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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-774

Filed 06 June 2023

Cleveland County, Nos. 18 CRS 55562, 18 CRS 2073, 19 CRS 1807

STATE OF NORTH CAROLINA

v.

KEON TEKOAS SMITH

Appeal by Defendant from Judgments entered 22 February 2022 by Judge Louis A. Trosch, Jr. in Cleveland County Superior Court. Heard in the Court of Appeals 12 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.

Sean P. Vitrano for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Keon Tekoas Smith (Defendant) appeals from Judgments entered on 22 February 2022 upon jury verdicts finding him guilty of Second-Degree Forcible Rape, Second-Degree Forcible Sex Offense, and Second-Degree Kidnapping. In briefing to this Court, however, Defendant only challenges the Judgment entered on the Second-

Degree Kidnapping conviction. The Record, including the evidence presented at trial, tends to reflect the following:

Following a Thanksgiving celebration on 23 November 2018 at Victim's home, Victim fell asleep in her bedroom with the light on. In the early hours of 24 November 2018, Victim awoke when her bedroom light suddenly turned off. In her doorway Victim saw a tall, skinny man with dreadlocks. Thinking the man was her son, she turned over to go back to sleep. A moment later, the man, later identified as Defendant, jumped on Victim and began pulling off her clothes, at which point Victim realized the man was not her son. Defendant removed Victim's pants and underwear and began raping her. Victim told Defendant to stop, but Defendant did not do so. Defendant held Victim down, repeatedly struck her, and threatened to kill her. During the rape, if Victim did not respond to Defendant's questions how he wanted her to, he would strike her again. Victim did not know whether Defendant had a weapon or would carry out his threats, so she complied out of fear for her life.

At some point during the encounter, Victim asked to use the bathroom because she "was trying to figure out a way to get away from [Defendant]." Defendant first told Victim to urinate on him on the bed, but she refused. He then permitted her to go to the bathroom but followed her into the bathroom. The bathroom is an interior room adjoining Victim's bedroom. While Victim was sitting on the toilet, Defendant stood in front of her and told her to perform oral sex on him. Defendant grabbed Victim's neck, and, against her wishes, Victim complied with Defendant's demand.

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Upon leaving the bathroom, Victim was unable to exit through the bedroom door, so she returned to the bed in her bedroom. Defendant again demanded Victim to perform fellatio on him, and Victim complied. After Defendant ejaculated, Defendant fell asleep on Victim's bed.

When Victim heard Defendant snoring, she first crept to the bathroom before making her way to the kitchen to get a knife and the living room to retrieve her phone. Victim was afraid Defendant might wake up, so she called 9-1-1 from the porch. An officer responded to the call. Defendant managed to evade the officer but was later identified, located, and brought in for questioning.

Defendant was indicted for Second-Degree Forcible Rape, Second-Degree Forcible Sex Offense, and First-Degree Kidnapping. In addition, Defendant was also charged with First-Degree Burglary and Assault by Strangulation. This matter came on for trial on 14 February 2022. Defendant stipulated his location was subject to electronic monitoring, which placed him at or near Victim's home during the time of the incident. Defendant also stipulated he engaged in vaginal intercourse and other sexual acts with Victim.

At the close of the State's case-in-chief, the State dismissed the Assault by Strangulation charge. Defendant then moved to dismiss all remaining charges and was heard further on the First-Degree Kidnapping charge, claiming the State failed to prove the necessary elements of the crime. The trial court denied the Motion. Defendant chose not to testify or otherwise offer evidence. At the close of all evidence,

Defendant renewed his Motion to Dismiss all charges and again asserted there was insufficient evidence for Kidnapping. Once again, the trial court denied Defendant's Motion.

During the charge conference, the trial court decided to omit "removal" from the jury instructions for the First-Degree Kidnapping charge. Thus, the trial court instructed the jury only on confinement and restraint, defining confinement as "imprison[ing] her, within a given area" and restraint as "restrict[ing] her freedom, of movement." The trial court further instructed the jury that in order to return a guilty verdict for First-Degree Kidnapping, the jury would have to find "this confinement and/or restraint was a separate, complete act independent of and apart from the second-degree forcible rape and/or second-degree forcible sex offense." Finally, in addition to First-Degree Kidnapping, the trial court instructed the jury on the lesser-included offense of Second-Degree Kidnapping:

If you do not find the defendant guilty of first-degree kidnapping, you must then determine whether the defendant is guilty of second-degree kidnapping. Second-degree kidnapping differs from first-degree kidnapping only in that it is unnecessary for the State to prove that the [victim] was not released by the defendant in a safe place, had been sexually assaulted and/or had been [seriously] injured.

On 22 February 2022, the jury returned guilty verdicts for Second-Degree Forcible Rape, Second-Degree Forcible Sex Offense, and Second-Degree Kidnapping. The jury returned a verdict of not guilty of First-Degree Burglary. The trial court sentenced Defendant to 127 to 213 months each for Second-Degree Forcible Rape and

Second-Degree Forcible Sex Offense to run consecutively, and to 44 to 65 months for Second-Degree Kidnapping to run concurrently with the sentence for Second-Degree Forcible Rape. After sentencing, Defendant entered Notice of Appeal in open court.

Issue

The sole issue raised on appeal is whether the trial court erred in denying Defendant's Motions to Dismiss the Kidnapping charge for insufficient evidence of confinement or restraint as a separate and complete act independent of the Second-Degree Forcible Rape and Second-Degree Forcible Sex Offense.

Analysis

Defendant's sole argument on appeal is that the trial court erred by denying his Motions to Dismiss the Kidnapping charge at trial.¹ In ruling on a motion to dismiss, the trial court considers "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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007). The trial court "must view the evidence in the light most favorable to the State, giving the State the benefit of

¹ Notably, Defendant does not challenge the validity or sufficiency of the indictments, the jury instructions, verdicts, or sentences imposed. As noted above, Defendant also does not challenge his other convictions.

all reasonable inferences.” *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). “If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court’s duty to submit the case to the jury.” *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958). “Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo.” *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016).

Relevant to this case, a criminal defendant is guilty of kidnapping if they, *inter alia*, “unlawfully confine, restrain, or remove from one place to another, any other person . . . without the consent of such person . . . for the purpose of . . . [f]acilitating the commission of any felony . . . or [d]oing serious bodily harm to . . . the person” N.C. Gen. Stat. § 14-39(a)(2)-(3) (2021). Confinement is defined as “some form of imprisonment within a given area, such as a room, a house or a vehicle” while restraint is broadly defined to include both “a restriction upon freedom of movement by confinement” and “a restriction, by force, threat or fraud, without a confinement.” *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Removal—or asportation—is not an independent necessary element to kidnapping “where there is the requisite confinement or restraint.” *Id.* at 522, 243 S.E.2d at 351.

In this case, Defendant specifically argues there was not substantial evidence of any confinement or restraint separate and apart from the confinement and restraint inherent to the Second-Degree Forcible Rape and Second-Degree Forcible

Sex Offense charges sufficient to submit the kidnapping charge as a separate offense to the jury. Defendant is correct that our Supreme Court has acknowledged: “It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim.” *Id.* at 523, 243 S.E.2d at 351.

Further, the Court later explained:

[I]t was not the legislature’s intent in enacting G.S. 14-39(a) to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes. To have construed the statute otherwise would allow a defendant to be punished twice for essentially the same offense, violating the constitutional prohibition against double jeopardy.

State v. Irwin, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981).

A kidnapping charge may, nevertheless, arise from the same course of conduct as an underlying felony, when “the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony.” *Fulcher*, 294 N.C. at 523-24, 243 S.E.2d at 351-52. “The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping ‘exposed [the victim] to greater danger than that inherent in the [other felony] itself’” *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (first alteration in original) (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446). “The defendant is guilty of kidnapping if the defendant takes acts that cause additional restraint of the victim or increase the victim’s helplessness and vulnerability.” *State v. Smith*, 359 N.C. 199, 213, 607 S.E.2d 607,

618 (2005). Additionally, evidence may support submission of both kidnapping and rape charges to the jury when the evidence tends to show the victim was placed in greater danger by the alleged kidnapping than that inherent in the rape. *See State v. Key*, 180 N.C. App. 286, 291, 636 S.E.2d 816, 821 (2006) (“defendant’s conduct put [the victim] in a more vulnerable position by threatening her life, blinding her and preventing her from calling for help after being removed from the bedroom where her children remained.”).

For example, in *State v. Knight*, 245 N.C. App. 532, 534, 785 S.E.2d 324, 328 (2016), the defendant gained control over the victim in the living room but decided to carry her to the bedroom where he raped her. We held “‘the commission of the underlying felony of rape did not require [defendant] to separately restrain or remove’ [the victim] from her living room couch to her bedroom.” *Id.* at 552, 785 S.E.2d at 339 (first alteration in original) (quoting *Key*, 180 N.C. App. at 291, 636 S.E.2d at 821). Therefore, the defendant’s restraint and removal of the victim to the bedroom was “‘a separate and independent act’” that “‘increase[d her] helplessness and vulnerability.’” *Id.* at 552-553, 785 S.E.2d at 339 (alteration in original) (quoting *Key*, 180 N.C. App. at 290-91, 636 S.E.2d at 820-21). Consequently, the defendant’s motion to dismiss was properly denied. *Id.* at 553, 785 S.E.2d at 339-40.

Here, the evidence, taken in the light most favorable to the State, first demonstrates confinement and/or restraint in addition to Second-Degree Forcible Rape and Second-Degree Forcible Sex Offense committed by Defendant. The

evidence tends to show that *after* being raped by Defendant, Victim attempted to get away from Defendant by going to the adjoining bathroom. Defendant, however, would not allow Victim to go by herself and entered the bathroom with Victim. This is evidence from which a jury could find Defendant did so to keep Victim under guard in the bathroom and not allow her out of his sight, preventing any escape. Furthermore, Victim testified that after leaving the bathroom, “[she] couldn’t go out the door, so [she] walked back to [her] bed.” It was there Defendant again sexually assaulted Victim. From this, the jury could certainly find Defendant imprisoned Victim “within a given area, such as a room” (i.e., the bathroom) or restricted Victim’s “freedom of movement by confinement” or otherwise restricted Victim “by force, threat or fraud, without a confinement.” *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351. While Defendant contends there was no evidence Defendant forced Victim to the bathroom or back to the bed, it is well established, for purposes of kidnapping “threats and intimidation are equivalent to the actual use of force or violence.” *State v. Hudson*, 281 N.C. 100, 104, 187 S.E.2d 756, 759 (1972). Here, there was substantial evidence of Defendant’s threats of violence to Victim to force her compliance and the fear and intimidation instilled in Victim by these threats of violence.

Moreover, again taken in the light most favorable to the State, there is “evidence from which a jury could reasonably find that the necessary [confinement or] restraint for kidnapping ‘exposed [Victim] to greater danger than that inherent in the [other felonies]’” *Pigott*, 331 N.C. at 210, 415 S.E.2d at 561 (quoting *Irwin*,

304 N.C. at 103, 282 S.E.2d at 446). For instance, the evidence again reflects Victim was confined or restrained to the bathroom *after* the rape. It further reflects Victim was sexually assaulted after she left the bathroom and returned to the bed. As such, based on this evidence, analogous to *Knight*, confinement or restraint of Victim in the bathroom was not necessary to rape and sexually assault Victim in the bedroom. Defendant contends the evidence Defendant also sexually assaulted Victim in the bathroom shows the confinement or restraint was merely part of the Rape and Sex Offense.² However, the sequence of events shown by the evidence in fact demonstrates separate and independent acts that “ ‘increase[d Victim’s] helplessness and vulnerability’ ” beyond that inherent in the rape or forcible sex offense. *Knight*, 245 N.C. App. at 553, 785 S.E.2d at 339 (quoting *Key*, 180 N.C. App. at 290, 636 S.E.2d at 820).

Thus, the State presented substantial evidence of confinement and/or restraint as a separate and complete act, independent of the confinement and restraint inherent in the Second-Degree Forcible Rape and Second-Degree Forcible Sex Offense. Therefore, the trial court did not err in denying Defendant’s Motions to Dismiss the Kidnapping charge. Consequently, the trial court properly submitted the Kidnapping charge to the jury.

² It bears noting that the jury rejected the idea Defendant in fact raped or sexually assaulted Victim as part of the kidnapping because it did not return a verdict on First-Degree Kidnapping and instead found Defendant guilty of Second-Degree Kidnapping.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the Judgments entered by the trial court.

NO ERROR.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).