NO. COA01-1523

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v. Caswell County
No. 00 CRS 1392-93
No. 00 CRS 1855

RICKY ESQUIVEL

Appeal by defendant from judgment entered 27 April 2001 by Judge Abraham Jones in Superior Court, Caswell County. Heard in the Court of Appeals 17 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Sonya M. Allen, for the State.

Theresa K. Pressley, for the defendant-appellant.

WYNN, Judge.

From his convictions of first-degree kidnapping, second-degree rape, and misdemeanor violation of a domestic violence protective order, defendant Ricky Esquivel appeals the following issues: (1) Did the trial court err by denying defendant's motions to dismiss due to insufficient evidence? and (2) Did the trial court err by entering judgment for first-degree kidnapping and second-degree rape in violation of Double Jeopardy? We uphold the trial court's denial of defendant's motions to dismiss the charges; however, under the mandate of *State v. Freeland*, we hold that defendant was

erroneously subjected to double punishment, and therefore, remand for a new sentencing hearing.

The State's evidence tended to show that while defendant worked at the same factory as Mr. and Mrs. X, he began an extra-marital affair with Mrs. X in 1995. Eventually Mrs. X separated from her husband and moved in with defendant for two years. During their relationship, the couple experienced several instances of domestic violence resulting in restraining orders against defendant.

In April 1997, Mrs. X reconciled with her husband; nonetheless, defendant made numerous attempts to contact Mrs. X. On several occasions, defendant was arrested for violating domestic violence restraining orders; and, Mrs. X and her husband moved twice for the express purpose of avoiding defendant. On 2 June 1999, defendant hit Mrs. X in the mouth, knocked one of her teeth loose, and fled the scene. Defendant was arrested and served jail time for this incident.

The State's evidence further tended to show that on 15 June 2000, while Mrs. X fed chickens from her porch, defendant attacked her from behind; covered her mouth with his hand and threatened to kill her if she screamed. Thereafter, he dragged her into a wooded area; forcibly inserted his fingers in her vagina; raped her; and fled the scene when her husband began calling her name.

Defendant's evidence tended to show that on the date of the incident, he walked twenty-two miles to Mrs. X's home and saw her on the front porch when he arrived. Mrs. X told him that she

wanted to have intercourse with him, but they had to be quick because her husband was inside; thereafter, they had consensual sexual intercourse and then walked into the woods. During a subsequent conservation, defendant became angry, began hitting her, and fled the scene when her husband came running towards him. In sum, defendant denied raping or kidnapping Mrs. X, but admitted that he hit and kicked her.

Following his convictions at trial, Judge Abraham Jones sentenced defendant to consecutive terms of a minimum of 151 months and a maximum of 191 months for first-degree kidnapping, a minimum of 151 months and a maximum of 191 months for second-degree rape, and 150 days for violating the domestic violence protective order.

On appeal, defendant first contends that the trial court erred by denying his motion to dismiss the charge of first-degree kidnapping because the evidence was insufficient to support a conviction on that charge. We disagree.

"Upon a motion to dismiss by a defendant, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Brayboy*, 105 N.C. App. 370, 373-74, 413 S.E.2d 590, 592 (1992). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Williams*, 133 N.C. App. 326, 328, 515 S.E.2d 80, 82 (1999) (citation omitted). "In ruling on a motion to dismiss for insufficient evidence, the trial court must

consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." State v. Dick, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997).

N.C. Gen. Stat. § 14-39 defines the felony of kidnapping as:

> 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:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

Furthermore, the offense is kidnapping in the first-degree if the victim is either released in an unsafe place or sexually assaulted. N.C. Gen. Stat. § 14-39(b).

The evidence in this case, considered in the light most favorable to the State, shows that defendant attacked Mrs. X, dragged her into the woods, and forced her to have sexual intercourse without consent. After the rape, Mrs. X was beaten and kicked by defendant. There is substantial evidence that defendant's restraint and removal of Mrs. X from the porch was done with the purpose of either "doing serious bodily harm to or terrorizing" her, or for the purpose of "facilitating the commission of a felony." Moreover, the evidence shows that

defendant sexually assaulted Mrs. X. Thus, there was sufficient evidence showing that defendant's conduct constituted first-degree kidnapping as defined by N.C. Gen. Stat. § 14-39.

Second, defendant assigns error to the trial court's denial of his motion to dismiss the second-degree rape charge. N.C. Gen. Stat. § 14-27.2 states that "[a] person is guilty of rape in the second-degree if the person engages in vaginal intercourse with another person . . . [b]y force and against the will of the other person."

Viewed in the light most favorable to the State, the evidence shows that defendant attacked Mrs. X; dragged her into the woods; and had non-consensual intercourse with Mrs. X. While defendant contended that the intercourse was consensual, the jury apparently chose to believe Mrs. X's version of the incident and other evidence presented which satisfied each element of second-degree rape. Therefore, we hold that this assignment of error is without merit.

Third, defendant assigns error to the trial court's denial of his motion to dismiss the misdemeanor violation of a domestic violence protective order. N. C. Gen. Stat. § 50B-4.1(a) provides that "a person who knowingly violates a valid protective order . . . [is] guilty of a Class A1 misdemeanor."

In this case, the State's evidence showed that on 3 February 2000, a domestic violence protective order was entered in the presence of defendant. The order extended from 3 February 2000 through 3 February 2001, and provided that defendant shall not

initiate contact with Mrs. X. The State's evidence further showed that defendant initiated contact with Mrs. X by placing numerous collect calls to her home from prison in August 2000. The calls only stopped after Mrs. X's husband requested that the telephone company block all calls placed from any North Carolina corrections facility. Thus, the State presented evidence satisfying each element of the offense and showing that defendant was the perpetrator. Therefore, we hold that this assignment of error is without merit.

Finally, the State concedes that the trial court committed error by entering judgment on first-degree kidnapping and second-degree rape in violation of Double Jeopardy. "Under the Double Jeopardy Clause of the United States Constitution, a defendant may not be subjected to trial and possible conviction more than one time for an alleged offense." *State v. Wiggins*, 136 N.C. App. 735, 741, 526 S.E.2d 207, 211 (2000). When a defendant is tried in a single trial, for violating two statutes punishing the same conduct, the amount of punishment permitted is determined by the intent of the legislature. *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986). "If the legislature has specifically authorized cumulative punishment for the same conduct under two statutes 'the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.'" *State v. Freeland*, 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986) (citations omitted).

The State points out that defendant's conviction for rape is

a necessary element of first-degree kidnapping. *See, Freeland*, 316 N.C. at 23, 340 S.E.2d at 40-41 (holding that the North Carolina legislature "did not intend that defendants be punished for both the first-degree kidnapping and the underlying sexual assault.")

Accordingly, we remand this case to the trial court for a new sentencing hearing. *Wiggins*, 136 N.C. App. at 742, 526 S.E.2d at 211-12. On remand, the trial court may: (1) arrest judgment on the first-degree kidnapping conviction and re-sentence for second-degree kidnapping and second-degree rape; or (2) arrest judgment for the second-degree rape conviction and sentence on first-degree kidnapping. *Id.* (citation omitted).

No error in part, Remanded in part for a new sentencing hearing.

Judges GREENE and BIGGS concur.

Report per Rule 30(e).