IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1144

Filed: 6 August 2019

New Hanover County, No. 16CRS056627

STATE OF NORTH CAROLINA

v.

JACQUEL LEVELL HOLLIDAY, Defendant.

Appeal by Defendant from judgment and order entered 3 April 2018 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David D. Lennon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for the Defendant.

DILLON, Judge.

Appeal by Defendant Jacquel Levell Holliday from (1) a judgment finding him guilty of kidnapping and various other charges stemming from an altercation which occurred on 4 July 2016 and (2) an order awarding two hundred fifty dollars ($250) in restitution to the victims of the altercation. After careful review, we find no error

in the trial court's conviction of Defendant on his kidnapping charge. However, we do vacate and remand the restitution order, as the award was not supported by sufficient evidence.

I. Background

The evidence at trial tended to show as follows:

On 4 July 2016, Defendant and his friend ("Mr. T")[1] were outside of Mr. T's apartment complex. While outside, someone on a nearby apartment balcony yelled a racial slur at them and threw a beer bottle in their direction. Defendant and Mr. T went to the apartment door to confront the gentleman. However, when Defendant and Mr. T arrived at the apartment, that gentleman had fled.

Two other individuals, though, did answer the door when Defendant and Mr. T came knocking. It was these two individuals who would become the victims of the crimes for which Defendant was convicted.

In any event, Defendant, Mr. T, and the two individuals talked outside the apartment for approximately two and a half minutes. The two individuals attempted to calm down Defendant and Mr. T. But Defendant and Mr. T escalated the situation by threatening the two individuals with a gun and punching one of them in the face. As a struggle ensued, Defendant and Mr. T continued to beat them, forcing them down the hallway of the apartment and into the bedrooms, where Defendant and Mr.

[1] Mr. T was also charged as a result of this encounter; however, Mr. T is not a party to this appeal.

T robbed them. Specifically, Defendant and Mr. T took money, wallets, a football jersey, an Xbox, and other personal items.

Defendant was subsequently arrested and charged with various crimes based on his conduct on the night in question.

Defendant consented to a bench trial. At trial, Defendant moved to dismiss the charges against him. Defendant's motion was denied, and he was found guilty of kidnapping and other crimes. Defendant was further ordered to pay two hundred fifty dollars ($250) in restitution to the victims for the stolen goods. Defendant timely appealed to our Court.

II. Analysis

On appeal, Defendant argues that the kidnapping conviction must be vacated for various reasons. Additionally, Defendant argues that the restitution order is not supported by sufficient evidence. We address each argument in turn.

A. Kidnapping Conviction

Defendant argues that his kidnapping conviction should be vacated for three separate reasons.

First, Defendant contends that the evidence to support this conviction deviates from the indictment. While we review motions to dismiss *de novo*, *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016), an argument that the evidence varies from the indictment *must* be asserted in a motion to dismiss or it is waived. *See State*

v. Pickens, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review."); *see also State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195 (1995). As Defendant based his motion to dismiss in the trial court on the insufficiency of the evidence, and *not* on any variance between the evidence and the indictment, we do not address this argument. *State v. Hill*, 247 N.C. App. 342, 347, 785 S.E.2d 178, 182 (2015) ("If the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue."). Therefore, we do not address this contention on appeal.

Second, Defendant contends that the evidence was insufficient to support the kidnapping conviction.

Section 14-39 of our General Statutes provides that "[a]ny person who shall unlawfully confine, restrain, or remove from one place to another, any other person . . . without the[ir] consent[,] . . . 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)(2) (2016). One is "confined" when he is "imprison[ed] within a given area, such as a room, a house or a vehicle." *State v. Fulcher,* 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). And one is "removed" when he is forcibly moved some distance. *State v. Lowry,* 263 N.C. 536, 541, 139

S.E.2d 870, 874 (1965) ("It is the fact, not the distance of forcible removal of the victim that constitutes kidnapping."); *accord State v. Brayboy,* 105 N.C. App. 370, 375, 413 S.E.2d 590, 593 (1992) ("[R]emoval does not require movement for a substantial distance.").

Defendant contends that the evidence supports neither confinement nor removal, arguing that a mutual fight took place, naturally progressing down the hallway and into the bedroom, without any intentional movement or placement of the victim.

However, when ruling on a motion to dismiss, the trial court must "view the evidence in the light most favorable *to the State*, giving the State the benefit of every reasonable inference to be drawn from it." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988) (emphasis added).

And when the evidence is viewed in the light most favorable *to the State*, it could be inferred that Defendant forcibly moved the victims throughout the apartment during the attack. *Lowry,* 263 N.C. at 541, 139 S.E.2d at 874. More specifically, both victims testified that Defendant participated in repeatedly punching one of them, forcing him down the hallway to the bedroom, where he was subsequently robbed. Our Court has held that such movement, from one area of the victim's home to another, can constitute kidnapping. *See State v. Mangum*, 158 N.C. App 187, 195, 580 S.E.2d 750, 755-56 (2003); *see also State v. Blizzard*, 169 N.C. App.

285, 291, 610 S.E.2d 245, 250 (2005). As such, the trial court did not err in denying Defendant's motion to dismiss the kidnapping charge based on insufficiency of the evidence.

Third, Defendant urges that his kidnapping conviction should not be upheld because any such confinement or removal present was inherent within his commission of common law robbery, for which Defendant was also convicted, and thus creates a double jeopardy violation.

Our Supreme Court has held that "[t]o avoid constitutional violations related to double jeopardy, the confinement, restraint, or removal element [of a kidnapping charge] requires a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Stokes,* 367 N.C. 474, 481, 756 S.E.2d 32, 37 (2014) (internal citations omitted). Our Supreme Court has further held that a kidnapping conviction will not stand where any alleged removal is "a mere technical asportation," inherent in the commission of an attendant robbery. *State v. Ripley,* 360 N.C. 333, 338, 626 S.E.2d 289, 293 (2006). For instance, in *Ripley*, robbers forced hotel guests from the entryway of a hotel into the lobby and then robbed them. *Id.* at 334-335, 626 S.E.2d at 290. The Supreme Court found that the asportation of the victims into the lobby was insufficient to sustain a separate kidnapping conviction. *Id.* at 340-341, 626 S.E.2d at 294. Defendant draws parallels

from *Ripley* to his case, arguing that any such removal was only technical, inherent to the common law robbery itself, from which Defendant does not appeal.

However, this Court has also considered a similar question – whether a kidnapping charge was already inherent to a related robbery conviction. *See State v. Muhammad*, 146 N.C. App. 292, 294-96, 552 S.E.2d 236, 237-38 (2001) (affirming convictions of both common law robbery and kidnapping where the underlying "removal" of the victim by beating and holding him in a chokehold at gunpoint while forcing him to walk from the back of a restaurant to the front register was "sufficient evidence of restraint and removal separate and apart from that which is inherent in common law robbery"). And Defendant's actions are more like that of the defendant in *Muhammad* than in *Ripley*. Specifically, viewed in the light most favorable to the State, there is evidence that Defendant subjected the victim to greater danger and physical harm than was necessary to effectuate common law robbery. *Muhammad*, 146 N.C. App. at 295-96, 552 S.E.2d at 237-38. Thus, double jeopardy is not implicated in Defendant's conviction of both common law robbery and kidnapping.

B. Restitution Order

Defendant also takes issue with the order of restitution, arguing that the amount awarded was not supported by sufficient evidence. We agree.

It is well settled that "the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson,* 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995).

In the present case, no evidence was submitted to support the restitution order. While a restitution worksheet from Mr. T's case was submitted to the court after judgment had been entered, there was no testimony regarding the valuation of the stolen items, which were the subject of the restitution motion. As such, the restitution order was *not* supported. State *v. Blount,* 209 N.C. App. 340, 348, 703 S.E.2d 921, 927 (2011) ("A restitution worksheet, unsupported by testimony, documentation, or stipulation, is insufficient to support an order of restitution.") (internal citations omitted). We, therefore, vacate the restitution order and remand the matter for further proceedings. On remand, the trial court may, in its discretion, consider new evidence regarding the issue of restitution.

III. Conclusion

We conclude that the trial court did not err in its conviction of Defendant for kidnapping. However, we vacate the trial court's restitution order and remand the matter for reconsideration. On remand, the trial court may accept and review additional evidence regarding restitution.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).