ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

Not designated for publication.

DIVISION IV

CACR06-809

FEBRUARY 28, 2007

JAMES ARTHUR APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR05-2958]
V.	HON. JOHN LANGSTON, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant James Arthur appeals his conviction by a Pulaski County jury for false imprisonment in the second degree, for which he was sentenced to pay a $1,000 fine. On appeal, appellant argues that the circuit court erred by instructing the jury that false imprisonment in the second degree is a lesser-included offense of kidnapping, the offense with which he was originally charged. We affirm.

On or about July 29, 2005, appellant was charged with kidnapping pursuant to Ark. Code Ann. § 5-11-102 (Repl. 2006). The information alleged that on or about June 4, 2005, he unlawfully, feloniously, without consent, did restrain Melanie Rosenstock so as to

interfere substantially with her liberty with the purpose of terrorizing her or another person, or inflicting physical injury upon her, or of engaging in sexual intercourse, deviate sexual activity, or sexual contact with her.

A jury trial proceeded on April 6, 2006, with appellant and the victim testifying as the central witnesses. Each gave a separate account as to what appellant's attorney refers to as "an over-the-road trucking run gone awry." At the conclusion of the testimony, the attorneys and the circuit court held a jury-instruction conference, during which appellant's attorney requested that the judge instruct the jury on false imprisonment in the second degree, a misdemeanor. The State did not object, and the circuit judge did present the proffered instruction to the jury. Subsequent to the instructions being given, the jury deliberated and returned a verdict of guilty on the charge of false imprisonment in the second degree. The conviction was evidenced by the judgment and commitment order filed on April 21, 2006, and appellant filed a timely notice of appeal on May 2, 2006.

Appellant argues that the circuit court erred in instructing the jury that false imprisonment in the second degree is a lesser-included offense of kidnapping because second-degree false imprisonment was not charged in the charging instrument, and because second-degree false imprisonment is not a lesser-included offense of kidnapping. He acknowledges that his trial counsel requested that the instruction be given, but nevertheless requests that the conviction be reversed.

Kidnapping is defined in relevant part in Ark. Code Ann. § 5-11-102 as:

(a) A person commits the offense of kidnapping if, without consent, the person restrains another person so as to interfere substantially with the other person's liberty with the purpose of:

* * *

(4) Inflicting physical injury upon the other person;
(5) Engaging in sexual intercourse, deviate sexual activity, or sexual contact with the person; [or]
(6) Terrorizing the other person or another person[.]

* * *

(b)(1) Kidnapping is a Class Y felony.

(2) However, kidnapping is a Class B felony if the defendant shows by a preponderance of the evidence that he or she or an accomplice voluntarily released the person restrained alive and in a safe place prior to trial.

False imprisonment in the second degree is defined in Ark. Code Ann. § 5-11-104 (Repl. 2006) as:

(a) A person commits the offense of false imprisonment in the second degree if, without consent and without lawful authority, the person knowingly restrains another person so as to interfere substantially with the other person's liberty.

(b) False imprisonment in the second degree is a Class A misdemeanor.

In order to be considered a lesser-included offense, an offense must meet one of the statutory requirements of Ark. Code Ann. § 5-1-110(b) (Repl. 2006), which provides in relevant part:

(b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:

(1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or

(2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or

(3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

See also McCoy v. State, 347 Ark. 913, 69 S.W.3d 430 (2002).

Appellant asserts that our supreme court has relied upon this statutory language to determine that neither first-degree nor second-degree false imprisonment is a lesser-included offense of kidnapping. *See Davis v. State*, 365 Ark. 634, __ S.W.3d __ (2006) (finding that (1) it required an additional element not required to prove kidnapping because it contains the language "without lawful authority" while kidnapping is different in that no person can consent to it, (2) it is not an attempt to commit kidnapping, and (3) the risk of injury is not the only difference).

While acknowledging that the trial court gave the instruction at his behest, appellant argues that because it was not a lesser-included offense, his trial counsel could not assent to his conviction of second-degree false imprisonment. He contends that the error belongs to the class of errors that may be raised without preservation, such as an illegal sentence.

The State argues that appellant's assertion that this erroneous jury instruction on a charge that is not a lesser-included offense is analogous to an illegal-sentence claim that can be raised for the first time on appeal is incorrect. We agree with the State. Illegal-sentence claims are considered when raised for the first time on appeal because they are matters of subject-matter jurisdiction. *Banks v. State*, 354 Ark. 404, 125 S.W.3d 147 (2003). Such is

not the case with an erroneous jury instruction on a non-lesser-included charge given at the defendant's behest. *See Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990).

Appellant also maintains that a conviction on an offense that is neither a lesser-included offense nor charged in the charging instrument violates the Fourteenth Amendment's guarantee of due process under the law. *See Dunn v. U.S.*, 442 U.S. 100 (1979). However, he failed to properly develop these arguments before the court. Our law is well settled that issues raised for the first time on appeal, even constitutional ones, will not be considered because the circuit court never had the opportunity to rule on them. *See Callaway v. State*, __ Ark. __, __ S.W.3d __ (Jan. 11, 2007). Finally, appellant points out that because he is not in custody, he is unable to raise this issue in a Rule 37 petition. *See Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999). Consequently, he urges this court to address the merits of his argument on direct appeal or he will be left without a remedy.

Our supreme court has been steadfast in holding that a party who invites a trial court to commit an error cannot complain on appeal of that court's acceptance of the invitation. *Wyles v. State*, 357 Ark. 530, 182 S.W.3d 142 (2004). It has even specifically held that it will not consider a challenge to a jury's being instructed in accordance with the arguments of a defendant's own attorneys. *Randle v. State*, 245 Ark. 653, 434 S.W.2d 294 (1968). This is the situation in this case, and, as such, we reject appellant's attempt to circumvent these principles.

The State maintains that appellant's claim is subject to the contemporaneous-objection rule, and because no objection to the instruction was made at trial, his argument must be rejected. *See Isom v. State*, 356 Ark. 156, 148 S.W.3d 257, *cert. denied*, 543 U.S. 865 (2004). Additionally, the State claims that appellant's argument that he has been denied due process because he was convicted of a crime with which he was never charged does not absolve him of making an objection at the trial court level. Even those claims must be raised at that level rather than for the first time on appeal. *Moore v. State*, 303 Ark. 514, 798 S.W.2d 87 (1990), *overruled on other grounds*, *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136, *cert. denied*, 540 U.S. 967 (2003). Because he failed to make a contemporaneous objection below, his claim of reversible error is not preserved for appellate review.

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.