NO. COA11-95
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 07 CRS 15169-15172
No. 07 CRS 15175

ANTHONY EARMOND MARCUS

Appeal by Defendant from judgments entered 19 April 2010 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy A. Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Michael E. Casterline, for Defendant.

BEASLEY, Judge.

Anthony Earmond Marcus (Defendant) appeals pursuant to N.C. Gen. Stat. § 15A-1442 from convictions of first-degree murder, attempted robbery with a dangerous weapon, robbery with a dangerous weapon, and three counts of attempted first-degree kidnapping. We find no error.

On 3 July 2004 at approximately 9:10 p.m., David Leslie (Leslie) was driving home to the Villager Hotel. When Leslie exited his car, he was approached by a man he did not know. The

man asked Leslie for a ride and when Leslie refused, the man pulled out a revolver and stuck it in Leslie's face. Leslie gave the man and his accomplice his keys and the two men drove off in Leslie's white Geo Metro.

Later that night, the two men, later identified as Defendant and Defendant's brother, Thomas, were involved in a car accident while driving Leslie's vehicle. Defendant, who was the driver, exited the vehicle after the collision and approached Olivia Sigmon's (Sigmon) vehicle. Sigmon's vehicle was at the intersection where the accident occurred, but her vehicle was not involved in the collision. As Defendant approached, Sigmon asked if Defendant and his brother needed assistance. Defendant responded by pulling out a gun from under his t-shirt and demanding that she get out of the car. Sigmon had three passengers in the car: her boyfriend, James Moss, was in the front passenger seat, and her eleven-year-old daughter and her daughter's ten-year-old friend both rode in the backseat. As Defendant yelled through the opened window at Sigmon to give him the car, he stuck the gun in between the seat and right against her back, near her left shoulder. Sigmon told Defendant, "[l]et me get my babies out," and as Sigmon tried to take off her seatbelt, Defendant shot her. After Defendant shot her, he continued to try to gain entry into the car. At this point, Moss took the steering wheel and pushed Sigmon's leg on

the pedal, accelerating the car through the intersection. Sigmon later died from her injuries.

On 12 March 2007, Defendant was indicted on one count of first-degree murder, one count of attempted robbery with a dangerous weapon, three counts of attempted first-degree kidnapping, and possession of a firearm by a felon. On 8 February 2010, the original indictment was superseded by an indictment charging one count of robbery with a dangerous weapon and one count of attempted robbery with a dangerous weapon. After a jury trial, Defendant was found guilty of first-degree murder, one count of attempted robbery with a firearm, one count of robbery with a firearm, and three counts of attempted kidnapping. Defendant was sentenced to life imprisonment without parole for the murder conviction and consecutive terms of imprisonment of 117 to 150 months, and three separate terms of 133 to 169 months. The trial court arrested judgment on the attempted armed robbery conviction. On 19 April 2010, judgment was entered and Defendant gave notice of appeal.

Defendant raises three issues on appeal. We address each in turn.

First, Defendant contends that he was denied his constitutional right to effective assistance of counsel when his defense attorney requested a jury instruction on voluntary intoxication as to the charge of first-degree murder with

premeditation, but failed to do so as to the felony murder charge. We disagree.

In order to determine whether Defendant was denied the effective assistance of counsel, our Court applies the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) and adopted in *State v. Braswell,* 312 N.C. 553, 324 S.E.2d 241 (1985):

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at __, 80 L. Ed. 2d at 693). Moreover, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the

court need not determine whether counsel's performance was actually deficient." *Id.* at 563, 324 S.E.2d at 249.

Defendant argues that trial counsel only requested a jury instruction on voluntary intoxication with respect to the first-degree murder charge because trial counsel was not aware that the voluntary intoxication defense applied to the felony murder charge. Regardless of whether or not trial counsel's act was a misapprehension of law, this omission was not prejudicial error where the trial court denied Defendant's request for the voluntary intoxication jury instruction as to the charge of first-degree murder under the theory of premeditation and deliberation.

At trial, defense counsel presented evidence in support of a jury charge of voluntary intoxication as to first-degree murder under the theory of premeditation and deliberation. The trial court found that defendant's evidence was not substantial, and therefore did not warrant a jury instruction of voluntary intoxication. Arguably, defense counsel would have requested the voluntary intoxication instruction, with respect to the felony murder charge based on the same evidence counsel presented to the court as to the charge of first-degree murder under a theory of premeditation and deliberation. The evidence presented in support of the voluntary intoxication instruction would be substantially similar, if not identical, regardless of

whether the charge was felony murder or first-degree murder with premeditation and deliberation. The trial court heard the evidence and denied Defendant's request to submit to a voluntary intoxication instruction to the jury. Defendant was not prejudiced where the trial court refused to submit the voluntary intoxication instruction to the jury due to lack of substantial evidence. Because there is no reasonable probability that trial counsel's request for a voluntary intoxication instruction for the felony murder charge would have been granted by the trial court or, even if granted, changed the outcome of the trial, we find no error.

Second, Defendant argues "[t]he trial court erred by denying defendant's motion to dismiss the attempted kidnapping charges at the close of evidence, because the State failed to prove that the restraint or removal of the victims went beyond that which was inherent in the offense of attempted armed robbery." We disagree.

We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith,* 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* "Evidence is substantial if it is relevant and adequate to

convince a reasonable mind to accept a conclusion." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Scott,* 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation omitted).

Defendant was convicted of three counts of attempted first-degree kidnapping. An attempt to commit an offense is defined as (1) "the intent to commit the substantive offense," and (2) "an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense." *State v. Smith,* 300 N.C. 71, 79, 265 S.E.2d 164, 169-70 (1980).

> The North Carolina General Statutes define kidnapping as the unlawful confinement, restraint, or removal from one place to another, of a person over the age of 16, without consent, if such confinement, restraint or removal is for the purpose of . . . [f]acilitating the commission of any felony . . . [or] [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed. . . .

State v. Lawrence, __ N.C. App. __, 706 S.E.2d 822, 828-29 (2011) (internal quotation marks omitted); N.C. Gen. Stat. § 14-39(a), (a)(2)-(3) (2009).

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so

> hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony. (emphasis added)

State v. Fulcher, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). The State concedes *sub judice* and we agree that the trial court erred by denying Defendant's motion to dismiss the charge of attempted first-degree kidnapping as to Sigmon. Because any restraint on Sigmon resulting from Defendant's efforts to take the vehicle and kill her was inherent in the offenses of attempted armed robbery and first degree murder, a charge of attempted kidnapping does not survive. We now address the additional two counts of attempted kidnapping.

Because the attempted restraint or removal of Moss and Sigmon's daughter was not an inherent and inevitable element of the robbery with a dangerous weapon offense, Defendant's convictions of attempted kidnapping do not constitute error. *See State v. Irwin*, 304 N.C. 93, 102-03, 282 S.E.2d 439, 446 (1981). It is well established that "[w]hether a defendant's restraint or removal of a person during the commission of an

armed robbery will support a separate conviction for kidnapping is guided by two factors: (1) whether the person was forcibly removed for any reason other than the commission of the robbery or (2) whether the restraint or removal exposed the person to a greater danger than was inherent in the other offense." *State v. Morgan*, 183 N.C. App. 160, 166, 645 S.E.2d 93, 99 (2007).

Here, the State presented evidence that Defendant ordered Sigmon to give him the Saturn and ordered her to get out of the car. When she said, "[l]et me get my babies out," Defendant shot her and tried to unlock the door. The State's evidence was sufficient to allow a jury to infer that Defendant intended to remove Sigmon, the driver, from the car and then drive off with Moss and Sigmon's daughter (as well as Sigmon's daughter's friend) still in the car. This scenario would have been consistent with a prior carjacking committed by Defendant, evidence of which was admitted under Rule 404(b).

Had Sigmon and Moss not been able to accelerate away from Defendant, the armed robbery would have been complete upon Defendant's seizing the car. Defendant's requiring Moss and Sigmon's daughter to remain in the car as he drove off would not have been a necessary part of the armed robbery. Defendant could have allowed them to leave the car prior to driving away (as Sigmon requested). *See State v. Burrell*, 165 N.C. App. 134, 140, 598 S.E.2d 246, 249-50 (2004) (holding that trial court

properly denied motion to dismiss kidnapping charge when defendants forced their way into victim's vehicle at gunpoint and drove off with victim in car because the robbery was "complete when defendants took control of [the victim's] vehicle at gun point and his property at the shopping mall"); *State v. Hill*, 139 N.C. App. 471, 483, 534 S.E.2d 606, 614 (2000) (finding sufficient evidence to support kidnapping charge separate from robbery when "defendant forced his way into, and took control of, [the victim's] car by threatening her with a pistol, completing the force necessary to commit the robbery").

In addition, had Defendant successfully driven off with Moss and Sigmon's daughter, they would have been subjected to greater danger than that inherent in the armed robbery of the Saturn. The danger of being driven at gunpoint by someone fleeing an accident scene to avoid being arrested for a prior armed robbery is greater than that inherent in being required at gunpoint to step out of a car. *See Burrell*, 165 N.C. App. at 140, 598 S.E.2d at 250 ("Furthermore, the evidence tends to show that [the victim] was subjected to a greater amount of danger during the two hours [driving] than that amount of danger inherent in the armed robbery itself."); *Hill*, 139 N.C. App. at 483, 534 S.E.2d at 614 ("By further restraining [the victim] in the car and driving her to an isolated park, he exposed her to greater danger than that inherent in the robbery.").

Pursuant to *Burrell* and *Hill*, because Defendant was attempting to remove and further restrain Moss and Sigmon's daughter after the completion of his robbery of the Saturn, the jury could reasonably find Defendant guilty of attempted first-degree kidnapping of Moss and Sigmon's daughter separate and apart from the restraint inherent in the armed robbery of the Saturn.

Finally, Defendant contends that the "trial court erred and abused its discretion in allowing the State to join the murder and kidnapping cases with the alleged robbery of David Leslie because (1) there was no transactional connection between those cases; and (2) joinder was prejudicial to the Defendant." We disagree.

N.C. Gen. Stat. § 15A-926(a) (2009) provides that "[t]wo or more offenses may be joined . . . for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." The court must apply a two-part test in order to determine whether joinder is proper. First, the court must make "a determination of whether the offenses have a transactional connection" and then "if there is such a connection, consideration then must be given as to whether the accused can receive a fair hearing on more than one charge at the same

trial." *State v. Perry*, 142 N.C. App. 177, 180–81, 541 S.E.2d 746, 748 (2001) (internal quotation marks and citations omitted). We consider the following factors to determine whether the transactions are connected: "(1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *Id.* at 181, 541 S.E.2d at 749. Here, both incidents occurred on the same day within about an hour of each other. Both incidents involved armed robbery of vehicles. Moreover, Defendant's theft of Leslie's vehicle and subsequent accident in Leslie's vehicle led to Defendant's attempt to steal Sigmon's car. Based on the foregoing, a transactional connection existed and Defendant's argument is without merit.

Next, Defendant contends that joinder prejudiced him because it strengthened the State's case as to the robbery of Leslie. Defendant asserts that the State's evidence was weak because Defendant presented his own taped statement which alleged that Leslie allowed Defendant to borrow his car in exchange for crack cocaine. This argument is meritless where the State presented substantial evidence of the armed robbery of Leslie. Moreover, in his brief, Defendant misconstrues the applicable standard when he states, "[a]bsent the highly prejudicial evidence about the murder, it's unlikely that a jury

would have evaluated that charge the same way." Defendant's argument is without merit.

No Error.

Judges BRYANT and GEER concur.

Report per Rule 30(e).