An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-119

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v. Wake County
No. 00 CRS 16268-69

JIM ROBINSON

Appeal by defendant from judgment entered 2 August 2000 by Judge Wade Barber in Superior Court, Wake County. Heard in the Court of Appeals 16 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Bertha L. Fields, for the State.

Ligon and Hinton, by Lemuel W. Hinton, for the defendant-appellant.

WYNN, Judge.

Following his convictions of robbery with a dangerous weapon and second-degree kidnapping, defendant Jim Robinson raises two issues on appeal: (1) Did the trial court err by instructing the jury on flight? and (2) Did the trial court err in denying defendant's motion to dismiss second-degree kidnapping? We hold that the trial court properly instructed on defendant's flight, and that the State produced sufficient evidence of "restraint" to sustain a kidnapping charge, beyond that restraint which was necessary to facilitate the robbery. Accordingly, we uphold defendant's convictions.

At trial, the State’s evidence tended to show that on 28 February 2000, while Stacy Adolph worked at North American Video, defendant knocked on the door at about 10:00 p.m.; asked if he could buy a phone card to which Adolph replied the store did not carry phone cards; and asked if he could use the store phone to which Adolph agreed. However, when Adolph opened the door, defendant pushed him to the floor; pulled out a four inch knife; demanded money; and threatened Adolph. Defendant found a change bag containing two hundred dollars.

Thereafter, defendant ordered Adolph to the store’s back exit; pushed him toward a wooded area; told Adolph he would kill him if Adolph stopped running into the woods or looked back; and fled the scene as Adolph ran into the woods. After reaching a place of safety, Adolph used his cellular telephone to contact the police.

At the police station, Adolph identified defendant from a photo lineup. On 8 March 2000, the police suspecting that defendant resided at a home in Raleigh, knocked on the door. A woman answered and told the officers that defendant was not there. However, upon hearing commotion in the back of the house, the officers identified defendant and began chasing him. After his capture, defendant confessed to the robbery.

A jury convicted defendant of robbery with a dangerous weapon and second-degree kidnapping; however, the trial court consolidated the convictions for judgment and sentenced defendant to a term of not less than 79 months and not more than 103 months. From that judgment, defendant appealed.

On appeal, defendant first argues the trial court erred by instructing the jury on flight as follows:

> The State contends and Mr. Robinson denies that he fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show consciousness of guilt. However, proof of this circumstance is not sufficient itself to establish guilt.

Defendant contends this instruction was prejudicial error; we disagree.

"A flight instruction is appropriate where 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime[.]'" *State v. Kornegay*, 149 N.C. App. 390, 397, 562 S.E.2d 541, 546 (2002) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "'The relevant inquiry concerns whether there is evidence that defendant left the scene . . . and took steps to avoid apprehension.'" *Kornegay*, 149 N.C. App. at 397, 562 S.E.2d at 546 (2002) (quoting *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990)).

Here, there is substantial evidence in the record that defendant fled from the crime scene and took steps to avoid apprehension. For example, at the crime scene, defendant led Adolph out the back door, told Adolph "not to look back and not to quit running or he'd kill [Adolph]." As Adolph ran into the woods, defendant fled from the scene. Moreover, when police went to defendant's home, a female answered the door and informed the officers that defendant was not home. During the conversation, the

officers heard a commotion and observed defendant running down the street. The officers pursued defendant for five hundred yards before placing him in custody. Although defendant argues that he did not have "any clue that the four individuals chasing him were police officers," we find that this evidence, as well as other evidence in the record, "reasonably support[s] the theory that [defendant] fled" and took steps to avoid apprehension. *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990) (citation omitted). Accordingly, the flight instruction was appropriate, and defendant's first assignment of error is without merit.

By his second assignment of error, defendant contends the trial court erred in denying his motion to dismiss the second-degree kidnapping charge. Defendant argues the State failed to produce sufficient evidence of "restraint," beyond that restraint which was necessary to facilitate the robbery. We disagree.

"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). "[T]he 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." *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).

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:
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

The trial court ruled that the State did not produce sufficient evidence of "confinement" to support a kidnapping charge. The court also noted that the State could not prove kidnapping on the theory of "removal," because the indictment failed to allege removal. Therefore, the trial court allowed the second-degree kidnapping charge to go to the jury on the theory that defendant restrained Adolph for the purpose of facilitating defendant's flight. Conversely, defendant argued that he "removed" Adolph and did not restrain him. Defendant contends that affirming the trial court's decision on the basis of "restraint" is purely semantic, and impermissibly allows the jury to consider evidence of removal, not alleged in the indictment, to support a verdict of second-degree kidnapping.

Our Supreme Court has consistently held that a "restraint" which is an inherent or inevitable part of some other felony, such as robbery or rape, will not support a separate charge of kidnapping. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1981) ("To hold otherwise would violate the constitutional

prohibition against double jeopardy.”). The fundamental inquiry “is whether . . . the necessary restraint for kidnapping ‘exposed [Adolph] to greater danger than that inherent in the armed robbery itself.’” *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (citation omitted); *see also State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994); *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). In *Pigott*, our Supreme Court expounded on the nature of this inquiry by analyzing whether the alleged restraint incident to kidnapping “had the effect of increasing the victim's helplessness and vulnerability beyond the threat that first enabled defendant to search the premises for money.” *Pigott*, 331 N.C. at 210, 415 S.E.2d at 561.

Here, after the robbery was complete, defendant ordered Adolph at knife point to the back exit of the store. In response to questions concerning the “new restraint”, Adolph testified as follows:

> Q: Where did you go once you got outside?
>
> A: [Defendant] started pushing me toward the wooded lot. It was very thick. That’s when he pushed me away, told me not to look back and not to quit running otherwise he’d kill me.
>
> Q: Tell me, Mr. Adolph, what did you think was going to happen when you went outside that store?
>
> A: When he began leading me into the woods, that’s when I was most convinced that he was probably going to stab and kill me.
>
> Q. Did it scare you, Mr. Adolph?
>
> A: Yes.

Essentially, this evidence establishes that defendant forced Adolph

into the woods for the purpose of facilitating his escape from the crime scene.

Defendant argues, however, that he never "restrained" Adolph after the commission of the robbery; but, instead, he "removed" Adolph from the video store into the woods. Since the indictment failed to allege "removal," it was error to permit the charge to go to the jury on the theory of "restraint," where the record did not contain competent evidence of "restraint."

"It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417,420-21 (1986)(quoting *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)); accord, *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840-41 (1977). In *Tucker*, for instance, our Supreme Court reversed a kidnapping conviction where (1) the indictment charged defendant with unlawfully "removing" the victim, and (2) the trial court instructed the jury that defendant could be convicted of kidnapping if he "restrained" the victim. *Tucker*, 317 N.C. at 538, 346 S.E.2d at 421. In reversing the conviction, the *Tucker* Court held that "the judge's instructions permitted the jury . . . to predicate guilt on theories of the crime which were not charged in the bill of indictment and which were, in one instance, not supported by the evidence at trial." *State v. Tucker*, 317 N.C. at 540, 346 S.E.2d at 422.

In the case *sub judice*, however, the trial court did not

instruct the jury on a theory not included in the indictment. Rather, the trial court noted the indictment's insufficiency, but, nevertheless, concluded that the State presented substantial evidence of "restraint" to permit the jury to consider the charge. We agree; the evidence shows that defendant forced Adolph to proceed at knife point to the back exit of the store. Although this movement is necessarily a "removal," this fact does not forestall the possibility that the movement also had separate elements of restraint. We have consistently held that "[r]estraint may be accomplished . . . by force" or threat of force. *State v. Raynor*, 128 N.C. App. 244, 250, 495 S.E.2d 176, 180 (1998) (citing *State v. Moore*, 77 N.C.App. 553, 335 S.E.2d 535 (1985)), *aff'd*, 317 N.C. 144, 343 S.E.2d 430 (1986) (per curiam). Here, the trial court had substantial evidence to conclude that defendant used the threat of force to restrain Adolph's movement. Therefore, this assignment of error is without merit.

No error.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).