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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-979

Filed: 31 December 2020

Beaufort County Nos. 18 CRS 051043-46

STATE OF NORTH CAROLINA

v.

KENNETH RAY WOOLARD, Defendant.

Appeal by Defendant from judgments entered 17 April 2019 by Judge Cy A. Grant, Sr. in Beaufort County Superior Court. Heard in the Court of Appeals 12 August 2020.

*Attorney General Joshua H. Stein, by Assistant Attorneys General Ellen Newby and Chris Agosto Carreiro, for the State.*

*Dylan J.C. Buffum, for defendant-appellant.*

MURPHY, Judge.

An indictment is sufficient when it includes the essential elements required to notify the defendant of the crime in question. Here, the kidnapping indictment was sufficient because it contained the essential elements and apprised Defendant of the

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crime in question by providing the name of the victim, a lack of consent, a theory of the crime, and the purpose for the kidnapping.

A trial court commits plain error when it instructs the jury on a theory of a crime not alleged in the indictment. Here, the trial court committed plain error by instructing the jury on a theory of removal when the indictment alleged a theory of confinement. Given the conflicting evidence on the element of confinement, this instructional error prejudiced Defendant.

A trial court does not commit error in denying a motion to dismiss when there is sufficient evidence to support submitting the charge to the jury. Here, the trial court did not err in denying Defendant's motion to dismiss as there was sufficient evidence of fraud to support submitting the felonious restraint charge to the jury.

However, the trial court commits error when there is insufficient evidence provided at trial to support an order of restitution. Here, the trial court erred by ordering restitution when there was no evidence presented during trial or at sentencing to support the order. Additionally, the trial court commits error when it imposes costs on multiple judgments which were part of a single criminal trial. Here, the trial court erred when it imposed costs on each judgment adjudicated in the same case against Defendant.

**BACKGROUND**

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*Opinion of the Court*

On 2 March 2018, Rose<sup>1</sup> and her roommate, Bonnie, decided to go out for a night of drinking. They began the night between 6:30 and 7:00 p.m. by meeting Bonnie's boyfriend, Henri, at his mother Danielle's home. Danielle and her boyfriend, Victor, were present at the home and ate and drank with Rose, Bonnie and Henri. Rose consumed five shots of Southern Comfort along with a mixed liquor drink, and felt "pretty buzzed." Between 10:00 and 11:00 p.m., the group made the decision to go out to "The Rebel," a bar in Washington. While at the bar, Rose was introduced to Defendant Kenneth Ray Woolard.

Shortly after arriving, Rose became sick on the dance floor and Bonnie accompanied her to the bathroom. Rose "was feeling so nauseated [she] couldn't stand . . . [and] slid down the wall in the . . . bathroom." Bonnie believed "[Rose] was heavily intoxicated . . . way past where she was when she left the house[]" so she helped Rose stand up and guided her out to Danielle's car with the assistance of Henri. After helping Rose into Danielle's car, Henri and Bonnie headed back into The Rebel and noticed Defendant was standing in the parking lot next to his car a short distance away. Once Rose was in Danielle's car, she "[g]ot in the backseat, fell over, and . . . went to sleep for maybe [] a minute." She was awoken by a tapping on the car window, and saw "[c]learly through the window, it was [Defendant]." After

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<sup>1</sup> Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the victim and for ease of reading.

waking up, Rose vomited in Danielle's car and proceeded to unlock the car doors and Defendant opened the door from the outside.

During this time, Danielle and Victor left the bar to check on Rose and found Defendant leaning against Danielle's car talking to Rose. Danielle and Victor observed vomit on the backseat of the car. Leaving Rose in Danielle's car, Danielle and Victor headed back into The Rebel to get Bonnie and Henri to leave. As they headed toward The Rebel, they noticed Defendant walking away from Danielle's car. Thereafter, Rose exited Danielle's car stumbling and unable to keep her balance, and Defendant assisted Rose to his car.

While Defendant was driving, Rose was in the passenger seat "leaning over the side, trying to just get [her] bearings because [she] knew [she] was still kind of out of it . . . [she] didn't know where [she] was going." "[Defendant] took his right hand and started rubbing [Rose's] left leg . . . [then] [h]e moved up to [Rose's] left breast and started playing with it too." "[A]t some point, it stopped, and that's when [Rose] noticed that [they] arrived at [Defendant's] house."

After arriving at Defendant's house, Rose went inside to use the bathroom. While Rose used the toilet, "[Defendant] entered [] the bathroom and he started caressing [Rose's] face." Defendant then forced his penis into her mouth with "[o]ne [hand] [] at the back of [Rose's] head and one [] holding [her] face still." Rose "used [her] arm to [] push him away[,] and subsequently fell off the toilet seat. Defendant

lifted Rose up off the bathroom floor and guided her to his bedroom where Rose had a feeling “[Defendant] wanted to have sex with [her].” Her response was to “[d]rop dead to the floor . . . [as an] immediate defense mechanism[.]” Again, Defendant lifted Rose off the floor and pushed her onto his bed. Defendant forced his penis inside Rose and refused to stop, even after Rose said “no” multiple times. Rose “knew [she] couldn’t fight back[]” so she passed out on Defendant’s bed.

While Rose was at Defendant’s house, Bonnie, Henri, Danielle, and Victor were still at The Rebel. Henri went outside to check on Rose and noticed she was no longer in Danielle’s car and Defendant’s car was missing. Bonnie tried calling Rose but was unable to contact her and found her phone in Danielle’s car. After trying to locate Rose, Danielle and Victor found Defendant’s address, drove to his home, and discovered Rose passed out on Defendant’s bed without any clothes on.

Danielle and Victor helped Rose into Danielle’s car and drove back to The Rebel to pick up Henri and Bonnie. Shortly after, Rose contacted her parents and told them what happened. Rose’s mom then took her to the hospital where a sexual assault exam and rape kit were conducted.

Several days after the rape kit was conducted, police went to Defendant’s residence to question him and collect a sample of his DNA. After Defendant was questioned by police, he made and signed a statement regarding his recollection of the events. In his statement, Defendant stated while talking to Rose at Danielle’s

car “[Rose] said she needed to go to Greenville. I told [Rose] I was going to Greenville and would take her. She then got out of the vehicle on her own and got right in my vehicle without any trouble.”

Defendant was indicted on charges of felonious restraint, first-degree kidnapping, second-degree rape and two counts of second-degree sexual offense. Defendant was found guilty of all charges with the kidnapping charge being reduced to second-degree kidnapping. The trial court entered judgment on each count. The trial court sentenced Defendant to active terms of 50 to 72 months for the kidnapping and 33 to 49 months for the felonious restraint, which were to run concurrently with the second-degree rape sentence. Defendant was also sentenced to three consecutive terms of 146 to 236 months for each count of second-degree sexual offense and the second-degree rape charge. No evidence was presented at trial or sentencing regarding Rose’s medical services. Despite the issue of restitution not being discussed prior to the trial court’s judgment, costs and restitution were imposed by the trial court.

Defendant appeals only his convictions of second-degree kidnapping and felonious restraint arguing seven issues on appeal: the kidnapping indictment was fatally flawed because it alleged two different theories of kidnapping; the trial court erred by denying Defendant’s motion to dismiss for insufficient evidence of fraud or force on the kidnapping charge; if the indictment was sufficient, it was plain error for

the trial court to instruct the jury on a kidnapping theory not alleged in the indictment; the trial court erred by denying Defendant's motion to dismiss for insufficient evidence of fraud or force on the felonious restraint charge; assuming there was sufficient evidence of fraud or force, the trial court erred in entering judgment on both the kidnapping and felonious restraint charges and violated Defendant's right to be free from double jeopardy; there was insufficient evidence to support the trial court's order of restitution; and the trial court erred in imposing duplicative costs.

## **ANALYSIS**

### **A. Kidnapping**

#### **1. Sufficiency of the First-Degree Kidnapping Indictment**

Defendant argues the kidnapping indictment here was fatally flawed because it alleged a hybrid of two theories, removal and confinement. Specifically, Defendant argues the phrase "unlawfully confining her from one place to another[]" is not a mere grammatical error, but rather fatally flawed language because the ambiguity makes it unclear what Defendant is being charged with. We disagree. The indictment here included the essential elements of a theory of kidnapping, putting Defendant on notice of the charges against him. The additional language beyond the essential elements of one theory was merely surplusage.

“[W]e review the sufficiency of an indictment *de novo*.” *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). “[D]e novo’ means fresh or anew; for a second time[.]” *State v. Watkins*, 246 N.C. App. 725, 730, 783 S.E.2d 279, 283 (2016) (quoting *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)). “An attack on an indictment is waived when its validity is not challenged in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). “However, where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *Id.*

**a. Notice to Defendant**

N.C.G.S. § 15A-924(a)(5) specifies what must be contained in an indictment to be valid and provides, in relevant part:

A criminal pleading must contain . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant’s commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2019). “As a [p]rerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge.” *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011) (quoting *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)). “[A]n indictment is not

facially invalid as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy.” *McKoy*, 196 N.C. App. at 656, 675 S.E.2d at 411 (quoting *State v. Haddock*, 191 N.C. App. 474, 476-77, 664 S.E.2d 339, 342 (2008)). “Our courts have recognized that while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.” *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006).

Defendant challenges the validity of the kidnapping indictment here and argues the language in the indictment fails to provide clarity on what specific conduct was alleged to be the criminal kidnapping. Our kidnapping statute provides:

(a) Any person who shall unlawfully *confine, restrain, or remove* from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such *confinement, restraint or removal* is for the purpose of:

...

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

...

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class

C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C.G.S. § 14-39 (2019) (emphasis added). “[A]n indictment charging first-degree kidnapping *must* include information regarding the factual basis under which the State intends to proceed . . .” *State v. Brown*, 312 N.C. 237, 248-49, 321 S.E.2d 856, 863 (1984) (internal quotation marks omitted). According to N.C.G.S. § 14-39, the indictment must include either a theory of confinement, restraint, or removal. The kidnapping indictment here alleged:

[D]efendant named above unlawfully, willfully and feloniously did kidnap [Rose], a person who had attained the age of 16 years by *unlawfully confining her from one place to another*, without the consent of the victim, and for the purpose of facilitating the commission of a felony, kidnapping and rape. [Rose] was not released by [Defendant] in a safe place.

(Emphasis added).

This indictment provides the alleged theory and essential element required under *Brown* to be confining. Additionally, Defendant was sufficiently put on notice of the charges since the indictment provided the name of the victim, a lack of consent, and the purpose for which the kidnapping occurred. The indictment here is not fatally flawed because when viewed as a whole “it substantially follows the language of [the statute] and its essential elements, and apprised Defendant of the crime in question.” *State v. Hill*, 262 N.C. App. 113, 116, 821 S.E.2d 631, 633-634 (2018).

**b. Surplusage**

When an indictment includes the essential elements of a crime being charged, those “[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.” *State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 7 (1989) (citing *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972)). While “an indictment may be couched in ungrammatical language, this will not, of itself, render the indictment insufficient, provided the intention and meaning of the pleader is clearly apparent[.]” *State v. Harris*, 219 N.C. App. 590, 594, 724 S.E.2d 633, 637 (2012) (citations omitted).

Here, the indictment provides the alleged theory of kidnapping to be confinement with the additional language “from one place to another[.]” As the indictment provides Defendant notice by stating the essential element of confinement, the additional language is not an essential element and can be disregarded as mere surplusage. While this additional language may be ungrammatical, the phrase “from one place to another” is likely the result of a drafting or clerical error given that it follows the language provided in N.C.G.S. § 14-39. Moreover, even with this additional language, the theory of kidnapping by confinement is still apparent within the indictment.

Here, the indictment included the essential elements required under N.C.G.S. § 14-39 by alleging a proper theory of kidnapping which put Defendant on notice of

the charges against him. Therefore, the indictment is not fatally flawed. Further, the additional language, “from one place to another,” that went beyond the essential elements of the offense was mere surplusage and does not render the indictment invalid.

## **2. Motion to Dismiss**

Defendant argues the trial court erred in denying his motion to dismiss the first-degree kidnapping charge as there was insufficient evidence of removal by fraud or force to support submitting the charge to the jury. Given our holding the removal language provided in the first-degree kidnapping indictment was mere surplusage, this issue is moot, and we need not reach it on appeal.

## **3. Jury Instructions**

Defendant argues that if the indictment was sufficient, then it was plain error for the trial court to instruct the jury on a removal theory of kidnapping rather than the confinement theory alleged in the indictment. Defendant acknowledges he did not object to the instructions at trial and we review this issue for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (“Unpreserved error in criminal cases . . . is reviewed only for plain error.”). Under the plain error standard of review, “a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error ‘had a probable

impact on the jury's finding that the defendant was guilty.” *Id.* at 518, 723 S.E.2d at 334 (internal citation omitted).

“It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.” *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420-421 (1986) (quoting *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)). In *State v. Tucker*, the indictment alleged the theory of kidnapping was “removing her from one place to another . . . .” *Id.* at N.C. 537, 346 S.E.2d at 420 (emphasis omitted). The trial court, however, put forth the instruction “that the defendant unlawfully *restrained* [the victim], that is, restricted [her] freedom of movement by force and threat of force.” *Id.* At trial, the victim testified the defendant refused to let her leave his vehicle, threatened her, and sexually assaulted her multiple times while the defendant testified the sexual acts were consensual. *Id.* at 534, 346 S.E.2d at 418-19. Holding this instructional error amounted to plain error, our Supreme Court stated “[i]n light of the highly conflicting evidence in the instant kidnapping case on the unlawful removal and restraint issues, we think the instructional error might have . . . caused the jury to reach its verdict convicting the defendant.” *Id.* at 540, 346 S.E.2d at 422 (internal quotation marks omitted).

In *State v. Brown*, our Supreme Court held the trial court committed plain error where one of the theories submitted to the jury was supported by neither the

evidence nor the indictment. *Brown*, 312 N.C. at 249, 321 S.E.2d at 863. There, the indictment alleged “[the] defendant confined the victim for the purpose of facilitating commission of a felony . . . and the basis for first-degree kidnapping . . . was that [the] defendant did not release the victim in a safe place.” *Id.* at 247, 321 S.E.2d at 862. The trial court, however, instructed the jury regarding whether the defendant “‘removed, restrained and confined’ the victim ‘for the purpose of terrorizing’ her” and the basis for first-degree kidnapping was the defendant “‘sexually assaulted’ the victim[.]” *Id.* On appeal, our Supreme Court was “especially concerned by the ‘terrorism’ instruction, for the State presented absolutely no evidence . . . that [the] defendant kidnapped [the victim] for the purpose of terrorizing her.” *Id.* at 249, 321 S.E.2d at 863. The Court held

the judge’s instructions permitted the jury in this case to predicate guilt on theories of the crime which were not charged in the bill of indictment and which were, in one instance, not supported by the evidence at trial. We therefore hold that under the factual circumstances of this case, there was “plain error” in the jury instructions . . . .

*Id.*

Conversely, in *State v. Lucas*, our Supreme Court found no plain error where the trial court failed to instruct on the theory of confinement as alleged in the indictment but rather instructed the jury on the theory of removal. *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001) *rev’d in part on other grounds*, *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005). Our Supreme Court distinguished *Tucker*

because “the evidence of confinement, restraint and removal was compelling[.]” *Lucas*, 353 N.C. at 588, 548 S.E.2d at 726. This “compelling” evidence included the defendant’s testimony he armed himself with a shotgun and accompanied his friend to the victim’s home where his friend forced the victim into a car at gunpoint and the defendant drove the car to a hotel. *Id.* at 582, 548 S.E.2d at 722; *see also State v. Clinding*, 92 N.C. App. 555, 562-63, 374 S.E.2d 891, 895 (1989) (holding no plain error “[b]ecause the evidence of [the] defendant’s guilt in this case is overwhelming,” including “the testimonies of five eyewitnesses, and a confession by the defendant explaining his involvement in the crimes . . .”).

We also note *State v. Harding*, where we held a variance between the indicted language and the jury instruction did not amount to plain error. *State v. Harding*, 258 N.C. App. 306, 314, 813 S.E.2d 254, 261, *writ denied, review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018). The first-degree kidnapping indictment provided the element of “sexual assault[.]” while the jury instruction provided “it could find [the] defendant guilty if it found ‘the [victim] was not released by the defendant in a safe place and/or had been sexually assaulted and/or had been seriously injured.’” *Harding*, 258 N.C. App. at 313, 813 S.E.2d at 260 (alternation in original). After being instructed on the additional elements, the jury was given a special verdict sheet that separately listed all three elements. *Id.* On the special verdict sheet, “the jury indicated it found [the] defendant guilty of first-degree kidnapping based on each

individual . . . element.” *Id.* We held the variance did not amount to plain error because “[t]he State presented compelling evidence to support the . . . element of not released in a safe place, and the jury separately found [the] defendant guilty of first-degree kidnapping based on all three . . . elements.” *Id.*

The kidnapping indictment here provided the theory of the crime as confinement; however, the jury was instructed on removal. The trial court instructed the jury regarding the kidnapping charge as follows:

[T]he State must prove five things beyond a reasonable doubt: First, that [Defendant] unlawfully *removed a person from one place to another*. Second, that the person did not consent to this *removal*. Consent obtained or induced by fraud or fear is not consent. Third, that [Defendant] *removed* that person for the purpose of facilitating [Defendant’s] commission of a second-degree rape. I have heretofore defined for you the crime of second-degree rape. Fourth, that this *removal* was a separate, complete act, independent of and apart from the second-degree rape. And fifth, that the person had been sexually assaulted.

(Emphasis added). Here, the variance between the indictment and jury instruction constitutes error as it allowed the jury to convict on grounds other than those charged in the indictment. The trial court’s instruction amounts to plain error as it is probable the jury would have reached a different result if the trial court properly instructed on confinement rather than removal.

The State argues Defendant confined Rose by refusing to let her leave the bathroom by grabbing her face and forcing his penis in her mouth.<sup>2</sup> However, given the conflict between Rose's testimony and Defendant's statement to police put into evidence by the State, we hold this variance had a probable impact on the jury's finding of guilt.

Rose testified while she was in the bathroom

[o]ne [hand] was at the back of [her] head and one was holding [her] face still. . . . [She] had used [her] arm to [] push him away as [she] was trying to figure out if [she] was going to actually throw up because of the gagging. . . . [A]fter leaning over, [she] lost [her] balance and like sort of like started falling off the toilet seat. And then that's when [Defendant] lifted [her] up to say -- [h]ey, come lay down in the bed. . . . He guided [her] . . . by showing [her] where the bedroom was[.]

In addition to Rose's testimony, the State offered Defendant's statement to police where he said

[w]hen we got to the house, she walked into the house behind me once I unlocked the door. She immediately said she needed to use the bathroom. I showed her where it was. While using the bathroom, she never closed the door. While she used the bathroom, I stood in the hallway waiting. When she started throwing up, I carried my dog out to keep the dog from getting in the vomit. When I came

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<sup>2</sup> We note the State's brief and argument focuses on Defendant confining Rose within the bathroom rather than confinement on Defendant's bed. Additionally, "[t]o avoid constitutional violations related to double jeopardy, the confinement, restraint, or removal element 'require[s] 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) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)). Given the proximity between the rape and alleged confinement on the bed, we focus our analysis on whether there was confinement within the bathroom.

back in, she was in my bed buck naked. She had also passed out about five or ten minutes -- I'm sorry. Let me start over. She had also passed out.

Here, like *Tucker*, there is conflicting evidence regarding whether Defendant confined Rose within the bathroom. *See Tucker*, 317 N.C. at 540, 346 S.E.2d at 422. Additionally, unlike in *Harding*, the jury did not find anywhere within the verdict Defendant confined the victim in the bathroom. *See Harding*, 258 N.C. App. at 313, 813 S.E.2d at 260. As the entirety of the Record discloses the jury did not find beyond a reasonable doubt Rose was confined by Defendant and the evidence surrounding this element is in conflict, the trial court's failure to instruct on confinement "had a probable impact on the jury's finding that [Defendant] was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

We hold the trial court committed plain error by erroneously instructing the jury on a charge not alleged in the indictment.

### **B. Felonious Restraint**

Defendant argues the trial court erred in denying his motion to dismiss regarding the felonious restraint charge because there was insufficient evidence of fraud or force to support submitting the charge to the jury.

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).

Upon [a] defendant's motion for dismissal, the question for [us] 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 [the] defendant[] being the perpetrator of such offense. If so, the motion is properly denied.

*State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “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. . . . Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.” *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (internal citations omitted).

Defendant specifically argues there was insufficient evidence of fraud to support submitting the charge of felonious restraint to the jury. Under N.C.G.S. § 14-43.3, “[a] person commits the offense of felonious restraint if he unlawfully restrains another person without that person’s consent . . . and moves the person from the place of the initial restraint by transporting him in a motor vehicle or other conveyance.” N.C.G.S. § 14–43.3 (2019). “Specifically, ‘restraint’ can also occur when ‘one person’s freedom of movement is restricted due to another’s fraud or trickery.’” *State v. Lalinde*, 231 N.C. App. 308, 315, 750 S.E.2d 868, 873 (2013) (quoting *State v. Sturdivant*, 304 N.C. 293, 307, 283 S.E.2d 719, 729 (1981)).

Recently, in *State v. Parker*, we held the denial of a motion to dismiss was proper where there was sufficient evidence to support submitting the second-degree kidnapping charge to the jury.<sup>3</sup> *State v. Parker*, \_\_ N.C. App. \_\_, \_\_, \_\_S.E.2d \_\_, \_\_, slip op. at 20 (filed 1 December 2020) (No. COA18-1175). The defendant argued the State failed to prove the element of removal by force because there was conflicting evidence on whether he was driving the car. *Id.* at \_\_, \_\_ S.E.2d at \_\_, slip op. at 14-15. We noted even without the evidence showing the defendant was driving, the facts provided sufficient evidence for “a reasonable juror to find that [the] [d]efendant unlawfully removed [the victim] by means of fraud or trickery[.]” *Id.* at \_\_, \_\_ S.E.2d at \_\_, slip op. at 16, 20. The victim in *Parker* entered Walmart alone to cash a check, then returned to the car expecting to be dropped off at a community college by the defendant. *Id.* at \_\_, \_\_ S.E.2d at \_\_, slip op. at 18. The defendant instead claimed, “he had to make a quick stop somewhere” and directed the victim to get in the car. *Id.* The victim complied and entered the car but became concerned as the defendant continued to drive in the opposite direction of the college and after asking about their destination the defendant only responded with “he was going to show [the victim].” *Id.* We held there was sufficient evidence of removal by fraud as

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<sup>3</sup> Under N.C.G.S. § 14-43.3, felonious restraint is a lesser included offense of kidnapping. N.C.G.S. § 14-43.3 (2019); *see also State v. Wilson*, 128 N.C. App. 688, 693, 497 S.E.2d 416, 420, *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998). “In addition to not requiring the specified purpose or intent outlined in the kidnaping [sic] statute, the offense of felonious restraint contains an element not contained in the crime of kidnaping-transportation [sic] by motor vehicle or other conveyance.” *Wilson*, 128 N.C. App. at 693, 497 S.E.2d at 420.

[i]t is evident that [the] [d]efendant's initial and continuing "trickery directly induced [the victim] to be removed to a place other than where he intended to be. . . ." [The] [d]efendant fraudulently induced [the victim] to enter the car under the pretext of providing him with a ride to the [c]ommunity [c]ollege; it is clear, however, that [the] [d]efendant never intended to follow through on his illusory offer.

*Id.* (internal citations omitted).

Here, like in *Parker*, there was sufficient evidence of restraint by fraud to support submitting the charge of felonious restraint to the jury. In his voluntary statement to police, Defendant admitted he obtained consent from Rose by telling her he was headed to Greenville and would drive her there, but instead drove to his house. While Rose testified she did not remember these representations, there was evidence Rose did not willingly go with Defendant to his house when she testified "[she] didn't know where [she] was going." Viewing "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences[.]" the evidence shows Rose was heavily intoxicated, she did not know she was going to Defendant's home, and according to Defendant he offered to take her to her home in Greenville but instead took her to his house. *Scott*, 356 N.C. at 596, 573 S.E.2d at 869. The jury could reasonably infer Rose was directly induced by Defendant's fraudulent representation to take her to her desired destination when she left Danielle's vehicle. The trial court did not err in denying Defendant's motion to dismiss.

### **C. Double Jeopardy**

Defendant also argues the trial court erred in entering judgment on both kidnapping and felonious restraint given the State's theory of the case on removal which subjected him to double jeopardy. However, with our holding of plain error resulting in a new trial, there is only one conviction before us. Given our resolution here, we hold this issue is moot and dismiss without prejudice.

#### **D. Restitution**

In its *Restitution Worksheet, Notice and Order*, the trial court ordered Defendant to pay \$1,420.59 to Vidant Medical Center. Defendant argues there was no evidence offered to support the imposition of this restitution, and the State concedes this issue. Even though Defendant “did not specifically object to the trial court’s entry of an award of restitution, th[e] issue is deemed preserved for appellate review under [N.C.G.S.] § 15A-1446(d)(18).” *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004). “On appeal, we review *de novo* whether the restitution order was ‘supported by evidence adduced at trial or at sentencing.’” *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (quoting *Shelton*, 167 N.C. App. at 233, 605 S.E.2d at 233).

N.C.G.S. § 15A-1340.36(a) provides “[t]he amount of restitution must be limited to that supported by the [R]ecord[.]” N.C.G.S. § 15A-1340.36(a) (2019); *see also State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (“[T]he amount of restitution recommended by the trial court must be supported by evidence adduced

at trial or at sentencing.”). The evidence cannot be based solely upon unsworn statements by the prosecutor. *See State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992) (vacating restitution order when the amount of restitution was based “only upon the unsworn statements of the prosecutor, which does not constitute evidence and cannot support the amount of restitution recommended”).

Here, the only evidence in the Record regarding restitution is the *Restitution Worksheet, Notice and Order* and a statement by the trial court that “as a condition of work release, [Defendant is] to make restitution to Vidant Medical Center in the amount of \$1,420.59 and also for whatever his attorney’s fee will be.” There was no stipulation to this amount and there was no other evidence provided during trial or at sentencing to support this amount. Since the restitution amount was not supported by any evidence in the Record, the order must be vacated and remanded for further consideration by the trial court. *See id.* at 342, 423 S.E.2d at 821 (“vacat[ing] [the] portion of the judgment recommending the payment of restitution as a condition of work release or parole”).

#### **E. Duplicative Costs**

Defendant argues the trial court incorrectly imposed statutory costs on multiple judgments. We agree. We recently held our review of statutory errors related to duplicative costs is de novo. *See State v. Alexander*, \_\_ N.C. App. \_\_, \_\_, \_\_S.E.2d \_\_, \_\_, slip op. at 9 (filed 20 October 2020) (No. COA19-847) (“We therefore

analyze [the] [d]efendant's argument that the trial court failed to comply with [N.C.G.S.] § 7A-304 in its imposition of costs by considering the matter anew and freely substituting our own judgment for that of the trial court.") (citation and internal quotation marks omitted).

N.C.G.S. § 7A-304 allows court costs to be assessed "[i]n every criminal case . . . wherein the defendant is convicted, or enters a plea of guilty or nolo contendere[.]" N.C.G.S. § 7A-304 (2019). "When multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single 'criminal case' for purposes of [N.C.G.S.] § 7A-304." *State v. Rieger*, 267 N.C. App. 647, 652-653, 833 S.E.2d 699, 703 (2019). In *Rieger*, we performed a detailed statutory analysis and found "using court costs as another form of punishment is not the General Assembly's intent." *Id.* at 652, 833 S.E.2d at 703. "[T]he trial court may assess costs only once, even if the case involves multiple charges that result in multiple, separate judgments." *Id.* at 653, 833 S.E.2d at 703.

Here, the trial court imposed costs for each judgment against Defendant. While Defendant's charges for rape, kidnapping, felonious restraint, and sexual offenses were all brought under separate indictments, the charges were heard and decided during the same court proceeding making them "part of a single 'criminal case[.]'" *Id.* Given the duplicative costs entered against Defendant, the costs in the remaining judgments except for Case No. 18 CRS 51045(51) must be vacated and

remanded for entry of new judgments without duplicative costs. *See id.* (vacating judgment and remanding for entry of new judgment that excludes costs).

**CONCLUSION**

The indictment was not fatally flawed because it included the essential elements required under N.C.G.S. § 15A-924(a)(5) and apprised Defendant of the charges against him. However, the trial court did commit plain error by instructing the jury on a theory of removal that was not alleged in the indictment. Given the lack of evidence to support the theory alleged within the indictment, Defendant was prejudiced by this error. Additionally, the trial court did not err by denying Defendant's motion to dismiss based on felonious restraint as there was sufficient evidence of fraud.

The trial court erred in ordering Defendant to pay restitution because there was insufficient evidence in the Record to support the order. We vacate the restitution order and remand for further consideration by the trial court. Finally, the trial court erred in imposing duplicative costs because Defendant's charges were adjudicated together as part of a single criminal case. We vacate the remaining judgments except for Case No. 18 CRS 51045(51) and remand for entry of new judgments without duplicative costs.

NO ERROR IN PART; NEW TRIAL IN PART; DISMISSED IN PART;  
VACATED AND REMANDED IN PART.

STATE V. WOOLARD

*Opinion of the Court*

Judges HAMPSON and YOUNG concur.

Report per Rule 30(e).