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NO. COA11-638
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.	New Hanover County
	Nos. 10 CRS 57913
JAMES EMMANUEL NETTLES,	10 CRS 58745
Defendant.	10 CRS 10172

Appeal by defendant from judgments entered 10 March 2011 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 November 2011.

Roy Cooper, Attorney General, by Phillip K. Woods, Assistant Attorney General, for the State.

Thomas R. Sallenger, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in three bills of indictment returned by the New Hanover County Grand Jury with the common law robbery and first-degree kidnapping of Shawn Lopez, the robbery with a dangerous weapon and second-degree kidnapping of Charles Hall, and attaining the status of an habitual felon. He appeals from judgments entered on jury verdicts finding him guilty of the

common law robbery and first-degree kidnapping of Lopez, the robbery with a dangerous weapon and second-degree kidnapping of Hall, and his admission to having attained the status of an habitual felon.

At trial, the State's evidence tended to show the following. Between 1:30 and 1:45 a.m. on 25 July 2010, after visiting several Wilmington bars, Shawn Lopez lit a cigarette and walked toward his vehicle, parked in a nearby parking deck. As he walked, a woman approached, asked him for a cigarette, and said her name was Lisa. Lisa asked Lopez to walk her to her car. Lisa also asked Lopez if she could borrow his cell phone to call her friends, who, she explained, had left her.

As the two approached Lisa's vehicle, a Nissan Altima, Lopez saw a man he later identified as defendant in the front passenger seat. Lisa denied knowing defendant and yelled at him. Defendant, claiming he was "really drunk," got out of the car, left the passenger door open, and walked off. Lisa asked Lopez to help her check to see if anything had been stolen from the Altima. Lopez then sat on the edge of the passenger seat with the door open and one leg outside the door, and helped her look. At that time, Lopez noticed defendant coming toward the Altima. Lopez tried to move toward the door, but defendant

shoved the door closed on him, got into the backseat, and told Lisa to drive. Lopez asked to be let out of the car, but defendant told Lisa to continue driving. The car was stopped at Church Street. Defendant got out of the car and then reached through the front passenger window and punched Lopez three to five times, causing Lopez's eyeglasses to come off. Defendant then pulled Lopez out of the car, punched him five to seven more times, went through Lopez's pockets, taking Lopez's wallet and keys, and then got back in the car as it drove away.

Early the next morning, 26 July 2010, while Charles Hall's truck was stopped at a Rose's shopping center in New Hanover County so he could complete paperwork for his trucking route, a woman approached the driver's side of his truck. Hall testified that he assumed she was a "lot lizard" and was soliciting him for sex. The woman asked him for a cigarette, told him her car had been towed, and asked him for money so that she could get home. According to Hall, at that time, the passenger side door of his truck was opened and a man he identified at trial as defendant jumped in, asked if Hall was "trying to f--- his girl," and then "snatched [Hall] out of [his] seat, and proceeded beating on [him]." After defendant was in the truck, the woman also got in the truck. Hall testified that defendant

found a screwdriver in the truck, which he held close to Hall's neck, and forced Hall to take him to an ATM machine. Hall testified that, at some point, defendant and the woman got his wallet and took approximately \$40. Hall testified that "[t]he girl said if I gave [the debit card] to [defendant] that [defendant] would leave me alone and let me go." After reaching the ATM machine and finding no money in the account, the two headed back to the truck.

When they reached the truck, Hall got a piece of pipe from the truck's side compartment, "drew [the pipe] back to defend [him]self, and told [the woman and defendant] to get out of [his] truck." Hall testified that defendant ran toward him, knocked him down, and grabbed the piece of pipe. Hall testified that defendant "pretty much kind of grabbed me, put me in the truck and made me take him back down to the shopping center." The woman held the pipe. Eventually the woman and defendant left his truck, and Hall testified that "[a]pparently [his] phone had been stolen, because [he] did not have [his] phone at the time."

Defendant brings forward the following issues on appeal:

- (1) whether the trial court erred by denying his request to

submit an instruction on false imprisonment to the jury, and (2) whether the trial court erred by denying his motion to dismiss the charges of common law robbery, first-degree kidnapping, robbery with a dangerous weapon, and second-degree kidnapping. For the following reasons, we find no error.

I.

Defendant argues the trial court committed reversible error when it denied his request to submit the charge of misdemeanor false imprisonment to the jury as a lesser included offense of the first-degree kidnapping of Lopez and the second-degree kidnapping of Hall. We disagree.

"The crime of false imprisonment is a lesser included offense of kidnapping." *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). "When any evidence presented at trial would permit the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding that lesser included offense." *Id.* "Failure to so instruct the jury constitutes reversible error not cured by a verdict of guilty of the offense charged." *Id.* "'So, whether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment depends upon whether the act was committed to accomplish one of the purposes enumerated in

our kidnapping statute.'" *Id.* (quoting *State v. Lang*, 58 N.C. App. 117, 118-19, 293 S.E.2d 255, 256, *disc. review denied*, 306 N.C. 747, 295 S.E.2d 761 (1982)).

Defendant's indictment for the first-degree kidnapping of Lopez alleges he kidnapped Lopez for the purpose of facilitating the commission of a felony, common law robbery, and for facilitating the flight of defendant and Lisa following the commission of a felony, common law robbery. Defendant's indictment for the second-degree kidnapping of Hall alleges he kidnapped Hall for the purpose of facilitating the commission of a felony, robbery with a dangerous weapon. Therefore, in this case, "[t]he crux of this [issue] . . . concerns whether there was evidence from which the jury could have concluded that . . . defendant, although restraining, confining and removing the victim[s], [did so] for some purpose other than . . . to commit [robbery]." See *id.* at 520-21, 342 S.E.2d at 518 (fourth alteration and third omission in original) (internal quotation marks omitted).

Defendant points to portions of a statement he made to Detective Swenson, read into evidence during the State's direct examination of the detective, as evidence from which the jury could have found that he restrained, confined, and removed Lopez

"for some purpose other than to commit robbery." These statements are to the effect that defendant did not want Lopez in the Altima, had hit Lopez once because Lopez would not get out of the Altima, and had not robbed anyone. In sum, according to defendant, after Lopez got in the Altima "on his own will forcibly," defendant "got his a-- up out of there forcibly." This evidence does not tend to show that defendant restrained, confined, and removed Lopez for some purpose other than to commit robbery or to facilitate his and Lisa's flight following the commission of robbery. See *id.* Defendant's statements simply deny that he committed robbery or false imprisonment.

As to Hall, defendant contends his statements to Detective Swenson to the effect that "no robbery with a dangerous weapon had occurred and that what did take place . . . was that . . . Hall and the [d]efendant's girlfriend had each been caught in a compromising situation by the [d]efendant wherein . . . Hall gave the [d]efendant's girlfriend . . . [money]" support an instruction on false imprisonment. However, again, these statements do not support a reasonable inference that defendant restrained, confined, and removed the victim for some purpose other than robbery, see *id.*; defendant simply denies that he

committed robbery or false imprisonment. Defendant's arguments on this issue are overruled.

II.

Defendant next contends the trial court erred by denying his motions to dismiss the charges of common law robbery of Lopez, first-degree kidnapping of Lopez, robbery with a dangerous weapon of Hall, and second-degree kidnapping of Hall. We disagree.

"In ruling upon a defendant's motion to dismiss in a criminal trial, 'the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.'" *State v. Williams*, 201 N.C. App. 161, 168, 689 S.E.2d 412, 415 (2009) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is defined as 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt,' the motion should be denied." *Id.* at 168, 689 S.E.2d at 415-16 (alteration in original) (quoting *State v. Miller*, 363

N.C. 96, 99, 678 S.E.2d 592, 594 (2009)). "In addition, '[t]he reviewing court considers all evidence in the light most favorable to the State.'" *Id.* at 168-69, 689 S.E.2d at 416 (alteration in original) (quoting *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005)). "[A]ny contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.'" *Id.* at 169, 689 S.E.2d at 416 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). "[T]he credibility of a witness's testimony and the weight to be given that testimony is a matter for the jury, not for the court, to decide." *State v. Jackson*, 161 N.C. App. 118, 122, 588 S.E.2d 11, 14 (2003).

Defendant first contends there was insufficient evidence of the common law robbery of Lopez. "'Robbery at common law 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.'" *Williams*, 201 N.C. at 169, 689 S.E.2d at 416 (quoting *State v. Black*, 286 N.C. 191, 193, 209 S.E.2d 458, 460 (1974)). Defendant points out that there were inconsistencies between Lopez's testimony and defendant's statement to Officer Swenson. However, any discrepancy in the

evidence was for the jury to resolve. See *id.* Defendant also attempts to argue that "[t]here was no evidence that money was ever 'forcefully' taken." This suggestion is without merit. Lopez testified that defendant pulled him out of the Altima, punched him five to seven times, and took Lopez's cell phone, keys, and wallet. Lopez testified that he "could feel [defendant] reaching through [his] pockets" and that defendant "rolled [him] over and grabbed [his] wallet." Finally, without citation to relevant authority, defendant also suggests that without "scientific proof," the evidence supported only a suspicion that defendant was the perpetrator of the robbery. There is no merit to defendant's suggestion. Lopez was face-to-face with defendant during the incident, later identified him from a lineup with ninety percent certainty, and positively identified him at trial. Defendant's arguments on this issue are overruled.

Defendant also contends there was insufficient evidence of the first-degree kidnapping of Lopez, in sum, because defendant's testimony differed from Lopez's. Defendant misapprehends the scope of appellate review; because "discrepancies in the evidence are for the jury to resolve," see

id., any inconsistency between defendant's statement and Lopez's testimony was not a ground for dismissal in this case.

Next, defendant contends there was insufficient evidence of the robbery with a dangerous weapon of Hall. "[T]he essential elements of robbery with a dangerous weapon are: '(1) the unlawful taking or attempted taking of personal property from another, (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means, and (3) danger or threat to the life of the victim.'" *State v. Allred*, 131 N.C. App. 11, 19, 505 S.E.2d 153, 158 (1998) (quoting *State v. Donnell*, 117 N.C. App. 184, 188, 450 S.E.2d 533, 536 (1994)). Defendant contends there was insufficient evidence that a dangerous weapon was used, pointing to evidence indicating Hall's testimony was not credible, including testimony that Hall initially told the 911 operator that he was grabbed around the neck, and only mentioned the screwdriver in response to the operator asking him whether defendant had any weapons, or "just used his fists to hit [Hall;]" that Officer Smith's original report neglects to mention a screwdriver; and that a screwdriver was never found. Defendant again misapprehends the scope of appellate review. Hall testified that defendant found a screwdriver in the truck, held it to his neck, forced Hall to

take him to an ATM machine, and took approximately \$40 from his wallet. Any discrepancy in the evidence was for the jury to resolve. This issue is overruled.

Finally, defendant contends there was insufficient evidence of the second-degree kidnapping of Hall, again pointing to inconsistencies between the victim's and defendant's account of the event in question. This is not a ground for dismissal. This issue is overruled.

No error.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).