2019 IL App (1st) 162006-U

No. 1-16-2006

Order filed on May 28, 2019.

Second Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	2014 CR 07633
	)	
RAPHEAL HALL,	)	The Honorable
	)	Clayton J. Crane & Alfredo
Defendant-Appellant.	)	Maldonado,
	)	Judges Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court's misstatement did not constitute an acquittal, double jeopardy principles did not preclude subsequent convictions. In addition, defendant's aggravated kidnapping conviction was proper where the asportation and confinement of the victim were not merely incidental to aggravated criminal sexual assault. Defendant's challenges to the fines and fees order, as well as the mittimus, were not properly before the court.

¶ 2 Following a bench trial, defendant Rapheal Hall was convicted of aggravated criminal sexual assault, aggravated kidnapping, robbery and aggravated battery.[1] He received consecutive six-year prison terms for the former two offenses, a concurrent three-year prison term for robbery and a concurrent two-year prison term for aggravated battery. On appeal, defendant asserts that his convictions for aggravated criminal sexual assault, aggravated kidnapping and aggravated battery violated double jeopardy principles. He also asserts that his aggravated kidnapping conviction was improper because his movement and confinement of the victim were merely incidental to aggravated criminal sexual assault. Finally, he challenges various monetary impositions and the accuracy of the mittimus. For the following reasons, we affirm defendant's convictions but remand for further proceedings under Illinois Supreme Court Rule 472 (eff. May 17, 2019).

¶ 3 I. BACKGROUND

¶ 4 Defendant and codefendant Samuel Walton were charged with 13 counts for an incident involving two victims: J.J. and her friend, Jementae Johnson. Specifically, defendant and codefendant were charged with the aggravated criminal sexual assault of J.J. (counts 1 through 3), the aggravated kidnapping of J.J. (counts 4 through 6), the aggravated robbery of Johnson (count 7), the aggravated robbery of J.J. (count 8), the aggravated criminal sexual abuse of J.J. (counts 9 through 11), the aggravated battery of J.J. (count 12) and the aggravated battery of Johnson (count 13).

¶ 5 At trial, the evidence generally showed that on the night of March 29, 2014, Johnson and J.J. went to a house party near 57th and Laflin. Johnson had driven them there. After leaving the party at about 2 a.m., they were approached by defendant and codefendant. Johnson and J.J.

[1]Defendant's name appears as "Rapheal," "Raphael" and "Ralpheal" in the record.

agreed to give the men a ride because they were going in the same direction. Defendant sat behind J.J. and codefendant sat behind Johnson.

¶ 6 When Johnson eventually pulled the car over at 5512 South Throop, codefendant asked where Johnson was from. Johnson answered that he was from "everywhere" because he understood that question to mean something and he was not in a gang. Defendant then said, "Give me all that shit," and twice banged J.J.'s head against the dashboard. According to J.J., she turned around and hit defendant in the face.

¶ 7 Johnson exited the car, taking his phone with him. J.J., defendant and codefendant exited the car as well. Codefendant moved toward Johnson, who was calling the police, and motioned as though he had a gun. Meanwhile, J.J. was fighting with defendant on the passenger side of the car. J.J. testified that defendant threw her toward a tree and hit her in the face. She fell to the ground on the sidewalk. While J.J. and defendant were fighting, codefendant ran back to search the car. Johnson moved toward the car to find something to use as a weapon but codefendant chased him away. Furthermore, J.J. testified that she got up to try to reach Johnson but defendant dragged her by her hair to the alley, which, according to J.J., was five feet away from Johnson's car.

¶ 8 In the alley, J.J. fought back. When defendant choked her, she scratched him on the back of his neck to try to get him off of her. She would later identify a photograph depicting scratches on the back of defendant's neck. He called her "a pretty little bitch," and said, "I'm thinking about raping you." Defendant then threw her to the ground and began touching her. He put his hand under her bra, unbuttoned her pants and put his hands in her vagina for about 10 seconds. He then picked her back up, ripped her hoodie, and "threw" her to codefendant, saying, "Cuz, finish it." Codefendant hit J.J. and she fell to the ground.

¶ 9 Meanwhile, Johnson, who had been on the phone with 911 the entire time, flagged down Officer Margolis and his partner, who in turn directed Officer Schultz and his partner to the alley behind Throop. When Officer Schultz arrived in the alley, he saw codefendant standing over J.J. Officer Margolis then arrived and made the same observation. He also heard screaming. J.J. testified that after she heard sirens, defendant and codefendant fled. Officer Schultz chased codefendant and took him into custody. During a search of codefendant's person, Officer Schultz recovered items taken from Johnson's car.

¶ 10 Following codefendant's apprehension, Officer Margolis and his partner toured the area looking for the second offender. At 2:56 a.m., they located defendant at about 5630 South Racine, just two blocks east of the original occurrence, and transported him to the scene, where J.J. identified him. Johnson testified that he identified one of the perpetrators at the scene but could not recall which one. Later at the police station, Johnson identified photographs of defendant and codefendant.

¶ 11 After closing arguments, Judge Clayton Crane found the victims' testimony was sufficient, albeit imperfect, and stated as follows:

> "I had some difficulty as they testified in this case with their ability to put together the facts as they appeared to be in the case.
>
> That having been said, there was an identification made and I believe as it concerns Mr. Hall what puts it over the top is the scratches on the neck. *I don't believe I am certain beyond a reasonable doubt. Finding of not guilty as to all counts except for Counts 7 and 8, as to the lesser included count of robbery*." (Emphasis added.)

After Judge Crane went on to find codefendant guilty of certain offenses, defense counsel sought clarification:

"MR. ROLECK [Assistant Public Defender]: Your Honor, what were the counts for Mr. Hall?

THE COURT: For Mr. Hall, it's Counts 1 to 4, Count 7 lesser included robbery, Count 8 lesser included robbery, and then the balance of the other counts through 13."

Before adjourning, the court stated:

"Let me correct the, if there's an error in the, if there's a mistake in the record, it's Counts 1 through 4, Mr. Hall has been found guilty.

***

One, 2, 3, 4, 9, 10, 11, 12 and 13, and then in Counts 7 and 8 it's a lesser included."

¶ 12 During post-trial proceedings, this case was transferred to Judge Alfredo Maldonado. In support of defendant's post-trial motion, defense counsel argued that Judge Crane erred by modifying his original findings:

"MR. ROLECK: He said a finding of not guilty as to all counts for Mr. Hall except count 7 and 8, lesser included robbery. Then he went on to enter findings as to Mr. Walton, the co-defendant.

THE COURT: Actually, then you asked to clarify. You asked the Judge to clarify, which he then did.

MR. ROLECK: Which he did, your Honor. And I would argue at that time, after he said not guilty to all counts, once that has left his mouth, we would argue that's that. He cannot go back and change that finding. *** The transcript says, and I did ask, what counts as to Mr. Hall, just for that clarification. I would argue that that's not enough for him to go back."

The State represented, however, that Judge Crane had been experiencing problems with his voice for months and that the transcript was inaccurate:

> "As I recall correctly, he was having difficulty with his voice and was eating candy to try to moisturize his throat for lack of a better word. And that's apparent and supported by the rest of the record in that Mr. Roleck in fact did ask for the Court to clarify his ruling because he couldn't hear. As well as defense counsel for [codefendant] also asked that, could the Court clarify because I couldn't hear everything. I have [] hearing loss, and the Judge did clarify for the record of what the counts were. And simply because the Court said finding of not guilty as to all counts except for - - no judgment has been entered until the Judge enters a judgment. The Defense argument is that this is no take-backs. Once something comes out of your mouth, you are not allowed to correct yourself, because you said it. That doesn't work with children, and it doesn't work with this record here because the Court did not make entry of the judgment."

¶ 13 Judge Maldonado found that when read in its entirety, the record showed Judge Crane clearly intended to find defendant guilty of counts 1 through 4, counts 9 through 13 and robbery, a lesser included offense of counts 7 and 8. "I can see that it is a little confusing, but it's not confusing that it's in some way fatal to the ruling that Judge Crane did make."

¶ 14 I. ANALYSIS

¶ 15 A. Double Jeopardy

¶ 16 As stated, the trial court found defendant guilty of, and imposed sentences on, aggravated criminal sexual assault (count 1), aggravated kidnapping (count 4), robbery (a lesser-included offense of count 7), and aggravated battery (count 12). Defendant contends, however, that Judge

Crane's comments made prior to his findings of guilt actually acquitted defendant of all offenses but robbery. According to defendant, his other convictions violate double jeopardy principles.

¶ 17 Initially, defendant acknowledges he failed to object to this error at the time it occurred but nonetheless urges us to review it as plain error or as a reflection of counsel's ineffective assistance. "To succeed under either theory, however, there must have been an error." *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 24. We find none.

¶ 18 The double jeopardy clause found in the United States Constitution provides the same protection as that found in Illinois' constitution. *People v. Cabrera*, 402 Ill. App. 3d 440, 446 (2010). Both constitutions prohibit a person from being twice placed in jeopardy for the same offense. *People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 24 (citing U.S. Const., amend. V; Ill. Const. 1970. Art. I, § 10). More specifically, double jeopardy principles prohibit (1) a second prosecution for the same offense following acquittal; (2) a second prosecution for the same offense following conviction; and (3) multiple punishments for the same offense. *Cervantes*, 2013 IL App (2d) 110191, ¶ 24.

¶ 19 The prohibition against double jeopardy is intended to prevent the State from engaging in multiple attempts to convict, which would subject an individual to additional expense, embarrassment, insecurity and anxiety, and increase the possibility that he may be found guilty even if innocent. *Cabrera*, 402 Ill. App. 3d at 446. This prohibition also furthers the finality of proceedings. *Id*. Double jeopardy principles are not to be mechanically applied, however, particularly where the interests the rule is intended to protect are not endangered and where a mechanical application of those principles would frustrate society's interest in the enforcement of criminal laws. *People v. Staple*, 2016 IL App (4th) 160061, ¶ 14. Where neither the witnesses'

credibility nor the facts are at issue, the application of double jeopardy principles constitutes a question of law, which we review *de novo*. *Id*. ¶ 12.

¶ 20 Jeopardy must attach and terminate in order for further prosecution to be barred. *Cabrera*, 402 Ill. App. 3d at 449. In a bench trial, jeopardy attaches where the first witness is sworn and the court begins hearing evidence. *Id*. at 447. Additionally, jeopardy generally terminates in a bench trial when the judge enters a final judgment of acquittal. *Cervantes*, 2013 IL App (2d) 110191, ¶ 54. "[O]nce a defendant is acquitted, the court may not thereafter reconsider and vacate the acquittal." *Id*. ¶ 61. The question here, however, is whether Judge Crane actually acquitted defendant before finding him guilty.

¶ 21 Acquittals include rulings that the evidence was insufficient to convict, factual findings negating any criminal culpability and any other ruling impacting the ultimate question of guilt or innocence. *Id*. ¶ 29. In addition, "[a] mistaken acquittal is an acquittal nonetheless." *Evans v. Michigan*, 568 U.S. 313, 318 (2013). "A finding of not guilty must be unequivocal, however, to trigger double jeopardy implications." *People v. Williams*, 188 Ill. 2d 293, 301 (1999). In determining whether an acquittal was unequivocal, we must consider the record as a whole. *Id*. at 302.

¶ 22 Defendant contends that Judge Crane unequivocally acquitted him of all charges except for the lesser-included offense of robbery when he stated, "Finding of not guilty as to all counts except for Counts 7 and 8, as to the lesser included count of robbery." We disagree.

¶ 23 After making the foregoing statement, Judge Crane, prompted by defense counsel, clarified the record. Regardless of whether Judge Crane and defense counsel were motivated by concerns that the transcript might be inaccurately transcribed or concerns that Judge Crane misspoke, the record indicates that the statement defendant now relies on did not and does not

reflect Judge Crane's actual findings.[2] This was not an unequivocal acquittal. Furthermore, Judge Crane clarified the record in almost the same breath as he made the allegedly exculpatory finding. Compare *Williams*, 188 Ill. 2d at 298-301 (finding no acquittal occurred where the trial court said it was "going to grant the motion for a directed finding and finding of not guilty" but a few sentences later offered to hold that ruling in abeyance for the parties to submit additional law), and *People v. Burnette*, 325 Ill. App. 3d 792, 806-07 (2001) (finding no double jeopardy concern where the trial court inadvertently said "not guilty" but immediately corrected that statement by unequivocally finding the defendant guilty), with *Cervantes*, 2013 IL App (2d) 110191, ¶ 46 (finding that while the trial court in *Burnette* obviously misspoke by saying "not guilty," the prosecutor in *Cervantes* essentially persuaded the trial court to modify its unambiguous "not guilty" finding).

¶ 24 Defendant's reliance on case law pertaining to mistaken acquittals is misplaced. To be a mistaken acquittal, a finding must be an acquittal in the first instance. See also *Williams*, 188 Ill. 2d at 301 (stating that the issue was "not the effect of a finding of not guilty, but rather, whether the trial court in fact made this finding"). Here, however, there was no acquittal, let alone a mistaken one. *Cf. Evans*, 568 U.S. at 320, 325 (finding that while the trial court's clear ruling was unquestionably predicated on a misunderstanding of law, the court nonetheless acted on the view that the prosecution failed to prove its case).

¶ 25 Defendant was not subjected to additional expense, embarrassment, insecurity or anxiety. The State did not engage in multiple attempts to convict. Were we to superficially label Judge Crane's initial statement as an acquittal, we would frustrate society's interest in the enforcement of criminal laws. Defendant was not placed twice in jeopardy.

[2]We agree that as transcribed, the report of proceedings contains certain oddities.

¶ 26 B. Aggravated Kidnapping

¶ 27 Next, defendant asserts that we should vacate his aggravated kidnapping conviction because his movement and confinement of J.J. were merely incidental to the aggravated criminal sexual assault of J.J. We disagree.

¶ 28 "A person commits the offense of aggravated kidnapping when he or she commits kidnapping and *** commits another felony upon his or her victim." 720 ILCS 5/10-2 (West 2014). Additionally, "[a] person commits the offense of kidnapping when he or she knowingly *** by force or threat of imminent force carries another from one place to another with intent secretly to confine that other person against his or her will." 720 ILCS 5/10-1 (West 2014). Pursuant to the *Levy-Lombardi* doctrine, a defendant cannot be convicted of kidnapping where asportation or confinement is merely incidental to another crime. *People v. Eyler*, 133 Ill. 2d 173, 199 (1999). That being said, "[i]t cannot be seriously argued that in every case where a victim is murdered or raped during a secret confinement the perpetrator is to be absolved of guilt as to the offense of kidnapping."*People v. Enoch*, 122 Ill. 2d 176, 197 (1988).

¶ 29 To determine whether asportation or confinement is merely incidental to another crime, courts consider (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during another offense; (3) whether the detention or asportation was inherent in the separate offense; and (4) whether the detention or asportation created a significant danger that was independent of the danger posed by the separate offense. *People v. Smith*, 91 Ill. App. 3d 523, 529 (1980). Whether asportation constitutes kidnapping involves a fact specific inquiry that depends on the circumstances of each case. *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 24.

¶ 30 While defendant urges to review this matter *de novo*, this court has already determined that we apply the same standard of review that applies to challenges to the sufficiency of the evidence. *People v. Sumler*, 2015 IL App (1st) 123381, ¶ 53. We must determine whether a rational trier of fact, after viewing the evidence in the light most favorable to the prosecution, could have determined that the prosecutor proved the elements of the crime beyond a reasonable doubt. *Id*. ¶ 54. Under any standard of review, however, we would affirm the court's judgment.

¶ 31 Defendant's movement of J.J. to the alley was not incidental to aggravated criminal sexual assault. Although J.J. testified that the alley was only five feet away, maps suggest that 5512 South Throop, where Johnson's car was parked, was more than five feet away. See *People v. Lee*, 2016 IL App (2d) 150359, ¶ 12 n.1 (taking judicial notice of location based on an Internet-based map). More importantly, it is well settled that the brevity of the distance or duration of asportation does not preclude a kidnapping conviction. *Sumler*, 2015 IL App (1st) 123381, ¶ 57. Transporting the victim as little as half a block may be sufficient. *People v. Rush*, 238 Ill. App. 3d 806, 817 (1992); see also *People v. Banks*, 344 Ill. App. 3d 590, 596 (2003) (affirming the defendant's aggravated kidnapping conviction where the victim was dragged 10 feet down an alley). Furthermore, J.J. was confined in the alley long enough to be physically and sexually violated, and her confinement may have continued had the police not arrived. *People v. Pugh*, 162 Ill. App. 3d 1030, 1035 (1987) (recognizing that the intervention of the police made the detention brief).

¶ 32 Additionally, courts have determined that kidnapping constitutes a separate offense where the victim was moved prior to a sexual assault. *People v. Singuenza-Brito*, 235 Ill. 2d 213, 226 (2009); *People v. Ware*, 323 Ill. App. 3d 47, 56 (2001); *People v. Riley*, 219 Ill. App. 3d 482, 489 (1991). Here, asportation occurred before, not during, the aggravated criminal sexual

assault and defendant was not required to move J.J. in order to accomplish that assault, notwithstanding defendant's assertion to the contrary. Defendant could have continued to assault her next to Johnson's car.

¶ 33 Furthermore, "the forced movement of the victim from one place to another is not inherent in the offense of criminal sexual assault." Compare *Ware*, 323 Ill. App. 3d at 56, and *Riley*, 219 Ill. App. 3d at 489, with *People v. Lamkey*, 240 Ill. App. 3d 435, 440 (1992) (stating that detention is inherent in the commission of aggravated criminal sexual assault), and *People v. Young*, 115 Ill. App. 3d 455, 470 (1983) (finding that the act of grabbing the victim and throwing her against the wall was inherent in the rape itself since the victim had to be restrained in some way to accomplish the rape and the detention lasted only for the duration of the rape). Similarly, asportation and confinement are not elements of aggravated criminal sexual assault. *People v. Quintana*, 332 Ill. App. 3d 96, 107 (2002).

¶ 34 Finally, defendant's method of moving J.J., *i.e.* dragging her by her hair, created a significant danger that she would be injured, apart from any danger ensuing from aggravated criminal sexual assault. In addition, J.J. was removed from public view, off the main road, in the dark of night. The police found her because Johnson directed the police where to look: they did not stumble upon her. The asportation and confinement here increased the danger to J.J. by making it easier for defendant to engage in more serious criminal activity without detection from passersby. *Quintana*, 332 Ill. App. 3d at 106-08; see also *Johnson*, 2015 IL App (1st) 123249, ¶ 28 (finding that moving the victim to an area between garages, away from the street and sidewalk, heightened danger to the victim by decreasing the likelihood that she would be heard or seen, particularly in the dark of night).

¶ 35 Here, the asportation and confinement of J.J. were not incidental to aggravated criminal sexual assault. Accordingly, we affirm defendant's aggravated kidnapping conviction.

¶ 36 C. Sentencing Errors

¶ 37 Finally, defendant asserts that certain monetary assessments were improper and that others should have been offset by credit. He also asserts that we should correct the mittimus to reflect the correct offenses for which he was convicted.

¶ 38 On February 26, 2019, our supreme court adopted Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting certain sentencing errors, including, "[e]rrors in the imposition or calculation of fines, fees, and assessments or costs," "[e]rrors in the application of *per diem* credit against fines" and "[c]lerical errors in the written sentencing order." Ill. S. Ct. R. 472(a)(1), (2), (4) (eff. Mar. 1, 2019). The rule provides that, in criminal cases, "the circuit court retains jurisdiction to correct" the enumerated errors "at any time following judgment ***, including during the pendency of an appeal." Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019). Additionally, "[n]o appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule "unless such alleged error has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019). More recently, our supreme court amended Rule 472 to add subsection (e), which states:

> "In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 39 Here, defendant failed to raise these challenges in the circuit court. Consequently, his contentions are not properly before us and we remand to allow defendant the opportunity to file a motion under Rule 472.

¶ 40 III. CONCLUSION

¶ 41 The trial court's misstatement did not acquit defendant of any offenses and, consequently, none of his convictions placed him in jeopardy a second time. In addition, the asportation and detention supporting the kidnapping conviction was not merely incidental to aggravated criminal sexual assault. Furthermore, defendant will have the opportunity on remand to raise his challenges to the fines and fees order as well as the mittimus.

¶ 42 Affirmed; remanded.