NO. COA02-224

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v. Jackson County
No. 00 CRS 853-4
JAMIE EUGENE RATHBONE 00 CRS 858-67

Appeal by defendant from judgments entered 23 March 2001 by Judge James L. Baker, Jr. in Jackson County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Leo J. Phillips for defendant-appellant.

CAMPBELL, Judge.

By true bills of indictment defendant James Eugene Rathbone was charged with two counts of second degree kidnapping, three counts of communicating threats, five counts of statutory rape of a person who is 13, 14 or 15 years old, five counts of indecent liberties with a child, and eight counts of contributing to the delinquency of a juvenile. The State subsequently dismissed the three counts of communicating threats, the eight counts of contributing to the delinquency of a minor, one count of indecent liberties and one count of statutory rape. The State's evidence

tended to show that on the night of 19 February 2000, B.M. packed some clothes in a book bag and left her house in Waynesville, N.C. because she was having problems with her grandparents. B.M. eventually took a cab to the house of her friend, A.G., who also had been having problems at home. A.G. let B.M. into her house through her bedroom window. After talking and watching television, the two girls decided to leave A.G.'s home on foot. As they walked down the road at approximately 3:00 a.m., an automobile drove by, turned around, and stopped beside them. Defendant, who was driving the automobile, asked the two girls if they needed a ride. Although the girls were scared, they decided to take the ride.

Defendant told the girls his name was Jeremy Gibson and that he was twenty years old. Defendant asked the girls how old they were. B.M. stated she was thirteen and A.G. stated she had just turned fourteen. Defendant then asked the girls where they wanted to go and A.G. told him they wanted a ride to a friend's house, but she did not know the exact address. Defendant drove around and eventually stopped in Sylva, North Carolina. When the girls indicated they did not have a place to stay, defendant took them to a house in the woods. The girls asked defendant where they were, but defendant only answered that he owned the house. The house did not have a phone.

The girls stayed at the house for a total of four days. The first night, defendant and the girls sat and talked. When A.G. and B.M. started dozing on the couch, defendant went into the first front room and laid two mattresses on the floor. A.G. and B.M.

laid on one mattress and defendant laid on the other. After an hour and a half, A.G. felt hands on her stomach and her pants. Initially, A.G. thought the touching was an accident. When she felt hands again, however, she attempted to wake up B.M., but could not do so. Defendant put his finger inside A.G.'s vagina, pulled A.G.'s pants down and put his penis inside her vagina. Defendant put his penis inside A.G.'s vagina a second time while the girls were at the house. On the third night, defendant touched B.M.'s stomach, breasts, and vagina. He also put his finger and penis inside her vagina, once on the mattress and once on the couch. B.M. told defendant to stop several times during the incident.

During the four days, defendant took the girls to the McDonald's drive-through and to the store. He also took the girls to his friend's house in Waynesville twice. The girls did not attempt to get away because there were three men at the house and they did not know what would happen if defendant found them. Defendant had told the girls that he would kill them if they left or if anyone found out the truth. At one point, B.M. asked defendant to take them to a friend's house in Waynesville or to let them call their friend, but he did not do so.

A.G. and B.M. found out the house was not defendant's when defendant told the girls they needed to leave the house because a work crew was coming to work on the house. Defendant took the girls with him to Canton, where he tried to sell items at pawn shops. The crew was still working on the house when they returned, so defendant dropped off the girls in the woods. A.G. and B.M.

walked in circles looking for somewhere else to go other than back up to the house, but they only saw a house under construction.

On the fourth day a man and two women arrived at the house while defendant went to work cleaning houses. The man was defendant's boss and the owner of the house. The man's wife recognized A.G.'s face from the news and the man called the police. A.G. and B.M. were transported to the hospital and examined by a nurse. DNA test results from underwear belonging to the two girls matched defendant's DNA.

At the end of the State's evidence, defendant moved to dismiss all of the charges. Defendant's boss and his boss's wife testified on defendant's behalf. Defendant's boss and wife testified that when they confronted the girls at the house, the girls just wanted to leave with their belongings and did not want the police called.

A jury found defendant guilty of two counts of statutory rape, two counts of indecent liberties with a child and one count of second degree kidnapping as to each girl. The trial court sentenced defendant to two consecutive terms of 240 to 297 months imprisonment. Defendant appeals.

Defendant first contends the trial court erred by not inquiring into his request for another appointed attorney. Defendant sent a letter to the Jackson County Clerk of Court asking that his court-appointed counsel, Leonard Hilty, be replaced with attorney, Leo Phillips, as his court-appointed counsel because Mr. Hilty had spoken to defendant "5 times in a total of six months."

Defendant asserts the trial court's failure to investigate his dissatisfaction with Mr. Hilty was error.

The right to counsel, which is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, includes the right of an indigent defendant to appointed counsel. *See State v. McFadden,* 292 N.C. 609, 234 S.E.2d 742 (1977); *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799 (1963); *see also* N.C. Gen. Stat. § 7A-450. A defendant who retains private counsel has a Sixth Amendment right to counsel of his choosing. *McFadden,* 292 N.C. 609, 234 S.E.2d 742. Furthermore, a defendant must be granted a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel of his choosing where, through no fault of his own, he is without counsel. *Id.* at 614-15, 234 S.E.2d at 746. Finally, a defendant also has a right to represent himself in a criminal proceeding. *State v. Thacker,* 301 N.C. 348, 271 S.E. 2d 252 (1980).

The right to choose one's counsel, however, is not absolute. *McFadden,* 292 N.C. at 612, 234 S.E.2d at 745. Where a defendant is appointed counsel, he may not demand appointed counsel of his choice. *State v. Anderson,* 350 N.C. 152, 166-67, 513 S.E.2d 296, 305, *cert. denied,* 528 U.S. 973, 145 L. Ed. 2d 326 (1999). Additionally, "an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial." *McFadden* at 616, 234 S.E.2d at 747.

Here, defendant complained that Mr. Hilty had not visited with him or spoken to him often enough. Defendant does not show why or how his case could have been better prepared had Mr. Hilty been replaced. Furthermore, defendant did not mention any dissatisfaction with Mr. Hilty during the trial. We fail to perceive that the trial court abused its discretion or deprived defendant of his constitutional right to be represented by competent counsel at his trial.

Defendant also contends the trial court erred by denying his motion to dismiss the charge of first degree kidnapping because there was insufficient evidence of the element of confinement or restraint. Specifically, defendant argues there was insufficient evidence that he restrained or confined the victims separate and apart from any restraint necessary to accomplish the alleged acts of statutory rape and indecent liberties with a child. *See State v. Mebane,* 106 N.C. App. 516, 532, 418 S.E.2d 245, 255, *disc. review denied,* 332 N.C. 670, 424 S.E.2d 414 (1992) (The unlawful restraint in a first or second degree kidnapping must be an act independent of the intended felony.)

Under the North Carolina Rules of Appellate Procedure a motion to dismiss made at the close of the State's evidence is waived if the defendant presents evidence and fails to renew the motion at the close of all the evidence. N.C. R. App. P. 10(b)(3). Although defendant moved to dismiss the charges against him at the close of the State's evidence, he presented evidence and failed to renew his motion at the close of all the evidence. Defendant is

therefore precluded from challenging the sufficiency of the evidence presented at trial. *See State v. Elliott*, 69 N.C. App. 89, 100, 316 S.E.2d 632, 640, *appeal dismissed and disc. review denied*, 311 N.C. 765, 321 S.E.2d 148-49 (1984).

Nevertheless, we conclude defendant's restraint of the victims here was independent of the alleged statutory rape and indecent liberties. The requisite restraint need not be accomplished solely by physical force. The evidence in this case reveals that defendant restrained the victims for a period of four days in a house, which did not have a phone and was located in the woods. During that time the defendant forced the victims to accompany him to the store, McDonald's, a pawn shop and to a friend's house. Defendant did not take the girls to their friend's house even though B.M. asked him to. Defendant had told the girls that he would kill them if they left or if anyone found out the truth. These restraints are not inherent in the crime of statutory rape. As a result, there was substantial evidence of restraint to support the conviction of kidnapping separate and apart from the restraint inherent in the crime of rape. We, therefore, conclude the trial court did not err in submitting the second-degree kidnapping charge to the jury.

We do not address the merits of defendant's claim of ineffective assistance of counsel because such a claim is more appropriately made by a motion for appropriate relief filed in the trial court division pursuant to N.C. Gen. Stat. § 15A-1415 and N.C. Gen. Stat. § 15A-1420 (2001). *See State v. Ware,* 125 N.C.

App. 695, 697, 482 S.E.2d 14, 16 (1997). Defendant may file such motion, supported by affidavits and other documentary evidence to support his claim, in the trial court. Upon the filing of a motion for appropriate relief, the trial court will determine the motion and make appropriate findings of fact.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).