NO. COA08-1359

NORTH CAROLINA COURT OF APPEALS

Filed: 21 July 2009

STATE OF NORTH CAROLINA

v. Jones County
Nos. 05CRS050678
05CRS050679

TIVON WICHADO BROWN

Appeal by defendant from judgments entered 16 August 2006 and 17 August 2006 by Judge Russell J. Lanier, Jr. in Jones County Superior Court. Heard in the Court of Appeals 22 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Tivon Wichado Brown ("defendant") appeals from judgments entered in accordance with jury verdicts finding him guilty of: (1) misdemeanor resisting a public officer; (2) second degree rape; (3) first degree kidnapping; and (4) assault on a female. The trial court consolidated the latter three convictions (05CRS050678) and sentenced defendant to an active term of 100 to 129 months imprisonment. For the resisting a public officer conviction (05CRS050679), the trial court imposed a 60 day sentence to be served consecutively. After careful review, we find no error in defendant's trial, but remand this case for resentencing.

I. Background

The State's evidence tended to show that on the evening of 29 August 2005, R.M.G.[1] was walking home when she was approached by defendant on Highway 58 near Pollocksville, North Carolina. R.M.G. testified that she had known defendant since she was thirteen years old. She admitted having consensual sexual relations with defendant in the past, most recently in May 2005, but testified that she did not consent to sexual intercourse with him on 29 August 2005.

When defendant approached R.M.G., he told her to stop and asked her to accompany him to an abandoned house on Gardner Lane. She said "no" and attempted to walk away from him. According to R.M.G., defendant continued to follow her and to insist that she go with him to the abandoned house, but she repeatedly declined and tried to walk away from him. At one point, defendant proceeded to hit her "with his left fist in [her] left chest" and told another young man ("JD") to grab her shirt to prevent her from walking away. R.M.G. managed to break free from JD, at which point, defendant tried to hit her with a football, but missed.

R.M.G. then crossed the street and again tried to get away from defendant, but defendant continued to follow her and became more insistent in his demands that she accompany him to the abandoned house on Gardner Lane. Defendant then grabbed R.M.G. by the hair and tried to pull her toward the abandoned house, but she

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[1] R.M.G. was seventeen years old at the time the alleged offenses occurred.

managed to break free from defendant and tried to walk away from him. However, defendant chased her down, again grabbed her by the hair, and dragged her by the hair to the front of the abandoned house. There, defendant struck R.M.G. on the arm, banged her head against an outside brick wall, and demanded that she enter the house. R.M.G. refused, and again defendant banged her head against the brick wall. She testified that, at this point, some children began to pass by the house on bicycles. Defendant threatened her and stated that if she did not enter the house before the children passed by again, he was going to "'beat [her] down[,]'" and R.M.G. entered the house against her will.

R.M.G. testified that once she and defendant were inside the abandoned house, defendant pushed her, blocked the door, and would not let her leave. Defendant then pulled down his pants, exposed his penis, and demanded that R.M.G. get down on her knees and keep her head down. When she attempted to lift her head, defendant threatened and repeatedly tried to light her hair on fire. Defendant then told R.M.G. to pull her pants down. She refused, and he threatened to push her into a hole in the floor and to push her out the window. Eventually, R.M.G. pulled her pants down. She testified that defendant then told her to bend over, pushed her head down, and forced her to have sexual intercourse against her will. R.M.G. further testified that she told defendant that she was going to press charges and that he stated that "he didn't care because he got what he wanted."

R.M.G. went to the hospital where she was examined by Nicole

Russell ("Ms. Russell"), a sexual assault nurse examiner. Ms. Russell testified that R.M.G. had bruising and redness and that her injuries were consistent with blunt force trauma.

Defendant testified on his own behalf. He stated that he had consensual sex with R.M.G. two nights prior to the incident in question. Defendant denied assaulting R.M.G. in any way and testified that they had engaged in rough, consensual sex in the abandoned house on the evening in question.

II. Analysis

A. Hearsay Evidence: Resisting Public Officer

First, defendant argues that he is entitled to a new trial on the resisting arrest conviction because the trial court allowed Deputy Steven Thompson ("Deputy Thompson") to testify, over his objection, that probation officer Danny Heath "notified [him] personally that he had seen someone run from the back door[,]" when law enforcement arrived at defendant's mother's house for the purpose of arresting defendant. This argument is without merit.

Even assuming, *arguendo*, that this testimony was inadmissible hearsay, "defendant here has not persuaded us that there exists any reasonable possibility that the outcome of the trial would have been any different had the testimony not been allowed. The evidence of defendant's guilt was overwhelming. The trial court's error, if any, was harmless." *State v. Smith*, 87 N.C. App. 217, 222, 360 S.E.2d 495, 498 (1987), *appeal dismissed and disc. review denied*, 321 N.C. 478, 364 S.E.2d 667 (1988). At trial, defendant explicitly admitted on direct that he resisted arrest. In

addition, Deputy Thompson testified that arresting officers found defendant hiding in a ditch near his mother's house, and that when the officers attempted to take him into custody, defendant resisted being taken into the police car. Finally, according to Deputy Thompson, it was defendant's mother who "came to the car and physically put him in the car for [the police]." Accordingly, we overrule this assignment of error.

B. Motion to Dismiss: Second Degree Rape

Next, defendant argues that the trial court erred by denying his motion to dismiss the second degree rape charge. Defense counsel acknowledges that he has found no case law supporting this assignment of error based on the facts of the instant case and that "[t]he issue of force/consent appears to be a factual determination [for] the jury." However, defendant asks us to review the transcript and record to determine if there was sufficient evidence to support this charge.

In essence, here, defense counsel asks this Court to conduct an *Anders* review of one issue while fully arguing other issues on appeal. *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). The Supreme Court of North Carolina has explicitly held that this type of partial *Anders* review is inappropriate because "*Anders* . . . generally applies only where counsel believes the whole appeal is without merit. *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991). In addition the Supreme Court of North Carolina has also stated:

> Apart from the language of *Anders*, we also note that among the responsibilities of

> counsel representing a criminal defendant on appeal is the duty to carefully review the assignments of error, separate those of arguable merit from those without merit and assert the former on appeal. If counsel, during the course of this review, determines that an assignment of error is without merit, he or she should either present it only as a preservation issue or omit it entirely from his or her argument on appeal, thereby allowing the appellate court to focus its attention and expend its judicial resources on those issues about which a genuine controversy exists. The submission, as in the case at bar, of isolated "*Anders* issues" for the appellate court to research is not a viable course of action.

State v. Barton, 335 N.C. 696, 712, 441 S.E.2d 295, 303-04 (1994). Nevertheless, we have reviewed defendant's assignment of error as to this issue and find it to be without merit.

C. Motion to Dismiss and Sentencing: First Degree Kidnapping

Next, defendant asserts that the trial court erred by denying his motion to dismiss the first degree kidnapping charge based on insufficiency of the evidence. Specifically, defendant asserts that the asportation of R.M.G. was an inherent and integral part of the rape and that there is insufficient evidence to support a separate kidnapping offense. We disagree.

"Upon defendant's motion for dismissal, the question for the 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). "Substantial evidence is evidence from which any rational trier of fact could

find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986).

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Powell, 299 N.C. at 99, 261 S.E.2d at 117.

As to the crime of kidnapping, section 14-39 provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
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> . . . .
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> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
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> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C. Gen. Stat. § 14-39(a) (2007).

> When the charge of kidnapping is based on the allegation that the confinement, restraint or removal of the victim was for the purpose

> of facilitating the commission of a felony, the defendant is normally also charged with the underlying felony. This procedure can sometimes conflict with the constitutional prohibition on double jeopardy. In order to avoid violating a defendant's constitutional guarantee against being subjected to multiple punishments for the same offense, our Supreme Court has held that where the removal of the victim was "an inherent and integral part of [the underlying felony]," it would be "insufficient to support conviction for a separate kidnapping offense."

State v. Parker, 81 N.C. App. 443, 447, 344 S.E.2d 330, 332-33 (1986) (alteration in original) (citation omitted) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)). Although some restraint is arguably inherent in the crime of forced rape, the Supreme Court of North Carolina has stated that "the restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape." *State v. Silhan*, 297 N.C. 660, 673, 256 S.E.2d 702, 710 (1979). In this regard, this Court has stated:

> Asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape. Such asportation is separate and independent of the rape, is removal for the purpose of facilitating the felony of rape, and is, therefore, kidnapping pursuant to N.C.G.S. § 14-39.

State v. Walker, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987); *see also State v. Whittington*, 318 N.C. 114, 122, 347 S.E.2d 403, 408 (1986) (holding that where the defendant dragged the victim from the front of a car wash to the back of the car wash to

sexually assault her, the asportation of the victim was not a necessary element of the sexual assault); *State v. Newman and State v. Newman*, 308 N.C. 231, 239-40, 302 S.E.2d 174, 180-81 (1983) (holding that where the defendants abducted the victim in a store parking lot, took her to a wooded area behind the store, and raped her there, the asportation was not inherent in the crime of rape; rather, it was committed for the purpose of facilitating the rape).

In the instant case, R.M.G. testified that she repeatedly tried to get away from defendant, but that he continuously followed her and tried to get her to enter the abandoned house, where he eventually forced her to have sexual intercourse with him against her will. In the process, defendant struck R.M.G. in the chest, tried to hit her with a football, grabbed her by the hair on two separate occasions, dragged her towards the house by the hair, banged her head against a brick wall two times, and threatened her with further physical harm in order to get her to enter the house. Here, defendant could have perpetrated the rape at any point prior to entering the abandoned house. His act of grabbing R.M.G. by the hair and dragging her towards the abandoned home was not an inherent or integral part in the commission of the crime of rape. "Rather, it was a separate course of conduct designed to remove her from the view of a passerby who might have hindered [or witnessed] the commission of the crime" and to facilitate the rape.[2] *Newman*,

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[2] In fact, R.M.G. told law enforcement that after two children had passed by the abandoned house on bicycles, defendant stated: "'If those kids come by here again and you're not inside the house, I'm gonna beat you down.'"

308 N.C. at 239-40, 302 S.E.2d at 180-81.

As such, viewed in the light most favorable to the State, the evidence presented was sufficient to prevent dismissal of the kidnapping charge. Accordingly, we overrule this assignment of error.

In addition, defendant argues that the trial court erred by not arresting either the first degree kidnapping conviction or the second degree rape conviction at sentencing. The State concedes that defendant is correct and that his case must be remanded for resentencing in accordance with *State v. Walker*, 84 N.C. App. at 544, 353 S.E.2d at 247-48. We agree.

> There shall be two degrees of kidnapping as defined by [N.C. Gen. Stat. § 14-39(a)]. 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 and is punishable as a Class C felony. If 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 and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39(b). Here, the trial court instructed the jury that in order to find defendant guilty of first degree kidnapping, it had to find that "defendant confined, restrained, or removed that person for the purpose of facilitating the commission of rape or the other sexual offenses about which you will be charged." Although defendant was charged with both second degree rape and second degree sexual offense, the jury only found him guilty of second degree rape. Hence, the rape served as the underlying felony for the first degree kidnapping conviction.

Because "the rape was used to raise the kidnapping to first-degree in this case, defendant was convicted more than once for the same offense in violation of the prohibition against double jeopardy." *Walker*, 84 N.C. App. at 544, 353 S.E.2d at 247. "Therefore, this case must be remanded to the trial court for a new sentencing hearing." *Id.* On remand, "[t]he trial court may arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or it may arrest judgment on the second-degree rape conviction." *Id.* at 544, 353 S.E.2d at 247-48.

D. Motion to Dismiss: Assault on a Female

Finally, defendant argues that the trial court erred by denying his motion to dismiss the assault on a female charge, asserting that "the elements of the assault on a female conviction in this case are necessarily subsumed by the rape and kidnapping charges and convictions." This argument is without merit.

The elements of assault on a female are: "(1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). The third and fourth elements of assault on a female are not elements of the crime of second degree rape or kidnapping. *See* N.C. Gen. Stat. § 14-27.3(a) (2007) (second degree rape); N.C. Gen. Stat. § 14-39 (kidnapping); *see also State v. Wortham*, 318 N.C. 669, 672, 351 S.E.2d 294, 296-97 (1987) (holding that assault on a female is not a lesser included offense of attempted second degree rape "because the assault offense contains

essential elements which are not contained in the attempted rape offense"). Because the assault on a female charge does not contain the same elements as the crimes of second degree rape or kidnapping, it could not be subsumed by the rape or kidnapping charge. Accordingly, we overrule this assignment of error.

III. Conclusion

In sum, while we conclude that no error occurred in defendant's trial, we remand this case to the trial court to conduct a new sentencing hearing in accordance with this opinion and this Court's decision in *Walker*. 84 N.C. App. at 544, 353 S.E.2d at 247-48.

No error; remanded for a new sentencing hearing.

Judges McGEE and BEASLEY concur.

Report per Rule 30(e).