NO. COA02-128

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v. Robeson County
Nos. 00 CRS 12735
JULLIAN JOERELL ROBINSON 00 CRS 12736
00 CRS 12745

Appeal by defendant from judgments entered 25 July 2001 by Judge James Floyd Ammons, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 7 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

Paul Pooley for defendant-appellant.

EAGLES, Chief Judge.

Defendant appeals his convictions for robbery with a dangerous weapon, assault with a deadly weapon inflicting serious injury, and first-degree kidnapping. We find no error.

The State's evidence tended to show the following. On 1 June 2000, Marvin Barnes drove from his home in Fayetteville to defendant's residence in Saint Pauls in order to repay a $130 debt to defendant. Defendant was not at home. As Barnes was leaving the area, he saw defendant in the street talking to his brother, Steven Robinson (Steven), and Cory Martin. Barnes stopped his car

and gave defendant the $130. As defendant counted the money, he turned around and handed a pistol to Steven, who pointed the weapon at Barnes' head and ordered him to turn off the car. While Steven held Barnes at gunpoint, defendant took his wallet, earring, and wedding band. Steven removed Barnes' keys from the ignition and told Barnes to get into the trunk. Barnes balked, saying he would not fit. He tried to flag down a passing van, but Steven put the gun to his back and shoved him into the back seat of the car.

Defendant drove Steven, Martin and Barnes to a cemetery outside the city limits. Wary of being seen by a passing motorist, Martin drove the group to a nearby gas station. Barnes asked defendant to release him in exchange for his wallet, car and jewelry. In response, defendant told Steven that Barnes had originally stolen the $130 from him at gunpoint. Steven refused to let Barnes leave, fearing that he would "come back for us."

After filling the car with gas, defendant drove Barnes to an open field. Steven ordered Barnes to get out of the car, remove his clothes and put them in the trunk. As Barnes undressed, Steven fired the gun at him. Steven then handed the gun to defendant, who shot Barnes in the chest. Barnes saw defendant hand the gun to Martin and ran toward a nearby patch of woods. Martin emptied the gun firing at Barnes. When he reached the woods, Barnes realized he had been shot in the leg and that his leg was broken. He packed his wounds with mud and leaves and bound them with vines to stop the bleeding. Barnes hid in the woods until morning, when he crawled out to the road and waved down a passing truck. He was

taken by ambulance to a hospital in Lumberton, where he remained "for about two weeks."

Defendant testified that it was Martin who pulled the weapon on Barnes and stole his earring. Defendant then searched Barnes and his car for money while Martin held the gun on Barnes. Defendant drove Barnes car to MacKinnon Cemetery outside the city limits in order to search Barnes again. Barnes told defendant that his money was in a hotel in Lumberton, but defendant knew he was lying. When a truck arrived at the cemetery, Martin drove to a gas station on Highway 87. Barnes asked to be let go, but Steven refused. Defendant then drove up Howell Road between Lumberton and St. Pauls and into a field. Defendant asked Barnes why he had taken his money, and Martin told Barnes to remove his clothes. Martin fired the gun into the ground. Defendant did not see any blood and did not think Barnes had been shot. When the gun jammed, Barnes "started running." Martin shot at Barnes "four or five times." When Barnes reached the woods, defendant drove away with Barnes' clothes in the trunk. Defendant acknowledged that his participation in the incident was voluntary. When asked why he had not contacted anyone to assist Barnes after leaving him naked in the woods, defendant replied, "I don't know, I was seeking revenge." Defendant denied shooting Barnes or handling the gun.

Defendant first asserts that the trial court erred by reading the statutory definition of first-degree kidnapping to the jury at the beginning of the trial. He argues that the language of the kidnapping statute includes theories of culpability with which he

was not charged, resulting in a risk of confusion to the jury similar to that created by reading to the jury from an indictment. *See* N.C. Gen. Stat. § 15A-1213 (1999) (proscribing the reading of a defendant's indictment to the jury). Defendant raised no objection to the court's action at trial and has not assigned plain error on appeal. *See* N.C.R. App. P. 10(b)(1), (c)(4). Therefore, this issue was not preserved for appellate review and we decline to address it.

Defendant next contends the trial court erred in denying his motion to dismiss the kidnapping charge because the State failed to show anything more than a "technical asportation" of Barnes which was an inherent and inevitable part of the robbery and assault. *See State v. Ross*, 133 N.C. App. 310, 515 S.E.2d 252 (1999) (no separate kidnapping where robbery victims were forced to lie on the floor of their apartment and led into their bedrooms to retrieve personal effects); *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981) (no separate kidnapping where robbery victim was forced to walk from a store cash register to a safe in the back of the store). We disagree.

In *State v. Newman*, 308 N.C. 231, 302 S.E.2d 174 (1983), the defendants forced a woman from the parking lot of a shopping center into some nearby woods, in order to rape her. In finding the evidence sufficient to support convictions for both rape and kidnapping, the Court stated:

> Removal of [the victim] from her automobile to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape. Rather, it

> was a separate course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime. To this extent, the action of removal was taken for the purpose of facilitating the felony of first-degree rape. Thus, defendant's conduct fell within the purview of G.S. [§] 14-39 and the evidence was sufficient to sustain a conviction of kidnapping under that section.

Id. at 239-40, 302 S.E.2d at 181. Here, as in *Newman*, the evidence of Barnes' removal from one place to another fully supported a separate conviction for kidnapping. Defendant and his associates could have simply robbed and shot Barnes on the street near defendant's house. Instead, they forced him into his car at gunpoint and drove him outside the city limits to a cemetery, a gas station and an open field. These serial acts of asportation over a distance of several miles were in no way an inherent or integral part of the armed robbery or the assault and fully support a separate kidnapping conviction. *See State v. Whittington*, 318 N.C. 114, 122, 347 S.E.2d 403, 408 (1986).

In his final argument, defendant claims the trial court committed plain error in instructing the jury on the doctrine of concerted action. The court instructed the jury as follows:

> Now, as to the next three things that the defendant is charged with. This instruction that I am about to give you applies to all three cases. For a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons join in a purpose to commit a crime or crimes each of them if actually or constructively present is guilty of that crime if the other person commits the crime.

By way of comparison, we repeat the language defendant now offers as the proper form of the instruction:

> For a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty of that crime if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit that crime.

Although he offered no objection at trial, defendant insists that "the trial court instructed the jury that there was a common purpose to commit armed robbery among defendant and the others and eliminated any need for the jury to determine that element beyond a reasonable doubt."

We find no merit to defendant's assertion of plain error. The challenged instruction tracked the language of the pattern jury instruction and is correct in all respects. *See State v. Golphin*, 352 N.C. 364, 457, 533 S.E.2d 168, 228-29 (2000) (quoting N.C.P.I.--Crim. 202.10 (1998)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). The trial court made clear that the doctrine of concerted action applied only "[i]f two or more persons join in a purpose to commit a crime or crimes." Nothing in the instruction either suggested or compelled the jury to find that defendant had, in fact, joined in any such common purpose with another person. Defendant's position that the trial court somehow resolved an issue of fact for the jury finds no support in the transcript. The court's charge to the jury repeatedly affirmed the State's burden

of proof beyond a reasonable doubt as to each element of each charged offense.

The record on appeal contains additional assignments of error not addressed in defendant's brief to this Court. By Rule, we deem them abandoned. *See* N.C.R. App. P. 28(b)(5).

We find defendant received a fair trial free from prejudicial error.

No error.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).