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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-683

No. COA20-567

Filed 7 December 2021

Mecklenburg County, Nos. 17 CRS 217292, 217294–95

STATE OF NORTH CAROLINA

v.

BILLY JOE HENRY

Appeal by defendant from judgments entered 8 October 2019 by Judge Stephen R. Futrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant.

DIETZ, Judge.

¶ 1 Defendant Billy Joe Henry appeals his convictions for assault with a deadly weapon with intent to kill inflicting serious injury and first degree kidnapping. He argues that the trial court committed plain error in its jury instructions on first degree kidnapping, that he received ineffective assistance of counsel because his counsel failed to object to those instructions, and that the trial court erred by

sentencing him for both first degree kidnapping based on inflicting a serious injury and assault with a deadly weapon with intent to kill inflicting serious injury.

¶ 2 We reject these arguments. The trial court properly instructed the jury on all of the required elements of first degree kidnapping under the theory the State chose to pursue, and that resolves both his plain error challenge to the instructions and the accompanying ineffective assistance of counsel claim. The trial court also properly imposed punishment for both the assault and kidnapping convictions because the applicable statutes permit those punishments, which involved separate and distinct acts. Accordingly, we find no error in the trial court's judgments.

Facts and Procedural History

¶ 3 In 1992, Sarah Mason[1] went to a club in Charlotte with her brother. After her brother was ejected for getting into a fight, Sarah stayed at the club, telling her brother she would find a ride home. Later that night, Defendant Billy Joe Henry drove Sarah home. While riding in Henry's car, Sarah saw a gun in the glove compartment. She asked Henry why he had a gun, and he told her he needed it to defend himself.

¶ 4 When they arrived at Sarah's house, Henry asked if he could come inside and talk to her. Sarah agreed because she did not feel comfortable telling him no. She

[1] We use a pseudonym to protect the complainant's identity.

testified that she did not plan to have sex with Henry.

¶ 5 Sarah and Henry sat down in her living room. Henry told Sarah that he wanted to be her man, but she rejected him, telling him that "he was an ugly guy" and that he was not the kind of man she dated. Sarah then asked him to leave. Henry pulled the gun out of his pocket and said, "You get in the back, you bitch."

¶ 6 Sarah went to her bedroom with Henry because he had a gun. Henry told Sarah to take off her clothes and get into bed. Henry told her that he was going to kill her. Henry then pulled his pants down, climbed on top of Sarah, and put his penis in her vagina while holding the gun in his right hand. After a few minutes, Henry ejaculated. He then shot Sarah in her left eye and left. Sarah remained conscious. She waited until she heard Henry drive away and then went to her neighbor's home for help.

¶ 7 When police arrived, Sarah told them she had been shot and raped by a black male named "Billy" who left in a white Cadillac Seville. In Sarah's house, police found blood on the carpet in the living room, on the wall beside the front door, and on the sheets and a pillow in the bedroom. They found a shell casing in the middle of the bed.

¶ 8 At the hospital, Sarah told doctors she was raped before she was shot. An exam showed a tear in the tissue of Sarah's vagina. Hospital staff collected a sexual assault kit, including thigh and vaginal swabs that contained semen and sperm, and a cutting

from Sarah's bathrobe. Sarah's left eye socket was shattered and her eye had to be removed. Sarah now has a prosthetic eye and scarring on her face from reconstructive surgery. Sarah ultimately underwent six surgeries to remove the bullet from her neck and repair the damage to her eye socket. She couldn't talk for several weeks after she was shot.

¶ 9 The case went cold in the years after the crime. But, in 2005, through a grant to help the Charlotte Mecklenburg Police Department examine DNA in cold cases, the swabs collected from Sarah in 1992 were examined for DNA. Police identified a single source male DNA profile from the vaginal and thigh swabs. Then, in 2017, a detective with the Cold Case Unit received new information indicating that Henry was a suspect in Sarah's assault. In May 2019, police arrested Henry, and he voluntarily gave a buccal swab. The crime lab determined that the DNA from the buccal swab matched the DNA profile from the swabs collected from Sarah in 1992.

¶ 10 The State charged Henry with assault with a deadly weapon with intent to kill inflicting serious injury, first degree rape, and first degree kidnapping. The case went to trial in September 2019.

¶ 11 Sarah testified to the events described above and the State presented the DNA evidence. At the close of the State's evidence, Henry moved to dismiss the kidnapping charge, arguing that any restraint of Sarah was not distinct and separate from that necessary to the rape charge. The trial court denied the motion.

¶ 12 Henry testified in his defense. He asserted that Sarah offered to have sex with him if he paid her 30 or 40 dollars. He testified that while they were having sex, they heard a knock at the door and Sarah motioned for him to be quiet. He put his clothes on and, after not seeing anyone outside, he left. Henry admitted to having sex with Sarah, which he asserted was consensual, but he denied shooting her.

¶ 13 The jury convicted Henry of assault with a deadly weapon with intent to kill inflicting serious injury and first degree kidnapping. The trial court declared a mistrial on the rape charge after the jury was unable to reach a unanimous verdict. The trial court sentenced Henry to consecutive terms of 20 years in prison for the assault charge and 40 years for kidnapping.

¶ 14 Henry gave oral notice of appeal after the trial court announced the sentences, but before the trial court announced that the sentences would run consecutively. Henry filed a petition for a writ of certiorari with this Court seeking review of his appeal despite his premature notice of appeal. Because Henry intended to appeal and the State suffered no prejudice from the untimely oral notice of appeal, in our discretion we allow Henry's petition and issue a writ of certiorari to reach the merits of this appeal. N.C. R. App. P. 21(a)(1).

Analysis

I. Jury instructions on first degree kidnapping

¶ 15 Henry first argues that the trial court committed plain error in its jury

instructions on the first degree kidnapping charge because the instructions lowered the State's burden of proof by failing to inform the jury that any confinement, restraint, or removal had to be a separate, complete act independent and apart from the acts constituting the rape and assault charges. Henry also contends that he received ineffective assistance of counsel when his trial counsel failed to object to the challenged instructions. We address each of these arguments in turn.

¶ 16 "For error to constitute plain error, 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). In other words, a defendant must "show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Plain error "is to be applied cautiously and only in the exceptional case" where the error seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334.

¶ 17 Jury instructions must address all "substantive and material features of the crime with which a defendant is charged." *State v. Bogle*, 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989). "This includes instruction on the elements of the crime." *Id.* at 195, 376 S.E.2d at 748. The omission of one or more elements of a criminal offense

is error. *State v. Bunch*, 196 N.C. App. 438, 439, 675 S.E.2d 103, 104 (2009), *aff'd*, 363 N.C. 841, 689 S.E.2d 866 (2010).

¶ 18 Henry points to a line of cases from our Supreme Court concerning the double jeopardy issue that may arise where a defendant is convicted both of kidnapping to facilitate commission of a felony and of the felony itself. *See*, *e.g.*, *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). In those cases, the Court explained that the kidnapping statute "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." *Id*. Thus, to permit separate and additional punishment for kidnapping "where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981).

¶ 19 Here, at the charge conference, the State explained that its theory of the kidnapping charge was that Henry kidnapped Sarah "for the purpose of facilitating his commission of first-degree murder" and requested instruction on that theory. The State clarified that it was not proceeding under the theory that Henry "committed this restraint, confinement, and removal to rape" Sarah.

¶ 20 Henry's counsel responded by asserting that the felony specified in the kidnapping instructions should be "assault with a deadly weapon with intent to kill

inflicting serious injury, not first-degree murder." The State countered that "the felony that is alleged . . . in the first-degree kidnapping instruction – does not have to be a charged felony offense. We have always maintained in the State's case that the defendant intended to kill [Sarah], and that is the felony that we are electing to proceed under."

¶ 21 The trial court then instructed the jury that, to convict Henry of first degree kidnapping, it must find "that the defendant confined, restrained, or removed [Sarah] for the purpose of facilitating the commission of the felony of first-degree murder" and "that this confinement or restraint or removal was a separate complete act independent of and apart from the defendant's intent to commit first-degree murder." Henry did not object to the instructions.

¶ 22 Henry contends that the trial court's instructions "lowered the State's burden to prove every element of first-degree kidnapping beyond a reasonable doubt by giving instructions that essentially omitted an element," namely by failing to instruct the jury that "they had to find that any confinement, restraint, or removal of [Sarah] was an act that was entirely separate from any assault or rape that occurred."

¶ 23 We reject this argument. The trial court was not required to instruct the jury that the confinement, restraint, or removal element of the kidnapping charge must be separate from that inherent in the other charged offenses of assault or rape. The State's theory of the case was that Henry confined, restrained, or removed Sarah for

the purpose of murdering her. The precedents of *Fulcher* and *Irwin* are not applicable in this case. The double jeopardy issue identified in those cases only exists where the defendant is being convicted both for an underlying felony that inherently involves confinement, restraint, or removal of the victim *and* kidnapping for the purpose of committing that same underlying felony. *Fulcher*, 294 N.C. at 523–24, 243 S.E.2d at 351–52; *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446. The purpose of the rule established in those cases is to prevent duplicative criminal convictions for the same conduct. *Id.* That double jeopardy issue was not present in this case.

¶ 24 Henry further argues that the trial court's jury instruction that the confinement, restraint, or removal must be a separate act "from the intent to commit first-degree murder" or "from the murder" was incorrect "because no murder occurred." And he asserts that the trial court "repeated its mistakes" when the jury asked for clarification on the kidnapping charge, asking whether the offense elements required "that the first-degree murder took place, or that there was only an intent to commit first-degree murder." In response, the trial court brought the jury back and reread its original first degree kidnapping charge. After the jury asked the same question again, the trial court, at the State's request, instructed the jury based on a footnote to the pattern instruction, stating "In answer to your question, it is not necessary that the felony be committed, or the injury actually occur. Only that such was the purpose of the defendant."

¶ 25 We find that both the trial court's instruction and answer to the jury's questions correctly explained the elements of the kidnapping charge and the applicable law. The State is required to present substantial evidence showing that the defendant had the intent to commit the particular underlying felony at the time he confined, restrained, or removed the victim. *State v. Brayboy*, 105 N.C. App. 370, 375, 413 S.E.2d 590, 593–94 (1992). But "[i]t is not necessary that the felony which was facilitated by the kidnapping be committed against the victim of the kidnapping. The kidnapping statute clearly requires only that the kidnapping facilitate the commission of any felony." *Id.* Thus, it was not necessary for the State to prove that Henry actually committed the underlying felony that formed the purpose for the kidnapping, in this case murder, only that he had the intent to commit that felony.

¶ 26 Additionally, even assuming that the trial court erred by failing to instruct the jury that the confinement, restraint, or removal must be separate from the assault or rape, Henry has not shown that the error rose to the level of plain error or had a probable impact on the jury's verdict. *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334–35. Henry was not convicted of the rape charge, so there is no resulting double jeopardy issue as to that offense. "[T]he act of kidnapping must be distinct from [the underlying] felony *if* the perpetrator is to be convicted of both kidnapping and the underlying felony." *State v. Cole*, 199 N.C. App. 151, 157, 681 S.E.2d 423, 428 (2009) (emphasis added). And the offense of assault with a deadly weapon with intent to kill

inflicting serious injury does not inherently involve confinement, restraint, or removal. "[T]here are certain felonies, such as forcible rape and armed robbery, which cannot be committed without some restraint of the victim. Assault with a deadly weapon with intent to kill inflicting serious injury is not within that class of felonies. Such an assault may be committed without ever necessitating the restraint or confining of the victim—for example the firing of a gun at a victim." *State v. Carrillo*, 115 N.C. App. 674, 677, 446 S.E.2d 379, 381–82 (1994) (citations omitted).

¶ 27 Henry also argues that he received ineffective assistance of counsel because his trial counsel failed to object to the kidnapping instructions. "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). The first prong of this test, deficient performance, "is not satisfied where defendant cannot . . . establish that an error occurred." *State v. Lee*, 348 N.C. 474, 492, 501 S.E.2d 334, 345 (1998). Because we find that the trial court's challenged jury instructions were not error, Henry's counsel was not deficient in failing to object to those instructions. *Id.*

II. Sentencing for both assault and first degree kidnapping

¶ 28 Henry next argues that the trial court erred and "contravened the intent of our

Legislature" by sentencing him for both first degree kidnapping based on Sarah's serious injuries as well as assault with a deadly weapon with intent to kill inflicting serious injury. This is so, Henry argues, because these sentences meant he was punished twice for causing the same serious injury.

¶ 29 "Whether multiple punishments were imposed contrary to legislative intent presents a question of law, reviewed *de novo* by this Court." *State v. Hendricksen*, 257 N.C. App. 345, 347, 809 S.E.2d 391, 393 (2018). The applicable statute provides that kidnapping is elevated to first degree kidnapping if the victim "was not released by the defendant in a safe place or had been seriously injured or sexually assaulted." N.C. Gen. Stat. § 14-39. Here, Henry was convicted of, and sentenced for, first degree kidnapping on the theory that Sarah was seriously injured. He also was convicted of and sentenced for assault with a deadly weapon with intent to kill inflicting serious injury.

¶ 30 In *State v. Freeland*, our Supreme Court held that the "defendant was unconstitutionally subjected to double punishment under statutes proscribing the same conduct" where the defendant was sentenced both for first degree kidnapping elevated by sexual assault of the victim and for the sexual offense the jury relied on to satisfy the sexual assault element of the kidnapping charge. 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986). The Court concluded that "the legislature did not intend that defendants be punished for both the first degree kidnapping and the underlying

sexual assault." *Id.* at 23, 340 S.E.2d at 40–41. The Court reasoned that, because the defendant's conviction for the sexual offense "is a necessary element of first degree kidnapping in this case, the trial judge erred in sentencing defendant for [both] crimes unless the legislature specifically authorized cumulative punishment." *Id.* at 21, 340 S.E.2d at 39–40.

¶ 31 In contrast, in *State v. Romero*, this Court found that there was no error, and no double jeopardy issue or contravention of the legislature's intent, where the defendant was punished both for assault with a deadly weapon with intent to kill inflicting serious injury and kidnapping involving serious injury. 164 N.C. App. 169, 175, 595 S.E.2d 208, 212–13 (2004). "Although the State may have been required to prove [the victim] suffered serious bodily injury" in order to prove the kidnapping charge, "this alone does not mandate the application of the principles of double jeopardy to arrest judgment on the assault with a deadly weapon charge." *Id.*

¶ 32 Henry relies on the reasoning of *Freeland* to assert that "the Legislature did not intend for defendants to be punished twice for causing a serious injury." But the reasoning of *Freeland* does not apply in this case because the holding of *Freeland* was based on a double jeopardy issue that does not exist with the charges at issue here. Unlike the underlying sexual offense and the sexual assault elevation in *Freeland*, assault with a deadly weapon with intent to kill inflicting serious injury has multiple additional elements beyond the "serious injury" necessary to elevate the kidnapping

charge and is not fully encompassed within the elevated kidnapping charge. *State v. Gardner*, 315 N.C. 444, 454, 340 S.E.2d 701, 709 (1986); *State v. Liggons*, 194 N.C. App. 734, 742, 670 S.E.2d 333, 339 (2009).

¶ 33 Indeed, *Romero* indicates that punishment for both assault causing serious injury and first degree kidnapping is appropriate under the applicable statutory scheme. *Romero*, 164 N.C. App. at 175, 595 S.E.2d at 212–13. Henry was not improperly punished twice for the same conduct, but rather received two punishments for two distinct sets of actions—one for the confinement, restraint, or removal of the victim and the second for assaulting her with a deadly weapon by shooting her. Punishment for both did not implicate double jeopardy concerns and was permissible under the applicable statutory scheme, despite the fact that both offenses required the State to prove serious injury to the victim. *Id.*; *Gardner*, 315 N.C. at 454, 340 S.E.2d at 709.

¶ 34 In any event, these two convictions did not involve the identical serious injuries. The assault charge was based on the loss of Sarah's left eye, but the State's evidence further indicated that Sarah also suffered extensive mental trauma from the shooting, that she required multiple surgeries over several years to remove the bullet from her neck and reconstruct her face, and that she had facial scarring as a result of the shooting. Thus, there were multiple serious injuries supporting the first degree kidnapping offense and Henry did not receive two punishments solely for

inflicting the same serious injury to Sarah.

¶ 35 Accordingly, we hold that the trial court did not err in sentencing Henry for both first degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury.

Conclusion

¶ 36 For the reasons explained above, we find no error in the trial court's judgments.

NO ERROR.

Chief Judge STROUD and Judge COLLINS concur.

Report per Rule 30(e).