NO. COA05-986

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v. Cumberland County
No. 03 CRS 51553

NICHOLAS HOLMES

Appeal by defendant from judgments dated 9 March 2005 by Judge Jack A. Thompson in Superior Court, Cumberland County. Heard in the Court of Appeals 29 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for the State.

Jeffrey Evan Noecker for defendant-appellant.

McGEE, Judge.

Nicholas Holmes (defendant) pleaded guilty on 11 March 2004 to second degree kidnapping, assault inflicting serious bodily injury, and accessory after the fact to second degree rape. With respect to the charges of second degree kidnapping and assault inflicting serious bodily injury, the trial court found the following aggravating factors: (1) "[D]efendant joined with more than one other person in committing the offense[s] and was not charged with committing conspiracy[,]" and (2) "[t]he victim [had] great mental suffering." The trial court did not make any written findings regarding the charge of accessory after the fact to second degree

rape.

The trial court sentenced defendant as follows: (1) in the aggravated range to a term of thirty-one months to forty-seven months for the charge of second degree kidnapping; (2) in the aggravated range to a term of twenty months to twenty-four months for the charge of assault inflicting serious bodily injury; and (3) in the presumptive range to a term of twenty-five months to thirty-nine months for the accessory charge. The trial court suspended the sentences and placed defendant on supervised probation for a period of sixty months.

Defendant's probation officer filed three probation violation reports dated 15 February 2005, alleging that defendant violated three conditions of his probation. Defendant's probation officer alleged, *inter alia*, that defendant violated the condition of his probation that prohibited defendant from having contact with the victim. Defendant's probation officer specifically alleged the following:

> [O]n 2-5-05 . . . defendant was at the victim's place of employment at Silverado located inside Cross Creek Mall and stood approximately 22 feet from her with three other males staring and smiling at her in an obvious effort to intimidate her. When asked to leave by the victim's mother, a security officer for the mall, . . . defendant looked at her, smiled, and walked away.

At defendant's probation violation hearing, the victim testified that on 5 February 2005, she saw defendant with three other males in the mall where she worked. The victim testified that defendant and the three males stood facing her for about five

minutes, during which time defendant made eye contact with her. The victim further testified that defendant and the three males went into a store, came back out, and stood in the same place, facing the victim. The victim called her mother, who was working as a security officer in the mall. The victim testified her mother arrived and talked with defendant and the three males, who then walked away.

The victim's mother testified she was working as a security officer at Cross Creek Mall on 5 February 2005, when she received a call from the victim, who was her daughter. Her daughter told her that defendant and his friends were standing in the mall, watching her. The victim's mother watched defendant and the three males for a few minutes because she "wanted to make sure that they were watching [the victim] instead of just being inside the mall." The victim's mother saw defendant and the three males standing in a line, staring directly at her daughter, and she approached them. She told defendant that he was probably in violation of his probation because he was standing so close to the victim. The victim's mother testified that defendant looked at her name tag, smiled and walked away.

The trial court stated as follows:

> The most material violation [that is] alleged is, of course, the second one, contact with the victim. That is essential in these type[s] of cases that that be followed. There is no question, [there is] no reasonable doubt in my mind that . . . defendant had contact with the victim intentionally. [Defendant] [h]ad an opportunity to walk away and [did not]. And I think unfortunately for . . . defendant, in this particular case, the

> victim's mother was not only a detective but was readily available to be a second witness in this violation and confirmed my findings.

In judgments dated 9 March 2005, the trial court found that defendant violated the condition that prohibited defendant from contacting the victim. The trial court activated defendant's suspended sentences and sentenced defendant to a term of 76 months to 110 months in prison. Defendant appeals.

I.

Defendant first argues the trial court erred and abused its discretion by revoking defendant's probation. In order to revoke a defendant's probation, the evidence need only "reasonably satisfy the [trial court] in the exercise of [its] sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). The breach of any one condition of probation is sufficient grounds to revoke a defendant's probation. *State v. Seay*, 59 N.C. App. 667, 670-71, 298 S.E.2d 53, 55 (1982), *disc. review denied*, 307 N.C. 701, 301 S.E.2d 394 (1983). A verified probation violation report is competent evidence that a violation occurred. *State v. Duncan*, 270 N.C. 241, 246, 154 S.E.2d 53, 58 (1967). A defendant has the burden of presenting competent evidence demonstrating an inability to comply with the terms of probation. *State v. Tozzi*, 84 N.C. App. 517, 521, 353 S.E.2d 250, 253 (1987). "[E]vidence of [a] defendant's failure to comply may justify a finding that [a]

defendant's failure to comply was wilful or without lawful excuse." *Id.* A trial court's judgment revoking a defendant's probation will only be disturbed upon a showing of a manifest abuse of discretion. *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960).

Defendant does not argue there was insufficient evidence to prove that he violated his probation. Rather, defendant simply argues that: (1) he was in compliance with the other conditions of his probation, (2) he was a good student in high school, and (3) he was otherwise a good probationer. Defendant further argues that "[t]he fact that he failed to immediately walk away should not have resulted in [defendant] going to prison for 76 to 110 months."

Defendant did not present evidence at the probation violation hearing. Defendant states in his brief that he stood near the victim "for several minutes longer than he should have." Defendant also states in his brief that he "should have walked immediately away." The violation reports and the evidence presented at the probation violation hearing were sufficient to support the revocation of defendant's probation. We conclude the trial court did not err or abuse its discretion by revoking defendant's probation.

II.

Defendant argues the trial court erred by imposing aggravated sentences upon revocation of defendant's probation where the aggravating factors were found by the trial court and not by a jury, in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004).

This argument is identical to the one recently endorsed by our Court in *State v. McMahan*, ___ N.C. App. ___, 621 S.E.2d 319 (2005). In *McMahan*, our Court held that "[t]he trial court erred in activating sentences in the aggravated range without [the] defendant's stipulation or submission of the aggravating factors to a jury to be proven beyond a reasonable doubt." *Id.* at ___, 621 S.E.2d at 322-23. We are bound by the prior decision of this Court. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We hold the trial court erred by activating defendant's aggravated sentences on the charges of second degree kidnapping and assault inflicting serious bodily injury. We vacate the aggravated sentences imposed by the trial court and remand the matter for a new sentencing hearing. *See McMahan*, ___ N.C. App. at ___, 621 S.E.2d at 323. We affirm the sentence of twenty-five months to thirty-nine months in prison imposed on the charge of accessory after the fact of second degree rape because the sentence was derived from the presumptive range.

Defendant fails to set forth arguments pertaining to his remaining assignments of error and we deem them abandoned pursuant to N.C.R. App. P. 28(b)(6).

Affirmed in part, vacated and remanded in part.

Judges HUNTER and STEPHENS concur.

Report per Rule 30(e).