NO. COA09-710

NORTH CAROLINA COURT OF APPEALS

Filed: 22 December 2009

STATE OF NORTH CAROLINA

v.

TAVAROUS MAURICE SIMPSON

Mecklenburg County
Nos. 07 CRS 201442
07 CRS 201444-46
07 CRS 201449-52

Appeal by defendant from judgments entered 12 and 19 December 2008 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Kevin P. Bradley, for defendant-appellant.

CALABRIA, Judge.

Tavarous Maurice Simpson ("defendant") appeals judgments entered upon jury verdicts finding him guilty of first degree rape, first degree burglary, two counts of robbery with a dangerous weapon, first degree kidnapping, two counts of second degree kidnapping, and assault with a deadly weapon. We find no error at trial, but remand for resentencing.

I. Background

On the morning of 5 December 2006, James Huggins ("James"), Carolyn Sue Huggins ("Carolyn"), and their 17-year-old daughter, Sandra Huggins ("Sandra") (collectively "the Huggins"), were at

their home when their dogs began barking. James went to investigate and was surprised by defendant, who had broken into the Huggins' home and was holding a gun. James attempted to grab the gun and an altercation ensued between James and defendant. Defendant gained the upper hand and began beating James over the head with the gun. James raised his hands in surrender and defendant then forced James into a bathroom. Defendant warned James that if he tried to exit the bathroom, he would shoot Carolyn.

Carolyn was in bed and witnessed the altercation between the two men. After defendant had moved James into the bathroom, he approached Carolyn, who handed defendant James' wallet. Defendant then demanded to know whether there was anyone else in the house. Sandra, who was sleeping in the living room, heard the commotion. Sandra got up and informed defendant that there was no one else in the home. Defendant then approached Sandra, pointed his gun at her, and directed her from the living room into her parents' bedroom.

In the bedroom, defendant pointed his gun at Carolyn and ordered Sandra to remove her pants. Sandra complied and defendant then ordered her to bend over. When Sandra complied again, defendant proceeded to rape her. At this time, Carolyn was kneeling on the floor approximately two feet away.

After a few moments, defendant disengaged from Sandra and demanded more money. Sandra then went into the dining room, retrieved her purse, and handed money to defendant. Defendant then

began to rape Sandra a second time. When he was finished, defendant pushed Sandra down towards her mother and fled the home.

Defendant was arrested on 6 April 2007. While defendant was in custody, a DNA swab was taken from him. Subsequent analysis matched defendant's DNA to samples taken from Sandra on 5 December 2006. Defendant was indicted for the following offenses: (1) one count of first degree rape (Sandra); (2) one count of first degree burglary; (3) two counts of robbery with a dangerous weapon (Carolyn and Sandra); (4) one count of assault with a deadly weapon (James); (5) one count of first degree kidnapping (Sandra); and (6) two counts of second degree kidnapping (James and Carolyn).

Defendant was tried in Mecklenburg County Superior Court beginning on 9 December 2008. At the close of the State's evidence, defendant made a motion to dismiss all of the charges. The trial court denied the motion. Defendant renewed his motion to dismiss at the close of all the evidence, and the trial court again denied the motion. On 12 December 2008, the jury returned verdicts of guilty to all the charges. The trial court consolidated the convictions for first degree rape, first degree kidnapping, and one count of robbery with a dangerous weapon and sentenced defendant to a minimum of 269 months to a maximum of 332 months ("the rape judgment"). The trial court then consolidated the remaining convictions and sentenced defendant to a consecutive term of a minimum of 82 months to a maximum of 108 months. All sentences were to be served in the North Carolina Department of Correction. Defendant gave notice of appeal.

The State then filed a motion to amend the rape judgment on the basis of a double jeopardy issue. The rape judgment in its original form erroneously punished defendant twice for the same act because the rape conviction was the aggravating factor that elevated the kidnapping charge from second degree to first degree. In order to correct this error, on 19 December 2008, the trial court, with the consent of defendant, amended the rape judgment by arresting judgment on the first degree kidnapping conviction and then sentenced defendant to the same term of a minimum of 269 months to a maximum of 332 months for the convictions for first degree rape, second degree kidnapping, and one count of robbery with a dangerous weapon. The remaining judgment was left undisturbed. Defendant appeals.

II. Expert Opinion

Defendant argues that the trial court erred in allowing expert testimony that Sandra's injuries were consistent with her history. We disagree.

Our Supreme Court has provided the following framework for the admissibility of expert opinion regarding the significance of a victim's physical injuries:

> [Expert] testimony is properly admitted if (1) the witness because of his expertise is in a better position to have an opinion on the subject than the trier of fact, (2) the witness testifies only that an event *could* or *might* have caused an injury but does not testify to the conclusion that the event did in fact cause the injury, unless his expertise leads him to an unmistakable conclusion and (3) the witness does not express an opinion as to the defendant's guilt or innocence.

State v. Brown, 300 N.C. 731, 733, 268 S.E.2d 201, 203 (1980) (citation omitted). "The acceptance of a witness as an expert and the admission of expert testimony are within the sound discretion of the trial court and will not be upset absent a showing of an abuse of discretion." *State v. Berry*, 143 N.C. App. 187, 202, 546 S.E.2d 145, 156 (2001)(internal quotations and citation omitted).

"Our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). "However, our appellate courts have generally upheld the admission of testimony from a medical expert in a sexual abuse case that her observations are 'consistent with sexual abuse.'" *In re T.R.B.*, 157 N.C. App. 609, 618, 582 S.E.2d 279, 285 (2003)(citations omitted).

In the instant case, registered nurse Michelle Krinsky ("Nurse Krinsky") performed an initial examination on Sandra the morning of the sexual assault. Nurse Krinsky testified for the State that Sandra indicated "[t]hat she had been sexually assaulted; penile penetration to the vaginal area from behind unwillingly." Nurse Krinsky then testified about the results of her physical examination of Sandra's vaginal area. Without objection, Nurse Krinsky testified that she observed injuries to Sandra's vaginal area that were consistent with the history Sandra had provided to her. The following exchange then took place:

> Q. And your opinion based on your background, training, and experience, and your examination of this patient how did that injury occur?
>
> [DEFENSE COUNSEL:] OBJECTION.
>
> THE COURT: OVERRULED. He's asking her opinion. You may give your opinion.
>
> A. In my opinion it occurred from blunt force trauma consistent with what the patient's history was that afternoon.
>
> . . .
>
> Q. In regard to blunt force trauma is penile penetration a form of blunt force trauma?
>
> A. Yes.
>
> Q. Are there other things that could be blunt force trauma?
>
> A. Yes. . . .A fist to the nose, insertion of a tampon.

Nurse Krinsky's testimony only establishes that the physical trauma revealed by her examination of Sandra was consistent with the abuse Sandra alleged had been inflicted upon her. Nurse Krinsky in no way vouched for Sandra's credibility; to the contrary, she acknowledged that there were other possible causes of blunt force trauma that would be inconsistent with the given history. This is precisely the type of expert testimony that has been consistently allowed by our appellate courts. *See, e.g., State v. Brothers*, 151 N.C. App. 71, 77-78, 564 S.E.2d 603, 607-08 (2002). This assignment of error is overruled.

III. Motion to Dismiss Kidnapping Charge

Defendant argues that the trial court erred in denying his motion to dismiss the charge of kidnapping Sandra. Defendant

contends that there was insufficient evidence of any confinement, restraint, or removal not inherent in the charges of first degree rape and robbery with a dangerous weapon. We disagree.

> The standard of review for a motion to dismiss in a criminal trial is "[u]pon 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. Blizzard, 169 N.C. App. 285, 289, 610 S.E.2d 245, 249 (2005)(quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

> In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witnesses' credibility. It is concerned only with the sufficiency of the evidence to carry the case to the jury. Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

Id. at 289-90, 610 S.E.2d at 249 (internal quotations and citation omitted).

> Kidnapping is the unlawful confinement, restraint, or removal of a person from one place to another for the purpose of: (1) holding that person for a ransom or as a hostage, (2) facilitating the commission of a felony or facilitating flight of any person following the commission of a felony, (3) doing serious bodily harm to or terrorizing the person, or (4) holding that person in involuntary servitude. N.C.G.S. § 14-39(a)

> (2003). Kidnapping is considered to be in the first-degree when the kidnapped person is not released in a safe place or is seriously injured or sexually assaulted during the commission of the kidnapping. N.C.G.S. § 14-39(b).

Id. at 290, 610 S.E.2d at 249 (quoting *State v. Bell*, 359 N.C. 1, 25, 603 S.E.2d 93, 110 (2004)). "The element of confinement, restraint, or removal requires a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *Id.* (internal quotations and citation omitted).

> In determining whether the restraint present in a given case is more than that which is an inherent or inevitable part of another felony, "[t]he key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or 'subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.'"

State v. Warren, 122 N.C. App. 738, 740-41, 471 S.E.2d 667, 669 (1996)(quoting *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994)). "[R]esort to a tape measure or a stop watch [is] unnecessary in determining whether the crime of kidnapping has been committed." *State v. Fulcher*, 294 N.C. 503, 522, 243 S.E.2d 338, 351 (1978).

In the instant case, defendant first encountered Sandra in the living room of the home. Defendant then pointed a gun at Sandra and directed her into her parents' bedroom, where he proceeded to sexually assault her. Defendant contends that under the holdings of our Supreme Court in *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981) and *State v. Ripley*, 360 N.C. 333, 626 S.E.2d 289 (2006),

this evidence is insufficient to support a separate conviction for the kidnapping of Sandra.

In *Irwin*, the Court held that the defendant's act of moving a store clerk, at knifepoint, from the front of the store to the back of the store where the store's safe was located was not sufficient to support a separate kidnapping conviction. 304 N.C. at 103, 282 S.E.2d at 446. In *Ripley*, the victims were ordered at gunpoint from the entranceway of a motel into the lobby (essentially moving the victims from one side of a door to the other) after the robbery had already commenced, which the Court determined to be "a mere technical asportation." 360 N.C. at 340, 626 S.E.2d at 294. The underlying facts of *Irwin* and *Ripley* are distinguishable from the instant case.

The asportation in the instant case was more extensive than simply moving a victim from one side of a door to the other. Sandra was required, at gunpoint, to move from the living room to her parents' bedroom. Once defendant moved Sandra to the bedroom, he immediately ordered her to remove her pants so that he could sexually assault her. There is nothing to indicate that defendant, who had previously witnessed Carolyn in this bedroom, would have had any reason to move Sandra into the same bedroom to retrieve something of value such that the asportation would be considered an integral part of the robbery.

Additionally, defendant had the opportunity to sexually assault Sandra in the living room, but instead chose to move her to the bedroom. This asportation was not inherent to the commission

of the sexual assault. This Court has previously held, in similar circumstances, that movement from one room to another is sufficient asportation, separate and independent of the elements of rape, to support a conviction for kidnapping. *See State v. Mangum*, 158 N.C. App. 187, 195, 580 S.E.2d 750, 756 (2003); *Blizzard*, 169 N.C. App. at 290-91, 610 S.E.2d at 250. This assignment of error is overruled.

IV. Resentencing

Defendant argues that the trial court erred by simply amending the rape judgment when instead it should have vacated the rape judgment and then resentenced defendant on the correct convictions. Defendant did not object to this resentencing at trial; the transcript indicates that defendant's counsel consented to the amended judgment. However, N.C. Gen. Stat. § 15A-1446(d)(18) provides:

> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446(d)(18) (2007).

"As a general rule, the trial court is divested of jurisdiction when a party gives notice of appeal, and pending the appeal, the trial judge is *functus of[f]icio*." *State v. Dixon*, 139 N.C. App. 332, 337, 533 S.E.2d 297, 301 (2000) (citation omitted). Therefore, after notice of appeal was entered, the trial court was

divested of jurisdiction and consequently the trial court had no authority to amend defendant's judgment. The original rape judgment, which punished defendant for first degree rape, robbery with a dangerous weapon, and first degree kidnapping (enhanced to first degree by the first degree rape), remains the judgment of record for those convictions. Because "defendant may not be separately punished for the offenses of first degree rape and first degree kidnapping where the rape is the sexual assault used to elevate kidnapping to first degree," *State v. Mason*, 317 N.C. 283, 292, 345 S.E.2d 195, 200 (1986), we must remand this case for resentencing in the cases consolidated for judgment in file number 07 CRS 201449.

No error at trial; remanded for resentencing.

Judges WYNN and BEASLEY concur.

Report per Rule 30(e).