

Crossing the Minefield of a Kidnapping Trial

Don Bridges
Senior Resident Superior Court Judge
District 27B



Tread Carefully

Watch for this:



Or step onto this:



Topics Covered

- Difficulties with disjunctive elements
 - Variance
 - Amendments
- Problems arising from multiple charges/convictions
 - Double Jeopardy and Legislative Intent issues
 - Elements used to allege Kidnapping in First Degree
 - Overlap in elements with other crimes
 - Possible use of special verdict sheet

What Makes Kidnapping So Difficult?

- Start by taking a look at the statute

G.S. 14-39. Kidnapping

(a) Any person who shall unlawfully *confine, restrain, or remove* from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

- (1) Holding such other person for a *ransom or as a hostage or* using such other person as a *shield; or*
- (2) Facilitating the *commission of any felony or facilitating flight* of any person *following the commission* of a felony; *or*
- (3) Doing serious *bodily harm to or terrorizing* the person so confined, restrained or removed or any other person; *or*
- (4) Holding such other person in *involuntary servitude* in violation of G.S. 14-43.12.
- (5) *Trafficking another person with the intent* that the other person be held in *involuntary servitude or sexual servitude* in violation of G.S. 14-43.11.
- (6) *Subjecting or maintaining* such other person for *sexual servitude* in violation of G.S. 14-43.13.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

Elements of First Degree Kidnapping

A person guilty of this offense:

- (1) (a) confines, (b) restrains, *or* (c) removes from one place to another
- (2) a person
- (3) (a) without the person's consent *or*, (b) if the person is under 16, without consent of the person's parent or guardian,
- (4) for the purpose of
 - (a) holding the victim as hostage, (b) holding the victim for ransom, (c) using the victim as a shield, (d) facilitating the commission of a felony, (e) facilitating flight following the commission of a felony, (f) doing serious bodily harm to the victim or any other person, (g) terrorizing the victim or any other person, (h) holding the victim in involuntary servitude in violation of G.S. 14-43.12, (i) trafficking another person with intent for involuntary or sexual servitude *or* G.S. 14-43.11, *or* (j) subjecting or maintaining the victim for sexual servitude in violation of G.S. 14-43.13 *and*
 - (5) (a) does not release the victim in a safe place, (b) seriously injures the victim, *or* (c) sexually assaults the victim.

Elements Including Disjunctive Options

- (1) Confine, restrain *or* remove;
- (3) Without the person's consent *or* without the consent of parent or guardian;
- (4) For purposes of holding victim as hostage *or* holding victim for ransom *or* using victim as a shield *or* facilitating the commission of a felony *or* facilitating flight following the commission of a felony *or* doing serious bodily harm *or* terrorizing any person, holding the victim in involuntary servitude *or* trafficking another person in violation of G.S. 14-43.11, *or* (j) subjecting or maintaining the victim for sexual servitude
- (5) Does not release the victim in a safe place *or* seriously injures the victim *or* sexually assaults the victim.

Disjunctive Instructions: A Quick Review

The basic rule:

A disjunctive instruction may not be used when the alternative acts constitute separate offenses.

A disjunctive instruction may be used when the alternative acts are simply various ways of establishing an element of the offense.

See Bridges, Potential Pitfalls When Using Disjunctive Instructions: Watch Out for that "Or"

Disjunctive Instructions: Some Guidelines

First, determine whether the statute at issue criminalizes a single wrong *or* whether it criminalizes multiple discrete wrongs. If the statute criminalizes multiple discrete wrongs, a disjunctive instruction may not be used. If the statute criminalizes a single wrong and the underlying acts are alternate ways of proving an element of that wrong, a disjunctive instruction is permissible.

Second, if there is no case law on point, consider the "gravamen" or "gist" of the statute to determine whether the statute criminalizes a single wrong or multiple discrete wrongs.

And third, if you use a disjunctive instruction, *make sure that each of the alternatives is supported by the evidence produced at trial and the allegations in the bill of indictment.*

Step 1: Read the Indictment!



Defendant is accused of second degree kidnapping under a bill of indictment alleging that the defendant “confined and restrained” the victim. At trial, the judge instructed the jury on the first element of the offense (and repeated in the final mandate) as “confine, restrain or remove from one place to another...” After Defendant is convicted, he enters notice of appeal. When this issue is addressed on appeal, this instruction *should* result in this conviction being:

- A. Affirmed
- B. Reversed
- C. Affirmed only if the Defendant fails to preserve error by objecting to the instruction at trial

State v. Boyd, 366 NC 548, ___ SE2d ___ (2013) and ___ NC App ___, 730 SE2d 193; See also *State v. Tucker*, 317 NC 532, ___ SE2d ___ (1986) and *State v. Dominie*, 134 NC App 445, ___ SE2d ___ (1999).



Confine, Restrain or Remove

Basic Rule:

It is *plain error* to instruct on a theory of kidnapping that is different from the theory charged in the indictment. *State v. Tucker*, 317 NC 532, ___ SE2d ___ (1986); see also *State v. Dominie*, 134 NC App 445, ___ SE2d ___ (1999); but see *State v. Boyd*, 214 NC App 294, ___ SE2d ___ (2011), rev'd by 366 NC 548, ___ SE2d ___ (2013)

Conclusion:

- Best practices require us to
 - Look at the indictment, see what is alleged
 - Charge only on the theories that are alleged and supported by the evidence

Confine, Restrain or Remove: The Terms are not Synonymous

- Confinement: some form of imprisonment within a given area, such as a room, house or vehicle.
- Restraint: may include confinement, but it also connotes a restriction, by force, threat or fraud, even without a confinement. Must be separate and apart from the restraint inherent in committing other charged felonies.
- Removal: some movement of the victim, though it need not cover a substantial distance nor does it require asportation.
- The confinement, restraint or removal must involve a *live* victim.

Defendant is accused of first degree kidnapping under an indictment in which it is alleged that he confined, restrained and removed Carrie Taylor without her consent, for purposes of facilitating his commission of the felony of first degree burglary. At the close of the State's evidence, the State moves to amend the indictment by (a) alleging that the victim actually was less than 16 years of age at the time of offense and that the confinement, restraint and removal was without consent of her parents; and (b) alleging that the kidnapping was for purposes of facilitating his commission of first degree statutory sex offense. Is it error to grant these motions to amend?

- Error as to age, not as to the felony
- Error as to the felony, not as to age
- Error as to both amendments
- Not error as to either amendment



Allegation, Variance and Amendment

- The State is not required to allege a specific felony in order to charge that the kidnapping was committed for purposes of facilitating the commission of a felony or facilitating flight therefrom. *State v. Freeman*, 314 NC 432, 333 SE2d 743 (1985).
- *But*—if the State alleges a specific felony, then it is bound by that allegation and must offer evidence of intent to commit that felony or flight therefrom. *State v. Yarborough*, 198 NC 22, 679 SE2d 397 (2009); *State v. McRae*, ___ NC App ___, 752 SE2d 731 (2014).
- If an intended felony that need not be alleged is in fact alleged, that allegation may not be amended. *State v. Silas*, 360 NC 377, 627 SE2d 604 (2006).
- Age of the victim is not an element of the offense. Consequently, a variance between allegation and proof as to the victim's age is not a material variance. *State v. Tollison*, 190 NC App 552, 660 SE2d 647 (2008).

Distinctions Between 1st and 2nd Degree Kidnapping

- Kidnapping is first degree if the victim is:
 - Not released in a safe place;
 - Seriously Injured; or
 - Sexually assaulted.
- What problems arise when a defendant is charged both with first degree kidnapping and a related sexual assault or assault that seriously injures the victim?

Defendant is charged with first degree rape and first degree kidnapping. The element that the State uses to elevate the kidnapping to first degree under GS 14-39(b) is an allegation "that the victim was sexually assaulted." If the jury returns a verdict finding Defendant guilty of both first degree kidnapping and first degree rape, how may the Defendant legally be sentenced?

- To consecutive sentences for first degree rape and first degree kidnapping
- To one sentence whereby the first degree kidnapping is consolidated under the first degree rape
- To consecutive sentences for first degree rape and second degree kidnapping
- Both B and C

State v. Freeland, 316 NC 13, 340 SE2d 35 (1986) and *State v. Daniels*, 189 NC App 705, 659 SE2d 22 (2008).



Double Jeopardy: A Quick Review

See Farb, "Double Jeopardy and Related Issues," *NC Superior Court Judges Benchbook and Smith*, "Bars and Defenses," *North Carolina Crimes*, Chapter 2

- 5th Amendment: No person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This provision prohibits
 - A second prosecution for the same offense after acquittal;
 - A second prosecution for the same offense after conviction and
 - Multiple punishments for the same offense.
- For double jeopardy purposes, offenses are not the same offense if each offense contains an element that is not in the other.
- *But-* for multiple punishments at the same trial, Double Jeopardy only bars a sentencing court from prescribing greater punishments than the legislature intended. Legislative intent is determined by examining the subject, language and history of the statutes at issue.

Double Jeopardy Analysis

- Kidnapping is not the same offense nor a lesser included offense of rape (or any other sexual assault) or any other level of assault inflicting serious injury).
- Neither assault inflicting serious injury nor any sexual assault is the same offense nor a lesser included offense of kidnapping (although the "sexual assault is identical to the *element* that elevates kidnapping from second degree to first degree;
- Issue: Did the legislature intend that a defendant may be punished for both offenses

Kidnapping with Sexual Assault

- What is "sexual assault?"
 - For purposes of GS 14-39, sexual assault includes rape, sexual assault offenses in Article 7A, Chapter 14 of NCGS or non-consensual crime against nature. *See* Smith, *North Carolina Crimes*, p. 309.

Kidnapping with Sexual Assault

- *Basic Rule:* If the Defendant is convicted of 1st Degree Kidnapping based on rape, sex offense or other sexual assault and is also convicted of the same sexual assault, Defendant cannot be sentenced for both 1st Degree Kidnapping and for the same sexual assault. *State v. Freeland*, 316 NC 13, 340 SE2d 35 (1986) and *State v. Daniels*, 189 NC App 705, 659 SE2d 22 (2008).
- Trial judge is required to arrest judgment on one of the offenses (may arrest on 1st degree kidnapping and sentence on 2nd degree kidnapping).
- Not necessary to arrest judgment if there is more than one sexual assault (though special verdict sheet may be necessary for clarity).

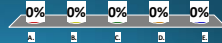
Why Use a Special Verdict Sheet?

- State may proceed with alternative theories.
- In such cases, we look to the appellate courts for guidance:
 - "Where the jury is presented with more than one theory upon which to convict a defendant and does not specify which one it relied upon to reach its verdict, such a verdict is ambiguous and should be construed in favor of defendant... This Court is not free to speculate as to the basis of a jury's verdict." *State v. Daniels*, 189 NC App 705, 659 SE2d 22 (2008)
 - "if multiple felonies support a felony murder conviction, the merger rule only requires the trial court to arrest judgment on at least one of the underlying felony convictions . . . In cases where the jury does not specifically determine which conviction serves as the underlying felony, we have held that the trial court may, in its discretion, select the felony judgment to arrest." *State v. Marion*, ___ NC App ___, 756 SE2d 61 (2014)

Defendant is charged with and first degree kidnapping and AWDWISI. The element that the State uses to elevate the kidnapping to first degree under GS 14-39(b) is an allegation "that the victim was seriously injured." If the jury returns a verdict finding Defendant guilty of both first degree kidnapping and AWDWISI, how may the Defendant legally be sentenced?

- To consecutive sentences for AWDWISI and first degree kidnapping
- To one sentence whereby the AWDWISI is consolidated under the first degree kidnapping
- To consecutive sentences for AWDWISI and second degree kidnapping
- Both A and B
- To any of A, B, and C

State v. Williams, 201 NC App 161 (2009); *State v. Romero*, 164 NC App 169, 595 SE2d 208 (2004).



Kidnapping with Serious Injury

- A defendant may be sentenced for both first degree kidnapping and assault *inflicting serious bodily injury*. *State v. Williams*, 201 NC App 161, ___ SE2d ___ (2009) (Assault inflicting serious bodily injury requires additional proof of "serious bodily injury" beyond the "serious injury" needed to prove first degree kidnapping).
- Convictions of 1st degree kidnapping and AWDWISI did not violate double jeopardy where the restraint and removal were separate and apart from the assault. *State v. Romero*, 164 NC App 169, 595 SE2d 208 (2004).
- *Conclusion*: NC appellate courts have found legislative intent that a defendant may be sentenced for 1st degree kidnapping based upon an AWDWISI and for the assault itself.

Inconsistent Holdings?

- 1st degree kidnapping based on sexual assault + sexual assault = NOT PERMITTED
- 1st degree kidnapping based on serious injury + AWDWISI (or AISBI) = PERMITTED
- A matter of discerning legislative intent.

Other Issues with Multiple Charges

- Some crimes, such as robbery and forcible rape, inherently involve some restraint of the victim. Our Supreme Court has held that the legislature did not intend that restraint which is inherently part of another felony can also satisfy the restraint element of kidnapping.
- In order for a defendant to be convicted of both kidnapping and another felony, the restraint must be "a separate, complete act, independent of and apart from the other felony" or "separate and apart from the restraint which is inherent in commission of the other felony." *State v. Fulcher*, 294 NC 503, 524, 243 SE2d 338, 352 (1978).
- *Fulcher* speaks to *conviction* as well as punishment, meaning that the trial judge must be alert to this issue at the close of evidence.

Pattern Jury Instruction Crim. 210.25

- Third, that the defendant [confined] [restrained] [removed] that person for the purpose of
 - a. [facilitating [his] [another person's] [commission of] [flight after committing] (*name and define felony*).]
 - b. [doing serious bodily injury to that person.]
- Fourth, that this [confinement] [restraint] [removal] was a separate, complete act, independent of and apart from the [(*name felony*)] [injury].

Separate, Complete Act Not Inherent in Another Felony

See State v. Payton, 198 NC App 320, 679 SE2d 502 (2009)

Factors pointing to separate, complete act:

- Victim moved to another location
- Victim injured
- Victim bound
- Victim brought back after attempts at escape
- Restraint or confinement accomplished by physical assault

“Key consideration”: was the victim exposed to greater danger by the confinement, restraint or removal than would have been experienced only through the other felony?

Separate, Complete Act Not Inherent in Another Felony

See State v. Payton, 198 NC App 320, 679 SE2d 502 (2009)

Factors pointing toward act being inherent in other felony:

- Movement of the victim was slight (“technical asportation”, merely from one room to another;
- Victim was not bound or *loosely* bound;
- Victim was held for a short time;
- Victims ordered to lie down while robbery took place;

Separate, Complete Act Not Inherent in Another Felony

See State v. Payton, 198 NC App 320, 679 SE2d 502 (2009)

Cases that seem to go both ways:

- Victim is “merely moved” to another area while the robbery is taking place, but is not bound or physically harmed;
- Victim is held at gunpoint, but not otherwise assaulted.

- *Caution: Watch out for the cases that fall into the category of “technical asportation.”*

Please note: Some felonies, e.g., forcible rape and armed robbery inherently involve some element of restraint; others, such as AWDWISL may be committed without any restraint or confinement of the victim. *State v. Carrillo*, 115 NC App 674, 677-78, 446 SE2d 374, 382 (1994).

Defendant is charged with armed robbery and second degree kidnapping. The evidence at trial shows that he points a gun at a clerk in a convenience store and forces the clerk to remove turn over money from the cash register. He then orders the clerk into a back room, but the clerk refuses to go. When Defendant orders to the clerk to go outside and get into Defendant's car, but the clerk again refuses. Defendant then tells the clerk to lie down on the floor and count to 500 before moving. The case is submitted to the jury on charges of RWDW and second degree kidnapping, with no lesser included offenses. The jury returns verdicts finding Defendant guilty of each charge. The Defendant may be legally sentenced on:

- A. RWDW only
- B. Second degree kidnapping only
- C. RWDW and second degree kidnapping
- D. RWDW and attempted second degree kidnapping

State v. Stokes, 2014 NC LEXIS 290 (4/11/2014)



State v. Stokes, 2014 NC LEXIS 290, ___ SE2d ___ (4/11/2014) reversing *State v. Stokes*, ___ NC App ___, 745 SE2d 375 (2013):

- Defendant robbed a convenience store with a gun;
- Defendant ordered clerk into the back room, but he refused to go;
- Defendant then ordered clerk to get into his car, refused again.
- Jury found defendant guilty of RWDW and 2nd degree kidnapping;
- COA vacated kidnapping conviction, finding that the restraint/confinement was inherent in that necessary to complete the RWDW;
- Supreme Court *held* that, by finding defendant guilty of 2nd degree kidnapping, jury found beyond a reasonable doubt every element of all lesser included offenses, including *attempted* 2nd degree kidnapping;
- Case remanded for defendant to be sentenced on attempted 2nd degree kidnapping (even though that was not a possible verdict submitted to jury).
