

A Multiple Conviction Issue in Kidnapping Cases

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In a recent case, [State v. Holloman](#), the North Carolina Court of Appeals held that the trial court erred by convicting the defendant of both first-degree kidnapping and sexual assault when the sexual assault raised the kidnapping to first-degree. Since the issue is a recurring one, let's review the rules.

A person is guilty of first-degree kidnapping when he or she

- (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 in violation of 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.

Element (5) is what elevates a second-degree kidnapping to a first-degree kidnapping. Note that proof beyond a reasonable doubt that the defendant did any one of the acts stated in Element (5) will do it; the State doesn't have to prove that the defendant did all three acts listed in Element (5).

Here's a fact pattern for you: The defendant is charged with both first-degree kidnapping and rape. To get to first-degree kidnapping, the State asserts that the defendant failed to release the victim in a safe place and sexually assaulted the victim. The trial judge instructs the jury and provides a special verdict sheet, requiring the jury to specify its findings as to the Element (5) factors that elevate the kidnapping to first-degree. The jury finds the defendant guilty of both first-degree kidnapping and rape. On the verdict sheet, the jury indicates that it found that the defendant failed to release the victim in a safe place and sexually assaulted the victim. Can the defendant be convicted and sentenced for both first-degree kidnapping and rape?

Yes. Because the jury found that the defendant failed to release the victim in a safe place, kidnapping can be elevated to first-degree based on this fact. Thus, there is no double counting of the rape and the defendant can be convicted and sentenced for both offenses. *State v. Williams*, 201 N.C. App. 161, 181, 186 (2009).

Let's tweak the fact pattern: Same facts as above but now assume that no special verdict form is submitted. The jury finds the defendant guilty of both first-degree kidnapping and rape. Can the defendant be convicted and sentenced for both offenses?

No. In fact this is what happened in *Holloman*. In that case, the court of appeals explained that since the jury didn't specify its basis for finding the defendant guilty of first-degree kidnapping, the court was required to "construe the ambiguous verdict in favor of defendant and assume that the jury relied on defendant's commission of the sexual assault in finding him guilty of first-degree kidnapping." Slip op. at 11-12 (quotation omitted). In this situation, the options for the trial judge are:

- reduce the first-degree kidnapping to second-degree kidnapping and sentence for second-degree kidnapping and rape; or
- enter judgment on first-degree kidnapping and arrest judgment on the rape.

Holloman, slip op. at 12 (so instructing the trial court on remand); see also *State v. Freeland*, 316 N.C. 13, 20–24 (1986) (multiple punishment would violate double jeopardy); *State v. Mason*, 317 N.C. 283, 292–93 (1986) (following *Freeland*); *State v. Daniels*, 189 N.C. App. 705, 709–10 (2008) (same).

Consider another twist: Suppose the State's evidence shows that the defendant committed two sexual assaults, a rape and a first-degree sexual offense. The trial court gives a special verdict sheet. The jury finds the defendant guilty of all offenses and indicates that first-degree kidnapping was elevated because of both sexual assaults. Can the defendant be convicted and sentenced for both first-degree kidnapping and rape?

Yes. In this instance, the first-degree sexual offense can be used to elevate kidnapping to first-degree. Since the rape isn't an element of the kidnapping conviction, it can stand alone as a separate conviction. *State v. Belton*, 318 N.C. 141, 162–65 (1986).

One final twist: Suppose the defendant is charged with first-degree kidnapping and assault inflicting serious bodily injury. The State's theory of first-degree kidnapping is that the defendant seriously injured the victim. If the jury finds the defendant guilty of both offenses, can the defendant be convicted and sentenced for both?

Yes. The North Carolina Court of Appeals has held that if a defendant is convicted of assault inflicting serious bodily injury and first-degree kidnapping that was elevated because of serious injury inflicted on the victim, there is no double jeopardy bar to punishing the defendant for both offenses. *Williams*, 201 N.C. App. at 181–82. The court reasoned that the felonious assault conviction required proof of serious bodily injury, a greater level of injury than required for Element (5) of first-degree kidnapping. *Id.*