NO. COA09-1660

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 217825, 28

LATONIUS QUARON LOCKHART

Appeal by defendant from judgment entered 10 July 2009 by Judge Timothy Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Stephen A. Armstrong, for the State.

S. Hannah Demeritt for defendant-appellant.

ERVIN, Judge.

Defendant Latonius Quaron Lockhart appeals from a judgment sentencing him to a minimum of 25 months and a maximum of 39 months imprisonment in the custody of the North Carolina Department of Correction based upon jury verdicts convicting him of second degree kidnapping and common law robbery. After carefully considering the merits of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant is not entitled to relief on appeal.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On 13 April 2008, Defendant and Matterius Gray positioned themselves outside a Petro Express store in Charlotte. Rodney Dove, who was listening to his scanner in a nearby car, overheard Defendant and two others using walkie-talkies to discuss a proposed robbery. According to Mr. Dove, one man was coaxing the other for "a good fifteen minutes," leading Mr. Dove to believe that Defendant was "hesitant to act." Mr. Dove walked to the store in order to alert the clerk that something might be about to happen and then returned to his car.

In the meantime, Ashley Anderson, the manager of the Petro Express, went on break. As part of that process, Ms. Anderson walked outside and went around the side of the store to smoke a cigarette. When she did so, Ms. Anderson noticed two men, whom she identified as Defendant and Mr. Gray, acting suspiciously. Mr. Gray was wearing a black hood, while Defendant was wearing a black wig, sunglasses, a black shirt, black shorts, and black shoes with lime green shoelaces. As Ms. Anderson took out her cell phone to call her fiancé, the two men approached Ms. Anderson, snatched the cell phone from her hand, and pulled out guns.

After the theft of Ms. Anderson's cell phone, Mr. Gray was standing directly in front of Ms. Anderson and pointing his gun at her face, while Defendant stood two feet further back and pointed his gun at the ground. When he saw a gun being held to Ms. Anderson's head, Mr. Dove attempted to describe the perpetrators in a call to the 911 system. At that point, Defendant and Mr. Gray

told Ms. Anderson that they wanted money, leading Ms. Anderson to understand that Defendant and Mr. Gray wanted her to go in the store. After Ms. Anderson hesitated, Mr. Gray threatened Ms. Anderson with his gun.

In light of Mr. Gray's threat, Ms. Anderson began walking "[f]ifty to a hundred" feet toward the store entrance, with Defendant and Mr. Gray behind her. As Ms. Anderson turned the corner to walk along the storefront, she "started motioning to a customer to call the cops." At the time that she did that, Defendant and Mr. Gray ran away, with Ms. Anderson's cell phone still in their possession. Mr. Dove was still on the phone with the 911 operator at the time that Defendant and Mr. Gray fled.

Shortly thereafter, law enforcement officers arrived at the Petro Express. Ms. Anderson gave the responding officers a description of Defendant and Mr. Gray. Officer Roberta Correa of the Charlotte-Mecklenburg Police Department observed a vehicle being driven recklessly in the neighborhood behind the Petro Express, determined that the occupants of the vehicle matched the description of the suspects that had been broadcast following the incident at the Petro Express, and stopped the car for a traffic violation. As she did so, Officer Correa observed the occupant of the rear seat reach into the rear portion of the vehicle.

The stopped vehicle contained Defendant, Mr. Gray, and a third individual named Calvin Lewis, who had formerly worked for Ms. Anderson and had been fired for stealing. After Defendant, Mr. Gray, and Mr. Lewis were detained, Ms. Anderson positively

identified Defendant and Mr. Gray as the individuals who had held her at gunpoint. In addition, Mr. Dove identified Defendant and Mr. Gray as the persons that he had seen outside the Petro Express on the basis of their distinctive clothing.

A search of the vehicle in which Defendant, Mr. Gray, and Mr. Lewis had been riding resulted in the seizure of a two-way walkie talkie, a black wig, a BB gun, a loaded handgun, and Ms. Anderson's cell phone. The black wig and the BB gun were found on the floorboard beneath the passenger seat in which Defendant had been sitting, while the handgun was found in the rear cargo area inside a plastic tire cover.

2. Defendant's Evidence

Mr. Lewis testified that he, Defendant, and Mr. Gray planned to commit a robbery on 13 April 2008 and that he had entered a plea of guilty to conspiracy to commit a robbery with a dangerous weapon. Mr. Lewis denied knowing that any weapon other than the BB gun would be used during the robbery. Mr. Lewis admitted that he and Defendant were involved in a romantic relationship and that he did not want Defendant to go to prison.

Although Defendant admitted putting the BB gun against Ms. Anderson's abdomen, he claimed that she took off running and that the BB gun was the only gun utilized during the robbery. In addition, Defendant claimed that the only person that followed Ms. Anderson around the corner of the building was Mr. Gray. On cross-examination, the State produced a statement in which Defendant

admitted that both he and Mr. Gray possessed guns during the robbery.

B. Procedural Facts

On 5 May 2008, the Mecklenburg County grand jury returned bills of indictment charging Defendant with robbing Ms. Anderson of her cell phone using a dangerous weapon, with the second-degree kidnapping of Ms. Anderson, and with conspiring with Mr. Gray and Mr. Lewis to commit robbery. The charges against Defendant came on for trial before the trial court and a jury at the 7 July 2009 criminal session of the Mecklenburg County Superior Court. After the presentation of evidence, the arguments of counsel, and the trial court's instructions, the jury returned verdicts convicting Defendant of second-degree kidnapping and common law robbery and acquitting him of conspiring to commit a robbery with a dangerous weapon. In light of the fact that Defendant had no prior criminal record other than a single driving while license revoked conviction, the trial court concluded that Defendant should be sentenced as a Level I offender, consolidated Defendant's two convictions for judgment, and sentenced Defendant to a minimum of 25 months and a maximum of 39 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

On appeal, Defendant contends that the trial court erred by denying his motion to dismiss at the close of evidence predicated on the State's alleged failure to present sufficient evidence to

support his conviction for second-degree kidnapping. We do not find Defendant's argument persuasive.

A. Standard of Review

The applicable standard of review for use in evaluating a defendant's challenge to the denial of a dismissal motion based on the alleged insufficiency of the evidence is "whether the State presented 'substantial evidence' in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005); *see also State v. McNeil*, 359 N.C. 800, 803-04, 617 S.E.2d 271, 273-74 (2005) (citations omitted); *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122, 125 S. Ct. 1301 (2005). "'"Substantial evidence" is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.'" *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274 (quoting *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citations omitted)). In making this determination, the evidence should be considered "'in the light most favorable to the State,'" which should be afforded "'the benefit of every reasonable inference supported by that evidence.'" *Id.* (quoting *Garcia*, 358 N.C. at 412-13, 597 S.E.2d at 746 (citations omitted)). For that reason, a reviewing court "'examines the sufficiency of the evidence presented but not its weight,'" which is a matter for the jury. *Id.* (quoting *Garcia*, 358 N.C. at 412-13, 597 S.E.2d at 746 (citations omitted)); *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation omitted). As a result, "[i]f there is

substantial evidence - whether direct, circumstantial, or both - to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274(citations omitted). Trial court rulings on motions to dismiss for insufficiency of the evidence are reviewed by this Court on a *de novo* basis. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

B. Second-Degree Kidnapping

The crime of second-degree kidnapping involves the unlawful confinement, restraint, or removal of a person from one place to another without that person's consent for purposes such as facilitating the commission of a felony so long as the kidnapped person is released in a safe place without having been seriously injured or sexually assaulted. N.C. Gen. Stat. § 14-39 (2009). Since "[i]t is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim" and since "mak[ing] a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes" "would violate the constitutional prohibition against double jeopardy," the Supreme Court held in *State v. Fulcher*, 294 N.C. 503, 523-24, 243 S.E.2d 338, 351-52 (1978), that "the restraint, which constitutes the kidnapping, [must be] a separate, complete act, independent of and apart from the other felony." As a result, in the event that a kidnapping is alleged to have

occurred in connection with the commission of another felony, the confinement, restraint or removal used to support the kidnapping charge must be separate from any confinement, restraint or removal that is inherent in the commission of that related felony. *State v. Braxton*, 183 N.C. App 36, 40, 643 S.E.2d 637, 640, *disc. review denied*, 361 N.C. 697, 653 S.E.2d 4 (2007) (citations omitted); *State v. Robertson*, 149 N.C. App. 563, 566, 562 S.E.2d 551, 554 (2002) (citation omitted). The pivotal question that must be addressed in deciding whether to sustain a kidnapping conviction based on a course of conduct that also supports a robbery conviction is whether the victim was exposed to greater danger than that inherent in the commission of the robbery or subjected to danger of the sort that was meant to be redressed by means of the kidnapping statute. *State v. Thomas*, 350 N.C. 315, 345, 514 S.E.2d 486, 504, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388, 120 S. Ct. 503 (1999) (citations omitted). Thus, the ultimate issue raised by Defendant's challenge to the trial court's judgment is whether the record contained sufficient evidence of a separate confinement, restraint, or removal separate from the confinement, restraint, or removal inherent in the commission of the common law robbery for which Defendant was also convicted.

C. Sufficiency of the Evidence

In his brief, Defendant contends that Ms. Anderson was not confined, restrained, or removed to a greater extent than was necessary for the perpetration of the robbery given that the seizure of Ms. Anderson's cell phone was a necessary step in

carrying out the planned robbery of the Petro Express, since that act prevented Ms. Anderson from calling for help or warning the other employees. On the other hand, the State contends that the evidence suggests that Defendant and Mr. Gray intended to commit two discrete robberies - one of Ms. Anderson and another of the Petro Express - and that the "removal" of Ms. Anderson toward the entrance to the convenience store was a separate act sufficient to support the submission of the issue of Defendant's guilt of second-degree kidnapping to the jury. We believe that the State has the better of the disagreement between the parties.

This Court and the Supreme Court have, in recent years, decided a number of cases addressing the issue raised by Defendant's challenge to his second-degree kidnapping conviction. A careful analysis of the facts set out in a generous sample of those decisions reveals that the facts of this case more closely resemble those in which the necessary separate "removal, confinement, or restraint" was found to exist than those in which it was not.

On the one hand, the Supreme Court held in *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981), that the necessary separate confinement, removal, or restraint did not exist where one of two robbers, who demanded to be given certain drugs while robbing a pharmacy, forced an employee "at knifepoint to walk from her position near the fountain cash register to the back of the store in the general area of the prescription counter and safe," since "it was necessary that either [the owner or the employee] go

to the back of the store to the prescription counter and open the safe" in order "[t]o accomplish defendant's objective of obtaining drugs." Similarly, the Supreme Court held in *State v. Ripley*, 360 N.C. 333, 340, 626 S.E.2d 289, 294 (2006), that the conduct of certain individuals who ordered two couples, who attempted to avoid entering a hotel lobby while a robbery was in progress, to come into the lobby and then forced the couples to the floor, searched them, and robbed them, was "'a mere technical asportation' which is an inherent part of the commission of robbery with a dangerous weapon" and did not support separate kidnapping convictions. In the same vein, this Court held in *State v. Payton*, __ N.C. App. __, __, 679 S.E.2d 502, 506-07 (2009), that the actions of the defendants, who were engaged in stealing items from the home of one of the victims when they were surprised by the occupants, in ordering the victims to enter a bathroom and remain there behind closed doors while the robbery was completed, amounted to a "removal and restraint" that constituted "an inherent part of the robbery and did not expose the victims to a greater danger than the robbery itself." In addition, this Court held in *State v. Cartwright*, 177 N.C. App. 531, 536-37, 629 S.E.2d 318, 323, *disc. review denied and appeal dismissed*, 360 N.C. 578, 635 S.E.2d 902 (2006), that the fact that the defendant pushed the victim back into the kitchen while brandishing a knife, unsuccessfully demanded money from the victim in the kitchen, put his knife back in his pocket, pushed the victim into the den and raped her, demanded money from the victim a second time, and followed the victim down

the hall to her bedroom, where the victim gave him a dollar, did not involve the separate confinement, restraint, or removal necessary to support a kidnapping conviction since the "armed robbery began when defendant showed the knife to the victim in the kitchen and demanded money, and defendant's movement between the kitchen, den, and bedroom did not expose the victim to a greater degree of danger." Finally, we held in *State v. Featherson*, 145 N.C. App. 134, 139, 548 S.E.2d 828, 832 (2001), that the fact that certain individuals engaged in the robbery of a restaurant forced one employee to the floor and loosely bound her while ordering another employee to open the safe resulted in a "restraint and movement" of the bound employee that "was an inherent and integral part of the armed robbery." As a result, in each of these instances, the Supreme Court and this Court have found the evidence insufficient to support a finding that the defendant's conduct involved a separate confinement, restraint, or removal because the conduct upon which the State relied in attempting to establish the defendant's guilt of kidnapping occurred while the robbery was still ongoing or was necessary to facilitate the commission of the robbery for which the defendant had been charged.

On the other hand, in *State v. Boyce*, 361 N.C. 670, 675, 651 S.E.2d 879, 883 (2007), the Supreme Court upheld the kidnapping conviction of a defendant who forced his way into the victim's residence, prevented the victim from escaping by pulling her back into the house as she opened the back door and stepped out of the house, and then took money from the victim at gunpoint, since

"defendant's kidnapping of the victim was a separate criminal transaction" that was "complete before the second felony commenced." Similarly, in *State v. Johnson*, 337 N.C. 212, 221-22, 446 S.E.2d 92, 98 (1994), the Supreme Court permitted the defendant to be separately convicted for kidnapping in a case in which, after entering the victim's residence through an unlocked door, he threatened to kill one of the victims with a lug wrench, "forcibly removed [the victim] from his bedroom to the living room sofa," had an accomplice guard the victim and his wife, and then stole money, jewelry, and other items, on the theory that, "[a]fter [the victim's] life was threatened, it was not necessary to remove him from one room to another in order to commit the robbery." This Court held in *State v. Morgan*, 183 N.C. App. 160, 167, 645 S.E.2d 93, 100 (2007), *disc. review denied and appeal dismissed*, 362 N.C. 241, 660 S.E.2d 536 (2008), that, in a case in which several armed intruders forced their way into the victims' hotel room, compelled the victims to lie on the floor and restrained them with duct tape, and then stole a small amount of money and the victims' cell phones, the defendants could be separately convicted for kidnapping since "[s]ufficient evidence was presented of a restraint and removal separate from the armed robbery . . . ." Furthermore, we held in *State v. McCree*, 160 N.C. App. 19, 29, 584 S.E.2d 348, 355, *disc. review denied and appeal dismissed*, 357 N.C. 661, 590 S.E.2d 855 (2003), that the evidence supported the defendant's separate conviction where "defendant *first* robbed [the victim] of $50.00, *then* forcibly restrained [the victim] and moved him about the

apartment at gunpoint for use as an interpreter to facilitate the robbery of the apartment's Spanish-speaking occupants." (emphasis in the original). In *State v. McNeil*, 155 N.C. App. 540, 541, 574 S.E.2d 145, 146 (2002), *disc. review denied and appeal dismissed*, 356 N.C. 688, 578 S.E.2d 323 (2003), the defendant, having broken into a dry cleaning establishment and taken a box which did not contain any money, reentered the establishment with a gun, ordered an employee to the rear of the building, robbed the employee of his wallet, walked the employee back to the front of the building at gunpoint, had the employee lie on the floor while he took the money from the cash register, and forced the employee to return to a standing position and walk back to the rear of the establishment. In upholding the defendant's separate conviction for kidnapping, we concluded that "it was not necessary for defendant to move [the employee] to the back of the cleaners at gunpoint," since "the robbery had already been completed" by that point. *Id.* at 547, 574 S.E.2d at 150. In *State v. Muhammad*, 146 N.C. App. 292, 295-96, 552 S.E.2d 236, 238 (2001), this Court refused to disturb the defendant's separate convictions for robbery and kidnapping in a case where the defendant "did not simply hold [the victim] at gun point and force him to walk to the cash register," but rather "placed [the victim] in a choke hold, hit him in the side three times, wrestled with [the victim] on the floor, grabbed [the victim] again around the throat, pointed a gun at his head and marched him to the front of the store," on the grounds that "defendant did substantially more than just force [the victim] to

walk from one part of the restaurant to another." Finally, in *State v. Raynor*, 128 N.C. App. 244, 250, 495 S.E.2d 176, 180 (1998), we found no error in the trial court's decision to allow defendant to be separately convicted of kidnapping where "defendant and his accomplice restrained and moved [the victim] from the front door of his residence to a back bedroom, so that they could take the money contained in [the victim's] wallet," and "then restrained and moved [the victim] to the kitchen, where the two took [the victim's keys and attempted to tie up their victim." Thus, in the instances in which the Supreme Court and this Court have upheld kidnapping convictions coupled with related robbery convictions contained in this sample, the conduct upon which the defendant's kidnapping conviction rested generally occurred before or after, rather than during, the commission of the related robbery or involved the use of substantially more force than was needed to effectuate the related robbery.

A careful examination of this sample of reported opinions addressing the sufficiency of the evidence to support a finding that the conduct of a particular defendant included a sufficiently separate confinement, removal, or restraint to support convictions for both kidnapping and robbery demonstrates that the present record, when taken in the light most favorable to the State, contains sufficient evidence of the necessary separate removal. When viewed in the light most favorable to the State, the record reflects that Defendant and Mr. Gray committed or intended to commit two distinct criminal acts: the robbery of Ms. Anderson and

a separate robbery of the Petro Express that was never completed. Defendant's common law robbery conviction was predicated on an indictment that charged him with robbing Ms. Anderson of her cell phone. In view of the fact that the evidence, when taken in the light most favorable to the State, tends to show that Defendant and Mr. Gray forced Ms. Anderson to move toward the entrance to the Petro Express for the purpose of robbing that establishment after they had already taken her cell phone, there is ample evidentiary support for a jury determination that the subsequent "removal" of Ms. Anderson was "a separate, complete act, independent of and apart from the" robbery. *Fulcher*, 294 N.C. at 524, 243 S.E.2d at 352. In fact, the facts contained in the present record are remarkably similar to those at issue in *McCree*, in which the forcible removal of the victim after a robbery had been completed was held to provide sufficient support for the defendant's kidnapping conviction. *McCree*, 160 N.C. App. at 29-30, 584 S.E.2d at 355-56. As a result, the trial court properly denied Defendant's motion to dismiss the kidnapping charge.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's sole challenge to the trial court's judgment lacks merit. Since Defendant received a fair trial that was free from prejudicial error, he is not entitled to any relief on appeal.

NO ERROR.

Judges MCGEE and STROUD concur.

Report per Rule 30(e).