NO. COA14-412

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Sampson County
No. 12CRS1246, -51356

JAMES EARL PARKER, JR.
Defendant.

Appeal by Defendant from judgments entered 30 August 2013 by Judge W. Douglas Parsons in Sampson County Superior Court. Heard in the Court of Appeals 7 October 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jon H. Hunt, for Defendant-appellant.

DILLON, Judge.

James Earl Parker, Jr. ("Defendant") appeals from his conviction for first-degree kidnapping. For the following reasons, we vacate Defendant's conviction.

I. Background

The State's evidence tended to show that on the evening of 27 October 2009, Kelly[1] was walking from a park through a field to a laundromat in Clinton to use the bathroom. As Kelly was

[1] A pseudonym.

walking, Defendant grabbed her from behind by the back of her neck, pulled her behind a storage building located at the edge of the field, and threw her to the ground beside some bushes and a fence.

When Kelly fell, she hit her head on the fence. Defendant forced himself on Kelly, penetrating her vaginally, and forcing her to perform oral sex on him. During this time, Defendant put his hands around Kelly's neck. At some point, Kelly lost consciousness. When she regained consciousness, Defendant was leaving the area.

Defendant was indicted on second-degree sexual offense, first-degree kidnapping, and two counts of second-degree rape. Defendant was tried by a jury. Defendant made motions to dismiss all charges at the close of the State's evidence and at the close of all evidence. Both motions were denied by the trial court.

The jury found Defendant guilty of all charges, and the trial court sentenced Defendant in four separate judgments. For the two second-degree rape and the second-degree sexual offense convictions, the trial court imposed active sentences of 90 to 117 months for each conviction to run consecutively. The trial court noted the first-degree kidnapping conviction but sentenced

Defendant for second-degree kidnapping to a consecutive term of 37 to 54 months imprisonment. Defendant entered notice of appeal in open court.

II. Argument

In his only argument on appeal, Defendant contends that the trial court erred in denying his motions to dismiss the charge of kidnapping. Specifically, Defendant argues that the State offered insufficient evidence to establish that Defendant restrained the victim in a way that was separate and apart from the restraint inherent in the rapes and the sexual assault for which he was convicted.

The standard of review for a trial court's denial of a defendant's motion to dismiss for insufficiency of the evidence is well established:

> A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). Additionally, "[t]he Court must consider the evidence in the light most favorable to the State and the State is entitled to every

reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Phillpott*, 213 N.C. App. 468, 478, 713 S.E.2d 202, 209 (2011) (citation omitted), *disc. review denied*, 365 N.C. 544, 720 S.E.2d 393 (2012).

Our law mandates that anyone who, without consent, unlawfully confines, restrains, *or* removes someone sixteen years of age or older shall be guilty of kidnapping when it is done for the purpose of facilitating commission of a felony. N.C. Gen. Stat. § 14-39(a)(2)(2009).

In the present case, the indictment for kidnapping alleged all three theories---that Defendant confined, restrained, and removed the victim. However, the trial court limited its instruction on kidnapping based on restraint. Further, during the charge conference, the trial court indicated his intention of limiting its instruction solely on the theory of restraint, and the State stipulated to the instruction. As the State abandoned any theory of confinement or removal at trial, our analysis is limited only to whether there was sufficient evidence of restraint.

N.C. Gen. Stat. § 14-39(b)(2009) states that when a victim of kidnapping is sexually assaulted, the kidnapping charge is raised from second-degree to first-degree kidnapping. Upon sufficient evidence, a defendant may be convicted of first-degree kidnapping and the underlying sexual offense which raised it to first-degree, although the defendant cannot be punished for both. *State v. Freeland*, 316 N.C. 13, 23-24, 340 S.E.2d 35, 40–41 (1986). In such an instance, it is permissible to punish for the underlying sexual offense and to punish for second-degree kidnapping, *id.*, as was done in the present case.

However, where a defendant is convicted of rape or sexual assault, a separate conviction of kidnapping in any degree based on restraint is sustained only where the restraint "is a separate, complete act, independent of and apart from the rape [or sexual assault]." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987) (citation and quotation marks omitted).

Citing *State v. Ackerman*, 144 N.C. App. 452, 551 S.E.2d 139, *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001), Defendant specifically argues that his motions should have been granted because his restraint of Kelly by pushing her to the ground and holding her was inherent in the "restraint necessary

to facilitate the sex offenses." Defendant concludes that this was insufficient to establish kidnapping upon a theory of restraint, the trial court erred in denying his motions to dismiss, and his conviction for kidnapping should be vacated.

The State contends that this case is distinguishable from *Ackerman* in that, "by putting his hands around her throat to the point where [Kelly] blacked out and lost consciousness," the victim was exposed "to a greater degree of danger than necessary for the accomplishment of the sex offense and rapes[.]" *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001). In concluding this restraint was not inherent in the sex offenses, the State analogizes the restraint to that in *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). In *Fulcher*, the Supreme Court held that there was sufficient evidence of an independent act of restraint where the defendant bound the hands of his victims to facilitate the commission of crimes against nature; having bound the victims' hands before compelling them to perform oral sex on him, "the crime of kidnapping was complete, irrespective of whether the then contemplated crime against nature ever occurred." *Id.* at 507, 523-24, 243 S.E.2d at 342, 351-52.

In a subsequent case, the Supreme Court further explained its rationale in *Fulcher*:

> [A] kidnapping charge cannot be sustained if based upon restraint which is an inherent feature of another felony [for which the defendant is also convicted]. . . . Defendant argues that the time which he restrained the victim was necessary for him to prepare for the sex act. The test established in *Fulcher* does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense.

State v. Williams, 308 N.C. 339, 346-47, 302 S.E.2d 441, 447 (1983).

In *Ackerman*, we held that there was insufficient evidence of independent restraint to support a kidnapping charge. 144 N.C. App. at 458-59, 551 S.E.2d at 143-44. We expressed that the defendant's "continuous confinement" of the victim in a vehicle was "restraint inherent in his commission of the sexual offense," even though "the sexual assault comprised only a small portion of the total time" they were in the vehicle, and even though the defendant had choked the victim and beaten her with a bottle to the point where she pretended to be unconscious to end the beating. *Id.* at 458-59, 551 S.E.2d at 143-44. In finding there was no independent restraint, despite the sexual offense having comprised a small portion of the time in the vehicle, we

explained that the test turns to what is inherent in the actual commission of the offense, not what is necessary to commit it. *Id*. We explained that there was no independent restraint such as what occurred in *Williams*, where "the defendant forced the victim to sit in the living room and to accompany him to the kitchen so that the defendant could get something to drink." 308 N.C. at 458, 551 S.E.2d at 143.

In the present case, we believe that the evidence of restraint was insufficient to support the charge of kidnapping because Defendant's restraint of the victim was inherent in the underlying felonies of sexual assault and rape. The State's evidence of restraint amounted to the following: Defendant grabbed Kelly from behind and forced her to the ground. Defendant put his knee to her chest. He grabbed her hair in order to turn her around after penetrating her vaginally from behind, and he put his hands around her throat as he penetrated her vaginally again and forced her to engage him in oral sex. Though the amount of force used by Defendant in restraining Kelly may have been more than *necessary* to accomplish the rapes and sexual assault, the restraint was inherent "in the actual commission" of those acts. *See Williams*, *supra*. Unlike in *Fulcher*, where the victims' hands were bound *before* any sexual

offense was committed, Defendant's acts of restraint occurred as part of the commission of the sexual offenses.

We note the State's argument in its brief that there was evidence that Defendant "removed" Kelly from the open field to the fence area behind the building. Such evidence might be sufficient to sustain a punishment for kidnapping separate from the punishments for the rapes and sexual assault. *See, e.g.*, *State v. Tucker*, 304 N.C. 93, 282 S.E.2d 439 (1981). However, since the trial court only instructed based on "restraint" and the State stipulated to the instruction, this argument is overruled.

As the State's evidence shows that Defendant's restraint of the victim was merely inherent to the commission of the underlying felonies, second-degree rape and second-degree sexual offense, see *Williams*, 308 N.C. at 347, 302 S.E.2d at 447, there was insufficient evidence to take this charge to the jury on the theory of restraint, and the trial court erred in denying Defendant's motions to dismiss as to this charge.

III. Conclusion

Accordingly, we vacate Defendant's conviction for first-degree kidnapping and his sentence for second-degree kidnapping.

VACATED.

Judge HUNTER, Robert C. and Judge DAVIS concur.