NO. COA00-1507

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v. Dare County
No. 99 CRS 6049, 6050, 6051
NICHOLAS N. CAULEY 00 CRS 520, 1696

Appeal by defendant from judgments entered 8 and 9 June 2000 by Judge G.K. Butterfield in Dare County Superior Court. Heard in the Court of Appeals 25 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Edwin Lee Gavin II, for the State.

Alexy, Merrell, Wills & Wills, L.L.P., by James R. Wills, III, for defendant-appellant.

EAGLES, Chief Judge.

Nicholas Cauley ("defendant") appeals from the trial court's judgments entered on jury verdicts finding him guilty of trafficking by possession of heroin, trafficking by transportation of heroin, second degree kidnapping, common law robbery, conspiracy to commit common law robbery, breaking or entering, and conspiracy to commit breaking or entering. On appeal, defendant argues that the trial court erred in denying his motion to quash, denying his motions to dismiss, and submitting written instructions to the

jury. After careful consideration of the record and briefs, we find no error.

The State's evidence tends to show the following: On the morning of 8 October 1999, office manager Sally Hoadley arrived at Qwacker's Tavern, located in Duck, North Carolina. Shortly after Ms. Hoadley arrived and removed the previous day's receipts from the office safe, defendant and Henry Gasby entered the office. Upon entering the office, defendant put his arm around Ms. Hoadley's neck, asked her the location of the bathroom, and pulled her towards the office door. When Ms. Hoadley replied that there was no bathroom, defendant stopped, pulled Ms. Hoadley back to the center of the room, and unsuccessfully attempted to tie her up. After Mr. Gasby tied Ms. Hoadley up, the two men took a bag containing approximately $9,000.00 and fled.

Within minutes, Ms. Hoadley freed herself, telephoned Julia Lee, and informed Ms. Lee that she had been robbed. Ms. Lee then telephoned Robert Lane, property manager of a neighboring building, who immediately went to Qwacker's. When he arrived at Qwacker's, Mr. Lane saw defendant and Mr. Gasby leave the restaurant, get into a brown mini-van, and drive south. Mr. Lane went to the restaurant's office, where he telephoned 9-1-1 with a description of the suspects, their vehicle, and their direction of travel.

Deputies George Farrow and Ed Cutrell of the Dare County Sheriff's Office received a call from dispatch informing them that Qwacker's had been robbed, a description of the suspects, their vehicle, and their direction of travel. Shortly thereafter, the

officers observed a brown mini-van headed south with two occupants matching the suspects' description. The officers activated their blue lights, and a high speed chase ensued. Eventually, the mini-van stopped in a business's parking lot. Both defendant and Mr. Gasby ran from the mini-van, but the officers quickly apprehended them. Mr. Lane came to the parking lot in which the mini-van had stopped and identified both men as the persons that he had seen leaving Qwacker's. Inside the mini-van, police found 86 capsules and "approximately 504 waxed envelopes" containing a substantial amount of heroin and bags containing approximately $9,000.00.

Defendant was tried during the 5 June 2000 Criminal Session of Dare County Superior Court. The jury found defendant guilty of trafficking by possession of heroin, trafficking by transportation of heroin, second degree kidnapping, common law robbery, conspiracy to commit common law robbery, breaking or entering, and conspiracy to commit breaking or entering. The trial court sentenced defendant to substantial terms of imprisonment and entered judgment. Defendant appeals.

Defendant first assigns error to the trial court's denial of his motion to quash the indictments charging trafficking by possession of heroin and trafficking by transportation of heroin. Specifically, defendant contends that both indictments had been impermissibly amended in violation of G.S. § 15A-923(e). After careful review, we disagree.

On 13 December 1999, the Dare County Grand Jury indicted defendant on the charges of trafficking by possession and

trafficking by transportation of "14 grams or more but less than 28 grams of heroin," in violation of G.S. § 90-95(h). Thereafter, on 10 April 2000, the Dare County Grand Jury indicted defendant on the charges of trafficking by possession and trafficking by transportation of "28 grams or more of heroin" in violation of G.S. § 90-95(h). The revised weight of the heroin was based on a State Bureau of Investigation's ("SBI") lab analysis of the heroin. Prior to trial, defendant filed a motion to quash contending that the indictments were "amended indictment[s] rather than [] superseding indictment[s]." After a hearing, the trial court denied the motion.

"A bill of indictment may not be amended." G.S. § 15A-923(e); *see also State v. Hughes*, 118 N.C. App. 573, 576, 455 S.E.2d 912, 914 (1995). Conversely,

> [i]f at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge. The first instrument is not, however, superseded with respect to any count contained therein which charged an offense not charged in the second indictment or information.

G.S. § 15A-646.

Here, the 10 April 2000 indictments charged defendant with offenses based on the same misconduct charged in the 13 December

1999 indictments. Defendant did not plead guilty to the charges in the 13 December 1999 indictments. Moreover, defendant had not been brought to trial before 10 April 2000, the date on which the second indictments were returned. Because the 10 April 2000 indictments charged defendant with offenses based on the same misconduct as the earlier indictments and were issued "before entry of a plea of guilty . . . or commencement of a trial," we conclude that the 10 April 2000 indictments superseded the earlier indictments pursuant to G.S. § 15A-646. While the better practice may be to caption the indictment as "superseding indictment," the absence of that language is not fatal. Accordingly, we overrule defendant's assignment of error.

Next, defendant assigns error to the trial court's denial of defense motions to dismiss the charges of trafficking by possession of heroin, trafficking by transportation of heroin, and kidnapping. Defendant contends that the State presented insufficient evidence to sustain his convictions for these offenses. We disagree.

At the close of the State's evidence, and again at the close of all the evidence, defendant moved to dismiss the trafficking by possession of heroin, trafficking by transportation of heroin, and kidnapping charges, *inter alia*. The trial court denied the motions. The standard for review of a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "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). In determining the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

First, defendant argues that there was insufficient evidence to convict him of trafficking by possession and trafficking by transportation of 28 grams or more of heroin. "To prove trafficking in heroin, G.S. [§] 90-95(h)(4) requires proof of possession of heroin or any mixture containing heroin in an amount of four grams or more." *State v. Agubata*, 92 N.C. App. 651, 660, 375 S.E.2d 702, 707 (1989). Upon conviction of trafficking, if it is found that the quantity of heroin is 28 grams or more, a defendant "shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined not less than" $500,000.00. G.S. § 90-95(h)(4)(c).

Trafficking in heroin "has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of heroin." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987). Here, defendant does not challenge the element of possession. Instead, defendant challenges the amount of heroin on the basis that only samples of the heroin were tested and

that there was a discrepancy in the evidence regarding the total number of wax envelopes.

At trial, Investigator Leary Sink of the Dare County Sheriff's Office testified that he collected the evidence from inside the brown min-van on 8 October 1999. Including the other evidence collected, Investigator Sink testified that he collected "approximately 504 waxed envelopes" containing an off white powder. Laurie Richards, a forensic chemist with the SBI, testified that she tested and weighed the 504 envelopes. In her initial testing, Ms. Richards weighed and tested the contents of only 25 of the envelopes. From this representative sample, Ms. Richards determined that the substance was heroin and that the extrapolated weight of the contents of the 504 envelopes was 21.5 grams.

Prior to trial, the envelopes were resubmitted to the SBI for an exact weight. In the trial transcript, Investigator Sink states that he resubmitted 408 envelopes to be weighed. In his brief, defendant concedes "that this was either a mistake in his testimony or a transcription mistake" and Investigator Sink "meant to say 480 [envelopes]." Upon the subsequent testing, Ms. Richards testified that she opened the 480 envelopes, weighed their contents, added the weight to the weight of the first 25 envelopes, and determined the actual weight of the contents of the 504 envelopes to be 22.3 grams. We note that the weight of the heroin in the envelopes was added to weight of the heroin in the 86 capsules (7.2 grams) in determining that defendant trafficked in 28 grams or more of heroin.

As to defendant's argument that the evidence was insufficient because only samples of the heroin were tested and weighed, this Court's decision in *State v. Harding*, 110 N.C. App. 155, 429 S.E.2d 416 (1993) is dispositive. In *Harding*, an expert chemist tested and weighed a representative sample of 165 total packets of heroin. We held that an expert chemist may give his opinion as to the whole of a substance even though only part of the whole has been tested. *Id.* at 163, 429 S.E.2d at 422; *see also State v. Holmes*, 142 N.C. App. 614, 619, 544 S.E.2d 18, 21 (2001). Accordingly, we conclude that Ms. Richards' opinion testimony regarding the heroin was sufficient to defeat defendant's motion to dismiss.

Additionally, defendant argues that a discrepancy in the evidence, i.e. 504 or 505 total envelopes (480 resubmitted envelopes plus the 25 originally tested envelopes equals 505 total), constitutes insufficient evidence of the amount of heroin to support his conviction. Contradictions and discrepancies in the evidence do not warrant dismissal of the case, but are for the jury to resolve. *See State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000). This issue was properly submitted to the jury for its determination. We hold that the State presented sufficient evidence that defendant trafficked by possession and transportation of 28 grams or more of heroin.

Second, defendant contends that there was insufficient evidence to convict him of second degree kidnapping. "The elements of kidnapping are: (1) confinement, restraint, or removal from one place to another; (2) of a person; (3) without the person's

consent; (4) for the purpose of facilitating the commission of a felony. N.C.G.S. § 14-39(a) []. If the victim was released in a safe place and neither sexually assaulted nor seriously injured, the kidnapping is of the second degree. N.C.G.S. § 14-39(b)." *State v. Lucas*, 353 N.C. 568, 582-83, 548 S.E.2d 712, 722 (2001). Defendant's challenge relates to the element of restraint.

Defendant contends that the restraint necessary for the kidnapping was not a separate and complete act, independent of and apart from the common law robbery. "The term 'restrain' connotes restriction by force, threat or fraud with or without confinement. Restraint does not have to last for an appreciable period of time and removal does not require movement for a substantial distance. Restraint or removal of the victim for any of the purposes specified in [G.S. § 14-39] is sufficient to constitute kidnapping." *State v. Brayboy*, 105 N.C. App. 370, 375, 413 S.E.2d 590, 593 (1992) (citations omitted). "Our Supreme Court has noted that restraint or removal is inherently an element of some felonies, such as armed robbery and rape, and therefore, the restraint, confinement or removal required of the crime of kidnapping, has to be something more than that restraint inherently necessary for the commission of these other felonies." *State v. Raynor*, 128 N.C. App. 244, 250, 495 S.E.2d 176, 180 (1998).

Here, the State's evidence shows that when he entered Qwackers' office, defendant put his arm around Ms. Hoadley's neck, asked her the location of the bathroom, and pulled her towards the office door. When Ms. Hoadley replied that there was no bathroom,

defendant pulled Ms. Hoadley back to the center of the room and attempted to tie her hands behind her back. Viewing the evidence in the light most favorable to the State, we conclude that the facts here tend to show that the restraint utilized in the kidnapping was more than that inherently necessary for the commission of the robbery. Thus, the trial court did not err in denying defendant's motion to dismiss.

In his final assignment of error, defendant contends that the trial court erred in submitting written instructions to the jury during its deliberations. After careful review, we conclude that defendant's assignment fails.

"A trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing." *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992). Here, the jury requested during their deliberations that they receive "[t]he law on common law robbery[] [and] first degree kidnapping." Defendant objected to the submission of the written instructions on these charges. Nevertheless, the court proceeded to verbally charge and then submit to the jury in writing the instructions on the two offenses, all consistent with the pattern jury instructions.

Here, defendant argues that the trial court violated G.S. § 15A-1233(b) by submitting the written instructions to the jury without his consent. G.S. § 15A-1233(b) provides that "[u]pon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room *exhibits*

and writings which have been received in evidence." (Emphasis added). In *State v. Bass*, 53 N.C. App. 40, 45, 280 S.E.2d 7, 11 (1981), this Court held that G.S. § 15A-1233(b) "applies to exhibits and writings received as evidence, not jury instructions." Accordingly, we conclude that G.S. § 15A-1233(b) does not forbid submission of instructions to the jury in writing. Consequently, the trial court did not abuse its discretion in submitting the written instructions to the jury. Defendant's assignment of error is dismissed.

In sum, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges HUDSON and BRYANT concur.

Report per Rule 30(e).