Cite as 2024 Ark. App. 56

ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-22-818

DARRELL CORTEZ JOHNSON APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered January 31, 2024 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SEVENTH DIVISION [NO. 60CR-19-4517] HONORABLE KAREN D. WHATLEY, JUDGE AFFIRMED

BART F. VIRDEN, Judge

Darrell Cortez Johnson appeals his conviction by the Pulaski County Circuit Court of the crime of kidnapping, arguing that the evidence supporting his conviction is insufficient. Johnson also contends that his Sixth Amendment right to self-representation was violated. We affirm.

I. *Relevant Facts*

On November 4, 2019, Darrell Cortez Johnson was charged with one count of felony kidnapping and one count of felony attempted rape. At the April 11, 2022 pretrial hearing regarding the waiver of his right to a jury trial, the court asked defense counsel a question, and Johnson interrupted, stating, "[B]efore you make your decision, I want to represent myself too before you make your decision." The court explained that the purpose of the

hearing was to set a date for the bench trial, and no decision other than a court date would be made that day. Johnson responded that he had "some very important paperwork" that he wanted to present to the court. The court reiterated that paperwork was not on the agenda that day and stated that Johnson's attorney would handle that for him. Johnson stated, "I want to represent myself from now on." Johnson persisted that the court had determined that he was fit for trial; thus, he wanted to represent himself.

THE COURT: So--and you believe that you're competent to represent yourself?

THE DEFENDANT: You all say that I am.

THE COURT: How much education have you received, Mr. Johnson?

THE DEFENDANT: My latest, I mean, the highest level of education is the eighth grade.

THE COURT: Okay. And have you ever done a trial before?

THE DEFENDANT: I don't think so.

THE COURT: Okay. Mr. Johnson, I don't think that you should represent yourself and I don't think that you're capable of representing yourself. You have a really good lawyer. And so I'm going to keep Mr. Jones on your case. If you have any paperwork that you think Mr. Jones needs to get to me, you get that to him and Mr. Jones can—

THE DEFENDANT: He's not—he's not working with me.

THE COURT: Mr. Jones can get anything to me that he needs.

Johnson proceeded to explain his history of mental illness and his recent experience when "the doctor of my last evaluation, he crossed his legs and said upon a second time—

upon a second time . . . I'm not in the mood for the bullshit, when I never spoke any bullshit. All I spoke was the truth, your Honor." Counsel was appointed, and the hearing ended.

At the next pretrial hearing, Johnson addressed the court "Howdy do, Mommy" and stated that

> [y]ou remember I'm the one who said I would like to represent myself because . . . there's some—there are some statements that he—he's—that are true that he—he doesn't—he's not comfortable saying because the charges I have—the charges I have are somewhat violent charges, but I—but I—I wouldn't hurt a fly, you know what I mean. And so, you know what I mean.

Johnson proceeded to sing, explain that the problem was that he needed a real girlfriend, and refer to himself a soldier of truth and understanding, and he continued to address the court as "Mommy" and "Judge K."

On the day of the trial, Johnson reminded the court that he had previously asked to represent himself and requested that the court read some "rare and very important information" during the break. The court advised Johnson to give the information to his attorney and assured him that the court had received his mail. Johnson's attorney informed the court that he was renewing Johnson's motion to represent himself, and Johnson himself confirmed that "[i]n stating it and presenting this, I want to represent myself in presenting this." The following colloquy then occurred:

> THE COURT: What we're here for today is for three bench trials.
>
> THE DEFENDANT: Okay. Then one of the cases, well, all of them, this right here is—this right here is from social workers and doctors who—do you want to read it? Did you get the mail that I sent you?
>
> THE COURT: I got all your mail, Mr. Johnson.

THE DEFENDANT: Did you get—did you read it?

THE COURT: Mr. Johnson, I don't believe you have an argument to go forward. If you did, I believe that Mr. Jones would've already brought that to my attention. I don't—and since you do not wish to represent yourself on these three bench trials today, I think we need to move forward with the bench trials.

At the July 19 bench trial, the victim testified that on September 7, she was working at the Dollar Plus Market when Johnson knocked on the door two minutes before the store opened. The victim unlocked the door early and let him in. Security footage of the store taken from different angles was played for the court. In the video, Johnson is shown chatting with the victim at the counter for about a minute, going to get a beer, bringing the beer to the counter and paying, then walking to the front door and deadbolting it. The video shows the victim pressing the silent alarm button, then running behind the counter. In the video, Johnson is shown walking around the counter toward the victim. Johnson grabs the victim and tries to restrain her while she struggles toward the silent alarm button and pushes it a second time. In the video, Johnson's pants are partially down, and he can be seen pulling up the victim's skirt and grabbing her while she tries to run away. The victim is shown running to the door with Johnson chasing her. The victim can be seen repeatedly attempting to open the door, as Johnson restrains her and prevents her from leaving. The victim's testimony matched the video evidence. She testified that when Johnson locked the deadbolt, she pressed the silent alarm button. Johnson cornered her behind the counter, pulled up her skirt, and groped her. She testified that she fought him off, and he again tried to grab her

when she was trying to get out of the door. When she was able to unlock and open the door, she ran to the restaurant next door and called 911.

Bryant Miller, a detective with the Little Rock Police Department, testified that he assisted Detective Carrig with Johnson's interview, and the video of the interview was played for the court. In the interview, Johnson explained that on September 7, 2022, he went to the Dollar Plus Market and bought a beer. He stated that he asked the victim how her relationship was, she told him that she did not like her relationship, and he bought the beer and left. Then, he recalled that he felt amorous toward the victim and exposed his penis. Johnson stated that after he exposed himself, the victim "started running around" and seemed afraid. Johnson did not recall touching the victim or locking the door, and he stated that he pulled his pants back up, and she ran out of the store. After being shown video excerpts of him locking the door and grabbing the victim, Johnson explained that he was high at the time. Counsel moved to dismiss the kidnapping and attempted-rape charges, and the court denied the motion.

Johnson took the stand and testified that he never lifted the victim's skirt. He explained that he relocked the deadbolt after she let him in because she had opened the door early for him. Johnson explained that when they began discussing her dissatisfaction with her marriage, he became sexually aroused. He testified that at the time of the incident, he was off his medication, which caused him to act out, and he tried to "grab her butt." Johnson stated that he exposed his penis to the victim to ascertain if she was sexually attracted to him.

The circuit court found beyond a reasonable doubt that Johnson was guilty of both kidnapping and attempted rape. At the sentencing hearing, Johnson sang "Beat It" and explained that Michael Jackson sometimes talked to him. Again, Johnson attempted to give the court the paperwork that he had been trying to deliver since before the trial. The court reminded Johnson that it had reviewed the paperwork but would do so again. Johnson explained that the papers were the same "Act 3" reports that had been admitted as defense exhibits, but he had highlighted the important passages on these copies. Before he read his written statement regarding sentencing, he explained to the court, "Well, I have the right to represent myself; but I guess because I am kind of slow that you wouldn't let me, Sweetheart." The court sentenced Johnson to twenty-five years' incarceration in the Arkansas Department of Correction on both counts to run concurrently, with credit for time served. Johnson timely filed his notice of appeal.

II. *Discussion*

A. Attempted Kidnapping

A motion for directed verdict in a jury trial or a motion to dismiss in a bench trial is treated as a challenge to the sufficiency of the evidence. *Halliburton v. State*, 2020 Ark. 101, 594 S.W.3d 856. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence. *Moore v. State*, 355 Ark. 657, 144 S.W.3d 260 (2004). Substantial evidence is evidence forceful enough to reach a conclusion one way or the other beyond suspicion or conjecture. *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003). When a defendant challenges the sufficiency of the evidence convicting him, the evidence is

viewed in the light most favorable to the State, and only evidence supporting the verdict will be considered. *Moore*, *supra*.

A person commits the offense of kidnapping if, without consent, the person restrains another person so as to interfere substantially with the other person's liberty with the purpose of engaging in sexual intercourse, deviate sexual activity, or sexual contact with the other person. Ark. Code Ann. § 5-11-102(a)(5) (Repl. 2013).

On appeal, Johnson asserts that when he locked the deadbolt—a simple lever that did not require a key to lock or unlock—he did not commit a secondary act separate from the attempted rape. Johnson contends that the act of locking the door was "part and parcel" of the restraint required to rape a person. Essentially, he contends that the victim could and did simply turn the lever; thus, his locking the door could not be considered an additional restraint constituting a "substantial interference with [the victim's] liberty." We disagree and affirm.

In Arkansas, it is only when the restraint exceeds that normally incidental to the crime that the rapist should also be subject to prosecution for kidnapping. *See Summerlin v. State*, 296 Ark. 347, 756 S.W.2d 908 (1988). Among the factors that have been considered by courts in determining whether a separate kidnapping conviction is supportable include whether the movement or confinement (1) prevented the victim from summoning assistance; (2) lessened the defendant's risk of detection; or (3) created a significant danger or increased the victim's risk of harm. *Lee v. State*, 326 Ark. 529, 533, 932 S.W.2d 756, 759 (1996).

In *Summerlin*, *supra*, our supreme court held that

> the exclusion of de minimus restraints from the definition of kidnapping is desirable since offenses such as rape or robbery necessarily contemplate restrictions on the victim's liberty while the crime is actually committed. Thus, it is only when the restraint exceeds that normally incidental to the crime that the rapist (or robber) should also be subject to prosecution for kidnapping.

As Johnson discusses, most of our case law presents more egregious examples of restraint exceeding that necessary to commit rape or attempted rape. *See Harris v. State*, 299 Ark. 433, 438–39, 774 S.W.2d 121, 124 (1989) ("[c]hasing and dragging the victim from room to room or building to building and forcefully engaging in acts of rape between the attempts at freedom"); *Moore v. State*, 355 Ark. 657, 665, 144 S.W.3d 260, 265 (2004) ("roughly an hour after he began holding his victims in search of a 'Mike,' . . . he forced [the victims] to perform oral sex on him. . . . Appellant continued to hold his victims hostage after the rapes were completed."). Johnson attempts to distinguish the facts of the instant case, citing *Summerlin*, *supra* and *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991), to support his argument. His argument is not well taken.

In *Summerlin*, the victim was jogging along a lakeside path when she was approached by her attacker. When the victim refused to "go for a swim," he tackled her from behind and tried to remove her clothing. Our supreme court reversed the kidnapping conviction, holding that the restraint employed did not exceed that normally incident to attempted rape. In *Shaw*, the victim voluntarily entered her attacker's vehicle but was later driven to a dead-end road and raped. Our supreme court reversed the kidnapping conviction because of the victim's testimony that she consented to her attacker's actions until the point at which he raped her. In both *Summerlin* and *Shaw*, the restraint used by the attacker was not additional

to that necessary to commit the crime of rape. Here, the victim testified that as soon as Johnson locked the door, she was afraid and pressed the silent alarm. After locking the door, Johnson walked around the counter she was standing behind, blocked her path, and physically restrained her. Locking the door was clearly an additional restraint separate from the attempted rape.

The instant case is more akin to *Tarpley v. State*, 97 Ark. App. 122, 124, 245 S.W.3d 192, 195 (2006), in which the appellant kept the doorway blocked with a chair for several minutes after threatening the victim and pointing a gun at her. Our court held that "the victim was prevented from summoning assistance during this time." Similar to Tarpley's blocking the door with a chair, Johnson committed an additional act of restraint when he locked the door. Johnson contends that *Tarpley* is inapplicable because there, the appellant brandished a gun at the bank employee. That is a difference between the cases; however, even though in *Tarpley* a gun was used in the commission of the kidnapping, our court found that the chair blocking the door was a significant, additional restraint.

Moreover, by locking the door, Johnson prevented the victim from summoning assistance and lessened the risk of detection. Johnson placed an additional obstacle between any police officers responding to the silent alarm and the victim. Also, by locking the door, Johnson lessened the risk of detection. Any person walking by would have been prevented from entering the store and discovering the attempted rape in progress; thus, Johnson created a secluded space to commit attempted rape, similar to the appellant in *Lee v. State*, 326 Ark. 529, 534, 932 S.W.2d 756, 759–60 (1996), in which our supreme court held that

"[b]y taking the victim to a dark and secluded place, appellant allowed the rape to be carried out more easily, thus preventing the victim from summoning assistance and decreasing his risk of being caught." Viewing the evidence in the light most favorable to the State, sufficient evidence supports the determination that Johnson committed the crime of kidnapping.

B. Right to Self-Representation

Johnson contends that the circuit court violated his Sixth Amendment right to self-representation by refusing to allow him to represent himself after his clear, unambiguous request to do so.

A defendant has a constitutional right to self-representation under the Sixth Amendment to the United States Constitution and article 2, section 10 of the Arkansas Constitution. A defendant may invoke his right to defend himself provided that (1) the request to waive the right to counsel is unequivocal and timely asserted; (2) there has been a knowing and intelligent waiver; and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. *Gardner v. State*, 2020 Ark. 147, 598 S.W.3d 10. Every reasonable presumption must be indulged against the waiver of a fundamental constitutional right. *Hatfield v. State*, 346 Ark. 319, 57 S.W.3d 696 (2001). When determining whether an attempt to waive counsel and begin self-representation is sufficiently unequivocal, we must view the defendant's statements in their entirety. *See Finch v. State*, 2018 Ark. 111, 542 S.W.3d 143. A defendant's lack of technical legal knowledge is not relevant to a determination of whether he had made a knowing and intelligent waiver of his right to counsel. *See Chambers v. State*, 2020 Ark. App. 54, 595 S.W.3d 371. A request to

waive counsel, however, must not leave any doubt that the waiver of counsel is what the defendant wants. *Reed v. State*, 2017 Ark. 246, 524 S.W.3d 929.

The State contends that Johnson failed to satisfy the first requirement of an unequivocal request to waive counsel. Viewing Johnson's statements and actions as a whole, the State is correct that Johnson's request left doubt that waiver of counsel for his entire bench trial is what he wanted. Johnson initially requested to represent himself by stating, "[B]efore you make your decision, I want to represent myself *too* before you make your decision." (Emphasis added.) This initial request is equivocal because he expressed his desire to represent himself alongside counsel. Then, Johnson explained that he had "some very important paperwork" that he wanted to present to the court. Johnson stated that he wanted to represent himself "from now on"; however, after the court questioned him regarding his education and lack of experience representing himself, the discussion returned to the single issue that he believed counsel was not be assertive enough regarding his mental-health evaluation. The trial date was set, and Johnson once again interrupted the court with discussion of his past mental-health evaluations, and the court reassured Johnson that his attorney would make sure the court was aware of his history.

The second time the subject was raised, Johnson only referred to his earlier request to represent himself, reminding the court of the previous hearing, and again he focused solely on the paperwork he was concerned about. In this instance, Johnson did not request that the court allow him to represent himself.

The subject of self-representation was raised on the day of trial. Johnson requested that the court look at "some rare and important information" and reminded the court that he had previously asked to represent himself. Johnson stated that he wanted to represent himself "in presenting this." The court explained, "What we're here for today is for three bench trials" and denied the request, concluding that Johnson had not expressed a desire "to represent yourself on these three bench trials today, I think we need to move forward with the bench trials." Thus, the circuit court determined that Johnson failed to make a clear, unequivocal statement that he wanted to represent himself for his trial, and Johnson did not challenge the court's determination.

Additionally, Johnson engaged in conduct that would prevent the fair and orderly exposition of the issues. At the two pretrial hearings, Johnson demonstrated an inability to stay on the subject and interrupted the proceedings with off-topic statements. He inappropriately referred to the court as "Mommy" and "Judge K," sang, and discussed his mental health when that was not the subject at issue. As stated above, the defendant requesting to represent himself who engages in conduct that would prevent the fair and orderly exposition of the issues may be denied the request for that reason. *See Gardner*, *supra*. We find no error and affirm.

Affirmed.

GLADWIN and WOOD, JJ., agree.

Mac J. Carder, Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Tim Griffin, Att'y Gen., by: *Joseph Karl Luebke*, Ass't Att'y Gen., for appellee.