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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-22

Filed: 18 August 2020

Haywood County, No. 18 CRS 000328

STATE OF NORTH CAROLINA

v.

ROBERT WILLIAM TREADWAY

Appeal by Defendant from Judgment entered 10 June 2019 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Drew Nelson for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Robert William Treadway (Defendant) appeals from a Judgment entered on 10 June 2019 upon his conviction of First-Degree Kidnapping while threatening to use or display a firearm. The Record before us, including evidence presented at trial, tends to show the following:

STATE V. TREADWAY

Opinion of the Court

On 6 May 2017, during an argument with his wife, Rebecca Treadway, Defendant allegedly choked, bit, and threatened to kill Ms. Treadway. Several days later, on 12 May 2017, Ms. Treadway reported the incident to the Haywood County Sheriff's Office. Defendant was arrested on 14 May 2017 and charged with Assault by Strangulation and Assault on a Female. A magistrate ordered Defendant be held at the Haywood County Detention Center pending a hearing on conditions for release on bond. The following day, 15 May 2017, the Haywood County District Court ordered Defendant's release pending trial conditioned, *inter alia*, on a \$5,000 secured bond and that Defendant have no contact with the alleged victim, stay away from the home, and not possess firearms.

On 24 May 2017, a Haywood County District Court judge, at Ms. Treadway's request, entered an Order modifying the conditions of Defendant's pre-trial release to allow, in part, "Defendant and the Prosecution Witness may have peaceful contact." Ms. Treadway testified she asked for this modification because "I was hoping that this would have been enough to make him want to change his life. And two, I was terrified what he was going to do to me since I had told on him." Defendant and Ms. Treadway resumed their marriage and began living together again.

Defendant's court date for the two assault charges was set for 11 September 2017. On the morning of 11 September 2017, Defendant, however, did not appear as scheduled.

STATE V. TREADWAY

Opinion of the Court

Ms. Treadway testified on the morning of the scheduled hearing, she tried to wake Defendant so he would be on time for the hearing. At first, Defendant refused to get out of bed, telling Ms. Treadway it was her fault he had to go to court. Ms. Treadway eventually woke Defendant, and he began to berate her until the argument again became physical and Defendant began pushing and poking Ms. Treadway and reaching for her throat so as to choke her. Ms. Treadway testified she stood back and said "I can't believe you're fixing to do that. That's what we're going to court for." At this point, Ms. Treadway, who was supposed to take her husband to court that day, determined she no longer wished to take Defendant to court. She testified:

I couldn't believe, you know, I was hoping if he did get in any kind of trouble, it was going to help him this time. And he was just in denial and not sorry. So I was upset and afraid and just didn't want to go at this point. I didn't want to go and I was scared because he was scaring [me] again. So I just didn't want to go and I told him I didn't want to go.

Ms. Treadway eventually relented and got in the car but refused to start the engine. Defendant took his gun out of his holster and loaded a bullet into the chamber. Defendant told her "You're taking me to court and you're going to wait till I get out." Victim identified the gun as a 9mm Smith and Wesson, which Defendant allegedly always carried. When Defendant took out his firearm and loaded a bullet into the chamber, Ms. Treadway interpreted this as a signal he could kill her.

Ms. Treadway began driving to the courthouse. On the way, Ms. Treadway told Defendant she needed to stop for gas. At the gas station, she told Defendant she

STATE V. TREADWAY

Opinion of the Court

needed to use the restroom because she was feeling ill and went inside. Defendant followed Ms. Treadway into the gas station and stood outside the restroom door with his gun. In fear that he would hear her make a phone call, Ms. Treadway sent a text message to her friend Shannon Mintz (Mintz) asking her to call the police. Mintz immediately called 911, but the police were unable to determine Ms. Treadway's location. Ms. Treadway testified she left the restroom because Defendant was becoming impatient and she was afraid.

Once back on the road, Ms. Treadway pretended to be sick again and pulled over near a Dollar General. At this point, Defendant decided to drive, forcing Ms. Treadway into the passenger seat and taking control of the car. When asked why she did not try to run into the Dollar General, Ms. Treadway stated: "Because I was terrified of him. . . . Because he could kill me. . . . Because he's tried to kill. He's wanted to kill me. He's threatened to kill me." She testified as Defendant was driving away, she saw a man entering a business by the side of the road and screamed to get his attention, but Defendant immediately rolled up the car windows and locked the doors. The couple pulled up to a stop sign at an intersection near the courthouse. Defendant decided he no longer wanted to go to court. Instead, Defendant told Ms. Treadway, "I'm leaving and when I get to where I'm going, I'm going to kill you." As Defendant began driving away from the courthouse, Ms. Treadway yet again convinced Defendant to stop—this time at a rest area—so she could use the restroom.

STATE V. TREADWAY

Opinion of the Court

Once Defendant stopped at the rest area, Ms. Treadway ran for the restroom while on a call with her daughter and with Defendant chasing after her. Once in the restroom, Ms. Treadway's daughter called 911, and Ms. Treadway hid in the restroom stall with the door locked until the police arrived, arrested Defendant, and took a handwritten statement from Ms. Treadway of the morning's events.

In contrast, in his own defense, Defendant testified on the morning of 11 September 2017, he offered to go to court alone because his wife was feeling ill. She responded: "[N]o, you ain't driving my car, you ain't got no license, and I ain't got no insurance on you." Defendant testified he was carrying his gun that day, but he disputed his wife's claim he loaded a bullet in the chamber to threaten her. Defendant corroborated Ms. Treadway's testimony, stating they stopped at both the gas station and rest area, but Defendant testified he made no threats of any kind. Defendant explained, due to the frequent stops: "By the time I reached [the intersection to the court], I'm late for court and I know they've done called [roll]. And I figured FTA, failure to appear. And I was thinking I was going -- well, I'm just going to text my lawyer." Defendant stated he stopped at the rest area to text his lawyer and let his wife use the restroom; however, when Defendant saw the police he ran away until he was caught and arrested.

A Haywood County Grand Jury indicted Defendant on one count of Felonious Assault Inflicting Physical Injury by Strangulation arising from the initial 6 May

STATE V. TREADWAY

Opinion of the Court

2017 alleged assault and one count each of Felonious First-Degree Kidnapping with a Firearm and Felonious Intimidation of a Witness with a Firearm arising from the 11 September 2017 incident. On 3 June 2019, Defendant's case came on for trial. At the close of the State's evidence, Defendant moved to dismiss the charges for insufficiency of evidence, which the trial court denied. Defendant renewed his Motion to Dismiss at the close of all evidence, and the trial court again denied the Motion. During the charge conference, the trial court discussed the proposed jury instructions with counsel, identifying the underlying felony to support the charge of First-Degree Kidnapping as "to intimidate a witness." Counsel for the State acknowledged he did not know whether Ms. Treadway was subpoenaed to appear in court on 11 September 2017. The State then proposed, and the trial court accepted, the jury charge for the kidnapping count be predicated on Ms. Treadway's obligation of "acting as a witness" for the 11 September 2017 hearing.

In closing arguments, the State identified two theories for Defendant's actions, arguing Defendant kidnapped Ms. Treadway: (1) to prevent her from testifying against him or (2) to terrorize her. The State then argued to the jury, over Defendant's objection: "Just hearing this story, does that terrorize you? Does it? Does it, Mr. Downs? . . . Mr. McWhirter? Doctor? It's really hard to put yourself in Rebecca Treadway's place" After closing arguments, the trial court instructed the jury

STATE V. TREADWAY

Opinion of the Court

regarding the kidnapping charge and only mentioned “facilitating defendant’s commission of the offense of intimidating a witness” as the alleged purpose.

The jury returned verdicts finding Defendant not guilty of Assault by Strangulation and Intimidating a Witness. The jury did find Defendant guilty of First-Degree Kidnapping while threatening to use or display a firearm. The trial court sentenced Defendant to a minimum of 165 months to a maximum of 210 months in the custody of the North Carolina Department of Adult Corrections. The trial court also recommended substance abuse, psychiatric, and/or psychological counseling. Defendant, through counsel, gave oral Notice of Appeal in open court at the close of the proceedings.

Issues

The issues on appeal are whether (I) the trial court erred by denying Defendant’s Motion to Dismiss the kidnapping charge and (II) the trial court erred by allowing, over Defendant’s objection, the prosecutor’s closing remarks asking the jurors to put themselves in Ms. Treadway’s place.

Analysis

I. First-Degree Kidnapping

On appeal, Defendant contends the trial court erred in denying his Motion to Dismiss the charge of First-Degree Kidnapping, arguing there was insufficient evidence Ms. Treadway was acting as a prospective witness where there was no

STATE V. TREADWAY

Opinion of the Court

evidence she was actually subpoenaed to testify at the 11 September 2017 hearing and there was no evidence she was planning on testifying against Defendant. We review the trial court's ruling on Defendant's Motion to Dismiss for insufficiency of the evidence de novo:

A trial court, on a motion to dismiss for insufficient evidence, must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Whether evidence presented constitutes substantial evidence is a question of law for the court and is reviewed *de novo*. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In reviewing the denial of a motion to dismiss for insufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.

State v. Glisson, 251 N.C. App. 844, 847-48, 796 S.E.2d 124, 127-28 (2017) (citations and quotation marks omitted).

A person is guilty of kidnapping if they “unlawfully confine, restrain, or remove from one place to another” a person without consent for the purpose of, *inter alia*, “[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]” N.C. Gen. Stat. § 14-39(a)(2) (2019). Kidnapping is in the first-degree if the person kidnapped “either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]” *Id.* § 14-39(b).

STATE V. TREADWAY

Opinion of the Court

In this case, the trial court instructed the jury on the charge of First-Degree Kidnapping: “[T]hat the defendant confined, restrained, or removed that person for the purpose of facilitating defendant’s commission of the offense of intimidating a witness.” Section 14-226(a) of our General Statutes provides:

If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, the person shall be guilty of a Class G felony.

N.C. Gen. Stat. § 14-226(a) (2019).

As such, the dispositive inquiry on this issue is whether the State presented substantial evidence to prove Ms. Treadway was acting as a prospective witness for the 11 September 2017 hearing. “[T]his Court has previously explained that it is unnecessary to demonstrate that an individual will definitely testify in an upcoming matter in order to qualify for protection as a witness under N.C. Gen. Stat. § 14-226(a).” *State v. Shannon*, 230 N.C. App. 583, 586, 750 S.E.2d 571, 573 (2013). In *State v. Neely*, this Court rejected the defendant’s argument his conviction should have been dismissed because when the threat was made the witness had already completed his testimony in the first trial and was not under a subpoena to testify in the superior court trial. 4 N.C. App. 475, 476, 166 S.E.2d 878, 879 (1969). The *Neely* Court explained because “[t]he gist of [the] offense” of intimidating a witness is the obstruction of justice, “[i]t is immaterial, therefore, that the person procured to absent

STATE V. TREADWAY

Opinion of the Court

himself was not regularly summoned or legally bound to attend as a witness.” *Id.* at 476-77, 166 S.E.2d at 879 (citation and quotation marks omitted); *see also Shannon*, 230 N.C. App. at 587, 750 S.E.2d at 574 (“*Neely* was simply establishing that prospective witness was the standard by which to determine whether an individual qualifies as being a person summoned or acting as such witness under N.C. Gen. Stat. § 14-226(a).” (quotation marks omitted)).

In the present case, there was substantial evidence presented at trial to support the State’s position Ms. Treadway was a prospective witness in Defendant’s assault case and Defendant intended to intimidate her to prevent her from appearing in court. After the 14 May 2017 arrest, Defendant’s conditions of release were modified, at Ms. Treadway’s request, to permit “peaceable contact.” In that Order, signed by both Ms. Treadway and Defendant, Ms. Treadway was referred to as the “Prosecution Witness.” Furthermore, after she reported the 6 May 2017 assault to the police, Ms. Treadway provided a handwritten statement describing the incident to law enforcement. *See Shannon*, 230 N.C. App. at 586, 750 S.E.2d at 574 (explaining the therapist understood every time she wrote a letter to the Department of Social Services about an incident, she was “opening herself up to have to testify”). Ms. Treadway also testified she planned to go to the hearing on the morning of 11 September 2017 and only began not wanting to go when Defendant started yelling at her and tried to choke her. Ms. Treadway’s plans to attend the hearing were verified

by her daughter, who testified at trial, “I knew my mom had court. And we were just waiting for a phone call to hear from her, [and] how it went.” Therefore, taken in the light most favorable to the State, there was substantial evidence presented that Ms. Treadway was a prospective witness against Defendant in his assault trial and planned on attending the 11 September 2017 hearing. Thus, the trial court did not err in denying Defendant’s Motion to Dismiss the First-Degree Kidnapping charge on this basis.

II. The State’s Closing Arguments

Defendant further argues the trial court erred by allowing the prosecutor, over Defendant’s objection, to make improper remarks concerning the jurors placing themselves in Ms. Treadway’s place. Consequently, Defendant contends the remarks were “unrelated to the jury instructions and designed to inflame the jury” and therefore were improper and prejudicial.

Our Supreme Court

has elaborated on the statutory provisions governing closing arguments and emphasized that closing arguments must: (1) be devoid of counsel’s personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passions or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.

State v. Tart, 372 N.C. 73, 80, 824 S.E.2d 837, 842 (2019) (citation and quotation marks omitted). “The standard of review for improper closing arguments that

STATE V. TREADWAY

Opinion of the Court

provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection.” *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). “[I]n order for an improper closing argument to constitute reversible error, the prosecutor’s remarks must be both improper and prejudicial.” *State v. Marino*, 229 N.C. App. 130, 134, 747 S.E.2d 633, 637 (2013) (citations and quotation marks omitted).

A. Impropriety

Defendant contends the State’s closing remarks were improper because the remarks concerned the jurors putting themselves in the alleged victim’s place. In *State v. Prevatte*, our Supreme Court held “[a]rguments that ask the jurors to place themselves in the victim’s shoes are improper.” 356 N.C. 178, 244, 570 S.E.2d 440, 476 (2002) (citation omitted). During closing arguments, the State, over Defendant’s objection, asked the jury: “Just hearing this story, does that terrorize you? Does it? Does it, Mr. Downs? . . . Mr. McWhirter? Doctor? It’s really hard to put yourself in Rebecca Treadway’s place” Here, the State specifically asked the jury to place themselves in the Ms. Treadway’s shoes. Thus, under our Supreme Court’s decision in *Prevatte*, the closing remarks were, in fact, improper. *See id.*

B. Prejudice

However, even though the closing remarks challenged by Defendant were improper, a new trial will be granted only if “the remarks were of such a magnitude

STATE V. TREADWAY

Opinion of the Court

that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.” *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. In the present case, given the testimony against Defendant offered at trial, Defendant has not met his burden of showing he was prejudiced by the State’s closing remarks. Specifically, Ms. Treadway testified before the jury Defendant forced her into the vehicle, took out his gun, and loaded a bullet into the chamber, which she believed was signaling Defendant could kill her if she did not comply. Defendant also followed Ms. Treadway to the restroom and stood outside the door while she attempted to call for help. Ms. Treadway testified when she tried to scream for help, Defendant immediately rolled up the car windows and locked the doors. Further, when Defendant drove away from the courthouse, he told his wife “I’m leaving and when I get to where I’m going, I’m going to kill you.”

Given the substantial evidence presented at trial regarding the events of 11 September 2017, Defendant has not demonstrated that the prosecution’s closing arguments, as challenged on appeal, rendered his conviction unsound. Although the State’s closing statements asking the jurors to place themselves in Ms. Treadway’s shoes were improper, Defendant has not demonstrated they were also prejudicial. Thus, we conclude the trial court did not commit prejudicial error in overruling Defendant’s objection to the closing argument.

Conclusion

STATE V. TREADWAY

Opinion of the Court

Accordingly, for the foregoing reasons, we conclude Defendant received a trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).