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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-922

Filed: 21 April 2020

Cleveland County, No. 17 CRS 56416-18; 17 CRS 56420-21

STATE OF NORTH CAROLINA

v.

WALLACE GAITHER

Appeal by defendant from judgments entered 27 March 2019 by Judge Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar, Jr., for the State.

William D. Spence for defendant-appellant.

TYSON, Judge.

Wallace Gaither (“Defendant”) appeals from judgments entered upon the jury’s verdicts finding him guilty of: (1) felony breaking and entering with intent to terrorize or injure; (2) first-degree kidnapping; (3) felony attempted first-degree forcible rape; (4) misdemeanor assault with a deadly weapon; and, (5) carrying a concealed weapon. We find no error.

I. Background

Defendant walked up to the front yard of an 82-year-old woman (“the victim”) on 7 December 2017. The victim was in her front yard to rake leaves when he approached. She had known Defendant for “upwards of forty years.” At trial, the victim and Defendant testified to their versions of what happened thereafter.

A. The State’s Evidence

The victim testified she and Defendant were speaking in her front yard when a man selling apples drove up to her house. She spoke with the seller to purchase apples and went inside her house to get money. The victim returned outside to purchase the apples. While she was paying for the apples, Defendant entered her house.

When the victim returned inside, Defendant was standing at the front door. The victim said, “Don’t shut that door. I’m going back out there.” Defendant replied, “No, you ain’t. You ain’t going back out there. You’re going to give me some pu--y.” She responded, “I ain’t going to do that. Let’s don’t do that. I don’t want to do that.”

Defendant locked the front door and told the victim, “You’re going to give me some.” The victim went out the back door to the porch while Defendant locked the front door. She sat on a church bench on the porch, holding it tightly. Defendant came outside to the bench and told her, “Come on here. You’re going to give me some.” The victim repeated that she did not want to have sex.

She testified Defendant then “jacked [her] up from the back” and pulled a knife from his pocket. Defendant threatened her, “I’m going to cut your neck slam off.” She replied, “No, don’t do that. Don’t cut me.” She added, “I’ll do anything you want me to do.”

Defendant then “jacked [her] up off the bench” and both went inside the house. The victim testified she complied because she was scared. She told Defendant she had to use the bathroom, and he stood in the door and watched her as she did. They then went into her bedroom.

Defendant pushed the victim onto the bed and crawled on top of her. He attempted to penetrate her repeatedly, but was unable to do so successfully. She testified, “He tried and tried and tried.” The victim then heard somebody knocking at the front door and told Defendant she had to answer it. Defendant allowed her to go to the door. She left Defendant in the bedroom.

The victim’s granddaughter was at the door. She testified the victim was not wearing her wig and her clothes were “messed up.” The victim’s granddaughter went to the bathroom and saw Defendant making up the bed. She then asked the victim who the man in the bedroom was. The victim replied, “He’s trying to make me have sex.”

The victim asked her granddaughter to “please get [Defendant] out of here.” Her granddaughter went outside and got her boyfriend and another friend to help.

After Defendant refused to leave, the granddaughter's friends pulled him out of the house.

Outside, Defendant chased the granddaughter's boyfriend and pulled a gun on him. Defendant turned and pointed the gun at the granddaughter. He threatened, "I'll shoot you, you little bi-ch." Defendant argued with another of the victim's family members, who was on the phone with the police, until he eventually left the victim's yard and returned to his house.

B. Defendant's Evidence

Defendant testified he approached the victim's house after he had been to a bootlegger's house, drank a beer, and consumed a \$2 shot. He testified he approached the victim as she was about to rake leaves because he wanted to ask her if he could take some of her leaves for his dog lot. He said they went inside and talked in her living room.

He testified the victim told him, "my daughter here don't want me to drink." She later added, "I hadn't had none since my husband died." Defendant replied, "We'll just see." Defendant testified they continued to talk, and then "went back to the back."

Defendant heard knocking on her front door after they had been sitting for four or five minutes. The victim went to see who was at her door. Defendant testified "the apple man" and the victim's grandchildren were at the door. Defendant asked the

victim for one of the apples she bought, then left her house after she gave him an apple.

Defendant denied raping or attempting to rape the victim. Defendant also denied threatening the victim with a knife or pointing a gun at her granddaughter.

C. Procedural History

Defendant was indicted for: (1) breaking and entering with intent to terrorize or injure; (2) first-degree kidnapping; (3) attempted first-degree forcible rape; (4) misdemeanor assault with a deadly weapon; and, (5) carrying a concealed weapon.

At the close of the State's evidence, Defendant's counsel moved to dismiss the charges. The trial court denied the motion. Defendant's counsel renewed the motion to dismiss the charges after the close of all evidence. The trial court determined substantial evidence existed to submit the charges to the jury and denied the motion.

The jury found Defendant guilty of all five charges. The trial court consolidated the offenses of attempted first-degree forcible rape, breaking and entering with intent to terrorize or injure, and assault with a deadly weapon, and sentenced Defendant to an active prison term of 180 to 276 months.

On the first-degree kidnapping conviction, the trial court determined "there are elements within that offense that have already been sentenced in the other matter." The trial court arrested judgment on the conviction of first-degree kidnapping and sentenced Defendant under second-degree kidnapping to 20 to 36

months in prison, to run concurrently with the sentence on the other charges.

Defendant entered his notice of appeal in open court.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court erred in denying his motions to dismiss the charges, specifically the charges of breaking and entering with intent to terrorize or injure, and first-degree kidnapping. Defendant also argues he was denied effective assistance of counsel at his trial, if this Court concludes his trial counsel failed to properly move to dismiss the charges.

IV. Standard of Review

“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 (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

“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). “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).

V. Analysis

We first address Defendant’s claim of ineffective assistance of counsel. Defendant raises this potential issue in the event his trial counsel’s general motions to dismiss were insufficient to preserve the issues of sufficiency of the evidence for appellate review. Defendant contends, and the State agrees, the motions were sufficient to preserve appellate review.

“[A] general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court.” *State v. Glisson*, 251 N.C. App. 844, 847, 796 S.E.2d 124, 127 (2017) (citations omitted). We address the trial court’s denial of Defendant’s motions and dismiss his claim of ineffective assistance of counsel as moot.

A. Breaking and Entering with Intent to Terrorize or Injure

Defendant asserts insufficient evidence was introduced to show his intent to either terrorize or injure the victim when he entered her home. We disagree.

“Any person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony.” N.C. Gen. Stat. § 14-54(a1) (2019). This offense, created by our General Assembly in 2013, differs from § 14-54(a), which requires the “intent to commit any felony or larceny therein.” N.C. Gen. Stat. § 14-54(a) (2019).

This Court previously addressed the element of “intent to terrorize or injure” in *State v. Griffin* and recognized, “the intent to terrorize or injure must exist at the time of entry.” *State v. Griffin*, __ N.C. App. __, __, 826 S.E.2d 253, 257 (citations omitted), *disc. review denied*, __ N.C. __, 831 S.E.2d 68 (2019). The “intent at the time of the breaking and entering, may be inferred from the acts he committed subsequent to his breaking or entering the building.” *Id.* (citation and internal quotation marks omitted).

This Court in *Griffin* also applied the meanings of the words “terrorize” and “injure” in N.C. Gen. Stat. § 14-54(a1). *Id.* Borrowing a definition of “terrorize” from the kidnapping and stalking contexts, this Court recognized “terrorize” in this statute requires “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.” *Id.* (citations omitted).

This Court in *Griffin* also reviewed our Supreme Court’s general precedents to apply “injure,” and held, “constructive intent to injure exists where the actor’s conduct

is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of [willfulness] and wantonness equivalent in spirit to an actual intent.” *Id.* (citations and internal quotation marks omitted).

Defendant argues the State presented insufficient evidence to show he intended to terrorize or injure the victim when he entered her home. Defendant compares the facts before us to those in *Griffin*, where the defendant was a mixed martial arts fighter who entered the victim’s home uninvited, began to argue with the victim over an incident involving the defendant’s girlfriend, then violently attacked the victim. *Id.* Defendant concedes he was not invited into the victim’s home, but argues they had known each other for many years, no evidence was shown that any ill will existed between them, and the victim showed no signs of fear after she found he had entered her home.

Viewing the evidence in the light most favorable to the State, sufficient evidence exists to infer Defendant’s intent to terrorize or injure the victim when he broke and entered her home without invitation. He told the victim she would not be going back outside, demanded sex, and locked the front door. He threatened her with a knife, forced her into the bedroom, and repeatedly assaulted her. Any conflicts in Defendant’s or the victim’s actions or testimonies were for the jury to consider and resolve. *See State v. Mitchell*, 240 N.C. App. 246, 258, 770 S.E.2d 740, 748 (2015) (“Any discrepancies or contradictions in the evidence [are] for the jury to resolve.”

(citation omitted)). The trial court properly denied Defendant's motion to dismiss the charge of breaking and entering the victim's residence with the intent to terrorize or injure. Defendant's argument is overruled.

B. First-Degree Kidnapping

Defendant asserts insufficient evidence supports the charge of first-degree kidnapping because any confinement, restraint, or removal of the victim was incidental to and an inherent part of the charge of attempted rape. We disagree.

Under the kidnapping statute, N.C. Gen. Stat. § 14-39(a) (2019), the State "need only show (1) an unlawful, nonconsensual restraint, confinement or removal from one place to another (2) for the purpose of committing or facilitating the commission of certain specified acts." *State v. Thompson*, 306 N.C. 526, 532, 294 S.E.2d 314, 318 (1982) (citation and internal quotation marks omitted).

The indictment in this case alleges those purposes were: (1) the facilitation of the commission of a felony or the facilitation of his flight therefrom; and, (2) doing serious bodily injury to and terrorizing the victim. *See* N.C. Gen. Stat. § 14-39(a)(2)-(3).

Years ago, our Supreme Court held: "It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). To avoid violating the constitutional prohibition against double jeopardy, our Supreme Court

held the “restraint” required under N.C. Gen. Stat. § 14-39(a) must “connote a restraint separate and apart from that which is inherent in the commission of the other felony.” *Id.*

However, “there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony.” *Id.* at 524, 243 S.E.2d at 352.

In *Fulcher*, the defendant bound the hands of his victims at knifepoint before forcing them to perform sexual acts upon him. *Id.* Our Supreme Court found those acts of restraint were “separate and apart from, and not an inherent incident of, the commission upon [the victims] of the crime against nature, though closely related thereto in time.” *Id.* The evidence in *Fulcher* was sufficient to support separate charges of kidnapping and crimes against nature.

Defendant committed several and distinct acts of restraint, confinement, or removal upon the victim that are separate from and not inherent to the attempted rape. Defendant locked the front door, physically removed the victim from the bench on her back porch into her bedroom, and threatened her at knifepoint. The trial court did not err in denying Defendant’s motion to dismiss the charge of first-degree kidnapping.

Further, we note the trial court avoided any double jeopardy concerns by arresting the first-degree kidnapping charge at Defendant's sentencing hearing and sentencing Defendant under second-degree kidnapping. First-degree kidnapping occurs where the defendant does not release the victim in a safe place, or the victim is seriously injured or sexually assaulted. N.C. Gen. Stat. § 14-39(b) (2019). In this case, the trial court determined "there are elements within [first-degree kidnapping] that have already been sentenced" on the other charges. The trial court sentenced Defendant under second-degree kidnapping, which does not feature any such overlapping elements, to avoid any potential issue of double jeopardy. *See id.* Defendant's argument is overruled.

VI. Conclusion

Defendant's counsel preserved the issue of sufficiency of the evidence through his general motions to dismiss the charges against Defendant for appellate review. Viewing the evidence in the light most favorable to the State, sufficient evidence exists to infer Defendant intended to terrorize or injure the victim when he illegally entered her home. Sufficient evidence also exists to show acts of restraint, separate and apart from the restraint inherent to the attempted rape, to support the charge of first-degree kidnapping.

The trial court did not err in denying Defendant's motions to dismiss the charges. Defendant received a fair trial, free from errors he preserved and argued.

STATE V. GAITHER

Opinion of the Court

We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judge ZACHARY and BROOK concur.

Report per Rule 30(e).