NO. COA 13-54
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH CAROLINA

v. Guilford County
No. 10 CRS 24332

WILLIE LEE MILLER

Appeal by defendant from judgment entered 4 May 2012 by Judge Lucy Inman in Guilford County Superior Court. Heard in the Court of Appeals 4 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Daniel D. Addison, for the State.

Glover & Petersen, PA, by James R. Glover, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Willie Lee Miller ("Defendant") appeals from judgment entered after a jury convicted him of: (i) first-degree kidnapping; (ii) second-degree rape; (iii) assault on a female; and (iv) resisting a public officer. On appeal, Defendant argues the evidence presented at trial was insufficient to permit a reasonable juror to find him guilty of kidnapping and

denial of his motions to dismiss violated his constitutional rights to due process and freedom from double jeopardy. Upon review, we conclude Defendant received a fair trial free from error.

I. Facts & Procedural History

On 4 May 2012, Defendant was convicted of first-degree kidnapping, second-degree rape, assault on a female, and resisting a public officer. The State's evidence at trial tended to show the following facts.

For nine years, "Caroline"[1] lived in a Greensboro apartment complex above Defendant and his wife. Caroline knew Defendant because they occasionally shared cigarettes. In the early morning hours of 20 March 2010, Caroline was watching television in her living room. At 1:30 A.M., she heard a knock on her front door. When Caroline asked who was there, Defendant identified himself and asked to use her telephone.

Caroline put on pants and opened the door. Once Defendant came into her living room, she closed the front door. Defendant dialed a number from Caroline's living room phone, but hung up after he appeared not to reach anyone. Defendant then grabbed Caroline by her t-shirt. Caroline struggled with Defendant and yelled for help. Defendant put an arm around Caroline's neck

[1] "Caroline" is a pseudonym used to protect privacy.

and covered her mouth with his hands. He repeatedly told her to be quiet. Caroline bit Defendant's hand.

As the struggle progressed, Caroline lost her balance and Defendant gained control of her. Defendant then dragged her from the living room down the hallway. Next, he took her into the bathroom. The lights in the bathroom were off. In the bathroom, Defendant knocked off Caroline's glasses. Defendant then turned on the water in the sink. Defendant continued to cover Caroline's mouth and she continued to bite his fingers. Defendant bit Caroline on the nose and threatened to beat her if she did not stop yelling. Caroline eventually fell down. Defendant then began to bang her head against the floor.

Although Caroline continued to resist, Defendant eventually overpowered her. Defendant then took Caroline's pants and underwear off and had forcible intercourse with her in the bathroom. When Defendant finished, he left Caroline's apartment. Caroline immediately locked the door and called the police.

Greensboro Police Officer Adam Bell ("Officer Bell") responded to Caroline's call. When Officer Bell arrived at the apartment complex, he saw Defendant standing outside his apartment. Defendant identified himself to Officer Bell, but walked away after Officer Bell began asking about the events with Caroline. Officer Bell then arrested Defendant.

On 3 May 2010, a grand jury indicted Defendant for first-degree kidnapping, second-degree rape, assault on a female, resisting a public officer, and second-degree sexual offense. At the beginning of the proceedings, the State dismissed the second-degree sex offense charge. Defendant received a jury trial during the 30 April 2012 Criminal Session of Guilford County Superior Court. At both the close of the State's case-in-chief and the close of all the evidence, Defendant moved to dismiss. The trial court denied Defendant's motions. On 3 May 2012, the jury found Defendant guilty of all charges. Defendant gave oral notice of appeal in open court.

II. Jurisdiction & Standard of Review

"The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (internal citation omitted). Additionally, "[t]he standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. rev. denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

"In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator." *State v. Sloan*, 180 N.C. App. 527, 531, 638 S.E.2d 36, 39 (2006) (quotation marks and citation omitted). "The evidence should be viewed in the light most favorable to the State, with all conflicts resolved in the State's favor." *Id.* (quotation marks and citation omitted). "If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt" *Id.* (quotation marks and citation omitted).

III. Analysis

On appeal, Defendant argues the evidence, when viewed in the light most favorable to the State, was insufficient to permit a reasonable juror to find him guilty of kidnapping. Relatedly, Defendant further argues his kidnapping conviction violates his constitutional rights to due process and freedom from double jeopardy. Upon review, we find no error.

In North Carolina,

> [a]ny 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 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 . . .* [*f*]*acilitating the commission of any felony*.

N.C. Gen. Stat. § 14-39(a) (2011) (emphasis added). To satisfy due process, the State must "prove beyond a reasonable doubt every essential element" of this crime, including the asportation requirement. *State v. Blair*, 101 N.C. App. 653, 657, 401 S.E.2d 102, 105 (1991).

Our Supreme Court has elaborated on the contours of the asportation requirement:

> [A] trial court, in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

State v. Ripley, 360 N.C. 333, 340, 626 S.E.2d 289, 293-94 (2006); *see also State v. McNeil*, 155 N.C. App. 540, 544-45, 574 S.E.2d 145, 148 (2002) ("The 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." (quotation marks

and citation omitted)). "The court also considers whether [the] defendant's acts cause additional restraint of the victim or increase the victim's helplessness and vulnerability." *State v. Key*, 180 N.C. App. 286, 290, 636 S.E.2d 816, 820 (2006). "To permit separate and additional punishment [for kidnapping] where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981).

For instance, in *Key*, we held the trial court appropriately denied the defendant's motion to dismiss his kidnapping charge. 180 N.C. App. at 291, 636 S.E.2d at 821. There, the defendant moved the victim at knife-point from her upstairs bedroom to her kitchen and then to her family room. *Id.* at 290, 636 S.E.2d at 820. In the process, the defendant took the victim's phone off of the hook and put tape over the victim's eyes. *Id.* The defendant then raped the victim in her family room. *Id.* In *Key*, we upheld the trial court's denial of the defendant's motion to dismiss because the defendant's actions increased the victim's vulnerability and "the commission of the underlying felony of rape did not require [the] defendant to separately restrain or remove the victim from her upstairs bedroom to the family room." *Id.* at 291, 636 S.E.2d at 821.

On the other hand, in *State v. Cartwright*, 177 N.C. App. 531, 629 S.E.2d 318 (2006), we vacated the defendant's kidnapping conviction because the asportation "was inherent to the crimes of armed robbery and rape." *Id.* at 536, 629 S.E.2d at 323. There, the defendant demanded money from the victim at knife-point in her kitchen. *Id.* The defendant then took the victim to her den and raped her. *Id.* Afterward, he again demanded money and took the victim to her bedroom to retrieve her wallet. *Id.* at 536–37, 629 S.E.2d at 323. In *Cartwright*, we held "[the] defendant's movement between the kitchen, den, and bedroom did not expose the victim to a greater degree of danger." *Id.* at 537, 629 S.E.2d at 323. We also noted that the rape occurred entirely in the victim's den. *Id.* Consequently, we vacated the kidnapping conviction because "there was insufficient evidence of confinement, restraint, or removal." *Id.*

In the present case, Defendant argues the evidence presented at trial was insufficient to permit a reasonable juror to find him guilty of kidnapping because any asportation was an "inherent part" of the rape. We disagree.

First, "the commission of the underlying felony of rape did not require [Defendant] to separately restrain or remove the victim" from her living room to her bathroom. *Key*, 180 N.C. App. at 291, 636 S.E.2d at 821. Here, Defendant gained control

of Caroline in her living room and could have raped her there. Instead, he took Caroline to the bathroom to rape her. Like in *Key*, we hold this movement constitutes "a separate and independent act" not inherent to the rape. *Id.*

Furthermore, taking Caroline to the bathroom "place[d] [her] in greater danger than is inherent in the other offense" and "increase[d] [her] helplessness and vulnerability." *Id.* at 290, 636 S.E.2d at 820. Specifically, Defendant moved Caroline away from her front living room, where she had a greater chance of successfully shouting for help from neighbors. Once in the bathroom, Defendant turned on the water in the sink and placed his hand over Caroline's mouth to muffle her yells. Defendant also bit Caroline on the nose and repeatedly banged her head on the floor in efforts to quiet her. Thus, evidence indicates "the asportation facilitated [Defendant's] ability to commit [rape]" and "exposed the victim to a greater degree of danger than that which is inherent in the [rape]." *Ripley*, 360 N.C. at 340, 626 S.E.2d at 294.

Defendant cites *Cartwright* to support his argument that moving Caroline to the bathroom was an "inherent part" of the rape. However, *Cartwright* is factually distinguishable from the instant case. In *Cartwright*, the rape occurred entirely in the victim's den. 177 N.C. App. at 537, 629 S.E.2d at 323. Here, on the other hand, Defendant initiated the rape in the living room

and then moved Caroline to the bathroom. Additionally, unlike in *Cartwright*, here Defendant took extra steps to ensure Caroline's vulnerability that exceeded the force necessary for rape. *See Key*, 180 N.C. App. at 291, 636 S.E.2d at 821 (distinguishing its facts from *Cartwright* for similar reasons). Specifically, Defendant covered Caroline's mouth, bit her nose, and repeatedly hit her head against the floor. Given these additional facts, we determine *Cartwright* is distinguishable from the instant case.

Consequently, we conclude Defendant's movement of Caroline to the bathroom was not an "inherent part" of the rape. Thus, the facts permit a reasonable juror to find him guilty of kidnapping and the trial court did not err in denying his motions to dismiss.

IV. Conclusion

For the foregoing reasons, we find

NO ERROR.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).