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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-553

Filed 17 September 2024

Buncombe County, Nos. 20CRS89242-43

STATE OF NORTH CAROLINA

v.

RESHOD LAMAR HENDERSON, Defendant.

Appeal by defendant from judgments entered on or about 6 October 2022 by Judge Marvin P. Pope Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 6 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

STROUD, Judge.

Defendant appeals the trial court's judgments convicting him of assault by strangulation and first-degree kidnapping. We conclude there was no plain error in the jury instructions.

I. Background

The State's evidence tended to show that in September of 2020, Ms. Jenny

Smith¹ met Defendant at an apartment complex; Defendant told Ms. Smith she was cute and asked if she wanted to get high. Ms. Smith went to Defendant's house with him. Defendant smoked crack cocaine, and "[h]e gave [her] a couple of small pieces, which he told [her] to put up for later[.]" Later, Defendant started asking Ms. Smith, "Where's it at? Where's it at?" and told her "to give him back what . . . he had given" her. Ms. Smith said no, and Defendant locked the door.

Defendant then told Ms. Smith "he was going to put [her] to sleep and that it was going to hurt, and that [she] might wake up or [she] might not, but if [she] did, [she] was going to be in a lot of pain because he was going to beat [her] f***ing a**." Defendant punched Ms. Smith in her face and had her start removing her clothes. Defendant also had Ms. Smith "bend over" so he could look for drugs on her person. Defendant strangled Ms. Smith until she lost consciousness. When Ms. Smith regained consciousness, Defendant strangled her until she was unconscious again. Ms. Smith was eventually able to flee to a nearby home. Ms. Smith was taken to an emergency room where her injuries were documented.

Defendant was indicted for assault by strangulation and first-degree kidnapping. A jury found Defendant guilty of both charges. The trial court entered judgments. Defendant appeals.

II. Kidnapping

¹ A pseudonym is used.

Defendant's only argument on appeal is that

[t]he trial court erred in its jury instruction on kidnapping because it omitted the requirement that the confinement or restraint be a separate and independent act from the underlying felony. This omission allowed the jury to improperly convict . . . [Defendant] of kidnapping based on a restraint—his strangling of [Ms. Smith]—that was the same act as the underlying felony: assault by strangulation. The trial court's omission constitutes plain error because the jury probably would have reached a different result absent the error given [Ms. Smith]'s significant credibility problems and the lack of any other witness to the alleged kidnapping.

Defendant notes that he is arguing plain error because he did not object to the jury instructions on the record. North Carolina General Statute Section 14-39 provides,

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

- (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
- (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; or*
- (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.
- (5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.

- (6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39 (2019) (emphasis added). “To avoid constitutional violations related to double jeopardy, the confinement, restraint, or removal element requires a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony.” *State v. Stokes*, 367 N.C. 474, 481, 756 S.E.2d 32, 37 (2014) (quotation marks and brackets omitted).

The State concedes that the trial court did not provide a “[s]eparate and [a]part” instruction but argues this failure does not rise to the level of plain error as contended by Defendant.

Unpreserved issues relating to jury instructions in criminal cases may nevertheless be reviewed for plain error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding

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that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Scarboro, 287 N.C. App. 184, 186-87, 882 S.E.2d 139, 142 (2022) (citations, quotation marks, and brackets omitted). Although Defendant filed a reply brief, his argument does not direct this Court to a case wherein the trial court's failure to provide a "separate and apart instruction" rises to the level of plain error; in fact, in the short section addressing "[p]lain [e]rror" specifically, Defendant does not cite any caselaw.

The State directs us to *State v. Clinding*, 92 N.C. App. 555, 374 S.E.2d 891 (1989), which heavily relies on *State v. Battle*, 61 N.C. App. 87, 300 S.E.2d 276 (1983). As *Clinding* explains,

in *State v. Battle*, 61 N.C. App. 87, 300 S.E.2d 276, *disc. rev. denied*, 309 N.C. 462, 307 S.E.2d 367 (1983), an armed robbery case in which the trial court instructed that the State had the burden of proving beyond a reasonable doubt that the defendant removed the victim from one place to another for the purpose of facilitating flight after the commission of a felony.

On appeal, this Court overruled defendant's assignment of error based upon *the trial court's failure to instruct the jury that the removal must have been separate and apart from that which is an inevitable feature of the commission of another felony*. The Court opined that since the trial court charged the jury in the language from the statute, the instruction "complied with the requirement of *Irwin* [*State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981)], that the jury find that the removal be separate and apart

from the other felony in order to find him guilty of kidnapping.” *Battle* 61 N.C. App. at 93, 300 S.E.2d at 279.

Clinding, 92 N.C. App. at 561, 374 S.E.2d at 894 (emphasis added) (alterations in original). In other words, in *Battle*, compliance with the language of the statute satisfied the “separate and apart” requirement. *See id.* *Clinding* then used *Battle*’s determination to note that

[t]here is evidence in the case *sub judice* that defendant forced five employees to the back of the store and into a freezer; retrieved one employee and forced him from the freezer and into the office where he was forced to open the safe; guided that employee back to the freezer; and informed all five employees that they would be shot if they left the freezer. All of these acts were committed with the use of a deadly weapon.

We find that this evidence was sufficient to support the trial court’s instruction as given. The court, as in *Battle*, instructed the jury with statutory language. This procedure complied with the *Irwin* directive that the jury must find that the removal is separate and apart from the other felony in order to find defendant guilty of kidnapping.

Id. (citation omitted).

Here, the trial court instructed the jury that

[i]f you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant unlawfully confined and/or restrained a person and that person did not consent, and that this was done for the purpose of facilitating the defendant’s commission of the felony of assault by strangulation, and/or sexual assault, and/or doing serious bodily injury, and/or terrorizing a person, being confined, and that the defendant -- and that the person confined and/or restrained was seriously injured and/or sexually assaulted, it would be your duty to return a verdict of guilty of first-degree kidnapping. If you do not

so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first-degree kidnapping.

This instruction follows the language of North Carolina General Statute Section 14-39. *See id*; *see also* N.C. Gen. Stat. § 14-39. Here, the evidence showed several instances of confinement and/or restraint separate from the strangulation: Defendant locked Ms. Smith in his house, hit Ms. Smith, and made Ms. Smith remove her clothes as he searched her body. *See Clinding*, 92 N.C. App. at 561, 374 S.E.2d at 894.

While Defendant stresses that Ms. Smith lacked credibility, this is a jury determination. *See State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 494, 692 S.E.2d 145, 153 (2010) (“Determination of the witness’s credibility is for the jury.”). Defendant’s assertions regarding Ms. Smith’s lack of credibility also fail to note that multiple pictures were shown to the jury evidencing the injuries testified to by Ms. Smith. Further, while directing our focus to Ms. Smith’s credibility, Defendant himself concedes that while the “separate and apart” instruction was important for “restraint[,]” “[t]he trial court did provide the jury an alternative basis to find . . . [Defendant] guilty of kidnapping—confinement[.]” Defendant noted that the State argued Defendant had “confined [Ms. Smith] when he locked the bedroom door.” Given the instructions and evidence, we conclude the failure of the trial court to provide a specific “separate and apart” instruction did not have a probable impact on the jury’s finding that Defendant was guilty. *See Scarboro*, 287 N.C. App. at 186, 882 S.E.2d at 142.

III. Conclusion

For the foregoing reasons, we conclude there was no plain error.

NO PLAIN ERROR.

Judges GRIFFIN and THOMPSON concur.

Report per Rule 30(e).