IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1043

Filed: 16 May 2017

Iredell County, No. 14CRS055588, 14CRS055589, 16CRS1418

STATE OF NORTH CAROLINA

v.

MARK BARON WILSON, Defendant.

Appeal by Defendant from judgments and order entered 29 April 2016 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 6 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John G. Batherson, for the State.

W. Michael Spivey for the Defendant.

DILLON, Judge.

Mark Baron Wilson ("Defendant") appeals from his convictions for second-degree kidnapping. For the following reasons, we find no error.

I. Background

Defendant was indicted for two counts of first-degree kidnapping in connection with an assault that occurred in October 2014. At trial, the State's evidence tended

to show as follows: In the early morning hours of 25 October 2014, two men, Mr. Handy and Mr. Briggs, were asleep in a home in Statesville. The owner of the home allowed both men and occasionally Defendant to stay at the home when they could not find space at the local homeless shelter.

The victim, Mr. Handy, testified that Defendant had come by the house the night before the assault asking if Mr. Handy knew anything about who had "flattened the tires" of his mother's car. Mr. Handy told Defendant he did not know, and Defendant left the premises.

Several hours later, at approximately four o'clock in the morning, Mr. Handy awoke to find Defendant beating him with a metal broom handle. Defendant accused Mr. Handy of slashing the tires of his mother's car and proceeded to hit Mr. Handy with his fists and with a wooden chair, breaking the chair over Mr. Handy's head and then beating him with a wooden chair leg. At one point, Mr. Handy attempted to escape and was dragged back inside the house by Defendant, where the assault continued. A witness, Ms. Sheriff, testified that Defendant blocked the front door of the home during the assault and stated that no one was going to leave.

Mr. Briggs was also present in the home at the time of the assault. Mr. Briggs testified that Defendant threatened him and Mr. Handy with a metal pipe, hit Mr. Briggs with the pipe, and watched Defendant assault Mr. Handy. According to Mr. Briggs, Defendant later put him and Mr. Handy in a bedroom of the home, blocking

the doorway and preventing their exit. Defendant and Mr. Briggs eventually fell asleep, and when Mr. Briggs awoke, Mr. Handy had left the premises.

Mr. Handy suffered two orbital fractures around his eye, a broken nose, cheek bone fractures, jaw fracture, a subdural hematoma, chest contusions, and two broken ribs. Mr. Handy spent twelve (12) to fourteen (14) days in the hospital.

Defendant was indicted for two counts of first degree kidnapping in relation to the incident.[1] Defendant moved to dismiss both kidnapping charges at the close of the State's evidence and at the close of all evidence. The trial court denied Defendant's motions, and the jury returned verdicts finding him guilty of two counts of second-degree kidnapping and attaining habitual felon status. Defendant gave notice of appeal in open court.

II. Analysis

Defendant makes several arguments on appeal. Specifically, Defendant contends that the trial court improperly denied his motions to dismiss the kidnapping charges, made several errors in its instructions to the jury, and entered a restitution order unsupported by competent evidence. We address each argument in turn.

A. Motions to Dismiss

[1] Defendant was also indicted for two counts of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). The jury was unable to reach a verdict on this charge as to Mr. Handy, and the trial court declared a mistrial. The jury found Defendant not guilty of AWDWIKISI as to Mr. Briggs.

Defendant first challenges the trial court's denial of his motions to dismiss both kidnapping charges for insufficiency of the evidence.

Our Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Marley,* 227 N.C. App. 613, 614, 742 S.E.2d 634, 635 (2013). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch,* 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith,* 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Kidnapping is a specific intent crime. *See State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). Thus, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in our kidnapping statute, N.C. Gen. Stat. § 14-39(a) (2013). *Id.* Our General Assembly has defined kidnapping, in relevant part, as follows:

> 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 . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .

> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C. Gen. Stat. § 14-39(a)(3). "Confinement" means "some form of imprisonment within a given area, such as a room, a house or a vehicle." *State v. Gainey*, 355 N.C. 73, 91, 558 S.E.2d 463, 475 (2002) (internal marks and citation omitted). Here, the trial court instructed the jury that it could convict Defendant of kidnapping if it determined that Defendant had "unlawfully *confined* a person, that is, imprisoned him within a given area . . . for the purpose of doing serious bodily injury to that person."

On appeal, Defendant contends that the State's evidence was insufficient to prove confinement for the purpose of doing serious bodily harm because any confinement occurred *after* Defendant had committed the assaults.

In *State v. Johnson*, our Court held that the State presented sufficient evidence of confinement where the victim asked the defendant to leave her apartment, but the defendant "continued to 'stand by the door' with his back to the only exit." *State v. Johnson*, 183 N.C. App. 576, 581, 646 S.E.2d 123, 126 (2007). In *Johnson*, our Court granted the defendant a new trial on the kidnapping charge because the evidence showed that at the time the defendant confined the victim, he had already committed the offenses of breaking or entering and larceny; thus, there was no evidence that the defendant confined the victim *for the purpose of* committing those offenses. *Id.* at 584, 646 S.E.2d at 128; *see also* N.C. Gen. Stat. § 14-39(a)(2).

However, it is clear that in this case, the State presented substantial evidence at trial tending to show that Defendant confined the victims *for the purpose of* "doing serious bodily harm . . . or terrorizing the [victims] so confined[.]" N.C. Gen. Stat. § 14-39(a)(3). Although the Defendant's version of events conflicted with the version presented by the State, we conclude that the generally consistent testimony of the three witnesses for the State constitutes "substantial evidence" of confinement such that the trial court properly denied Defendant's motions to dismiss. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. Specifically, the State presented evidence that during the assault of Mr. Handy, Defendant repeatedly physically blocked exits to rooms of the home and the exit of the home itself, stating that "nobody was going to leave." A witness testified that during the initial assault in the living room of the home, Defendant "blocked the front door and wouldn't let [her] leave. [Defendant] said nobody was going to leave." Defendant then continued to assault both victims. One of the victims, Mr. Briggs, testified that eventually, "[Defendant] put us in [the bedroom]. I guess he blocked the doorway and told us to get up in the room." In addition, Mr. Briggs testified that after Defendant put him and Mr. Handy in the bedroom, he let them use the bathroom and then made them go back into the bedroom and sit down. Mr. Briggs further testified that after they used the bathroom "some more pounding got done in that room."

This evidence was sufficient to establish Defendant's confinement of the victims for the purpose of facilitating the assault. It was for the jury to consider the weight to be given to this evidence in deciding its verdict. *Graham v. North Carolina Butane Gas Co.*, 231 N.C. 680, 683, 58 S.E.2d 757, 760 (1950) ("On the trial of an action, the competency, admissibility, and sufficiency of the evidence are for the court, while the credibility of the witnesses, and the probative force and weight of the testimony are for the jury."). Therefore, the trial court did not err in denying Defendant's motions to dismiss.

B. Jury Instructions

Defendant's second set of arguments on appeal relate to the trial court's instructions to the jury. Defendant contends that the trial court (1) should have instructed the jury on self-defense, (2) should have instructed the jury on the lesser offense of false imprisonment, and (3) should *not* have given an instruction on flight because it was unsupported by the evidence.

1. Self-Defense Instruction

First, we address the Defendant's argument that the trial court erred by failing to instruct the jury regarding self-defense. Specifically, Defendant contends that the trial court should have instructed the jury that the State was required to prove beyond a reasonable doubt that Defendant was *not* acting in self-defense when he confined the victims for the purpose of inflicting serious bodily harm. Defendant has

acknowledged that there is no case law from our Court or our Supreme Court in which a defendant was entitled to a self-defense instruction in defense of a kidnapping charge. However, our Supreme Court has stated that the trial court "must charge the jury on all substantial and essential features of a case which arise upon the evidence[.]" *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). This is true "even when . . . there is no special request for the instruction." *Id.* When there is evidence presented at trial such that a juror could infer that a defendant acted in self-defense, the defendant is entitled to an appropriate instruction from the trial court. *Id.*

"For a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant." *State v. Hudgins*, 167 N.C. App. 705, 711, 606 S.E.2d 443, 446 (2005) (internal marks omitted). The burden rests with Defendant to establish the affirmative defense. *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975).

Here, according to Defendant's version of events, Mr. Handy "initiated the fight when he kicked me" as Mr. Handy fell backwards off a bucket he had been sitting on. Because Mr. Handy's alleged kick constituted non-deadly force, Defendant was required to retreat if possible and was permitted to use only the amount of force necessary to repel the assault. *See State v. Allen*, 141 N.C. App. 610, 618, 541 S.E.2d

490, 497 (2000). Even if we consider Defendant's version of events to be true, his testimony establishes that his reciprocal use of force was excessive and that he had numerous opportunities to retreat but failed to do so. Indeed, Defendant stated on cross-examination that "it was a one-sided fight, honestly. I beat him into the house. And he was getting up, and I was hitting him some more. I fractured my hand hitting him in the face." When Mr. Handy fell from the bucket, he was likely prone for a period of time, which would have most likely given Defendant ample time to retreat. However, Defendant testified that after Mr. Handy kicked him and fell, Defendant began punching him and kept punching him, and that at one point, he hit him so hard that he knocked him into the house and then again into the middle of the living room. In addition, the responding police officer testified that Defendant was approximately six-foot-four in height and two-hundred and forty (240) pounds. Mr. Handy, the victim, testified that he was five-foot-nine and approximately one-hundred eighty (180) or one-hundred eighty-seven (187) pounds at the time of the assault. Even considering the evidence in a light most favorable to Defendant, we are unable to conclude that the trial court erred in failing to instruct the jury on self-defense. Accordingly, this argument is overruled.

2. False Imprisonment Instruction

Defendant also contends that the trial court erred in failing to instruct the trial court on the lesser offense of false imprisonment. *See State v. Whitaker*, 316 N.C.

515, 520, 342 S.E.2d 514, 518 (1986) ("[F]alse imprisonment is a lesser included offense of kidnapping."). "A defendant is entitled to have a lesser included offense submitted to the jury only when there is evidence to support that lesser included offense." *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000). "If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than [the] defendant's denial that he committed the offense, [the] defendant is not entitled to an instruction on the lesser offense." *Id.* at 267–68, 524 S.E.2d at 40.

The difference between kidnapping and false imprisonment is the purpose of the confinement, restraint, or removal of another person. *State v. Claypoole*, 118 N.C. App. 714, 717-18, 457 S.E.2d 322, 324 (1995). If the purpose of the confinement was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. However, if the unlawful confinement occurs without any of the purposes specified in the statute, the offense is false imprisonment. *Id.* (citing *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 562 (1992)). Because, as we have already determined, the evidence indicated that Defendant did in fact confine the victims for the purpose of inflicting serious bodily injury, we conclude that the trial court did not err in failing to instruct on the lesser-included offense of false imprisonment. *See id.*

3. Flight Instruction

In Defendant's final argument relating to jury instructions, he contends that the trial court improperly instructed the jury on flight, over his objection. The trial court instructed the jury that "[e]vidence of flight may be considered . . . together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt." Defendant objected to this instruction; therefore, we review this decision of the trial court *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

Again, we note that the trial court "must charge the jury on all substantial and essential features of a case which arise upon the evidence[.]" *Marsh*, 293 N.C. at 354, 237 S.E.2d at 747. A trial judge may instruct on flight "when there is *some evidence* in the record reasonably supporting the theory that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 489-90, 402 S.E.2d 386, 392 (1991). In determining whether a flight instruction is warranted, a trial court should view the evidence in the light most favorable to the State. *State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000).

Here, the State introduced evidence that Defendant's uncle learned that police officers were talking to Mr. Handy after the assault and were going to arrest Defendant. Defendant's uncle went to the house, found Defendant sleeping, and told Defendant's brother "wake up, man, tell [Defendant] the police is going to arrest him." According to Defendant's uncle, Defendant then "got up and said okay then, and . . .

just started walking." Defendant testified that his brother told him "get up, the police are coming," and that he got straight up and walked to the store. Viewed in the light most favorable to the State, we conclude that this evidence alone is sufficient to warrant the trial court's instruction of the jury regarding flight. This evidence reasonably supports the theory that Defendant heard that the police were coming to arrest him for his assault of Mr. Handy and Mr. Briggs, and that he took steps to avoid apprehension by leaving the scene. *See Thompson* 328 N.C. at 489-90, 402 S.E.2d at 392. Accordingly, this argument is overruled.

C. Restitution Order

Defendant's final argument on appeal relates to the trial court's restitution order, in which it ordered Defendant to pay restitution in the amount of $26,709.21 to two hospitals where Mr. Handy received treatment after the assault. We review *de novo* whether restitution awards were "supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011). "In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992). "The amount of restitution must be limited to that supported by the record[.]" N.C. Gen. Stat. § 15A-1340.36(a) (2014).

It appears from the record that the only evidence offered in support of the restitution award was testimony from Mr. Handy that he suffered injuries which

required treatment at two hospitals. Mr. Handy did not testify to the cost of his treatment. Thus, the only proffered evidence establishing the monetary figure of $26,709.21 was the restitution worksheet itself and the statements of the prosecutor regarding the total dollar amount. Because neither a restitution worksheet, standing alone, nor unsworn statements of a prosecutor are sufficient to support an order of restitution, we are compelled to vacate the $26,709.21 civil judgment against Defendant and remand for a new hearing regarding the amount of restitution. *See State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011) (stating that a restitution worksheet, "unsupported by testimony or documentation, is insufficient to support an order of restitution"); *State v. McNeil*, 209 N.C. App. 654, 668, 707 S.E.2d 674, 684 (2011) (stating that "unsworn statements of a prosecutor cannot support an order of restitution").[2]

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).

[2] Because we have left Defendant's convictions for second-degree kidnapping undisturbed, we also find no error in Defendant's conviction for attaining habitual felon status.