IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-804

Filed 21 November 2023

New Hanover County, Nos. 17 CRS 60189, 17 CRS 60191, 17 CRS 60193, 17 CRS 60195, 17 CRS 60290

STATE OF NORTH CAROLINA

v.

NATHANIEL LAWRENCE, Defendant.

Appeal by defendant from judgment entered 23 July 2021 by Judge Tiffany Peguise-Powers in New Hanover County Superior Court. Heard in the Court of Appeals 5 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Elizabeth Curran O'Brien, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

DILLON, Judge.

Defendant was convicted of five counts of armed robbery and eight counts of second-degree kidnapping in connection with his participation in five robberies.

I. Background

The evidence at trial tended to show as follows: Two men committed five robberies in Wilmington in the span of a month. In each case, the men robbed a retail establishment, either a fast-food restaurant, a convenience store, or a dollar store. The men wore dark clothing and face masks, approached an employee outside the building, forced the employee inside, and forced employees to move about the businesses to gain access to money, cigarettes, or other personal items. In each of the first four robberies, the men forced the two employees who were present inside the building into either a bathroom or a freezer while they made their getaway.

In the fifth robbery, after the men forced the one on-site employee to open the cash drawer so they could remove money, they did not direct the employee into any room before leaving. Instead, the men left abruptly when they saw a law enforcement officer in the parking lot.

The first robbery occurred on 1 November 2017. An employee at a fast-food restaurant was confronted by the two men outside during her smoke break. After gaining entry, the men forced her and another employee around the restaurant, retrieving $1,900 from the store safe and taking the cell phone and wallet of one employee. Afterward, the men forced the two employees into the freezer and left.

The second robbery occurred weeks later. An employee at a gas station was confronted by the men during her smoke break. After gaining entry, the men forced the two on-site employees to the cigarette room behind the counter, where the men

stole cigarettes. They forced one employee to open the safe, whereupon the men stole over $2,200. The men ordered the two employees into a bathroom and then left.

The third robbery occurred on 26 November 2017 at the same gas station where the second robbery occurred. The manager and another employee were outside when the men forced them to enter the store, disarm the alarm, and open the safe. After taking $2,500 and more cigarettes, the men ordered the employees into the bathroom, whereupon the men made their getaway.

The fourth robbery took place four days later, on 30 November 2017. A dollar store employee and her co-worker were approached by the men and a third man. One of the men zip-tied the hands of one employee and forced the other employee to open the safe. The men took more than $1,000, as well as cigarettes and cigars, after which they duct-taped the hands and feet of both employees and left the store.

The fifth robbery took place the next day at a gas station. The men forced an employee to open the safe and cash drawer. One man took $70 and put zip-ties and tape beside the employee, which were nearly identical to the ones used during the prior dollar store incident. However, the men fled upon seeing a deputy in the parking lot.

After extensive investigation, evidence pointed to Defendant and another man as the two men involved in the five robberies.

Defendant was convicted by a jury of five counts of armed robbery, one for each robbery—each a Class D felony—and eight counts of second-degree kidnapping—each

a Class E felony—arising from the first four robberies, each of which involved two employees.[1]

The trial court consolidated the convictions into five sentences: for each incident, the trial court consolidated the convictions relating to that incident into one sentence. Four of the sentences were for sixty-six to seventy-two months of imprisonment, with two of the four running concurrently. The fifth sentence was for forty-four to sixty-five months to be served after the conclusion of the other terms of imprisonment. Defendant appeals.

II. Appellate Jurisdiction

Defendant has acknowledged that he did not properly perfect his appeal. However, he has petitioned our Court for a writ of *certiorari* to review his convictions. In our discretion, we grant Defendant's petition, in part, to address his joinder argument and his argument concerning the sufficiency of the evidence concerning his kidnapping convictions.

III. Analysis

We address Defendant's joinder argument and his arguments concerning his kidnapping convictions in turn.

A. Joinder

Defendant was charged for his alleged involvement in all five incidents. All

[1] The State did not pursue a kidnapping charge with respect to the fifth robbery, as Defendant fled upon seeing law enforcement before forcing the store employees into a room.

his charges were joined for trial.

Defendant argues that the trial court erred by denying his motion to sever the charges. However, Defendant failed to renew his motion before the close of all the evidence. Accordingly, he waived his right to severance. *See* N.C. Gen. Stat. § 15A-927(a)(2) (stating that "[a]ny right to severance is waived by failure to renew the motion" before the close of all the evidence); *see also State v. Mitchell*, 342 N.C. 797, 805, 467 S.E.2d 416, 421 (1996) (holding that a defendant's right to severance "was lost" where he failed to properly renew his motion).

Defendant, though, further argues that the trial court abused its discretion when it previously joined all the charges for trial. Our General Assembly has provided that two or more offenses against the same defendant may be joined for trial where they are "based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a). Our Supreme Court has held that "a motion to consolidate charges for trial is addressed to the sound discretion of the trial court and that ruling will not be disturbed on appeal absent an abuse of discretion." *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981).

Based on our review of the record, including the similarities of the crime and evidence of the involvement of the same accomplice in all five robberies, we cannot say that the trial court abused its discretion in ordering all charges against Defendant in connection with the five robberies be joined for trial.

B. Seven Kidnapping Charges

Defendant was convicted of eight counts of kidnapping for the victims involved in the first four robberies. Defendant makes several arguments as to why the trial court should have allowed seven of the eight kidnapping charges to go to the jury. Each of the first four robberies involved two victims, for a total of eight. Defendant's arguments do not concern the victim in the fourth robbery, whose hands were zip-tied while Defendant and his accomplice moved around the dollar store with the other employee.

For the reasoning below, we must agree that there was insufficient evidence for a separate kidnapping conviction on the seven counts *based on the theory on which the State proceeded*. We, therefore, vacate the four judgments associated with the first four robberies and remand for resentencing.

Our Supreme Court has stated that "kidnapping is a specific intent crime [and that] the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the ten purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). Relevant to this case are two of the statutory purposes, that "[a]ny person who shall unlawfully confine, restrain, or remove" another "for the purpose of . . . [f]acilitating the commission of any felony" or for the purpose of "facilitating the flight of any person following the commission of a felony" is guilty of kidnapping. N.C. Gen. Stat. § 14-39(a)(2) 2017.

Here, Defendant was indicted for the kidnappings on both the theory that he

confined/restrained/removed the victims to facilitate *the commission of* the robberies and on the theory that he confined/restrained/removed the victims to facilitate *the flight* from the scenes following the commission of the robberies.

However, at trial, the jury was only instructed on the first theory, that Defendant acted for the purpose of facilitating *the commission of* the robberies.

Defendant concedes that the evidence was sufficient to support a finding that he confined/restrained/removed the seven victims for the purpose of facilitating his flight following the robberies, when the victims were ordered into a bathroom or freezer *after* Defendant and his accomplices had gathered the money and items from the victims at gunpoint and wanted to make their getaway.

Defendant argues there was insufficient evidence to support a finding that he acted to facilitate the actual robberies, which was the only theory upon which the jury was instructed. He contends that any confinement/restraint/removal of the victims as they were going around the stores to gather money and other items was inherent in the robberies and, therefore, cannot be the basis of separate kidnapping convictions. He also contends that any confinement/restraint/removal of the victims when they were ordered into the bathroom/freezer cannot be the basis for kidnapping convictions based on a theory that those actions were taken for the purpose of facilitating the robberies, as the robberies were already completed when the victims were ordered into the bathroom/freezer.

In its brief, the State makes no argument that the confinement/restraint/

removal of the victims as they were moved around the stores to unwillingly help Defendant and his accomplice gain access to money and items forms the basis of the kidnapping convictions. Indeed, based on our review of the evidence, any confinement/restraint/removal occurring during these times was inherent in the robberies and, therefore, cannot form the basis of separate kidnapping convictions. Rather, the State merely argues that the movement of the victims into the bathroom/freezer and their confinement therein facilitated the actual robberies, as the stolen money and other items had not been carried away at that point.

Larceny is a lesser-included offense of robbery. *See State v. Young*, 305 N.C. 391, 393, 289 S.E.2d 374, 376 (1982). Larceny consists of *both* the taking *and* carrying away of property. *See State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978). However, our Supreme Court has been clear that the "taking away" occurs simply when the defendant has moved the stolen item from its original location: there is no requirement that the defendant have already left the scene with the stolen item. *See id.* For instance, our Supreme Court has held that a defendant has carried away stolen money when he has simply removed a cash box from a safe. *Id.* at 103, 249 S.E.2d at 429. "A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is sufficient asportation or carrying away." *Id.* at 103, 249 S.E.2d at 428 (citation omitted).

Here, the record shows that in each of the first four robberies, Defendant and his accomplice had already gained possession of the items they were stealing before

ordering the victims into either the bathroom or the freezer. In other words, the armed robberies were completed before the victims were ordered into the bathroom or freezer. Therefore, we must conclude that there was insufficient evidence to support the seven convictions of kidnapping based on the only theory presented to the jury, and we must vacate the four judgments associated with those convictions. *See State v. Elder*, 383 N.C. 578, 604, 881 S.E.2d 227, 245 (2022) (vacating conviction where evidence only supported a finding of a kidnapping for the purpose of facilitating the flight from a completed felony, where the defendant was only indicted on the theory that he committed the kidnapping to facilitate the commission of a felony).

IV. Conclusion

For the reasons set forth above, we find no error with respect to the fifth judgment associated with the fifth robbery. However, we vacate seven of the eight convictions for kidnapping associated with the first four judgments and remand the entire matter for resentencing.

NO ERROR in part, VACATED in part, REMANDED for resentencing.

Judges MURPHY and THOMPSON concur.

Report per Rule 30(e).