IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-108

Filed: 20 August 2019

Mecklenburg County, No. 16 JB 410

IN THE MATTER OF: K.W.

Appeal by Juvenile from order entered 25 September 2018 by Judge Donald R. Cureton in Mecklenburg County Juvenile Court. Heard in the Court of Appeals 23 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Juvenile-Appellant.

COLLINS, Judge.

Juvenile appeals from a dispositional order entered upon an adjudication finding her delinquent for committing conspiracy to commit common law robbery, attempted common law robbery, and second-degree kidnapping. Juvenile contends that the court erred by (1) adjudicating her delinquent for committing second-degree kidnapping because there is not sufficient evidence of the elements of second-degree kidnapping beyond that inherent in the underlying offense of common law robbery and (2) failing to make sufficient findings of fact in its dispositional order. Because

we hold that there is not sufficient evidence of the confinement, restraint, or removal element of second-degree kidnapping beyond that inherent in common law robbery, we vacate the kidnapping adjudication and dispositional order and remand.

I. Background

The State's evidence generally tended to show the following: on 27 April 2018, Juvenile and three other juveniles approached Sonia Mendez, who was sitting alone in her vehicle waiting to pick up her son at a bus stop. Mendez believed the juveniles were requesting a ride. Mendez rolled down her window and told the juveniles that she could not help them because she was waiting for her son.

A few minutes later, the juveniles unlocked and opened the driver's-side door, grabbed Mendez by her hair and blouse, and pulled her out of the driver's seat. After Mendez was removed from the vehicle, all four juveniles climbed inside. Mendez then attempted to regain control of the vehicle. As Mendez "was fighting back, trying to get her keys[,]" the juveniles grappled with the parking brake, but could not figure out how to move the vehicle. When the car's alarm went off, the juveniles fled the scene, and were apprehended by police shortly thereafter. As a result of the confrontation, Mendez's shirt was torn, and she testified that her "hair was hurting" and her back hurt "like if [she] had been in an accident."

The State filed petitions alleging that Juvenile committed, *inter alia*, conspiracy to commit common law robbery, attempted common law robbery, and

second-degree kidnapping. Juvenile appeared in court for an adjudicatory hearing on the petitions on 25 September 2018. At the adjudicatory hearing, Juvenile testified on her own behalf and denied the State's allegations. Juvenile moved to dismiss all charges at the close of the State's evidence, and then again at the close of all evidence; the court denied both motions. The court ultimately adjudicated Juvenile delinquent for committing all three offenses.

The court then conducted a dispositional hearing. At the dispositional hearing, the court found that Juvenile had a low delinquency history. The second-degree kidnapping charge was the most serious offense before the court. Due to the violent nature of the kidnapping offense and serious nature of the other offenses, the court circled "Level 2 or 3" on the delinquency history worksheet. In its dispositional order, the court also checked a box indicating Juvenile's low delinquency history under the "Findings of Fact" section, and did not include any additional findings of fact. The court imposed a level-two disposition and ordered Juvenile to be placed on supervised probation for 12 months, subject to a number of conditions. Juvenile timely appealed from the dispositional order.

II. Discussion

Juvenile first argues that the court erred by adjudicating her delinquent upon finding that she committed second-degree kidnapping. She specifically argues that there is not sufficient evidence of the confinement, restraint, or removal element of

second-degree kidnapping beyond that inherent in the underlying offense of common law robbery.

A. Standard of Review

"We review a court's denial of a juvenile's motion to dismiss *de novo*." *In re K.C.*, 226 N.C. App. 452, 456, 742 S.E.2d 239, 242 (2013) (quotation marks, brackets, ellipsis, and citation omitted). Under *de novo* review, we "consider[] the matter anew and freely substitute[] [our] own judgment" for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

When a juvenile defendant moves to dismiss for insufficient evidence, the court "must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of the juvenile's being the perpetrator of such offense." *In re K.C.*, 226 N.C. App. at 456, 742 S.E.2d at 242 (quotation marks, brackets, and citation omitted). "Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *In re S.M.S.,* 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009) (quotation marks and citation omitted). The evidence is viewed "in the light most favorable to the State, which is entitled to every reasonable inference that may be drawn from the evidence." *In re R.D.L.*, 191 N.C. App. 526, 530, 664 S.E.2d 71, 73 (2008).

B. Preservation

As a threshold matter, we first address whether Juvenile has preserved for our review the issue of whether there is sufficient evidence to support her kidnapping adjudication.

Juvenile's notice of appeal specifically designated appeal from "the Court's disposition order entered on September 25, 2018." Although the notice of appeal did not specifically designate appeal from the adjudication order, "[g]enerally, when a juvenile appeals a final disposition order, [s]he also effectively appeals the underlying adjudication order." *In re A.J. M.-B.*, 212 N.C. App. 586, 588, 713 S.E.2d 104, 107 (2011) (citation omitted). Accordingly, Juvenile has properly appealed from the adjudication order.

The State asserts that Juvenile failed to challenge the sufficiency of the evidence as to the confinement, restraint, or removal element of kidnapping at the adjudication hearing, and that this argument is not preserved for appellate review. We disagree.

To preserve an issue for appeal, the party presenting the issue "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2018). "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is

made at trial." *Id.* at 10(a)(3). If a defendant's motion to dismiss is denied after the close of the State's evidence, in order to preserve an insufficiency of the evidence argument for appeal, a defendant must move to dismiss the action at the close of all evidence. *Id.*

A "general motion to dismiss" preserves arguments for appellate review, because it "requires the trial court to consider the sufficiency of the evidence on *all elements* of the challenged offenses[.]" *State v. Walker,* 252 N.C. App. 409, 412, 798 S.E.2d 529, 531 (2017) (emphasis added). Indeed, a general motion to dismiss can preserve "all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court." *State v. Glisson*, 251 N.C. App. 844, 847, 796 S.E.2d 124, 127 (2017).

Here, the hearing transcript reflects that (1) Juvenile made general motions to dismiss all of the charges for insufficient evidence at the close of the State's evidence and again at the close of all evidence, (2) although not required, Juvenile specifically argued the insufficiency of evidence of the confinement, restraint, or removal element of the kidnapping offense in making her motions, and (3) the court denied both motions.

We therefore conclude that the issue of whether there is sufficient evidence to support Juvenile's kidnapping adjudication was preserved and is properly before us.

C. Kidnapping Adjudication

Kidnapping is the unlawful confinement, restraint, or removal of a person without his consent for the purpose of, *inter alia*, "[f]acilitating the commission of any felony[.]" N.C. Gen. Stat. § 14-39(a)(2) (2018). "[T]he confinement, restraint or removal element requires a removal separate and apart from that which is an inherent, inevitable part of the commission of another felony[,]" in order to "avoid constitutional violations related to double jeopardy[.]" *State v. Stokes*, 367 N.C. 474, 481, 756 S.E.2d 32, 37 (2014) (internal quotation marks, brackets, and citation omitted).

When a defendant is charged with kidnapping in conjunction with another felony, both charges are appropriate if (1) "the victim was exposed to greater danger than that inherent in the commission of the underlying felony" facilitated by the kidnapping or (2) "the victim was subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.* (internal quotation marks and citation omitted). A victim is exposed to greater danger than that inherent in the commission of an underlying felony when a confinement, removal, or restraint "increase[s] the victim's helplessness and vulnerability beyond what was necessary" to complete the underlying felony. *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 370 (1998). The kind of danger and abuse the kidnapping statute was designed to prevent includes when victims are "bound or terrorized" or "physically injured[.]" *State v. Ripley*, 172 N.C. App. 453, 460, 617 S.E.2d 106, 111 (2005); *see also State v.*

Mann, 355 N.C. 294, 303, 560 S.E.2d 776, 782 (2002) (holding that beating and forcing the victim into a car trunk subjected the victim to the kind of danger and abuse the kidnapping statute was designed to prevent).

"Common law robbery is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear." *State v. Carter*, 186 N.C. App. 259, 262, 650 S.E.2d 650, 653 (2007) (quotation marks omitted).

Although by definition some violence is inherent in common law robbery, *id.*, unnecessary physical abuse or violence inflicted upon a robbery victim may suffice as "greater danger" sufficient to support a separate kidnapping conviction. For example, in *State v. Warren*, 122 N.C. App. 738, 471 S.E.2d 667 (1996), during the perpetration of a robbery, defendant (1) forced victims to move from the front to the rear of a store and (2) broke one victim's nose, inflicted a head injury that required the victim to get fourteen to twenty staples, and choked the victim with a chain until he was unconscious. *Id.* at 741, 471 S.E.2d at 669. This Court held that the victims were exposed to a greater danger than that inherent in the armed robbery and subjected to the kind of danger and abuse the kidnapping statute was designed to prevent, and upheld defendant's kidnapping convictions. *Id.* at 741-42, 471 S.E.2d at 669; *see also Beatty*, 347 N.C. at 559-60, 495 S.E.2d at 370 (upholding kidnapping conviction because the victim was exposed to greater danger where the victim's wrists were

bound and the victim was kicked in the back twice during the perpetration of a robbery); *but see State v. Cartwright*, 177 N.C. App. 531, 532-33, 537, 629 S.E.2d 318, 320, 323 (2006) (vacating kidnapping conviction because the victim was not exposed to greater danger when defendant attempted to choke and suffocate the victim during the perpetration of the underlying rape and robbery offenses).

The "mere technical asportation" of a victim during the perpetration of a felony, on the other hand, may be inherent in the underlying felony, and thus insufficient to support the confinement, restraint, or removal element of kidnapping. For example, in *State v. Ripley,* 172 N.C. App. 453, 617 S.E.2d 106 (2005), while brandishing guns, defendant forced some victims to lay on the ground and other victims to walk to various rooms in the hotel defendant sought to rob. *Id.* at 457-59, 617 S.E.2d at 110. This Court explained that "[n]o matter how reprehensible we find the actions of defendant and his agents, we cannot hold that the restraint exposed the victim to a greater danger than that inherent in the armed robbery itself." *Id.* at 458, 617 S.E.2d at 109-10 (quotation marks omitted). This Court held that the threatened use of a firearm on a robbery victim was inherent in armed robbery such that it could not support a separate kidnapping conviction, and reversed defendant's kidnapping convictions. *Id.* at 461, 617 S.E.2d at 111; *see also Cartwright*, 177 N.C. App. at 537, 629 S.E.2d at 323 (vacating kidnapping conviction holding that the

victim's movement was a "mere asportation" where she was threatened with a knife and forced to walk down the hallway during the perpetration of a robbery).

The State makes no argument that Mendez was confined, but argues that there is sufficient evidence that Juvenile removed Mendez from her vehicle and subsequently restrained her from re-entering the vehicle such that Juvenile's separate kidnapping adjudication should be upheld. A question for our consideration is thus whether Mendez's removal and restraint was inherent in the underlying attempted common law robbery.

In order to rob a driver of her vehicle, the perpetrator must remove the driver from the vehicle. There is sufficient evidence that Mendez was forced to move from her vehicle "by violence or . . . fear" in the attempted common law robbery of her vehicle, supporting Juvenile's robbery adjudications. *See Carter*, 186 N.C. App. at 262-63, 650 S.E.2d at 653 (noting that "the element of force in the offense of robbery . . . [includes force] sufficient to compel the victim to part with his property or property in his possession" (emphasis and citation omitted)).

But there is not sufficient evidence that Mendez's removal or subsequent restraint "exposed [her] to greater danger" than that inherent in the attempted common law robbery of her vehicle, or "subjected [her] to the kind of danger and abuse the kidnapping statute was designed to prevent." *Stokes*, 367 N.C. at 481, 756 S.E.2d at 37. Unlike in *Warren* or *Beatty*, where the victims were bound, choked, punched,

kicked, and otherwise unnecessarily harmed, Mendez's "helplessness and vulnerability" were not increased beyond what was necessary to complete the robbery. Mendez was removed from her car to initiate the attempted robbery, and the juveniles had not gained control of the vehicle at the time of Mendez's restraint, so the restraint was also part of the attempted robbery.

We thus find this case more analogous to *Ripley* and *Cartwright* than *Warren* or *Beatty*, and accordingly conclude that Mendez's removal from her vehicle and subsequent restraint amounted to a "mere technical asportation" that was inherent in the underlying attempted common law robbery. As a result, we hold that there is not sufficient evidence of the confinement, removal, or restraint element of kidnapping beyond what was inherent in the attempted common law robbery, and accordingly conclude that the court erred by finding that Juvenile committed second-degree kidnapping. We therefore vacate Juvenile's kidnapping adjudication and the resulting dispositional order.

Juvenile also argues that the court erred by failing to make sufficient findings of fact in its dispositional order. Because we remand the case for a new dispositional hearing, we need not address this argument. We note, however, that the court must include appropriate findings of fact in the new dispositional order, in accordance with N.C. Gen. Stat. § 7B-2512 (2018).

III. Conclusion

Because we conclude that there is not sufficient evidence to support a finding that Juvenile committed second-degree kidnapping, we vacate the kidnapping adjudication and dispositional order, and remand to the court for a new dispositional hearing without considering the kidnapping offense.

VACATED AND REMANDED.

Judges DIETZ and MURPHY concur.