NO. COA06-1095

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2007

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 03CRS108522
04CRS24457-60

RYAN LEWIS LITTLE

Appeal by defendant from judgments entered 6 October 2004 by Judge Edwin G. Wilson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 April 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Pitman, for the State.

Sue Genrich Berry for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from a jury verdict finding defendant guilty of robbery with a dangerous weapon and four counts of first-degree kidnapping. We remand for resentencing.

FACTS

Ryan Lewis Little ("defendant") was indicted for robbery with a dangerous weapon and four counts of first-degree kidnapping. The case was tried before a jury at the 27 September 2004 Session of the Superior Court of Guilford County.

The State presented evidence at trial which tended to show the following: On 31 August 2003, Kerry Donovan ("Donovan") was working

as the shift manager of a Pizza Hut. Corvonna Moore ("Moore") was working as the cook and Kirsten Jones ("Jones") was working as the server. An off-duty cook, Colina Barnett ("Barnett") was at the restaurant getting a free drink.

At about noon, a male entered the restaurant holding a black revolver. The man was black, approximately 5'11" tall, and had a medium complexion. He wore a hat and gloves with the fingers cut out, and covered part of his face with an orange bandana. Donovan was able to see some of the man's facial features. She estimated the robber was standing three to five feet from her during the robbery. In open court Donovan identified defendant as the robber with 75 to 85 percent certainty.

The robber ordered Donovan to open the safe. He ordered Moore, Jones and Barnett to move together to a location in the kitchen and to stay there. He ordered the women to place their phones and belongings on the counter.

The robber handed Donovan a yellow plastic bag and told her to put all the contents of the safe into it. He pointed the revolver directly at Donovan as she was emptying the safe. He took all the contents of the safe, which included cash and checks.

The robber locked all four women in the bathroom and propped a highchair against the door to block it. Before blocking the door, he threatened to kill them if they tried to come out of the bathroom. Jones had her cell phone in her pocket. After hearing the robber leave the restaurant, Donovan borrowed Jones' cell phone and attempted to call 911. When she got a busy signal, she called

her general manager instead. The women remained in the bathroom for about 10 minutes until the police opened the door and let them out.

Rita Little Hoover ("Hoover"), defendant's cousin, was employed as a customer service representative at the Pizza Hut. Hoover testified that on one occasion prior to 31 August 2003, defendant told Hoover he was going to rob the restaurant. Hoover did not report the statement to anyone, taking it as a joke. Hoover also testified that defendant called her the evening before she was to testify at his trial. He told her that she needed to tell the court that she told him to rob the restaurant.

During the evening of 31 August 2003, Tikelya Johnson ("Johnson"), Hoover's daughter, saw defendant and other relatives at a relative's home. Defendant admitted to Johnson and the other people present that he committed the robbery and discussed it in detail. She observed defendant with a number of personal checks, all made payable to Pizza Hut.

Ashley Childress ("Childress") was defendant's girlfriend. She testified that she spent the morning of 31 August 2003 with defendant at a hotel to celebrate her birthday and that they checked out of the room around noon that day. Though she knew defendant had been charged with robbery, she did not come forward presenting a possible alibi for defendant to law enforcement or anyone else until she testified at his trial. Childress presented no documentary proof of renting the room or any records of paying for it.

I.

Defendant contends the trial court was without jurisdiction to try him for the offenses of first-degree kidnapping because the indictments were insufficient in that they did not allege that each named victim was not released in a safe place. We agree.

The North Carolina Rules of Appellate Procedure provide that "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C. R. App. P. 10(c)(1). Here, defendant did not include either a transcript or record reference with this assignment of error; however, the assignment is detailed enough that we are able to determine where in the record the argued error is located.

"The established rule is that an indictment will not support a conviction for a crime unless all the elements of the crime are accurately and clearly alleged in the indictment." *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E.2d 339, 350 (1983). "The Legislature may prescribe a form of indictment sufficient to allege an offense even though not all of the elements of a particular crime are required to be alleged." *Id.* "The Legislature has not, however, established a short-form indictment for kidnapping. Accordingly, the general rule governs the sufficiency of the indictment to charge the crime of kidnapping." *Id.*

There are two degrees of kidnapping. N.C. Gen. Stat. § 14-39 (2005). The elements set forth in subsection (a) of N.C. Gen. Stat. § 14-39 are required for both degrees of kidnapping. The difference between the two degrees of kidnapping is found in N.C. Gen. Stat. § 14-39(b). "If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree . . .." *Id.* However, "[i]f the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree . . .." *Id.*

In *Jerrett*, the North Carolina Supreme Court held "[i]n order for the State to properly indict a defendant for first-degree kidnapping, the State must allege the applicable elements of . . . subsection (b)." *Jerrett*, 309 N.C. at 261, 307 S.E.2d at 351. Here, the indictments included all of the necessary elements of N.C. Gen. Stat. § 14-39(a), however, the indictments did not include any language from N.C. Gen. Stat. § 14-39(b). Thus, the indictments in the instant case were imperfect in regard to a charge of first-degree kidnapping.

The North Carolina Supreme Court has authored an opinion in an analogous case. *See State v. Bell*, 311 N.C. 131, 316 S.E.2d 611 (1984). In *Bell*, the indictments failed to allege any one of the elements of first-degree kidnapping as set out in N.C. Gen. Stat. § 14-39(b), but the North Carolina Supreme Court determined the indictments were sufficient to support a conviction for second-

degree kidnapping. *Id.* at 137, 316 S.E.2d at 614. We note that although *Bell* was decided under a previous version of N.C. Gen. Stat. § 14-39, subsection (b) is substantially the same. *See* N.C. Gen. Stat. § 14-39(b) (2005); *Bell*, 311 N.C. at 136-37, 316 S.E.2d at 614. Therefore, as in *Bell*, the jury's verdicts must be considered verdicts of guilty of kidnapping in the second degree. We vacate the judgments imposed upon the verdicts of guilty of kidnapping in the first degree and remand the cases to superior court for judgments and resentencing as upon verdicts of guilty of kidnapping in the second degree. *Bell*, 311 N.C. at 137, 316 S.E.2d at 614-15.

II.

We disagree with defendant's remaining contentions. First, the trial court did not err in overruling defendant's objections regarding the testimony of Eric Miller, a robbery detective with the Greensboro Police Department. Defendant asserts that some of Miller's testimony was hearsay. However, even if some of Miller's testimony was hearsay, we are not convinced that there is a reasonable possibility that a different result would have been reached at trial had this statement not been admitted because of the amount of competent testimony offered at trial by the State. *State v. Abraham*, 338 N.C. 315, 356, 451 S.E.2d 131, 153 (1994) (admission of hearsay not prejudicial where State "proffered strong and corroborated" eyewitness testimony of defendant's guilt). For example, Donovan testified that she stood 3 to 5 feet from the robber during the robbery. She identified defendant as the robber

with 75 to 85 percent accuracy. In addition, Johnson testified that she was present in a house a few hours after the robbery when defendant produced the stolen property from the Pizza Hut and admitted to committing the robbery.

Next, the trial court did not err by allowing testimony by Filicia Bledsoe and David Little regarding defendant's possession of guns and stolen property. Again, we are not convinced that there is a reasonable possibility that a different result would have been reached at trial had this statement not been admitted because of the amount of competent testimony offered at trial by the State. *Id.*

The trial court did not err by denying defendant's motion to dismiss at the close of the evidence. "Upon reviewing a trial court's denial of a motion to dismiss, we view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Hart*, ___ N.C. App. ___, ___, 633 S.E.2d 102, 108, *disc. review denied as to additional issues*, 360 N.C. 651, 637 S.E.2d 182 (2006), *aff'd in part, rev'd in part and remanded*, ___ N.C. ___, ___ S.E.2d ___ (filed 4 May 2007). We then consider *de novo*

> 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. If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

Id.

Here, defendant argues there was no evidence that the kidnap victims were not released in a safe place. However, in interpreting our kidnapping statute, our Supreme Court has stated that "[w]hile it is true that G.S. 14-39(b) does not expressly state that defendant must *voluntarily* release the victim in a safe place, we are of the opinion that a requirement of 'voluntariness' is inherent in the statute." *Jerrett*, 309 N.C. at 262, 307 S.E.2d at 351. Our Supreme Court went on to say that the "safe place" requirement of the statute "implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *Id.* Viewing the evidence in the light most favorable to the State, we determine that defendant did not voluntarily release the victims in a safe place. Prior to ordering the victims into the bathroom, he threatened to kill them if they tried to break out. Then he blocked the door to the bathroom.

Finally, defendant was not denied the effective assistance of counsel when his trial counsel (1) elected not to request an instruction on the defense of alibi and (2) elected not to request an instruction on the lesser included offense of second-degree kidnapping. When "a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Here, there is no reasonable

probability that in the absence of counsel's alleged errors the result of the proceeding would have been different. First, regarding the lesser included offense instruction, we are remanding this case for resentencing as upon verdicts of guilty of kidnapping in the second degree; thus, defendant's argument on this point is moot. Regarding the alibi instruction, the witness providing the alibi testimony claimed that she and defendant checked out of a hotel about noon on the day of the robbery; however, she stated her mother paid for the room in cash and she had no documentary proof to support her claim. In light of defendant's admission of guilt to Johnson, defendant's admission to Hoover that he wanted to rob the restaurant, Donovan's eyewitness identification of defendant, and other substantial evidence presented by the State, we conclude there is no reasonable probability the result of the proceeding would have been different had an alibi instruction been given.

Accordingly, the judgments entered on defendant's first-degree kidnapping conviction are vacated. We remand this case to the superior court for resentencing as upon verdicts of guilty of kidnapping in the second degree.

Remanded.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).