

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the *North Carolina Rules of Appellate Procedure*.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-477

Filed 1 October 2024

Wilson County, Nos. 21 CRS 050350, 001452

STATE OF NORTH CAROLINA

v.

ALPHONSO BASIL THEOPHILUS WARNER, Defendant.

Appeal by defendant from judgment entered 11 October 2022 by Judge Alma L. Hinton in Wilson County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashley Weathers, for the State.

John W. Moss for the defendant-appellant.

STADING, Judge.

Alphonso Basil Theophilus Warner (“Defendant”) appeals from a judgment after a jury found him guilty of felonious restraint and that he had obtained habitual felon status. For the reasons below, we discern no error.

I. Background

Defendant and K.L.¹ claimed to have worked together for about three months on flooring and painting jobs. On the evening of 2 February 2021, Defendant drove K.L. and two others they describe as coworkers to a hotel in Defendant's car. Their stories differ as to what happened next. K.L. testified that once they arrived at the hotel parking lot, she asked Defendant to take her home and he declined. K.L. said that if Defendant refused, she would take his car and drive herself home. According to K.L., when Defendant refused again, she jumped into the driver's seat and unsuccessfully attempted to drive off in his car. In contrast, Defendant claimed he said that he would take K.L. to her mother's house. He maintained, however, that she got in his car, drove off, and said that she is not going to her mother's house. When Defendant saw the car moving, he attempted to gain control from the outside. Defendant testified that he opened the door to regain control of the car. Defendant also testified that in response to this, K.L. moved to the back seat, smashed the rear window with a brick, and jumped out of the car. However, K.L. testified that Defendant smashed the rear window and grabbed her hair, to which she responded by getting out of the car and running away.

¹ Pseudonyms are used to protect the juvenile's identity.

K.L. then ran to a nearby store while Defendant got in his car and followed her. Defendant then entered the store, grabbed K.L. from behind the counter, and dragged her out forcefully. A video recording from the events inside of the store was shown to the jury. Defendant claimed he was already very upset from her lying about her age—that she was seventeen years old instead of nineteen. The store clerk on shift observed Defendant’s aggressive actions, attempted to help, and told Defendant to “stop hitting her, leave her alone or I’m going to call the police.” These pleas did not thwart Defendant’s actions as he continued to drag K.L. out of the store while stomping, hitting, kicking, and pulling her hair. In response to Defendant’s unwillingness to stop, the store clerk called 911 and requested help.

After exiting the store, Defendant continued dragging K.L. to his car, where he forced her inside. According to Defendant, as he was trying to put her inside of the car, she hit her face on the door jam. Defendant then drove off in his car with K.L. The store clerk—still on the phone with law enforcement—notified them of Defendant’s license plate information and vehicle type. Upon leaving the store, Defendant testified that he brought K.L. to her mother’s home. Defendant stated that K.L. next requested to go to Defendant’s home to grab some personal belongings since “[e]verything she owned for the last three months was at [his] house.” However, K.L. testified that Defendant brought her to a field and assaulted her again.

Defendant then drove K.L. to his house on Sawdust Road. Upon arriving, Defendant could not enter because “[K.L.] lost her keys [and] her pocketbook.” As a

result, Defendant left K.L. at his home while he searched for her pocketbook and keys. As soon as Defendant left, K.L. called 911 requesting emergency medical services.

Shortly after, Officers Denton and Coleman of the Wilson Police Department responded to the call from the store clerk. The officers reviewed the store's security footage and put out an alert for his name and vehicle. Defendant was later pulled over and apprehended by Wilson County Sheriff's Deputies. Officer Denton responded to the 911 call from K.L. at Sawdust Road. Despite losing her keys, upon arriving at Defendant's house, Officer Denton observed K.L. exit Defendant's home. Officer Denton ran K.L.'s name through his database, saw that she was a runaway juvenile and contacted her mother to take her home. Thereafter, Officer Denton "drove straight to the Magistrate's office, . . . swore out charges, and placed defendant into the Wilson County Detention Center."

On 10 October 2022, Defendant's trial commenced. Before the charge conference, Defendant submitted a request for the instruction of misdemeanor false imprisonment rather than felonious restraint. The State objected on the basis that no evidence in the record supported the instruction. In response, Defendant stated that he did not have the felonious intent necessary to carry out the crime when the vehicle was used, thereby warranting the lesser instruction. The trial court denied Defendant's request for the false imprisonment jury instruction and gave the instruction for felonious restraint instead.

The jury found Defendant guilty of felonious restraint. Thereafter, the jury determined that he had attained habitual felon status. During Defendant's sentencing hearing, the State submitted a worksheet classifying Defendant as a record level two offender. The State further requested that Defendant be sentenced within the presumptive range. Defendant submitted four mitigating factors for the trial court to consider for his sentencing: (1) he is gainfully employed and has marketable skills, (2) he supports his family, (3) he has a support system in his community, and (4) his prior relationship to K.L. was an extenuating circumstance. In support of these factors, Defendant submitted two letters—Exhibits 1 and 2²—and an apology outside the jury's presence. Ultimately, the trial court declined to find these mitigating factors. The trial court sentenced Defendant within the presumptive range to an active sentence of 83 to 112 months in the North Carolina Department of Adult Correction. Defendant timely entered his notice of appeal on 11 October 2022.

II. Jurisdiction

This Court has jurisdiction to consider Defendant's appeal under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Analysis

² Exhibits 1 and 2 consist of two letters from Defendant's current employers to demonstrate proof of the mitigating factors submitted. Exhibit 1 from When and Where Real Estate demonstrates his previous three months of work. Exhibit 2 from Ethan Blackburn, the owner of Blackburn Real Estate, LLC discusses his work skills, engagement with the community, and "enthusiasm and excitement about bringing his community back to life."

Defendant presents two issues on appeal: (1) whether the trial court erred by failing to instruct the jury on false imprisonment, and (2) whether the trial court abused its discretion by failing to find mitigating factors. For the reasons below, the trial court did not err when giving its instructions to the jury. Further, the trial court did not abuse its discretion in sentencing Defendant.

A. Jury Instructions

Defendant contends that the trial court erred because there is contradictory evidence on the record to warrant a lesser instruction of false imprisonment. Defendant further contends that there is conflicting evidence of whether he had felonious intent to transport K.L. under restraint from the store. We disagree.

“Assignments of error challenging the trial court’s decisions regarding jury instructions are reviewed *de novo*.” *State v. Osario*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). “[W]here the request for a specific instruction raises a question of law, the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (cleaned up). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted).

Moreover, “this Court reviews [a trial court’s] jury instructions contextually and in [their] entirety. The charge will be held sufficient if it presents the law of the

case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed.” *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citations and quotations omitted). “[I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” *State v. Boykin*, 275 N.C. App. 187, 196, 853 S.E.2d 781, 787 (2020) (citation omitted). This Court reviews preserved errors to a trial court’s jury instructions under the harmless error standard, which “requires a defendant show that there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *State v. Leaks*, 379 N.C. 57, 62, 864 S.E.2d 217, 220 (2021) (cleaned up).

In criminal cases,

a defendant is entitled to an instruction on lesser included offenses if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. . . . However, a lesser offense should not be submitted to the jury if the evidence is sufficient to support a finding of all the elements of the greater offense, and there is no evidence to support a finding of the lesser offense.

State v. Uvalle, 151 N.C. App. 446, 452-53, 565 S.E.2d 727, 731 (2002) (citations omitted). Put another way, “where the State’s evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required.” *State v. Millsaps*, 356 N.C.

556, 562, 572 S.E.2d 767, 772 (2002) (citation omitted). “The test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.” *Id.* (internal quotation marks and citation omitted). “In determining whether the evidence is sufficient to support the submission of the issue of a defendant’s guilt of a lesser included offense to the jury, courts must consider the evidence in the light most favorable to [the] defendant.” *State v. Debiase*, 211 N.C. App. 497, 503, 711 S.E.2d 436, 441 (2011) (cleaned up).

In this case, Defendant was convicted of felonious restraint, whereby “[a] person commits the offense of . . . 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. Gen. Stat. § 14-43.3 (2023).

Defendant first contends that restraint was complete when he transported K.L. from the store due to a lapse of thirty seconds before leaving in the car. Defendant further contends that because of this idling period, “[a] reasonable juror could have inferred that K.L. had time to exit the vehicle.” However, the State presented evidence showing her inability to do so when Defendant dragged K.L. from the store to the car while she visibly resisted, and he violently placed her in the car against her will. Indeed, Defendant himself admitted that he removed K.L. from the store and into the vehicle with restraint: “So when I got her out of the store I was trying to put

her inside the car and she pushed back and slipped and hit her face, hit her lip or her face. . . .” Given that K.L. was pushing back and became injured in the process, a reasonable juror could find that she was still under restraint by Defendant during the thirty-second idling period before leaving from the store. Thus, the evidence of the thirty-second lapse in time would not “permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *Uvalle*, 151 N.C. App. at 452, 565 S.E.2d at 731 (citation omitted).

Defendant also argues that a reasonable juror could find that restraint ended since he did not use a weapon against, hit, or hold K.L. in the car during the idling period. However, the thirty-second idling period occurred immediately after Defendant forcefully threw K.L. into the vehicle. K.L. testified that after being thrown into the vehicle and before driving away, “[Defendant] was saying a whole lot of things.” Moreover, the testimony of the store clerk demonstrates the violent nature of Defendant’s actions as well as the lack of consent from K.L. Although “there may have been a [thirty-]second delay, Defendant’s abuse and volatile behavior could lead a reasonable juror to infer that [] K.L. was restrained and had no chance of escape because she feared more physical abuse and even for her life.” As a result, this contention does not support a finding of a lesser charge.

Defendant further maintains that a reasonable juror could find that his restraint of K.L. ended once he took her to her mother’s home, given that it was “the place K.L. stated she wanted to go.” Assuming *arguendo* that restraint ended here,

this assertion fails because the evidence on the record and the finding of the jury demonstrates that the period of time consisting of exiting the store, entering the vehicle, and traveling to the next destination constituted restraint. After careful review, we conclude that the trial court did not err by denying the jury instruction for misdemeanor false imprisonment.

B. Mitigating Factors

Defendant next argues that the trial court abused its discretion due to its failure to acknowledge Defendant's mitigating factors set forth at sentencing. Defendant contends that the trial court had sufficient evidence to find two or more of the mitigating factors proposed. We disagree.

Under North Carolina law, the Structured Sentence Act sets out a framework of mitigating and aggravating factors that courts look to when imposing punishment. N.C. Gen. Stat. § 15A-1340.16(d)-(e) (2023). Aggravating and mitigating factors are discretionary tools a judge may use to increase or decrease a punishment as he sees fit outside the presumptive range. *Id.* at § 15A-1340.16(b); *see State v. Radford*, 156 N.C. App. 161, 164, 576 S.E.2d 134, 136 (2003). When none of these factors are present, the court must sentence the defendant within the presumptive range. *Radford*, 156 N.C. App. at 164, 576 S.E.2d at 136. However, if aggravating or mitigating factors are present, the tribunal has discretion on whether it finds them and steps outside the presumptive range. N.C. Gen. Stat. § 15A-1340.16(a); *See, e.g., State v. Brown*, 146 N.C. App. 590, 553 S.E.2d 428 (2001) (holding no abuse of

discretion when the trial court sentenced the defendant within the presumptive range despite uncontradicted evidence of mitigation). A trial court's discretion in weighing mitigating factors "will not be disturbed on appeal absent a showing that there was an abuse of discretion." *State v. Garnett*, 209 N.C. App. 537, 549, 706 S.E.2d 280, 288 (2011) (citation omitted). An "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Rollins*, 224 N.C. App. 197, 199, 734 S.E.2d 634 (2012) (citation omitted).

Relying on *State v. Jones*, Defendant argues that the trial court abused its discretion by failing to acknowledge his mitigating factors offered at sentencing. *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983) (discussing that a trial court's disregard of "substantial" and "uncontradicted" evidence of mitigating or aggravating factors would make such statutory factors meaningless). This argument falls short because a trial court is not required to find mitigating factors unless it is attempting to sentence a defendant outside the presumptive range. *Garnett*, 209 N.C. App. at 549-50, 706 S.E.2d at 288 (finding that a trial court's discretion in not finding uncontroverted mitigating factors was proper as the sentence was within the presumptive range). Moreover, this Court recently held that there can be no error in a trial court's failure to find uncontradicted mitigating factors so long as the sentence was within the presumptive range. *State v. Freeman*, 285 N.C. App. 606, 608, 878 S.E.2d 322, 323 (2022). In *Freeman*, this Court noted that the purpose of the *Jones*

decision was “to give effect to the Fair Sentencing Act, which has since been repealed . . . [and replaced by] the Structured Sentencing Act.” *Id.* In addition, this Court held that the Structured Sentencing Act makes clear that a judge’s decision to mitigate or aggravate a sentence outside the presumptive range lies within their discretion.³ *Id.* at 608-09, 878 S.E.2d at 323-24. Here, Defendant was sentenced in the presumptive range and the trial court was not bound to accept the mitigating factors advanced by Defendant.

Although Defendant’s sentence was on the higher end of the presumptive range, it was reasonable as it considered Defendant’s previous criminal history admitted at trial as well as his conviction for being a habitual felon. Moreover, this Court has upheld several cases where the trial court’s sentence was on the higher end of the presumptive range despite not making any findings of mitigating factors. *See State v. Streeter*, 146 N.C. App. 594, 598, 553 S.E.2d 240, 243 (2001) (cleaned up) (finding that the trial court did not err in sentencing the defendant on the highest end of the presumptive range—an active term of 129 months on a scale of 100-129). *See also State v. Ramirez*, 156 N.C. App. 249, 258-59, 576 S.E.2d 714, 721 (2003) (cleaned up) (“Since the court may, in its discretion, sentence defendant within the presumptive range without making findings regarding proposed mitigating factors,

³ The language of the Structured Sentencing Act indicates that it is discretionary by the use of the permissive language “in its discretion” as follows: “[t]he court shall make findings of the aggravating or mitigating factors present in the offense **only if, in its discretion**, it departs from the presumptive range of sentences. . . .” N.C. Gen. Stat. § 15A-1340.16(c) (emphasis added).

we hold the trial court did not err by sentencing defendant within the presumptive range without making findings as to this mitigating factor.”). Therefore, the trial court did not err by disregarding Defendant’s offered mitigating factors and sentencing him on the higher end of the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.16 (“The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2).”); *See also State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918 (2006) (citation omitted) (“[W]hile the Act directs trial courts to consider evidence of aggravating or mitigating factors in every case, it further instructs the courts to make findings of the aggravating and mitigating factors ‘only if, in [their] discretion, [they] depart[] from the presumptive range.’”).

Upon review, we hold that the trial court did not abuse its discretion by failing to find the mitigating factors submitted by Defendant because his sentence was within the proper presumptive range, and the trial court properly used its discretion.

IV. Conclusion

We hold that Defendant’s contentions about jury instructions and sentencing lack merit and discern no error by the trial court.

NO ERROR.

Judges WOOD and FLOOD concur.

Report per Rule 30(e).