NO. COA02-143

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 00 CRS 23344-46

JOSHUA MICHAEL McADOO

Appeal by defendant from judgments entered 1 June 2001 by Judge Steve A. Balog in Superior Court, Guilford County. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General P. Bly Hall, for the State.

Richard G. Roose for defendant-appellant.

McGEE, Judge.

Defendant Joshua Michael McAdoo was indicted on 21 February 2000 on charges of first degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious breaking and entering. At trial, the State introduced evidence tending to show that defendant and Dana McAdoo were married in May 1998, and their daughter was born on 16 May 1998. A few months later they separated. Mrs. McAdoo obtained a domestic violence protective order in August 1999. She met Tyrone Griggs in June or July of 1999 and began a relationship with him in August or

September of 1999. Mrs. McAdoo and her daughter had begun staying with Mr. Griggs at his home approximately a week before 24 December 1999.

Defendant knocked on Mr. Griggs' front door on the morning of 24 December 1999, but neither Mr. Griggs nor Mrs. McAdoo answered the door. After watching defendant back his vehicle out of the driveway and pull across the street, Mrs. McAdoo called 911. While she was on the telephone, she heard another knock at the front door. Things were quiet for about a minute, then she saw defendant's shadow at the back door. Defendant kicked in the door and shot at Mrs. McAdoo. She saw defendant's arms go to the left, and she heard Mr. Griggs make a noise after defendant shot three times.

Defendant threatened to kill Mrs. McAdoo, their daughter and himself. He dragged Mrs. McAdoo into different areas of the house and ordered her to get her things. An officer confronted defendant as they attempted to leave, and defendant threatened to shoot Mrs. McAdoo if the officer did not leave. Defendant then threw his wife and their daughter on a couch and went into the kitchen to make a telephone call. During the time defendant was on the telephone, he could not see Mrs. McAdoo. She ran out of the house with her daughter. Defendant appeared in the open doorway and asked where Mrs. McAdoo and his daughter were, that all he wanted to do was talk to her. Defendant refused to leave the house. Police officers fired tear gas into the house, and defendant surrendered to officers.

Defendant introduced evidence on his behalf, but did not testify himself. He requested during the charge conference that the trial court instruct the jury on the offense of second degree kidnapping on the basis that Mrs. McAdoo was released in a safe place. The trial court denied the requested instruction. The jury found defendant guilty of first degree kidnapping, misdemeanor assault with a deadly weapon, and misdemeanor breaking and entering. The trial court sentenced defendant to consecutive sentences of 125 to 159 months, 75 days and 45 days. Defendant appeals.

Defendant contends the trial court erred by denying his request to submit the lesser included offense of second degree kidnapping to the jury. He argues the instruction was warranted because the jury could have inferred that his willful action of leaving Mrs. McAdoo alone with the knowledge that officers were outside of the house ensured her release in a safe place. We disagree.

"An instruction on a lesser included offense is only required when there is some evidence to support the particular offense." *State v. Shubert*, 102 N.C. App. 419, 424, 402 S.E.2d 642, 645 (1991). The offense of second degree kidnapping occurs "[i]f the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted." N.C. Gen. Stat. § 14-39(b) (2001). Our Supreme Court stated that "in order to leave a victim in a safe place within the meaning of the statute, a 'conscious, willful action on the part of the defendant

to assure that his victim is released in a place of safety' [is] required." *State v. Parker*, 143 N.C. App. 680, 687, 550 S.E.2d 174, 178 (2001), (quoting *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983)).

The evidence shows that Mrs. McAdoo escaped with her daughter while defendant was talking on the telephone in another room. There is no evidence of any willful action on defendant's part to release Mrs. McAdoo, but rather that she escaped due to defendant's inattention. Defendant's subsequent action of appearing in the open doorway and asking where Mrs. McAdoo was further contradicts the possibility that defendant took any willful action to release his wife, much less to ensure her release in a place of safety. *See State v. Raynor*, 128 N.C. App. 244, 251, 495 S.E.2d 176, 180 (1998). In addition, "releasing a kidnap victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not 'voluntary' and . . . sending her out into the focal point of their weapons is not a 'safe place.'" *State v. Heatwole*, 333 N.C. 156, 161, 423 S.E.2d 735, 737-38 (1992). Accordingly, the trial court did not err by denying defendant's requested instruction.

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).