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NO. COA02-419

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

Caldwell County
No. 95 CRS 7853-54

LARRY EUGENE ROBINSON

On writ of certiorari to review judgments entered 5 September 1997 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 28 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

David Childers for defendant-appellant.

EAGLES, Chief Judge.

Larry Eugene Robinson ("defendant") appeals from the trial court's judgments entered on jury verdicts finding him guilty of first-degree burglary, first-degree kidnapping, assault inflicting serious injury and two counts of assault on a female. On appeal, defendant asserts two errors: that the trial court erred in (1) allowing the State to question defendant's father as a hostile witness and (2) denying defendant's motion to dismiss. After review of the record and briefs, we find no error.

The State's evidence tended to show that defendant's wife, Angela Bare Robinson, had been staying with Patty Ward (Ward) for

two days. On the night of 12 November 1995, defendant's wife, Ward and two men, Shannon Church and Derrick Riley Gilliland, returned to Ward's residence after eating dinner. Upon their return, the group found Ward's car windows broken and clothes strewn about the yard. Inside the house, a fish aquarium, microwave, glass table and VCR were broken. Ward called the police and, because she suspected defendant was responsible for the damage, called defendant. Defendant and his father arrived at Ward's house thirty minutes later in a station wagon.

After telling defendant's father to take defendant and leave the premises, Ward walked back to her house. Shannon Church, who observed defendant approach the house with a knife, closed the back door behind Ward and she locked the door. Defendant forced in the door and began searching for his wife. Defendant pointed the knife at Ward's neck and lunged at Shannon Church.

Defendant found his wife underneath a bed with Ward's daughter. Defendant picked up the bed, grabbed his wife and dragged her through the house. Defendant then punched Ward in the face, knocking her unconscious. When Ward regained consciousness, she saw defendant beating his wife in the back of the station wagon. Defendant's father then drove defendant and defendant's wife to their trailer. Defendant's father testified that he told his wife, "[y]ou better call [the police] or [defendant's] going to beat her to death right there in the yard[.]" The Caldwell County Sheriff's Department responded to the "911" call. Upon entering the trailer, Deputy Scott Brown observed "obvious injuries to the

face" of defendant's wife. Defendant was arrested and taken into custody.

Defendant did not present any evidence. A jury found defendant guilty as charged. The trial court sentenced defendant to consecutive terms of 96 months to 125 months imprisonment and 70 to 93 months imprisonment. Defendant's timely appeal was not perfected. This Court granted defendant's petition for writ of certiorari to review the trial court's judgments.

Defendant's first assignment of error deals with the State's direct examination of his father, William Robinson. When the State called Mr. Robinson as a witness, the State asked to be able to examine him as a hostile witness because Mr. Robinson was defendant's father, he accompanied defendant to court, and his alignment with his son would be adverse to the State. Defense counsel pointed out that Mr. Robinson had not resisted coming to court and that he had always responded to subpoenas. The trial court noted that the witness was the father of the defendant; that the witness operated the motor vehicle transporting defendant that night; and the witness took the victim and defendant to his residence, but deferred its ruling. Defense counsel then stated that Mr. Robinson would be testifying under oath "against his interest, possible criminal interest." At which point, the trial court replied, "Sir, you made out the case for me, him being a hostile witness." The State subsequently examined defendant's father. Toward the end of the State's direct examination, the State asked defendant's father leading questions about statements

he made to Patrolman Tracy Rich regarding defendant's actions on 12 November 1995.

Defendant first argues the trial court erred by allowing the State to examine its own witness as a hostile witness without making findings of fact. "The better practice in cases such as this would be for the trial court to make findings and conclusions and declare formally that the witness is friendly to the party cross-examining him or adverse to the party calling him as a witness." *State v. Hosey*, 318 N.C. 330, 340, 348 S.E.2d 805, 811 (1986). Where the record shows that a witness has reason to be adverse to the calling party, no formal declaration of the witness's hostility is required. Here, the trial court noted the reasons why it considered defendant's father a hostile witness. Accordingly, the trial court did not err by failing to make findings of fact when determining defendant's father to be a hostile witness.

Defendant also argues the State should not have been allowed to pose leading questions to defendant's father. We disagree.

North Carolina Rule of Evidence 607 allows a party to impeach its own witness, and Rule 611 allows the use of leading questions on direct examination of a hostile witness. N.C. Gen. Stat. §8C-1, Rules 607 & 611 (2001). In interpreting Rule 611(c), our Court has held that leading questions on direct examination should be permitted if the witness is hostile, has difficulty understanding the question, discusses a subject of a delicate nature, contradicts the testimony of prior witnesses, is being aided to refresh his memory, is giving preliminary or introductory

testimony, or where "the mode of questioning is best calculated to elicit the truth." *State v. Wiggins*, 136 N.C. App. 735, 739, 526 S.E.2d 207, 210, *disc. rev. denied*, 352 N.C. 156, 544 S.E.2d 243 (2000) (citations omitted). The decision of whether to permit leading questions is within the sound discretion of the trial court and should not be disturbed absent an abuse of discretion. *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986). Here, the State's witness was defendant's father, who observed defendant's actions and assisted defendant by driving him to and from Ward's residence. The State's questions focused on the witness's observations of the events. Additionally, the questions were asked for clarification and to further explain matters. It is apparent from the record that it was necessary for the State to ask these leading questions to develop the testimony of the witness. Thus, the trial court did not abuse its discretion in allowing the State's questioning of William Robinson.

Defendant also contends the trial court erred by denying his motion to dismiss based on insufficiency of the evidence. In his brief, defendant argues that the State failed to prove that the offense occurred at night. We note that defendant did not make this argument at trial. Rather, defendant argued that the trial court should dismiss the charge of first-degree burglary because the State failed to prove defendant broke and entered into the house with the intent to kidnap someone. Rule of Appellate Procedure 10(b)(1) requires that in order to preserve a question for appellate review, the party must state "the specific grounds

for the ruling the party desired the court to make." N.C.R. App. P. 10(b)(1). Thus, defendant did not preserve his argument for appellate review.

Nevertheless, this Court has reviewed the record and conclude the State presented sufficient evidence to show that defendant went to Ward's house between 9:00 p.m. and 9:30 p.m. on 12 November 1995 as he was charged in his indictment. Ward testified that she and her friends returned to her house "a little after" 9:00 p.m. Furthermore, Deputy Scott Brown testified that his office received a 911 call concerning the domestic dispute at approximately 9:30 p.m. Accordingly, the trial court properly denied defendant's motion to dismiss.

No error.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).