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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-454

Filed 06 June 2023

Anson County, Nos. 19 CRS 51177-78, 20 CRS 398-99

STATE OF NORTH CAROLINA

v.

MARK JONES, Defendant.

Appeal by defendant from judgment entered 7 October 2021 by Judge Stephan R. Futrell in Anson County Superior Court. Heard in the Court of Appeals 22 February 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien, Assistant District Attorney, Timothy M. Victory, and Assistant Attorney General, Adrian W. Dellinger, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the Defendant.

DILLON, Judge.

Defendant Mark Jones was convicted by a jury of nine crimes based on evidence of his involvement in a violent break-in of a private residence: first-degree burglary, armed robbery, felony larceny, two counts of second-degree kidnapping, three counts of conspiracy, and possession of a stolen vehicle. He appeals his

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convictions.

I. Background

Defendant and two others broke into a home occupied by three individuals in the town of Peachland. The State's evidence tended to show the following:

In the late evening of 16 October 2019, a man was returning to his home where he lived with his girlfriend and her young son. While outside, the man was approached by Defendant and two other thieves. Two of the thieves were armed. The thieves ordered the man at gunpoint to instruct his girlfriend to open the door to the home. Upon entry into the home, one of the thieves choked the man. The woman fled with her son into the child's bedroom for safety.

While one thief searched the home for items to steal, another thief held the man on the ground at gunpoint. Defendant held the woman and her child in the child's bedroom at gunpoint. After about 20 minutes, the thieves left with personal items including jewelry, a PlayStation, a gun, keys to both the man's car and the woman's car, and approximately \$1,000.00 in cash.

After exiting the home, the thieves stole a firearm from the man's car and loaded all the stolen items into the woman's car. During this time, one of the thieves went back inside the home for about 10 minutes and ordered the three residents at gunpoint to remain on the floor. He then went back outside and fled with the other thieves in the woman's car. A few days later, Defendant was apprehended after crashing the woman's car.

Defendant was charged with several crimes and convicted of most of them by a jury. The jury also found two aggravating factors. The trial court entered four judgments, sentencing Defendant to extensive terms of imprisonment for each, to be served consecutively. Defendant appeals.

II. Analysis

Defendant essentially makes four arguments on appeal, which we address in turn. The first three arguments challenge the trial court's ruling on Defendant's motion to dismiss.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015).

A. Second-Degree Kidnapping Convictions

Defendant was convicted for kidnapping the man and separately for kidnapping his girlfriend. On appeal, he argues the trial court erred by denying his motion to dismiss these charges as there was no substantial evidence of any confinement, restraint, or removal that was not inherent with the armed robbery and other crimes for which Defendant was also convicted.

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Our Supreme Court has instructed that a kidnapping can be committed *separate and apart* from the commission of another felony even if both criminal offenses grow out of the same course of action:

Two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other, for example, a breaking and entering, with intent to commit larceny, which is followed by the actual commission of such larceny. In such a case, the perpetrator may be convicted of and punished for both crimes. Thus, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate, which such restraint was committed, *provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony*. Such independent and separate restraint need not be, itself, substantial in time, under N.C. Gen. Stat. § 14-39 as now written.

State v. Fulcher, 294 N.C. 503, 523-524, 243 S.E.2d 338, 351-352 (1978) (emphasis added). The Court has also held that restraint in N.C. Gen. Stat. § 14-39(a) “connotes a restraint separate and apart from that inherent in the commission of the other felony.” *State v. Thomas*, 350 N.C. 315, 344-345, 514 S.E.2d 486, 504 (1999). “The key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.” *Id.*

Where a defendant is convicted of a robbery involving the restraint of the victim, such restraint will generally not support a separate kidnapping conviction if

the restraint occurs *during* the robbery, unless the restraint is done in such a way that exposes the victim to greater danger than necessary. *See State v. Boyce*, 361 N.C. 670, 673-74, 651 S.E.2d 879, 882 (2007). For instance, it has been held that restraining victims by tying them up during a robbery exposes them to greater danger than necessary to sustain a separate kidnapping victim. *See State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 370 (1998). However, our Supreme Court has held that pointing a gun at a victim during a robbery, though arguably more dangerous than pointing the gun in the air, is not sufficiently more dangerous to support a separate kidnapping conviction. *State v. Ripley*, 360 N.C. 333, 334-35, 626 S.E.2d 289, 290 (2006). However, a restraint of the victim occurring *prior to* the robbery to facilitate the robbery, may support both a conviction for kidnapping and for robbery. *Boyce*, 361 N.C. at 674, 651 S.E.2d at 882.

We conclude there was sufficient evidence to support Defendant's kidnapping convictions. For example, the victims were held at gunpoint after the robbery for which Defendant convicted was complete, occurring when the thieves stole a gun from the man's car. Though Defendant was convicted of armed robbery for the items taken from inside the home, he was not convicted for stealing the gun.

Alternatively, there was sufficient evidence that Defendant kidnapped the man and his girlfriend prior to the robbery to facilitate the robbery. Specifically, the man was held at gunpoint and forced into the house. He was choked as they entered the home. His girlfriend was forced to unlock the screen door as the thieves stood

outside, threatening her boyfriend. Accordingly, we hold that the trial court did not err by denying Defendant's motion to dismiss the two kidnapping charges.

B. Multiple Conspiracy Convictions

Defendant was convicted of three counts of conspiracy. He was convicted of conspiracy to commit robbery with a dangerous weapon and conspiracy to commit kidnapping. These two convictions were consolidated into one judgment. Defendant was separately convicted of conspiracy to commit burglary, which was the basis of one of the other judgments. Defendant argues the trial court erred in denying his motion to dismiss two of the three conspiracy counts because there was no evidence of more than one agreement. We conclude that the evidence was sufficient to support two of the three convictions, for the reasoning below.

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Abernathy*, 295 N.C. 147, 164, 244 S.E.2d 373, 384 (1978). It is not necessary that the parties agree expressly, "rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense." *Id.* A conspiracy ordinarily "ends with the attainment of its criminal objectives[.]" *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004).

If the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy. *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933). "The question of whether multiple agreements

constitute a single conspiracy or multiple conspiracies is a question of fact for the jury.” *Id.* (citation omitted). “When the evidence shows a series of agreements or acts constituting a single conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy.” *Id.* (emphasis in original) (citing *United States v. Kissel*, 218 U.S. 601, 31 S. Ct. 124, 54 L. Ed. 1168 (1910)). While the offense “is complete upon the formation of the unlawful agreement, *the offense continues until the conspiracy comes to fruition[.]*” *Id.* at 122, 357 S.E.2d at 179 (emphasis added).

We conclude that the agreement to commit armed robbery was part of the agreement to commit burglary, as the crime of burglary includes a home invasion with the intent to commit another felony. *See State v. Williams*, 314 N.C. 337, 355, 333 S.E.2d 708, 720 (1985) (for burglary it must be shown that the defendants had an intent to commit a separate felony inside the home at the time they broke in). However, there was evidence to support a separate conspiracy to kidnap the victims separate from the burglary and robbery, specifically when one thief returned to the home and held the victims at gunpoint after the initial invasion have concluded. Accordingly, we hold the trial court erred by not arresting judgment on one of the conspiracy counts, as there was insufficient evidence to support more than two conspiracies. Therefore, we vacate one judgment involving the three conspiracy convictions and remand for resentencing based on the conviction for two conspiracies.

C. Aggravating Factor

The jury found the existence of two aggravating factors. Defendant argues one of the two aggravating factors was without sufficient proof. Specifically, he argues the State failed to offer proof to support the aggravating factor found by the jury that he had *willfully* violated probation within the past ten years:

(12a) The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, *been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.*

N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2021) (emphasis added). We agree.

Here, the State offered evidence that Defendant violated probation in 2015. The only evidence offered by the State that Defendant willfully violated a condition of probation was a copy of a court order from 2015 revoking his probation for a 2014 offense. The judge made no findings or mention of the condition(s) of probation which Defendant allegedly violated, but rather merely stated “Defendant elects to serve” his previously suspended sentence of ten days.

Defendant contends this evidence fails to establish that his 2015 violation of probation was *willful*. The State counters, arguing that a trial court can only revoke probation for a willful violation, and that Defendant’s election to serve for whatever violation he allegedly committed was a concession that his violation was willful. The issue before us is whether there is a circumstance where a trial court may revoke

probation for a violation that is not willful.

Our Supreme Court has recently reiterated that a trial court may revoke probation where “a probationer has willfully or without lawful excuse violated a condition of probation.” *State v. Jones*, 382 N.C. 267, 272, 876 S.E.2d 407, 411 (2022) (citations and internal marks omitted). The use of the conjunction “or” suggests that the Court intended for “willfully” not to be the same as “without lawful excuse.” However, the Court has recognized in non-probation revocation cases that a wrongful act done “without justification or excuse” is “ordinarily” deemed “willful”:

Ordinarily, willful as used in criminal statutes means the wrongful doing of an act without justification or excuse, or commission of an act purposely and deliberately in violation of law.

State v. Brackett, 306 N.C. 138, 142, 291 S.E.2d 660, 662 (1982) (citations and internal marks omitted). The Court has also described “willful” in a criminal statute to mean something greater:

The word “willful,” when used in a criminal statute, means something more than an intention to do a thing. Willfulness requires doing an act purposely and deliberately in violation of law.

State v. Lamp, 382 N.C. 562, 570, 881 S.E.2d 62, 68 (2022).

The language in our General Statutes suggests a probationer could be revoked for a violation that is not necessarily willful. For example, a trial court may revoke probation “for a violation of a condition of probation[,]” without any reference that the violation must be willful. N.C. Gen. Stat. § 15A-1344(a)(2021). But there must be a

finding of a “*willful* violation” of a probation condition (less than ten years old) for the violation to serve as an aggravating factor in sentencing that defendant for a new crime. N.C. Gen. Stat. § 15A-1340.16(d)(12a)(2021) (emphasis added).

Further, our General Assembly has provided one’s probation may be revoked if he commits a “criminal offense in any jurisdiction.” N.C. Gen. Stat. § 15A-1343(b)(1)(2021). There are, however, some criminal offenses that do not require *any* criminal intent or knowledge, much less willfulness. *See, e.g., Watson Seafood v. George W. Thomas*, 289 N.C. 7, 13-14, 220 S.E.2d 536. 541 (1975) (constitutionality of strict liability crimes); *State v. Maldonado*, 241 N.C. App. 370, 374, 772 S.E.2d 479, 482-83 (2015).

Here, the State could have offered the probation violation report or other evidence, which may have shed light on the nature of Defendant’s probation violation. But as there is no evidence in the record to show that Defendant’s violation was willful, rather than non-willful but without lawful excuse, we must conclude the State did not present sufficient evidence from which the jury could find Defendant had willfully violated his probation. We, therefore, must vacate all the judgments and remand the matter to the trial court for resentencing.¹

¹ Where a defendant has not admitted to an aggravating factor, generally the factor must be found by a jury beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1340.16(a1). The parties did not brief whether principles of double jeopardy prevent a sentencing judge on remand to impanel a new jury and allow the State a chance to prove to that jury with new evidence whether Defendant willfully violated his probation in 2015. We, therefore, do not address this issue.

III. Conclusion

We conclude there was insufficient evidence to support more than two conspiracy convictions. We also conclude there was insufficient evidence to support the aggravating factor based on a willful violation by Defendant of probation within the ten years. Defendant, otherwise, received a fair trial, free of reversible error. We, therefore, vacate all four judgments against Defendant and remand the matter for resentencing.

NO ERROR IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.

Judges CARPENTER and STADING concur.