NO. COA10-1424
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 08 CRS 102408-09
08 CRS 104256-57; 60; 70

JAMES MCCONICO, JR.

Appeal by defendant from judgments entered 22 May 2009 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 18 August 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Kevin Anderson, for the State.

Eric A. Bach, for defendant-appellant.

CALABRIA, Judge.

James McConico, Jr. ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of robbery with a deadly weapon ("RWDW"), two counts of assault with a deadly weapon ("AWDW"), first degree kidnapping, second degree kidnapping, attempted willful and malicious injury of another by use of explosive or incendiary device, and conspiracy to commit

robbery with a dangerous weapon. Defendant is entitled to a new trial on the first degree kidnapping conviction; for the remaining convictions, we find no error.

I. Background

On 13 September 2008 Miguel Benavides-Salas ("Salas") and Jaime Arevalo ("Arevalo") arrived at 1230 Tank Court ("the Tank Court house) in High Point, North Carolina for a drug transaction. Defendant, Jerome LaGrande ("LaGrande"), Anthony Harrington ("Harrington") and others (collectively "the group") operated as individual drug dealers, selling their own cocaine from the Tank Court house. The group made a plan to rob Salas and Arevalo. When Salas and Arevalo arrived, only Salas went inside. Then Salas left the house and he and Arevalo drove around the block.

When Salas and Arevalo returned to the house, Salas went inside the house and was thrown on the couch. Arevalo was removed from the car, assaulted, and then brought inside the house. Defendant told Salas they needed more drugs, and then he pointed a gun at Salas and threatened to kill him. Defendant gave his gun to LaGrande who then used the gun to beat Salas. As a result of the beating, Salas sustained a head wound that bled profusely. Salas's wallet and pin number were stolen and his clothes were removed. At that point, Salas was taken into

the kitchen where another participant unsuccessfully attempted to stick a broom handle in his rectum, because penetration did not occur. Harrington then poured gasoline over Salas's body. The gasoline burned Salas's open head wound and his exposed genitals. During the time members of the group assaulted Salas, defendant and three other participants took Arevalo away from the house in Salas's Ford Explorer.

After the incident took place, defendant admitted his involvement to two friends, Delma Thomas and Lakeisha Jenkins ("Jenkins"). In the conversation with Jenkins, defendant specifically indicated he was present during the robbery and he admitted he helped beat up one of the victims.

Defendant was subsequently arrested and charged with: first degree sex offense, two counts of first degree kidnapping, conspiracy to commit first degree kidnapping, RWDW, attempted RWDW, conspiracy to commit RWDW, conspiracy to commit trafficking in cocaine by possession of four hundred grams or more, the attempted willful and malicious injury of another by use of explosive or incendiary device, AWDW inflicting serious injury, AWDW and conspiracy to commit AWDW. During pre-trial motions, the State reduced the first degree sexual assault charge to first degree attempted sexual assault. Beginning 19 May 2009, defendant was tried by a jury in Guilford County

Superior Court. At the close of evidence, the State voluntarily dismissed the charges of attempted robbery with a dangerous weapon, conspiracy to commit assault with a deadly weapon, and conspiracy to commit first degree kidnapping for insufficient evidence.

The indictment for first degree kidnapping of Salas listed the purpose of the kidnapping as facilitating the commission of a felony, RWDW, and alleged that Salas was sexually assaulted. When instructing the jury, rather than using the allegation of sexual assault found in the indictment, the trial court said the elevating factor was that Salas had been seriously injured. Jury instructions were discussed and debated by counsel prior to being given to the jury. Objections were made and indicated on the record, but no objection was made as to the jury instruction for first degree kidnapping. Before closing arguments took place, defendant did consent to allow his attorney to make a qualified admission, during closing argument, that defendant was guilty of conspiracy to commit robbery with a firearm of Salas.

On 22 May 2009, the jury returned verdicts finding defendant guilty of two counts of AWDW, conspiracy to commit RWDW, RWDW, attempted willful and malicious injury of another by use of explosive or incendiary device, first degree kidnapping, second degree kidnapping, and conspiracy to commit trafficking

in cocaine by possession of four hundred grams or more. The jury found defendant not guilty of attempted sexual assault. During the sentencing phase, the trial court arrested judgment as to the conspiracy to commit trafficking in cocaine by possession of four hundred grams or more. For the felony convictions, the trial court sentenced defendant to a minimum term of 321 months and a maximum term of 432 months in the North Carolina Department of Correction. For the two misdemeanor convictions, the trial court sentenced defendant to a term of 75 days for each offense. Defendant appeals.

II. Plain Error on Kidnapping Instruction

Defendant's first argument is that the trial court erred by constructively amending the first degree kidnapping jury instruction, when the indictment alleged sexual assault and serious injury was referenced in the jury instructions. We agree.

Defendant was tried for first degree kidnapping under N.C. Gen. Stat. § 14-39 which 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
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> (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....

N.C. Gen. Stat. § 14-39 (2009). The indictment for the first degree kidnapping of Salas, in pertinent part, stated defendant kidnapped Salas "by unlawfully restraining the victim, without the victim's consent, and for the purpose of facilitating the commission of a felony, to wit: RWDW. Miguel Alejandro Benavides-Salas was sexually assaulted." The elevating factor

included in the indictment was that Salas was sexually assaulted. However, the trial court instructed the jury that to establish first degree kidnapping they must find "that the person [Salas] had been seriously injured. I instruct you that serious injury is defined as such physical injury as causes great pain and suffering." Defendant made no objection to this substitution at trial. The trial court distinguished second degree kidnapping, stating, "[s]econd degree kidnapping differs from first degree kidnapping only in that it is unnecessary for the State to prove that the person had been seriously injured."

Generally, a party may not assign as error a portion of the jury charge unless an objection is made at trial, before the jury retires to consider the verdict. *State v. Cartwright*, 177 N.C. App. 531, 537, 629 S.E.2d 318, 323 (2006). Absent an objection, the court must determine whether plain error occurred. *Id.* at 537-38, 629 S.E.2d at 323. Plain error may be found if the record indicates "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *State v. Odom* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation and citation omitted).

It is well-established in North Carolina that error occurs when the jury instructions fail to match the indictment, and this error is usually prejudicial. *State v. Taylor*, 301 N.C.

164, 170, 270 S.E.2d 409, 413 (1980). In *State v. Brown*, the first degree kidnapping indictment included the theory of facilitation of a felony and that the victim was not released in a safe place, but when instructing the jury, the trial court instructed on the theory that the victim was terrorized and sexually assaulted. 312 N.C. 237, 247, 321 S.E.2d 856, 862 (1984). The Court determined that the judge's erroneous instructions which allowed the jury to "predicate guilt on theories of the crime which were not charged in the bill of indictment" amounted to plain error. *Id.* at 249, 321 S.E.2d at 863. In *State v. Bailey*, the indictment alleged the elevating theory for first degree kidnapping under N.C. Gen. Stat. §14-39(b) was that the victim was not released in a safe place, but the jury was instructed on the elevating theory of serious bodily injury. 97 N.C. App. 472, 478, 389 S.E.2d 131, 134 (1990). Following *Brown*, this Court held the variance constituted plain error and warranted a new trial. *Id.*

In the instant case, the indictment and jury instructions were based on different theories. The indictment alleged that Salas had been sexually assaulted. The trial court instructed the jury that if they found that Salas had been seriously injured, the jury should find defendant guilty of first degree kidnapping. Based on the fact that different elevating factors

were used in the indictment and the jury instructions, plain error occurred. *See id.*

Moreover, in light of the jury's not guilty verdict on defendant's attempted sexual assault charge, the error was particularly prejudicial. In the instant case, defendant had originally been indicted separately for both first degree kidnapping of Salas and first degree sexual assault of Salas. During pre-trial motions, the State reduced the first degree sexual assault charge to first degree attempted sexual assault. The separate charge of attempted first degree sexual assault was given to the jury and the jury found defendant not guilty.

In order for the jury to find defendant guilty of first degree kidnapping as charged in the indictment, the jury would have had to find that defendant sexually assaulted Salas. Since the jury did not find defendant guilty of even the *attempted* sexual assault of Salas, it is probable the jury would have reached a different verdict on the first degree kidnapping charge if the trial court would have instructed the jury according to the indictment. Therefore, the error in substituting serious injury for sexual assault was prejudicial and constitutes plain error. Defendant is entitled to a new trial on the kidnapping charge.

III. Double Jeopardy

Defendant next alleges that his sentence for a conspiracy conviction violated double jeopardy, as the conspiracy charge did not involve conduct separate from the robbery and kidnapping charges. We disagree.

For an issue to be argued on appeal, the issue must be assigned as error in the record on appeal.[1] *State v. Trull*, 349 N.C. 428, 438, 509 S.E.2d 178, 186 (1998). In defendant's assignments of error (8) and (9) defendant states the same error: "the imposition of consecutive sentences on Robbery with a Dangerous Weapon and Conspiracy." Defendant fails to state an assignment of error that addresses a double jeopardy issue concerning kidnapping and conspiracy. As such, defendant has failed to preserve this issue for appellate review. This Court will only examine the double jeopardy implications of sentencing for both robbery and conspiracy.

Our Courts have consistently held that if a Constitutional issue is not raised and ruled upon at trial it is not preserved for appeal. *See State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997) (holding defendant lost ability to appeal on

[1] Defendant gave notice of appeal on 22 May 2009 and is therefore under the older version of Rule 10(a): "Except as otherwise provided herein, the scope of review on appeal is confined to consideration of those assignments of error set out in the record on appeal...." N.C.R.App. P. 10(a)(2008).

double jeopardy by not objecting at trial). In the instant case, defendant made no objections relating to a potential double jeopardy issue at trial. Defendant made several objections to the jury instructions before they were given to the jury, but never suggested that double jeopardy was implicated by charges for conspiracy and robbery. In fact, defendant agreed to allow his counsel to make a qualified admission, during closing argument, that defendant was guilty of conspiracy to commit robbery with a firearm of Salas.

Even assuming, ***arguendo***, the double jeopardy issue was properly preserved for appeal, defendant's contentions are without merit. This Court has previously held that conviction of conspiracy to commit a robbery and conviction of the commission of the robbery does not violate double jeopardy. ***State v. Wiggins***, 21 N.C. App. 441, 442, 204 S.E.2d 692, 693 (1974).

IV. Conclusion

The trial court committed plain error when instructing the jury for first degree kidnapping on a different basis than was referenced in the indictment. Defendant is entitled to a new trial on the charge of first degree kidnapping. Defendant was not subject to double jeopardy when he was sentenced for both

conspiracy to commit robbery with a dangerous weapon and robbery with a dangerous weapon. We find no error on this issue.

New trial in part, no error in part.

Judge ELMORE concurs.

Judge STEELMAN concurs in the result only.

Report per Rule 30(e).