REL: January 10, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0442

Steven Duatell Rice

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-15-1225.60)

MINOR, Judge.

AFFIRMED BY UNPUBLISHED MEMORANDUM.

Kellum and McCool, JJ., concur. Windom, P.J., concurs in the result. Cole, J., concurs in part; dissents in part , with opinion.

COLE, Judge, concurring in part and dissenting in part.

I agree with this Court's decision to affirm the circuit court's summary dismissal of Steven Duatell Rice's Rule 32, Ala. R. Crim. P., petition as to Rice's claims that his counsel was ineffective for failing to inject a voluntary-safe-release defense on a kidnapping charge, for not requiring the trial court to comply with prescribed oaths to the jury venire and petit jury, and for failing to object to the trial court's failure to instruct the jury on the element of intent. However, I respectfully dissent from the affirmance of the circuit court's summary dismissal of Rice's petition as to his claims that his counsel was ineffective for failing to request a jury instruction on voluntary safe release and for failing to request a jury instruction on assault as a lesser-included offense of first-degree kidnapping. Because I am of the opinion that the circuit court should have granted Rice an evidentiary hearing to decide the merits of those two issues, I would reverse the circuit court's dismissal of Rice's petition as to those issues. Thus, I concur in part and dissent in part.

In affirming the judgment of the circuit court, the majority does not hold that Rice is precluded from raising the ineffective-assistance-of-counsel claims that I address. The majority correctly holds in its unpublished memorandum that "the petition was timely filed, the claims alleging ineffective assistance of counsel were not precluded, and Rice had only the burden of pleading, not proof, at this stage in the proceedings." Although I agree with this holding, I disagree with the majority's holdings (1) that "Rice was not entitled to a jury instruction regarding 'voluntary safe release,' and his counsel was not ineffective for failing to request one," and (2) that "Rice was not entitled to a jury instruction on assault, and his counsel was not ineffective for failing to object to the trial court's refusal to give one." Although I believe this Court is not in a position to determine, without further proceedings in the circuit court, whether trial counsel was ineffective, for the reasons stated herein I believe that this matter should be remanded to the circuit court for an evidentiary hearing as to those claims of ineffective assistance of counsel.

As noted above, both of the ineffective-assistance-of-counsel claims raised on appeal involve proposed jury instructions, and this Court's resolution of those issues depends largely upon the facts presented at trial. Because the majority's decision affirming the circuit court's judgment is based upon factual determinations rather than a procedural default, I will not go into detail regarding preservation of those issues. Yet, both issues addressed in this decision were properly raised in Rice's Rule 32 petition and are properly reasserted with sufficient authority in Rice's appeal to this Court.

The majority notes the following facts from this Court's unpublished memorandum affirming Rice's convictions on direct appeal:

> "On May 4, 2014, four high-school-age males, A.B., B.B., A.W., and T.W., wanted to purchase some marijuana. T.W. called someone and arranged the purchase. The males then walked toward a nearby convenience store located on Moores Mill Road in Madison County. T.W. got into a Ford Explorer [sport-utility vehicle] while the other three males waited nearby. T.W. then ran from the vehicle. The other three males saw someone chasing T.W., whom they all identified as Rice. A.W. and A.B. heard gunshots. The driver of the Ford Explorer drove around a street and blocked the path of A.B. and B.B. Rice held a gun to A.B.'s head and stated, '[w]e've got to get my shit back.' (R. 205.) Rice

> then 'shoved' A.B. and B.B. in the backseat of the Ford Explorer and blindfolded them. Rice twice switched vehicles. Once stopped, A.B. and B.B. were bound. Rice threatened to kill A.B. and B.B. if they did not return his marijuana. A.B. and B.B. were '[b]eaten, kicked, dragged, burnt.' (R. 214.) About two hours later, Rice and T.W. arranged a meeting. Rice later released A.B. and B.B. in exchange for the marijuana."

Although Rice's arguments were sufficiently pleaded, Rice was not given an opportunity to present testimony at an evidentiary hearing or to point out additional portions of his trial transcript that support his contentions. Yet this Court can take notice of the record in Rice's original appeal, including the trial transcript in Rice v. State (CR-15-1480, April 21, 2017), 246 So. 3d 989 (Ala. Crim. App. 2017) (table).[1] With regard to his injuries, B.B. testified: "I got a black eye. You know, my head's busted up. My ribs, bruising down in here. You know, you can see where my shoulders are tore up. ... You can see how the dirt and the asphalt and the little itty-bitty rocks and stuff is still stuck in my wounds from being drug across the road." (Record in CR-15-1480, R. 237-38, 242.) B.B. testified that the

[1]References to testimony from the reporter's transcript from Rice's trial included in CR-15-1480 will be shown as "Record in CR-15-1480, R. ___."

injuries happened "that evening," but he did not specify a precise time during the night in question that the injuries occurred. (Record in CR-15-1480, R. 243.) T.W. testified that, after he stole Rice's marijuana and had had several subsequent telephone conversations with Rice, Rice

> "told me to leave [the marijuana] at a stop sign--at the front of a stop sign. And I did as he asked. I kept walking. ...
>
> "I left it there. And I got up about far enough away to where I could barely even see inside the car. And they pulled up and got it and left. Then he told me that I could find my boys behind the house or like a building. And at the end of the road there was like a cemetery, a pet cemetery, I believe. Yeah, that's what it was. I thought they was there and I started searching around there. I couldn't find them. Then they came walking up to me. [B.B. and A.B.] came walking up to me."

(Record in CR-15-1480, R. 277-78.) T.W. testified that they did not telephone the police until later because drugs were involved and that he "just didn't know what to do." (Record in CR-15-1480, R. 285.) Furthermore, T.W. testified that they did not have money to pay for the drugs and intended to rob Rice all along. (Record in CR-15-1480, R. 290.)

According to A.B., Rice chased T.W. and then returned without him and, at gunpoint, made A.B. and B.B. get in the Ford Explorer. A.B. thought the vehicle was being driven by

Rice's girlfriend. (Record in CR-15-1480, R. 319.) After being blindfolded, A.B. and B.B were hit and kicked, then placed in the trunk of another car. They were taken to another location then Rice, and possibly his girlfriend, hit, kicked, burned by cigarettes, and threatened to kill them. (Record in CR-15-1480, R. 323, 326.) After A.B. and B.B. were beaten, T.W. finally dropped off the marijuana he had taken from Rice so that Rice could get it. A.B. testified that the following then occurred:

> "And all I remember is somebody coming to the trunk that we were sitting in for 45 minutes, just sitting there. And they popped the trunk. And they said, 'Well, today's y'all's lucky day. Y'all don't --y'all ain't going to die. He brought the weed back....'
>
> "The only other car I seen was when we--was when we got dropped off and we jumped up and all I seen was taillights....
>
> "I think it was in the middle of Blake Bottom Road....
>
> "After that we started walking toward Stringfield. And [B.B] wanted to go right and I wanted to go left. But we looked--we started going right and we seen [T.W.]. And that's when we used his phone to call Amanda, which is [B.B's] sister. And she came and got us."

(Record in CR-15-1480, R. 328-31.) A.B. further testified that they were "assaulted" and "beaten" in a "yard" in a "residential area." (Record in CR-15-1480, R. 332.)

Rice testified that after T.W. stole his marijuana that he saw two other individuals and the following occurred:

> "I started chasing them. And once--I caught one of them. The other one stopped. We all just got into a big fight. We fought for a little while. But, my girl, I guess she--a car had turned on the street or whatever. And when we seen headlights all of us just came to a stop. We had come to a stop. Because we didn't know who it was. It could have been the police. So all us just stopped.
>
> "And that's when one of them, I can't remember, I believe it was [B.B], he the one told me--he was like, 'Man, we didn't know he was going to rob you. We didn't know he was going to do you like that. We'll help you get your weed back.' And by that time the car that was turning on the street was my girlfriend. And we all got in the car with her calling [T.W.]. That's basically it."

(Record in CR-15-1480, R. 410-11.) When asked how the victims sustained the injuries, Rice stated, "I really couldn't tell you that. I mean, all I know is I got in a fight with these guys" and "they could have had [the injuries] before they saw me or after they saw me." (Record in CR-15-1480, R. 425.) Rice admitted that the injuries "could have" come from the fight with him. (Record in CR-15-1480, R. 426.)

The first claim addressed by the majority is whether Rice's trial counsel was ineffective for failing to request a jury instruction on "voluntary safe release" in accordance with Section 13A-6-43(b), Ala. Code 1975, which provides:

> "A person does not commit the crime of kidnapping in the first degree if he voluntarily releases the victim alive, and not suffering from serious physical injury, in a safe place prior to apprehension. The burden of injecting the issue of voluntary safe release is on the defendant, but this does not shift the burden of proof. This subsection does not apply to the prosecution for or preclude a conviction of kidnapping in the second degree or any other crime."

Second-degree kidnapping is a lesser-included offense of first-degree kidnapping, and a "person commits the crime of kidnapping in the second degree if he abducts another person." § 13A-6-44(a), Ala. Code 1975. The majority affirms the circuit court's summary dismissal of Rice's petition because, according to the majority,

> "Rice testified repeatedly that A.B. and B.B. agreed to go with him and that they were free to leave at any time. He denied kidnapping A.B. and B.B., and he did not testify that he did anything to 'release' them. Thus, if counsel had requested such an instruction, it would have been inconsistent with Rice's theory of defense and could have suggested that Rice's testimony was false."

Although the majority is correct in concluding that an instruction on second-degree kidnapping is inconsistent with Rice's testimony at trial, the law is clear that

> "'"[e]very accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however[] weak, insufficient, or doubtful in credibility," Ex parte Chavers, 361 So. 2d 1106, 1107 (Ala. 1978), "even if the evidence supporting the charge is offered by the State." Ex parte Myers, 699 So. 2d 1285, 1290-91 (Ala. 1997), cert denied, 522 U.S. 1054, 118 S. Ct. 706, 139 L. Ed. 2d 648 (1998). However, "[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." § 13A-1-9(b), Ala. Code 1975.'"

Morton v. State, 154 So. 3d 1065, 1082 (Ala. Crim. App. 2013) (quoting Clark v. State, 896 So. 2d 584, 641 (Ala. Crim. App. 2003)) (emphasis added). In addressing a requested jury instruction consistent with the State's evidence but not supported by any evidence presented by the defense, this court has also held that

> "[a]n accused is entitled to have the jury consider the issue of his intoxication where the evidence of intoxication is conflicting, Owens v. State, 611 So. 2d 1126, 1128 (Ala. Cr. App. 1992); Crosslin v. State, 446 So. 2d 675, 682 (Ala. Cr. App. 1983), where the defendant denies the commission of the crime, Coon v. State, 494 So. 2d [184,] 187 [(Ala. Cr. App. 1986); see Moran v. State, 34 Ala. App. 238, 240, 39 So. 2d 419, 421, cert. denied, 252 Ala.

> 60, 39 So. 2d 421 (1949), and where the evidence of intoxication is offered by the State, see Owens v. State, 611 So. 2d at 1127-28."

Fletcher v. State, 621 So. 2d 1010, 1019 (Ala. Crim. App. 1993). The standard that should be adopted by this Court is whether the testimony from either party presented a reasonable theory to support the lesser-included instruction. This Court used this standard in Kirksey v. State, 475 So. 2d 646, 648 (Ala. Crim. App. 1985), when the Court affirmed Kirksey's conviction and held that,

> "[s]ince the appellant denied that 'any act' between the parties occurred and since there was no reasonable theory presented at trial to support a lesser offense, the trial court had no obligation to charge on a lesser offense."

(Emphasis added.) Therefore, a jury instruction on a lesser-included offense should be given if it is supported by the evidence, even if the evidence is inconsistent with testimony presented by the requesting party.

Although the majority is correct in noting that Rice denied kidnapping B.B. or A.B. and that a jury instruction on second-degree kidnapping is generally inconsistent with Rice's testimony, the testimony presented by all three of the State's eyewitnesses established that B.B. and A.B. were voluntarily

released in a safe place after they were abducted, after T.W. returned Rice's marijuana, but before Rice was apprehended. Furthermore, the victims suffered injuries, but it appears they did not suffer "serious physical injury" as defined by § 13A-1-2(14), Ala. Code 1975: "Physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ." Although a question of fact could have arguably been presented as to the seriousness of their injuries, none of the injuries could be regarded as "serious physical injury" as a matter of law.

If a charge on the lesser-included offense of second-degree kidnapping had been given, defense counsel could have argued that Rice was not guilty based upon his own testimony, but that, even if the State's case was accepted in its entirety, Rice could not have been found guilty of anything greater than second-degree kidnapping. Offering alternative theories for the jury to consider can be an effective trial strategy. Convictions for the lesser-included offense of second-degree kidnapping would have also precluded imposition

of the life-without-parole sentences that Rice received. Without an evidentiary hearing on this issue, neither this Court nor the circuit court could determine if trial counsel's decision not to request the lesser-included instruction was an error warranting a new trial or was merely acceptable trial strategy. Thus, the circuit court erred in summarily dismissing Rice's petition as to that claim.

In relation to Rice's argument that his Rule 32 petition should have been granted because of his counsel's failure to request a jury instruction on assault, the majority acknowledges "that assault may constitute a lesser offense of kidnapping. See, e.g., Miller v. State, 645 So. 2d 363, 364 (Ala. Crim. App. 1994)." Likewise, in Ex parte Staten, 622 So. 2d 1321 (Ala. 1992), the Supreme Court of Alabama held that third-degree assault is a lesser-included offense of attempted kidnapping. The two similarly worded indictments in this case assert that Rice abducted B.B. and A.B. "with the intent to inflict physical injury upon" them. (Record in CR-15-1480, C. 13.) Without expressly stating that assault was a lesser-included offense of the first-degree kidnapping charge, the majority seems to agree that if the evidence had

established that an assault, rather than a kidnapping, occurred, a jury instruction on assault, as a lesser-included offense of kidnapping, would have been appropriate.

The majority affirms the trial court's summary dismissal of Rice's Rule 32 petition because

> "[t]here was no evidence submitted by Rice or by the State that would have supported the conclusion that A.B.'s and B.B.'s injuries were the result of a single, short fight with Rice. For the jury to have convicted Rice of assault, it would have had to disbelieve the victims' testimony, believed Rice's testimony that he fought with the victims only briefly but did not cause their injuries, and then speculate as to how the victims received their extensive injuries. The evidence showed that Rice was either guilty of kidnapping or he was innocent."

I disagree.

As noted previously, requested jury charges should be given by a trial court if they are not misleading and if they "'are supported by any evidence, however[] weak, insufficient, or doubtful in credibility.'" White v. State, 227 So. 3d 541, 544 (Ala. Crim. App. 2016) (quoting Ex parte Chavers, 361 So. 2d 1106, 1107 (Ala. 1978) (emphasis added)). In this case, Rice testified that he fought with the victims and that their injuries "could have" come from the fight. He also stated that some of the injuries could have occurred before or after

the fight. This testimony presented a factual question, albeit a weak one, as to the cause of A.B.'s and B.B.'s injuries. This was clearly evidenced when the jury asked the circuit court during their deliberations, "Can the charges be reduced to assault?" (Record in CR-15-1480, R. 498.) In other words, the jury could have believed that Rice did not kidnap the victims and that during their fight he caused only some of the injuries complained of by A.B. and B.B. Because there was evidence to support a jury instruction on assault as a lesser-included offense of first-degree kidnapping, the circuit court erred in summarily dismissing Rice's petition as to that claim. Rice should have been given an opportunity to present testimony to establish that his trial counsel should have requested an instruction on assault and that he was prejudiced by counsel's decision not to request the lesser-included instruction.

Based upon the foregoing, I would reverse the circuit court's judgment, in part, and remand this cause with directions for the circuit court to hold an evidentiary hearing on the two ineffective-assistance-of-counsel claims discussed herein. Therefore, I respectfully dissent.