

2012 IL App (2d) 110054-U  
No. 2-11-0054  
Order filed June 29, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CF-2174
	)	
JOHN W. RILEY,	)	Honorable
	)	John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

**ORDER**

*Held:* (1) The State failed to prove defendant guilty beyond a reasonable doubt of aggravated kidnaping, as the evidence established that defendant moved the victim to her basement with the intent not to secretly confine her there but to force her to open a safe that happened to be there; (2) we vacated defendant's sentence for home invasion and remanded for resentencing because the trial court did not make a finding, required by the parties' waiver of a presentence report as to defendant's history of delinquency or criminality.

¶1 Following a stipulated bench trial, defendant, John W. Riley, was convicted of home invasion (720 ILCS 5/12-11(a)(3) (West 2008)) and aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2008)). The trial court sentenced him to 23 years' imprisonment on each conviction, the sentences

to run concurrently. Defendant appeals, contending that the State failed to prove him guilty beyond a reasonable doubt of aggravated kidnaping and that the trial court erred in sentencing him without the benefit of a presentence report and without making a finding as to his history of delinquency or criminality. For the reasons that follow, we reverse defendant's conviction of aggravated kidnaping and remand for resentencing on his conviction of home invasion.

¶ 2 Defendant was charged with two counts of home invasion (720 ILCS 5/12-11(a)(2), (a)(3) (West 2008)), two counts of aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2008)), and one count of residential burglary (720 ILCS 5/19-3(a) (West 2008)).

¶ 3 Defendant agreed to proceed to a stipulated bench trial on one count of home invasion and one count of aggravated kidnaping, and the State dismissed the remaining charges. The parties further agreed that, if the trial court were to find defendant guilty, defendant would waive a presentence report and both parties would recommend a 23-year sentence.

¶ 4 At trial, the parties stipulated to the following evidence. If called to testify, Matthew Baumhart would testify to the following. On the afternoon of May 26, 2008, he was mowing the lawn of the house he shared with his mother, Lisa Weeks, when defendant pulled up to the house in a sport-utility vehicle with two African-American males. Baumhart had known defendant since he was approximately seven years of age, and defendant knew that Baumhart's father was deceased. Defendant asked Baumhart if he had any weed, to which Baumhart replied that he did not. Defendant then asked after Baumhart's mother, and Baumhart told defendant that Weeks was recovering from a recent surgery. Baumhart told defendant that he would soon be returning to military school and that he would not be around that evening. That evening, Baumhart received a phone call from defendant asking where Baumhart was and what he was doing. Baumhart told

defendant that he was at a barbecue in Kenosha, Wisconsin, and would soon be leaving for military school. Shortly thereafter, Baumhart received a phone call from a neighbor stating that someone had broken into his house.

¶ 5 If called to testify, Weeks would testify as follows. At approximately 7 p.m. on May 26, 2008, she was lying in bed recuperating from a “tummy tuck” surgery. She heard her door open and three men came into her bedroom. One of the men was African American and wearing white sunglasses. The second man was also African American but was wearing a hooded sweatshirt with the hood pulled up and covering his face. The third man was olive skinned and was also wearing a hooded sweatshirt with the hood pulled up and covering his face. The man wearing the sunglasses pulled her off of her bed, causing her to injure her head and bite her lip. The man put his knee on her stomach and, while pointing a silver gun at her, told her that she was being robbed and not to speak. He then placed duct tape over her mouth. One of the men asked her about a safe, and she indicated that it was in the basement. The man in the sunglasses pulled her to her feet, held her hands behind her back, and had her lead them to the safe. The basement windows were covered, and people from the street would not be able to see in. The safe contained her deceased husband’s handguns, rifles, coins, ammunition, and military papers. She attempted to open the safe but was unable to do so. She requested her glasses, which one of the men retrieved. Even after obtaining her glasses, however, she was still unable to open the safe. While one of the men attempted to open the safe, the olive-skinned man held the gun and pointed it at her. Eventually, the safe was opened, and the men collected the guns, coins, and other items from the safe and put them in bags the men had brought with them. The men also took her purse. While the other two men went upstairs, the man in the sunglasses took her to another part of the basement, put a blanket over her head, told the

other two men where he was putting her, and then left her there. She heard one of the men say that he had taken all of the phones. She waited approximately five seconds for the men to leave and then fled to a neighbor's house for help.

¶ 6 In addition, stipulated evidence established that defendant told police he entered Weeks' home and participated in the robbery with two other men and that defendant's DNA matched DNA found on a latex glove found in Weeks' driveway.

¶ 7 Following the presentation of evidence, the trial court found defendant guilty of both home invasion and aggravated kidnaping. After denying defendant's motion for a new trial, and based on the agreement of the parties, the trial court proceeded immediately to sentencing. Without the benefit of a presentence report, which the parties agreed to dispense with, the trial court sentenced defendant to 23 years' imprisonment on both counts, to run concurrently.

¶ 8 Defendant brought this timely appeal.

¶ 9 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt of aggravated kidnaping because (1) no evidence was presented that defendant moved Weeks to the basement with the intent to secretly confine her, and (2) under the *Levy-Lombardi* doctrine, the act of transporting Weeks from her bedroom to the basement was merely incidental to the armed robbery.

¶ 10 We review claims of insufficient evidence to determine “ ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates

a reasonable doubt of the defendant's guilt. *Collins*, 106 Ill. 2d at 261. It is not the function of this court to retry the defendant. *Collins*, 106 Ill. 2d at 261. The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 11 A person commits aggravated kidnaping when he “[c]ommits the offense of kidnaping while armed with a firearm.” 720 ILCS 5/10-2(a)(6) (West 2008). A person commits kidnaping when he knowingly “[b]y force or threat of imminent force carries another from one place to another with intent secretly to confine him against his will.” 720 ILCS 5/10-1(a)(2) (West 2008). The indictment alleged that defendant committed aggravated kidnaping when he, while armed with a firearm, knowingly and with the use of force carried Weeks from her bedroom to the basement with the intent to secretly confine her against her will.

¶ 12 Defendant contends that the State failed to prove beyond a reasonable doubt that he intended to secretly confine Weeks when he moved her from the bedroom to the basement. Rather, defendant argues, his intent in moving Weeks from the bedroom to the basement was merely to take her to open the safe, which happened to be located in the basement. We agree. The evidence presented at trial was that, upon entering the house and subduing Weeks, defendant and his accomplices immediately asked about the location of the safe. When Weeks informed them that it was in the basement, they brought her down there, had her assist in opening the safe, removed the items, and after moving her to another location in the basement, left her. Nothing indicated that defendant and his accomplices brought Weeks to the basement with the intent to hide or conceal her from others.

¶ 13 The State argues that defendant has confused his motive for transporting Weeks to the basement with his intent to secretly confine her. In support, the State points out that defendant and his accomplices knew that Baumhart would not be home, knew that Weeks was recovering from surgery, held her at gunpoint in the basement where no one could see in or out of the windows, and covered her with a blanket before leaving. While these facts demonstrate that defendant and his accomplices did, in fact, secretly confine Weeks, the relevant question is whether they demonstrate that defendant's intent in transporting Weeks to the basement was to secretly confine her. The State elected to proceed to trial on the charge alleging that defendant committed aggravated kidnaping in that he "knowingly, by the use of force, carried Lisa Weeks from her bedroom to the basement, with the intent to secretly confine Lisa Weeks against her will." The State chose to dismiss the charge alleging that defendant committed aggravated kidnaping in that he secretly confined Weeks against her will. Accordingly, whether defendant succeeded in secretly confining Weeks is irrelevant, as the pertinent issue is whether he intended to do so when he transported Weeks from her bedroom to the basement. The evidence indicates that defendant's intent in transporting Weeks to the basement was simply to have her open the safe and that the charged secret confinement of Weeks by the safe was merely a coincidental consequence of the safe's location in the basement.

¶ 14 In addition, that defendant and his accomplices moved Weeks from one area of the basement to another and covered her with a blanket before leaving is of no relevance, because defendant was charged only with transporting her from the bedroom to the basement, not from one area of the basement to another. We do not decide whether the transportation of Weeks from the location by the safe to another location in the basement and covering her with a blanket was sufficient.

¶ 15 Defendant's final argument on appeal is that his sentences should be vacated and the matter remanded for resentencing because the trial court sentenced him without a presentence report and without making a finding as to his history of delinquency or criminality. Because defendant's aggravated kidnaping conviction must be reversed, we need determine only whether he should be resentenced on his home invasion conviction. The State agrees with defendant that resentencing is necessary, and we agree.

¶ 16 Section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2008)) requires the trial court to consider a presentence report before sentencing a defendant on a felony unless the parties agree to a specific sentence and the trial court makes a finding for the record regarding the defendant's history of delinquency or criminality. "[T]he presentence investigation and report is a mandatory legislative requirement which cannot be waived except in accordance with the exception in the statute." *People v. Youngbey*, 82 Ill. 2d 556, 561 (1980). Given that the parties waived the presentence report in this case, the trial court was required to make a finding as to defendant's history of delinquency or criminality. It did not. Therefore, defendant's sentence for the home invasion conviction must be vacated and the matter remanded for resentencing in accord with the provisions of section 5-3-1. See *People v. Walton*, 357 Ill. App. 3d 819, 824 (2005). We express no opinion as to the parameters of resentencing, as the matter is within the discretion of the trial court.

¶ 17 For the foregoing reasons, defendant's aggravated kidnaping conviction is reversed, his home invasion sentence is vacated, and the cause is remanded for resentencing.

¶ 18 Affirmed in part, reversed in part, and vacated in part; cause remanded.