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NO. COA11-242  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v.

Burke County  
No. 06-CRS-2789

DENNIS E. PHILLIPS

Appeal by Defendant from judgments entered 27 July 2007 by Judge Beverly T. Beal in Superior Court, Burke County. Heard in the Court of Appeals 13 September 2011.

*Attorney General Roy Cooper, by Assistant Attorney General Brandon L. Truman, for the State.*

*Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant-Appellant.*

McGEE, Judge.

Dennis E. Phillips (Defendant) was convicted on 27 July 2007 of second-degree kidnapping, assault with a deadly weapon inflicting serious injury, assault inflicting serious bodily injury (AISBI), and felony assault on a handicapped person. Defendant petitioned this Court for a writ of certiorari, which was granted by order entered 4 March 2010.

I. Factual Background

Robert Robinson (Mr. Robinson), had lived with Defendant and Defendant's family for several years. Defendant had been the caretaker and driver for Mr. Robinson, who had "a very limited mobility problem." Mr. Robinson testified that his "ability to motivate [sic] is somewhat limited." Mr. Robinson also testified that he was a "modified quadriplegic."

Mr. Robinson had given Defendant a power of attorney to manage a trust fund that had been established for the benefit of Mr. Robinson. At some point during the time Mr. Robinson lived with Defendant and Defendant's family, Mr. Robinson's trust fund became depleted. Thereafter, a monthly disability check was Mr. Robinson's sole source of income. Over time, Defendant became verbally and physically abusive to Mr. Robinson. On or about 5 April 2006, Defendant began a series of abusive activities against Mr. Robinson that ended on 13 April 2006, when Defendant's wife reported Defendant's abusive activity to the Burke County Sheriff's Department.

Mr. Robinson testified at trial that Defendant knocked out his teeth by beating him with a handgun, hit him in the groin with a handgun, beat him about the head and face with a wet towel, cut him, and bruised him. Mr. Robinson also testified that Defendant kept him confined to the basement of their

residence for the eight-to-ten day period involved and would occasionally further confine him in a closet in the basement. Mr. Robinson testified that, when officers from the Sheriff's Department arrived at the residence on 13 April 2006, he was "[h]anging upside down in a coat closet, and [he] had to verbally tell . . . one of the officers that was in attendance there that [he] was alive." Further facts will be discussed below as necessary.

## II. Issues:

Defendant raises the following issues on appeal: (1) whether Defendant's conviction for AISBI must be vacated because the evidence failed to establish that Mr. Robinson sustained serious bodily injury; (2) whether the trial court erred in failing to dismiss the charge of kidnapping because the evidence was insufficient to establish confinement distinct from the actions amounting to AISBI; and (3) whether the trial court erred or committed plain error when instructing the jury on the definition of "serious bodily injury" for the purposes of kidnapping.

## III. Standards of Review

"The standard of review of a motion to dismiss for insufficient evidence is whether the State presented substantial evidence of each element of the offense and [the] 'defendant's

being the perpetrator.'" *State v. Hernandez*, 188 N.C. App. 193, 196, 655 S.E.2d 426, 429 (2008) (citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as sufficient to support a conclusion." *Id.* We "review[] the evidence in the light most favorable to the State, giving every reasonable inference arising from that evidence to the State, even if the same evidence supports reasonable inferences of the defendant's innocence." *Id.* at 196-97, 655 S.E.2d at 429. Contradictions in the evidence "'must be resolved in favor of the State.'" *Id.* (citation omitted).

#### IV. Sufficiency of the Evidence for AISBI

In Defendant's caption to his argument, he contends that "[t]he evidence failed to establish that Mr. Robinson sustained serious bodily injury, requiring that the conviction for assault inflicting serious bodily injury be vacated." Defendant contends the State "failed to establish any impairment of any function of any bodily member or organ as a result of being placed in a closet on 13 April 2006." Defendant further asserts that "[i]njuries may be 'serious,' yet fail to rise to the level of 'serious bodily injury.'" Defendant recites evidence tending to show that Mr. Robinson did not suffer a serious bodily injury

as a result of Defendant's locking him in the closet. However, we review the evidence in the light most favorable to the State.

A conviction of AISBI "requires proof of two elements: (1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4 (2002).

"'Serious bodily injury' is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization."

*State v. Rouse*, 198 N.C. App. 378, 382, 679 S.E.2d 520, 523 (2009) (citation omitted).

The State presented the following evidence that suggested Mr. Robinson suffered "impairment of the function of [a] bodily member[.]" Ms. Barbara Gilmer (Ms. Gilmer), a registered nurse, was married to Mr. Robinson's cousin. Ms. Gilmer testified that, after Mr. Robinson had been removed from the closet, she visited him in the hospital. Ms. Gilmer testified that Mr. Robinson had "been gone for ten years" and she had not seen him since he began to live with Defendant. During her cross-examination, Ms. Gilmer and Defendant's counsel had the following exchange:

Q . . . To your knowledge, did the injuries sustained by Mr. Robinson create -- you're a registered nurse, are you not?

A Yes, sir, I am.

Q Did the injuries sustained by Mr. Robinson, in your opinion, create a substantial risk of death?

A Not the injuries that he had right at that point, no.

Q And [you saw] Mr. Robinson right after the injuries, and of course you have seen him today?

A I saw him the next day.

Q The next day. Did the injuries sustained by Mr. Robinson cause permanent disfigurement?

A I think they caused him a lot . . . more weakness than he would have had, which he has not recovered from.

Q Do you think they caused him permanent disfigurement?

A Yes.

Q And can you explain your answer?

A Because of the -- because of the weakness. You know, ten years ago Mr. Robinson was able to get up, he was able to walk more. He's generally a lot weaker than he was. He's got his upper body strength, but he's not going to be able to recover the lower body strength. And I attribute that to the conditions that he was kept in.

Though Ms. Gilmer did not specifically testify that Mr. Robinson's loss in strength was a result of his being trapped in

the closet, we hold that a jury could reasonably infer that "the conditions [Mr. Robinson] was kept in" referred to his being hung upside down in the closet. We therefore find Defendant's argument without merit and hold that the trial court did not err in denying Defendant's motion to dismiss the charge of AISBI.

#### V. Kidnapping

Defendant argues that the trial court erred by denying his motion to dismiss the kidnapping charge because "[t]he confinement and intent to cause injury" required by a kidnapping charge "was the identical conduct alleged as the assault" charge. Defendant contends: "The confinement that constituted the assault was thus indistinguishable from the confinement which constituted the kidnapping." In *State v. Wade*, our Court stated: "Our case law requires confinement, restraint, or 'removal separate and apart from that which is an inherent, inevitable part of the commission of another felony.'" *State v. Wade*, 181 N.C. App. 295, 300, 639 S.E.2d 82, 87 (2007) (citation omitted).

However, reviewing the transcript, we find that there was evidence of a separate confinement on which the kidnapping charge could be based. Specifically, Mr. Robinson testified that, during the eight to ten days prior to the officers finding him confined in the closet, Defendant kept Mr. Robinson confined

in the basement area. During this time, Defendant subjected Mr. Robinson to beatings about the "[r]ibs, eyes, [and] around the face" which grew "more frequent and more severe." Defendant used "[t]he butt of a .38 [caliber handgun]" to administer the beatings. At trial, Mr. Robinson engaged in the following exchange with the State:

Q Were you able to freely leave that residence during that time period?

A No, sir.

Q Were you confined to the basement area and the closet?

A Yes, sir.

Mr. Robinson also testified that, during the eight to ten days prior to his rescue, "[Defendant] was repeatedly verbally abusive, and he was also repeatedly physically abusive. I never knew when he was going to come in and wake me up or tell me to go back into the closet, or just what he was going to do[.]" Thus, there was evidence that, while Defendant kept Mr. Robinson confined in the basement area for eight to ten days, he did not keep Mr. Robinson confined in the closet for the entirety of that period of time. This evidence could reasonably be interpreted as suggesting that Mr. Robinson was confined generally to the basement for more than a week, and was then specifically hung upside down in the closet on several different



occasions during that period of time. Thus, the "confinements" giving rise to the kidnapping charge and the assault charge could reasonably be construed as separate actions, independent from one another. We therefore find Defendant's argument without merit and hold that the trial court did not err in denying Defendant's motion to dismiss the kidnapping charge.

#### VI. Jury Instructions

Defendant argues that the trial court committed reversible error when instructing the jury as to the definition of "serious bodily injury" for the purposes of kidnapping. We first note that, though Defendant did make a general request for the "entire legal definition of serious bodily injury[,] " he did not object during the instructions or afterwards; nor did Defendant make a specific written request. "[W]here a party makes a *general* request, without giving specific suggested language, and the defendant fails to object to the instruction given, the issue is not preserved for appeal and is reviewed only for plain error." *State v. Wright*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 709 S.E.2d 471, 475 (2011). We therefore review the instructions for plain error.

The trial court gave the following instruction on kidnapping:

First, that . . . [D]efendant unlawfully confined a person, that is, imprisoned him

within a given area.

Second, that the person did not consent to this confinement. Consent obtained or induced by fraud or fear is not consent.

Third, that . . . [D]efendant confined that person for the purpose of doing serious bodily injury to that person. *Serious bodily injury may be defined as such physical injury as causes great pain or suffering.*

Fourth, that this confinement was a separate, complete act, independent and apart from the injury.

And fifth, that the person was not released by . . . [D]efendant in a safe place.

(Emphasis added).

While Defendant argues that the definition of "serious bodily injury" for the purposes of AISBI is different, and contends the trial court should have provided that definition in its instruction for kidnapping, we disagree. The definition of "serious bodily injury" for the purposes of AISBI is provided by statute. See N.C. Gen. Stat. § 14-32.4 (2009) ("'Serious bodily injury' is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization."). "Serious bodily harm" for the

purposes of kidnapping, however, is not defined under N.C.G.S. § 14-39, which provides the elements of kidnapping. See N.C.G.S. § 14-39 (2009).

The pattern jury instruction directs the trial court to instruct that the act of confinement "was done for the purpose of . . . <sup>b</sup>[doing serious bodily injury to the person [confined] [restrained] [removed]." N.C.P.I.--Crim. 210.25 The pattern jury instruction further clarifies that "[s]erious bodily injury may be defined as 'such physical injury as causes great pain or suffering.'" *Id.* n.5 (citation omitted). While we note that the pattern jury instruction uses the phrase "serious bodily injury" and not "serious bodily harm," N.C.G.S. § 14-39 is clear that, for the purposes of kidnapping, the requisite element is "serious bodily harm."

This Court recently addressed the appropriate instructions for kidnapping in *State v. Bonilla*, \_\_\_ N.C. App. \_\_\_, 706 S.E.2d 288 (2011):

Under North Carolina General Statutes, section 14-39, the offense of kidnapping is committed when "[a]ny person . . . unlawfully confine[s], restrain[s], or remove[s] from one place to another, any other person[,] . . . if such confinement, restraint or removal is for the purpose of . . . (3) [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed . . . ." N.C.G.S. § 14-39(a) (2009).

[The d]efendant specifically challenges the trial court's instruction regarding the elements of "terrorizing" and "serious bodily harm." In its instruction, the trial court stated the following:

Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. *Serious bodily injury may be defined as such physical injury as causes great pain or suffering.*

The trial court's instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for guilt of the offense of kidnapping under N.C.G.S. § 14-39. Defendant's argument is overruled.

*Id.* at \_\_\_\_, 706 S.E.2d at 295 (emphasis added). In the present case, the trial court gave the same definition of "serious bodily harm" as was approved in *Bonilla*. We therefore find that the trial court did not commit error in its jury instructions on kidnapping, let alone plain error.

No error.

Judge ELMORE concurs.

Judge HUNTER, JR. concurs in part and dissents in part with a separate opinion.

Report per Rule 30(e).

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HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

While I agree with the majority opinion on the issue regarding the sufficiency of the evidence to support a verdict of guilty on assault inflicting serious bodily injury, I do not believe that the evidence is sufficient to indicate that the act of kidnapping is distinct from the act of assault inflicting serious bodily injury.

The majority opinion quotes Ms. Gilmer's testimony as providing sufficient evidence that the "conditions [Mr. Robinson] was kept in" supplied the testimony to show a jury could infer that the "conditions" were being hung up in the closet. I agree. However, it is just as likely the jury could have inferred that the "conditions" were both confinement in the basement and the closet or confinement in the basement alone. Lacking a causal connection to the injuries sustained in the assault inflicting serious bodily injury to the closet alone

leads me to a different conclusion than the majority on the issue of whether the kidnapping is a separate offense.