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NO. COA09-624

NORTH CAROLINA COURT OF APPEALS

Filed: 22 December 2009

STATE OF NORTH CAROLINA

v.

Halifax County
Nos. 08 CRS 51571-72
08 CRS 51583

DESMOND MATTHEW BROWN

Appeal by defendant from judgments entered 8 January 2009 by Judge Cy A. Grant in Halifax County Superior Court. Heard in the Court of Appeals 28 October 2009.

Attorney General Roy Cooper, by David L. Elliott, Director, Victims and Citizen Services, for the State.

Thomas R. Sallenger, for defendant-appellant.

CALABRIA, Judge.

Desmond Matthew Brown ("defendant") appeals judgments entered upon jury verdicts finding him guilty of second degree kidnapping, assault by strangulation, and possession of a firearm by a felon. We vacate the judgment for assault by strangulation and find no error in the remainder of defendant's trial.

I. Background

Penelope Douma ("Douma") first met defendant at a mutual friend's house in Medock, North Carolina. During this meeting, defendant was seen with a .22 rifle ("the rifle") in his hand. On 5 March 2008, Douma and defendant met again and exchanged telephone

numbers. That evening, defendant picked Douma up and took her back to his residence ("the residence").

From Wednesday, 5 March 2008 until Friday, 7 March 2008, Douma and defendant watched movies and engaged in consensual sex at the residence. On Friday evening, Douma and defendant went to Shoney's Restaurant ("Shoney's") to eat, with the understanding that defendant would take Douma home afterwards. While Douma and defendant were dining, a male waiter asked Douma if she wanted more tea, to which she replied "sure baby." In response to this, defendant's entire demeanor changed and he became "upset and mad at everything." Although Douma asked defendant to take her home, defendant refused and instead took Douma back to the residence.

When Douma and defendant arrived at the residence, Douma took out her cell phone and stated that she was going to call her uncle to pick her up. Defendant grabbed Douma's cell phone away from her and the two of them entered defendant's bedroom, "arguing and fussing." Douma repeated to defendant that she wanted to leave.

Douma then attempted to leave the residence, but defendant grabbed her by the throat and threw her on his bed. Defendant placed a pillow over Douma's face until Douma was able to kick him away. Douma's throat was so swollen after defendant grabbed her that she had problems trying to breathe. Douma attempted to scream, but defendant slapped her and put his hand over her mouth. At this point, Douma noticed a rifle in the room. It was the same rifle that she had seen defendant with a few weeks earlier.

Later, defendant asked Douma to have sex and she refused. Defendant then wrapped his arm around Douma's throat, took off her pants, and forced her to have sexual intercourse with him. After this event, Douma's throat was so swollen that she could barely speak. When Douma again tried to leave, defendant, who was holding the rifle, grabbed her and prevented her from exiting.

The next morning, 8 March 2008, defendant had the rifle across his lap as he and Douma sat in defendant's bedroom. Defendant again told Douma she could not leave and then slapped her. The impact of the slap left a bruise under Douma's right eye. That evening, the two left the residence, drove to a convenience store, and then returned. Defendant had the rifle in his possession during this trip.

On Sunday morning, 9 March 2008, the couple had another argument and defendant again grabbed Douma by the throat. The couple then walked to a convenience store. Defendant did not bring the rifle with him on this trip. While Douma and defendant were walking, a sheriff's patrol vehicle passed by them. To avoid being seen, defendant threw Douma to the ground and dragged her into a ditch.

On Monday, 10 March 2008, a man came to the residence and delivered a message to defendant. After receiving the message, defendant fled the residence and Douma called 911. Law enforcement subsequently arrived at the residence and secured Douma. A search of the residence yielded the rifle, which had a flashlight attached

to the barrel with a bandage, and .22 rifle cartridges. Defendant was not apprehended at this time.

On 11 March 2008, officers returned to the residence to engage in additional investigation. When they arrived at the residence, they saw a gun barrel pointed at them from underneath a door. After a discussion with the officers, defendant walked out of the residence voluntarily and was arrested. The room defendant exited contained multiple pieces of an unidentified firearm. This particular weapon was inoperable.

Defendant was indicted for the offenses of first degree rape, first degree sexual offense, assault by pointing a gun, assault on a female, communicating threats, first degree kidnapping, four counts of assault by strangulation (one count for each day from 7-10 March 2008), and possession of a firearm by a felon. Defendant was tried in Halifax County Superior Court beginning 5 January 2009, for the charges of first degree rape, first degree sexual offense, first degree kidnapping, four counts of assault by strangulation, and possession of a firearm by a felon. At the close of the State's evidence, defendant made a motion to dismiss that was denied by the trial judge. Defendant did not present any evidence.

On 8 January 2009, the jury returned verdicts of guilty to second degree kidnapping, possession of a firearm by a felon, and assault by strangulation on 10 March 2008. The jury returned verdicts of not guilty for the remaining charges. Defendant made a motion to dismiss notwithstanding the verdicts, which was denied

by the trial court. Defendant was sentenced to: (1) a minimum of 59 months to a maximum of 80 months for the conviction of second degree kidnapping; (2) a minimum of 29 months to a maximum of 35 months for the conviction of possession of a firearm by a felon; (3) a minimum of 20 months to a term of 24 months for the conviction of assault by strangulation on 10 March 2008. The sentences were to be served consecutively in the North Carolina Department of Correction. Defendant appeals.

II. Motions to Dismiss

Defendant argues that the trial court erred in denying his motions to dismiss for the following charges: (1) assault by strangulation; (2) possession of a firearm by a felon; and (3) second degree kidnapping.

The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal quotations and citations omitted).

A. Assault by Strangulation

_____Defendant argues that the trial court erred in denying defendant's motion to dismiss the charge of assault by strangulation on 10 March 2008. We agree.

"The elements of assault by strangulation are defined by N.C. Gen. Stat. § 14-32.4(b): (1) an assault and (2) infliction of 'physical injury by strangulation.' N.C. Gen. Stat. § 14-32.4(b) (2005). 'Strangulation' is not defined in the statute. . . ." *State v. Little*, 188 N.C. App. 152, 157, 654 S.E.2d 760, 764 (2008). Defendant's indictment stated that defendant "[d]id assault Penelope Douma and inflict serious injury, by restricting her breathing and causing her throat to swell, by strangulation, using his hands to squeeze her throat."

Defendant was charged with four counts of assault by strangulation, one count for each of the four days he held Douma in the residence. The trial court instructed the jury on the offense of assault by strangulation as follows:

The defendant has been charged with assault inflicting physical injury by strangulation. For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt.

First, that the defendant assaulted the victim by intentionally strangling the victim. And, second, that the defendant inflicted physical injury upon the victim.

If you find from the evidence beyond a reasonable doubt that on or about Friday, March 7, 2008, the defendant intentionally assaulted Penelope Douma, inflicting physical injury by strangulation, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

The trial court then repeated this instruction for Saturday, 8 March 2008, Sunday, 9 March 2008, and Monday, 10 March 2008.

For the four counts of assault by strangulation, the jury only returned a guilty verdict for one count, with Monday, 10 March 2008 as the date of the offense. The jury returned verdicts of not guilty to the counts of assault by strangulation for each of the remaining three days. Douma testified about the events that took place on 10 March 2008 as follows:

Q: Was there any abuse, physical abuse, on (sic) the day on Monday?

A: Monday we woke up. [Defendant] got something to eat. . . . If I recall - I am trying to remember everything. It has been so long. I think Monday he did slap me Monday, if I recall. I am thinking he did slap me on Monday.

"Slapping" cannot be considered synonymous with "strangulation." Douma testified that defendant grabbed her by the throat on multiple occasions from Friday to Sunday, but the jury found defendant not guilty of assault by strangulation on each of those days. The State provided no evidence that, on 10 March 2008, defendant placed his hands on or squeezed Douma's throat. Therefore, defendant's judgment for assault by strangulation on 10 March 2008 must be vacated.

B. Possession of a firearm by a felon

____ Defendant argues that the trial court erred in denying defendant's motion to dismiss the charge of possession of a firearm by a felon. We disagree.

____ "[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007); see also N.C. Gen. Stat. § 14-415.1(a) (2007). Defendant's indictment for this offense stated that he did "possess a .22 rifle. . . ." In his brief, defendant does not dispute that he was a convicted felon.

While the defendant argues at length about whether the State provided substantial evidence concerning defendant's possession of the disassembled weapon found in the residence after defendant's arrest, this firearm is not at issue in this case. The only weapon identified at trial as a ".22 rifle" was the rifle that was recovered from the residence on 10 March 2008. Douma identified the rifle, which she could identify due to the flashlight attached to the barrel with a bandage, as the weapon defendant repeatedly held against her and threatened her with throughout the four-day ordeal.

The rifle recovered on 10 March was a firearm and Douma's testimony established that it was in defendant's actual possession. The State presented substantial evidence for a reasonable juror to conclude from the evidence that defendant was guilty of possession of a firearm by a felon. This assignment of error is overruled.

C. Second Degree Kidnapping

____Defendant argues that the trial court erred in denying defendant's motion to dismiss the charge of second degree kidnapping. We disagree.

Under North Carolina General Statutes, to be guilty of kidnapping, a defendant must "unlawfully confine, restrain, or remove from one place to another, any person 16 years of age or over without the consent of such person" for one of four specified purposes¹, including "[f]acilitating the commission of any felony[.]" Where the victim is released to a safe place and is not seriously injured or sexually assaulted, the defendant is guilty of second-degree kidnapping.

State v. Jordan, 186 N.C. App. 576, 584, 651 S.E.2d 917, 922 (2007) (quoting N.C. Gen. Stat. § 14-39 (2005)). The specified purposes in N.C. Gen. Stat. § 14-39(a) include: "(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or (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(a)(2)-(3) (2007).

Douma testified that when she and defendant left Shoney's, she asked defendant to take her home and he refused. When they returned to the residence, Douma repeatedly told defendant she wanted to leave. When Douma attempted to leave, defendant grabbed her by the throat and threw her on his bed. Later that evening, defendant forced Douma to have sex with him against her will. Over the course of the four-day ordeal, defendant repeatedly grabbed

¹ The current version of the statute contains six specified purposes. See N.C. Gen. Stat. § 14-39(a)(1)-(6) (2007).

Douma by the throat, struck her in the face, and threatened her with the rifle. He would not permit Douma to leave. Douma's testimony provides sufficient evidence to overcome a motion to dismiss and allow the case to be decided by a jury. This assignment of error is overruled.

III. Jury Instructions

Defendant argues that the trial court erred by failing to instruct the jury regarding the definition of strangulation, despite defendant's request to do so. Since we have vacated defendant's conviction for assault by strangulation, this argument is moot and we need not consider it.

IV. Conclusion

The State failed to present sufficient evidence of an assault by strangulation on 10 March 2008 and therefore defendant's judgment in file number 08 CRS 51571 is vacated. We find no error in the remainder of defendant's trial.

Vacated in part and no error in part.

Judges HUNTER, Robert C. and GEER concur.

Report per Rule 30(e).