than she initially faced.

We find instructive decisions in other cases involving the overlap of evidence from assault-based crimes. In *State v. Coffer*, this Court held that the removal and restraint of a victim from the front porch of her home to a secluded, wooded area constituted an asportation—a separate act from the assault. 54 N.C. App. 78, 84-85, 282 S.E.2d 492, 497 (1981). This element of restraining and moving a victim from a public area to a more remote location mirrors Defendant's removal of Ms. Dunn to a secluded parking lot, indicating separate conduct.

More recently, in *State v. Romero*, this Court held that dragging a victim from the defendant's front yard back into his home "to prevent others from witnessing [the defendant]" was separate and apart from the assault with a deadly weapon crime that occurred in the home. 164 N.C. App. 169, 175, 595 S.E.2d 208, 212 (2004). The dragging, much like the pushing here, became distinct conduct intended to restrain and remove the victim from her initial surroundings. Again, Defendant's restraint and removal of Ms. Dunn to the dark parking lot was a discrete act beyond the initial assault.

Defendant cites this Court's decision in *State v. Wade*, holding that dragging a victim toward a safe during the commission of a robbery was an inherent restraint. 181 N.C. App 295, 302, 639 S.E.2d 82, 87 (2007). There, the intruders dragged the victim *in order to* rob the contents of the safe, which was a clear continuation of their initial objective. *Id.* at 295, 639 S.E.2d at 84-85. Here, the inverse occurred. Defendant grabbed and pushed Ms. Dunn and put a gun to her head. Then, he moved her from the front of the office building to the more isolated lot, further escalating the danger and exposing her to an unknown threat.

The State provided substantial evidence to demonstrate that Defendant's conduct underlying the second-degree kidnapping conviction was "separate and distinct" from the conduct inherent to the assault convictions and increased the danger to Ms. Dunn. As such, the trial court did not err in denying Defendant's motion to dismiss.

B. Admissibility of Details about Prior Conviction on Cross-Examination

Defendant claims that evidence about the subject of Defendant's prior communication of threats and injury to real property convictions obtained by the State on cross-examination is inadmissible because it extends beyond the scope of a permissible inquiry into a prior conviction for impeachment purposes under North Carolina Rule of Evidence 609. Specifically, Defendant contends the details of the identity of the victim of those past threats—Ms. Dunn—exceeds the allowed "use of

prior felony convictions to 'the name of the crime and the time, place and punishment for impeachment purposes.'" *State v. Little*, 163 N.C. App. 235, 242, 593 S.E.2d 113, 117 (2004) (quoting *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993)). Further, Defendant argues that the admission of this testimony was unfairly prejudicial under Rule 404(b) as to the live issue of intent for the purposes of the kidnapping charge. Defendant did not object to the question on cross-examination at trial, so this issue is reviewed for plain error. To demonstrate plain error, a defendant must show that a "fundamental error occurred at trial" which "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Even if there were error in this case, it does not rise to the level of plain error.

Defendant argues that the prosecutor exceeded the permissible scope of questioning on cross-examination when he revealed Ms. Dunn as the victim of Defendant's past convictions of communicating threats and injury to real property. We cannot agree.

Under Rule 609(a), evidence of prior crimes is admissible for the purpose of impeaching a defendant's credibility when a defendant chooses to testify. N.C. Gen. Stat. § 8C-1, Rule 609(a) (2019). Rule 609 must be read alongside Rule 404(b) which provides that "[e]vidence of other crimes, wrongs, or acts is *not* admissible to prove the character of a person in order to show that he acted in conformity therewith."

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019) (emphasis added). Rule 404(b) "excludes evidence if its *only* probative value is to show defendant's character or propensity to commit a crime." *Lynch*, 334 N.C. at 412, 432 S.E.2d at 354 (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). But the rule also carves out certain exceptions where evidence of prior convictions is admissible "for other purposes" including to prove "motive, opportunity, *intent*, preparation, plan, knowledge, identity[.]" N.C. Gen. Stat. § 8C-1, Rule. 404(b) (emphasis added). Defendant ignores this exception altogether in his initial brief. In his reply, Defendant contends that the State has not proven "two further constraints" of Rule 404(b), mainly the "similarity" and "temporal proximity" of the prior crime relative to the current charge. *State v. Sexton*, 336 N.C. 321, 353, 444 S.E.2d 879, 897 (1994) (quoting *Lynch*, 334 N.C. at 412, 432 S.E.2d at 354).

The kidnapping statute requires an accompanying intent, and the State argued that Defendant kidnapped Ms. Dunn for "the purpose of terrorizing" her. Intent, in fact, is one of the specifically carved out exceptions under Rule 404(b). *Id.* Here, the prosecutor asked whether Defendant had "been convicted of communicating threats and injury to real property with Sade Dunn." Applying Rule 404(b), Defendant's intent in kidnapping Ms. Dunn is directly at issue in this case. Defendant claims his intent when he went to Ms. Dunn's place of work was simply to talk about their children and to question her about her new relationship. However,

he then proceeded to grab, push, move, and hold her at gunpoint against her will. Evidence of Defendant's prior threats and injury to real property directed at Ms. Dunn is probative to the jury's determination as to Defendant's intent when he confronted her at her place of work.

Further, Defendant's conduct underlying his prior convictions are similar and recent in time relative to the assault and kidnapping charges. When the charge before the jury and a prior crime involve a common *modus operandi*, like choking, evidence underlying the prior crime is not precluded by Rule 609. *Sexton*, 336 N.C. at 352-53, 444 S.E.2d at 897. "[R]emoteness in time is less significant when the prior conduct is used to show intent . . ." *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007) (quoting *State v. Sager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991)).

Defendant's conduct underlying the prior convictions, like his conduct supporting the kidnapping and assault charges, involved verbal harassment and use of force directed at the same victim—Ms. Dunn. Additionally, evidence underlying Defendant's past convictions—mainly the identity of the victim— was admissible to show Defendant's intent to commit kidnapping. Defendant's prior convictions also occurred less than five years before the incident on 13 March 2018.

As to the issue of whether this evidence was unfairly prejudicial, Defendant makes two assertions. First, Defendant points to conflicting evidence about his intent

in confronting Ms. Dunn at her work. Because his "defense depended on the jury's acceptance of his version of events," information about his past convictions involving Ms. Dunn would have been particularly prejudicial. However, Defendant admitted to questioning Ms. Dunn about her relationship, not just to discussing the welfare of his children. Second, Defendant points to the jury's request for clarification about the legal definition of "terrorizing" and "intent" on two separate occasions during their deliberations as evidence they have been prejudiced against Defendant. These inquiries make no mention of Defendant's credibility or past convictions and instead seek clarity on the letter of the law.

This testimony on cross-examination falls squarely within Rule 404(b)'s exception. Evidence underlying Defendant's past conviction for communicating threats and injury to real property is probative as to Defendant's intent in the present case for purposes of the second-degree kidnapping conviction and was properly admitted.

C. Kidnapping Instruction

Defendant contends that the inclusion of the theory of confinement in the kidnapping jury instruction, in the disjunctive form along with the two other theories, constituted plain error. Specifically, Defendant argues that the State did not present sufficient evidence that Defendant "confined" Ms. Dunn to warrant instruction on the theory. We disagree.

Defendant correctly looks to *State v. Lyons* for the law on the question, but wrongly applies its principle here. 330 N.C. 298, 412 S.E.2d 308 (1991). When a trial court "instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied." *Id.* at 303, 412 S.E.2d at 312. However, as Defendant points out, there must be sufficient evidence of each theory included in the disjunctive jury instruction to avoid reversible error requiring a new trial. *State v. Dick,* 370 N.C. 305, 308-10, 807 S.E.2d 545, 547-48 (2017).

The trial court instructed the jurors to find Defendant guilty of second-degree kidnapping if, along with satisfaction of the other elements, there was evidence that Defendant "confined, restrained, *or* removed" Ms. Dunn. As discussed *supra* Issue I, the State introduced adequate evidence of restraint and removal. Therefore, we limit our discussion to confinement. The trial court defined confinement as having "imprisoned [Ms. Dunn] within a given area." Although *Fulcher* describes confinement as "connot[ing] some form of imprisonment within a given area, such as a room, a house or a vehicle," this list of enclosed spaces is not exhaustive. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

The State presented evidence that Defendant intentionally confined Ms. Dunn to the parking lot, containing her in that given area. Defendant's testimony that he "came to [his] ex-girlfriend's job and held a gun to her head and pushed her to a dark

parking lot in order to talk to her about visiting [his] children," gives rise to a reasonable inference that Defendant acted to confine her to the parking lot. *See State v. Chevallier*, 264 N.C. App. 204, 214, 824 S.E.2d 440, 449 (2019) ("In determining whether the trial evidence adduced was sufficient to instruct on a particular theory of criminal liability, we review the evidence and any reasonable inference from that evidence in the light most favorable to the State. An instruction on a criminal liability theory is proper when there is some evidence in the record reasonably supporting the theory." (citations and quotation marks omitted)). Defendant has thus failed to show error. *See Dick*, 370 N.C. at 312, 807 S.E.2d at 550 (holding trial court did not err in giving disjunctive jury instruction on two theories of first-degree sexual offense when the State introduced sufficient evidence of both theories).

Assuming *arguendo* the State introduced no evidence of confinement and the trial court, therefore, erred in instructing on that theory, Defendant has failed to demonstrate the requisite prejudice to reverse for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). To determine plain error in this context—when the trial court gives alternative, disjunctive jury instructions—we weigh "whether the evidence at trial was sufficient to support a conviction under the *proper* instruction." *State v. Collington*, 259 N.C. App. 127, 135, 814 S.E.2d 874, 882 (2018) (emphasis added). Here, according to Defendant, the "proper" instruction would include only restraint and removal. Having already held the State presented

sufficient evidence of the restraint and removal theories of kidnapping, *supra* Issue I, Defendant cannot demonstrate prejudice to reverse for plain error.

Defendant makes no further allegation as to the adequacy of the indictment to support the jury instructions because the indictment alleged all three theories included in the trial court's instructions. To the extent that Defendant invites this Court to look to "other parts of the record" and conduct an "examination of the State's evidence" for plain error, we decline to do so, as our review is limited to the issues argued in and supported by the parties' briefs. N.C. R. App. P. 28(a) (2020).

III. CONCLUSION

For the above reasons, we conclude that the trial court did not err by denying Defendant's motion to dismiss the second-degree kidnapping charge, and that the trial court did not plainly err by admitting the identity of the victim of Defendant's prior convictions on cross-examination or by instructing the jury on the kidnapping theory of confinement.

NO ERROR.

Judge COLLINS concurs.

Judge BERGER concurs in result only.

Report per Rule 30(e).