NO. COA01-730

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Halifax County
No. 00 CRS 2197-2199

CARL KING

Appeal by defendant from judgment entered 16 November 2000 by Judge Cy A. Grant in Halifax County Superior Court. Heard in the Court of Appeals 17 April 2000.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Ronnie C. Reaves, for defendant.

BIGGS, Judge.

Carl King (defendant) appeals his convictions of attempted first-degree murder, robbery with a dangerous weapon, and first-degree kidnapping. For the reasons herein, we find no error in part, vacate in part, and remand for a new sentencing hearing.

The evidence tended to show the following: on the evening of 7 March 2000, J.C. Cuthrell was talking on the phone when he noticed defendant standing outside the locked door of Southern Loans. Cuthrell unlocked the door and let defendant inside, because he thought defendant was there to make a loan payment. Cuthrell escorted defendant to his office, sat down at his

computer, and pulled up defendant's records. When Cuthrell turned around, defendant had a gun pointed in Cuthrell's face. Defendant demanded that Cuthrell give him the cash box from his (Cuthrell's) desk drawer. Cuthrell opened the cash box and showed defendant that there was no money in the drawer. Defendant threatened that, if Cuthrell did not give him the money, he was going to kill him. Cuthrell repeated that the money was gone.

Defendant then said "[l]et's go to the back", directing Cuthrell to go to the rear where a walk-in safe was located. Defendant kept the gun pointed at Cuthrell as they walked down the hallway to the safe, repeatedly saying that he would kill Cuthrell if he "tried anything". Cuthrell opened the safe, went inside, and brought out a cash drawer, which contained very little cash. Defendant then stated "I know you have more money than that," to which Cuthrell responded he did not. Defendant next demanded that Cuthrell give him all the money he had on his person. Cuthrell obliged, and pulled out approximately $100.00. Defendant took the money, said "Die n[]," and shot Cuthrell in the face. Cuthrell dropped to his knees and defendant repeatedly beat him in the head with the "blunt end" of the gun. He struggled to a standing position and grabbed defendant. Defendant broke free, ran out of the front door, and down an alley. Cuthrell called his wife and asked her to call 911. Law enforcement arrived immediately and dispatched emergency medical assistance.

Defendant was charged with, and convicted of, attempted first-degree murder, robbery with a dangerous weapon and first-degree

kidnapping. From these convictions, defendant appeals.

I.

At the outset, we note that, while defendant sets forth five assignments of error, those not addressed in his brief are deemed abandoned pursuant to N.C.R. App. P. 28(b)(5).

Defendant argues first that the trial court erred in submitting the charge of first-degree kidnapping to the jury. Specifically, defendant contends that the State presented insufficient evidence of confinement and restraint separate from that inherent in the armed robbery. We agree.

N.C. Gen. Stat. § 14-39 (1999) sets forth the essential elements of kidnapping, in pertinent part:

> a) 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[.]

Our Supreme Court has held that a conviction for kidnapping requires restraint or removal more than that which is an inherent, inevitable part of the commission of another felony. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981). The Court construed N.C.G.S. § 14-39 in this manner to avoid "punish[ing a defendant] twice for essentially the same offense, violating the

constitutional prohibition against double jeopardy." *Id.* at 102, 282 S.E.2d at 446.

Thus, "a restraint which is an inherent, inevitable element of [a] felony, such as armed robbery" will not sustain a separate conviction for kidnapping under N.C.G.S. § 14-39(a). *Id.* at 102, 282 S.E.2d at 446. In *Irwin*, during an attempted armed robbery, defendant forced a drugstore employee at knifepoint to walk from the front cash register to the back of the store, in the general area of the prescription counter and the safe. Our Supreme Court stated:

> [The victim's] removal to the back of the store was an inherent and integral part of the attempted armed robbery. To accomplish defendant's objective of obtaining drugs it was necessary that [the victim] go to the back of the store to the prescription counter and open the safe. Defendant was indicted for the attempted armed robbery of [the victim]. [Her] removal was a mere technical asportation and insufficient to support conviction for a separate kidnapping offense.

Id. at 103, 282 S.E.2d at 446. The Court stated that "[t]o permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *Id.*

Where removal is separate and apart from the commission of another felony, however, N.C.G.S. § 14-39(a) allows conviction and punishment for both crimes. In *State v. Newman and State v. Newman*, 308 N.C. 231, 302 S.E.2d 174 (1983), the defendants abducted a woman from a shopping center parking lot and forced her

into nearby woods, where one of the defendants raped her. The Court stated:

> Removal of [the victim] from her automobile to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape. Rather, it was a separate course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime. To this extent, the action of removal was taken for the purpose of facilitating the felony of first-degree rape. Thus, defendant's conduct fell within the purview of G.S. [§] 14-39 and the evidence was sufficient to sustain a conviction of kidnapping under that section.

Id. at 239-40, 302 S.E.2d at 181.

In the case *sub judice,* defendant, upon learning that there was very little money in the cash box up front, demanded that Cuthrell go to the rear of the office, where defendant believed other money was kept in a safe. The record demonstrates that the removal from the front to the rear was to accomplish the robbery and thus was an inherent and inevitable part of the commission of same. We hold that the evidence was insufficient to sustain the kidnapping conviction, and that the trial court erred in denying defendant's motion to dismiss this charge. Accordingly, we vacate the kidnapping conviction.

II.

Defendant argues next that the trial court erred in declining to find, as a mitigating factor, defendant's limited mental capacity at the time of the commission of the offenses. Specifically, defendant contends that his mental capacity reduced his culpability for the offenses. We disagree.

This Court has held that "evidence of limited mental capacity, by itself, does not require a trial court to find mitigating circumstances." *State v. Williams,* 100 N.C. App. 567, 573, 397 S.E.2d 364, 368 (1990). During the sentencing phase, the judge must find a statutory mitigating factor if it is supported by a preponderance of the evidence. *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). However, the defendant bears the burden of persuasion, by a preponderance of the evidence, in establishing his entitlement to statutory factors in mitigation. *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986). A trial judge's failure to consider a statutory mitigating factor must be reversed on appeal if that factor is supported by uncontradicted, substantial, and credible evidence. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). In order to find error in a judge's failure to find a mitigating factor, "the evidence must show conclusively that this mitigating factor exists, [and that] no other reasonable inferences can be drawn from the evidence." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988).

In the case *sub judice,* the defendant argues that the trial court did not find as mitigating factors the following:

> 3. The defendant was suffering from a:
> a. mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
>
> . . . .
>
> 4. The defendant's:
> a. age, or immaturity, at the time of the commission of the offense significantly

> reduced defendant's culpability for the offense.
> b. limited mental capacity at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

In support of these mitigating factors, defendant offered a letter from River Stone Counseling and Personal Development, and a report from Dorothea Dix Hospital, that defendant's limited mental capacity reduced his culpability to commit the offenses for which he was charged. The reports, in essence, stated that defendant "is suffering from low mild to moderate mental retardation." In addition, defendant's evaluation revealed "symptoms of psychotic disorder, suicide ideations with intent and plan." However, the forensic psychiatric history and evaluation report from Dorothea Dix revealed that defendant was "able to understand the legal situation as explained to him by others and he has the ability to be cooperative."

Upon consideration of the evidence presented, the trial court rejected factors numbers three and four, but found by the preponderance of the evidence, mitigating factor number eleven, that "defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage of the criminal process." Additionally, the trial court found that the aggravating factor, that defendant committed the offense while on pretrial release on another charge, outweighed the mitigating factor, and that an aggravated sentence was justified.

We hold that defendant has not met his burden of establishing that any limited mental capacity significantly reduced his

culpability to commit the offenses for which he was charged. Further, we hold that the trial court did not err in declining to consider the mitigating factors of defendant's limited mental capacity. Nevertheless, in light of our ruling that the kidnapping conviction must be vacated, we remand for a new sentencing hearing.

III.

Lastly, defendant argues that the trial court erred by failing to allow his motions for a new trial, and for a judgment notwithstanding the verdict.

We have determined that the trial court erred in failing to grant defendant's motion to dismiss the charge of first degree kidnapping and ordered that his conviction for that offense be vacated. However, we decline to address any of defendant's motions with regards to the remaining charges, since he has abandoned them pursuant to N.C.R. App. P. 28(b)(5), by failing to provide reason or argument, and failing to cite authority. Accordingly, based on the above, we hold

No error in part; vacate in part, and remand for new sentencing.

Judges WYNN and MCCULLOUGH concur.

Report per Rule 30(e).