NO. COA05-1421

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v. Wake County
No. 04 CRS 80357-58
05 CRS 1392-98

TONY HARRELL JOHNSON

Appeal by defendant from judgment entered 15 June 2005 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Q. Shanté Martin, for the State.

Haral E. Carlin, for defendant.

STEELMAN, Judge.

Evidence presented at trial tended to show the following: Defendant's brother, Timothy Johnson (Johnson), was a drug dealer. In August of 2004, drugs, cash and a gun were stolen from Johnson's apartment. Johnson suspected Jeremy Ellis (Ellis), and enlisted the help of defendant and others in an attempt to recover his stolen property. Defendant and Rachel French (French) went to Ellis' house in an attempt to ascertain whether he had Johnson's cocaine. French informed Ellis she wished to buy some cocaine, and when Ellis produced a sample, defendant tasted it. After leaving

the house, defendant told French that the cocaine was Johnson's, and that they needed to do something to retrieve it. Defendant, Christopher Edge (Edge), Justin McCarty (McCarty), Michael Poole (Poole), Napolean Sanders (Sanders) and Nathan Archer (Archer) all agreed to assist Johnson in attempting to retrieve his property from Ellis.

On 23 August 2004, just after midnight, the men went to Ellis' house. McCarty, Edge and Poole had guns. Defendant carried a steak knife. The others carried a baseball bat, a fire poker and a golf club. The assailants were admitted through the front door by Jamie Morgan (Morgan). McCarty drew his weapon on Morgan, and forced him to the floor where he handcuffed him. Three other victims, Ellis, Ashley Case and Lucy Valazquez, were rounded up from within the house and brought to the living area while the house was searched for drugs, cash and guns. After searching the house and taking cash, cocaine, guns, ammunition and X-box video games, the assailants used duct tape to bind the victims' hands and feet. The assailants also attempted to limit communication by disabling the land-line phones in the house, and taking all the cell phones and sets of car keys they could find. The victims were left bound in the house. McCarty returned briefly after leaving in order to retrieve his handcuffs from Morgan's wrists and replace them with duct tape. The victims eventually freed themselves from the duct tape, and called police on a cell phone the assailants had missed.

McCarty pled guilty to single counts of first-degree burglary and robbery with a dangerous weapon, and testified for the State against defendant. He received a mitigated range sentence of 48 to 67 months imprisonment. Archer and Poole both pled to single counts of first-degree burglary and robbery with a dangerous weapon, and also testified for the State. These counts were consolidated, and they were sentenced in the mitigated range, Archer receiving 61 to 83 months and Poole 38 to 55 months. Johnson pled to single counts of first-degree burglary and robbery with a dangerous weapon, and was given consecutive sentences in the presumptive range totaling 122 to 166 months. Edge and Sanders also pled guilty and testified for the State, but the record does not reveal the sentences they received. Defendant elected to go to trial, was found guilty on all charges (first-degree burglary, four counts of robbery with a dangerous weapon, and four counts of first-degree kidnapping), and was sentenced to an active term of 192 to 257 months imprisonment. From this judgment, defendant appeals. For the reasons set forth below, we hold that defendant received a fair trial free from error.

In defendant's first and second arguments, he contends the trial court erred by penalizing him for not pleading guilty, and by sentencing him disproportionately to his co-defendants. We disagree.

> A sentence within statutory limits is "presumed to be regular." Where the record, however, reveals the trial court considered an improper matter in determining the severity of the sentence, the presumption of regularity is overcome. It is improper for the trial court,

> in sentencing a defendant, to consider the defendant's decision to insist on a jury trial.

State v. Peterson, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002). A jury found Defendant guilty of first-degree burglary, four counts of robbery with a dangerous weapon, and four counts of first-degree kidnapping. Defendant was level I for felony sentencing. N.C. Gen. Stat. § 15A-1340.14. The trial court consolidated the four counts of robbery with a dangerous weapon, consolidated the four counts of first-degree kidnapping, then sentenced defendant in the presumptive range for all the offenses. The sentences are to run consecutively, and constitute a total active sentence of 192 to 257 months imprisonment. The trial court could have, in its discretion, sentenced defendant at the top of the presumptive range, and run all his sentences consecutively. This would have resulted in an active sentence of 612 to 818 months.

Defendant complains not that his sentence is unfair on its face, but that it is unfair in light of the sentences obtained by his co-defendants. Defendant argues that this somehow indicates that he was punished excessively for exercising his constitutional right to a jury trial instead of accepting the plea agreement offered by the State, as did his co-defendants. Defendant is mistaken. Defendant was sentenced in the presumptive range for all the crimes for which he was convicted, and six of the nine crimes for which he was convicted are not reflected in his active sentences because the trial court, in its discretion elected to

consolidate a number of the sentences. Defendant received a sentence appropriate for his crimes. The record is completely devoid of any evidence that the trial court considered any improper matter when imposing the sentences. Defendant further argues that his sentences were disproportionate to those given to his co-defendants. There is no requirement that defendant's sentences, which were not obtained through a plea agreement, be proportional to his co-defendants' sentences. *See State v. Parker*, 137 N.C. App. 590, 604, 530 S.E.2d 297, 306 (2000). These arguments are without merit.

In defendant's third argument, he contends that the trial court erred in denying his motion to dismiss the charges of first-degree kidnapping at the close of State's evidence. We disagree.

"Upon defendant's motion for dismissal, the question for the [trial court] is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)(citations omitted). Substantial evidence is relevant evidence that a reasonable person would find sufficient to support a conclusion. *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987)(citation omitted). When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must

> view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the

> case but are for the jury to resolve. . . . Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then "'it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.'"

State v. Barnes, 334 N.C. 67, 75-6, 430 S.E.2d 914, 918-19 (1993)(citations omitted)(emphasis removed). "In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 456 (2000)(citation omitted), *cert. denied, Fritsch v. North Carolina*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

> Under N.C.G.S. § 14-39, a defendant commits the offense of kidnapping if he: (1) confines, restrains, or removes from one place to another; (2) a person; (3) without the person's consent; (4) for the purpose of facilitating the commission of a felony, doing serious bodily harm to the person, or terrorizing the person. If the defendant does not release the victim in a safe place, or if he seriously injures the victim, he is guilty of kidnapping in the first degree.

State v. Mann, 355 N.C. 294, 302, 560 S.E.2d 776, 782 (2002).

In order to support a conviction of both kidnapping and armed robbery, the confinement, restraint or removal indicated in element (1) for kidnapping must exceed that inherent in the commission of the armed robbery. *State v. Beatty*, 347 N.C. 555, 558-59, 495 S.E.2d 367, 369-70 (1998); *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). Defendant argues that the evidence in the instant case does not support confinement, restraint or removal

beyond that inherent in the commission of the armed robbery. Defendant thus argues that the evidence does not support his kidnapping convictions in addition to those for armed robbery. "'The key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping "exposed [the victim] to greater danger than that inherent in the armed robbery itself."'" *Beatty*, 347 N.C. at 559, 495 S.E.2d at 369.

In the instant case, defendant and his accomplices subdued the victims by brandishing guns, a knife, and other weapons. They then bound the victims' hands and feet with duct tape. Our Supreme Court has held on similar facts that when victims are being held at gunpoint, binding the victims constitutes restraint beyond that inherent in an armed robbery; exposes the victims to greater danger; and thus permits a defendant to be convicted of both armed robbery and kidnapping. *Id.*, 495 S.E.2d at 370. The evidence at trial was sufficient to survive defendant's motion to dismiss for this issue.

Defendant further argues that there was insufficient evidence to elevate the kidnapping charge from second-degree to first-degree because the victims were released in a safe place. The evidence is uncontroverted that the defendant and his accomplices left the victims bound hand and foot with duct tape. In *State v. Love*, __ N.C. App. __, __ S.E.2d __, 2006 N.C. App. LEXIS 1189 (Filed 6 June 2006), defendants left their victims bound in their own home following a breaking and entering and robbery with a dangerous

weapon. On appeal, defendants argued that because the victims were left bound in their own home, this constituted a "release" in a safe place, and the trial court erred in failing to instruct the jury on second-degree kidnapping in addition to its instruction on first-degree kidnapping. This Court rejected the defendants' argument, stating: "An instruction on the lesser included offense of second-degree kidnapping certainly requires an affirmative action other than the mere departing of a [premises]." *Id.* at __, __ S.E.2d at __, 2006 N.C. App. LEXIS 1189, 19-20. We hold that the victims in the instant case were never released for the purposes of N.C. Gen. Stat. § 14-39. *Id.* The evidence at trial was sufficient to withstand defendant's motion to dismiss the charge of first-degree kidnapping. This argument is without merit.

Because defendant has not argued his other assignment of error in his brief, it is deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2005).

NO ERROR.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).