NO. COA09-1702

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

STATE OF NORTH CAROLINA

v.

FRED GOINS MILLER, III
Defendant.

Forsyth County
No. 08 CRS 52050, 52051,
08 CRS 9728, 17221,
09 CRS 54288

Appeal by Defendant from judgments entered 22 July 2009 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy Cooper, by Philip A. Lehman, Assistant Attorney General, for the State.

William D. Spence, for Defendant-Appellant.

ERVIN, Judge.

Defendant Fred Miller, III, appeals from judgments entered based upon his convictions for first degree rape, first degree kidnapping, common law robbery, attempted second degree rape, felonious breaking or entering, felonious larceny, and having obtained the status of an habitual felon. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that Defendant had a fair trial, free from prejudicial error, and that the trial court's judgments should remain undisturbed.

I. Substantive Facts

A. Attack Upon Mabel

In 2007, M.C.[1] was 78 years old and lived with her husband on Langdon Drive in Forsyth County. On the morning of 1 July 2007, Mabel's husband had left her at home alone while he sold produce at a local farmer's market. During the morning, Mabel went to a nearby Food Lion store, purchased groceries, returned home, and removed the groceries from her car prior to reentering the house. As Mabel was climbing the porch steps, a man grabbed her from behind, forced her to go behind the house, shoved her onto the grass, and threatened to kill her if she did not follow his instructions. At that point, the man told Mabel to remove her clothes from the waist down, and he put on a condom and raped her.

Mabel described her assailant as an African-American who wore a long-sleeved shirt, a skull cap, and a bandana that covered his face. Mabel did not remember seeing Defendant at the Food Lion or noticing anyone following her home from that location. After raping Mabel, the assailant sprayed her with a garden hose and fled with her clothes and purse. Following the man's departure, Mabel entered the house, looked out the window, and saw the man driving away in a black car that looked like a Toyota.

After her assailant left, Mabel called 911 and, at 10:14 a.m., Forsyth County Sheriff's Deputy Michael Thompson was dispatched to Mabel's house. At the place at which Mabel said that the rape had

---

[1] Mabel is a pseudonym that will be used throughout the remainder of this opinion for ease of reading and to protect M.C.'s privacy.

occurred, Deputy Thompson saw that the grass was flattened and wet and that the hose was still running. Deputy Thompson had Mabel taken to the hospital, where she was interviewed by Ethlyn Csontos, an expert in the field of sexual assault nursing, who took a statement from her.

A number of other law enforcement officers assisted in the investigation of the attack on Mabel. After arriving at Mabel's residence, Forsyth County Deputy Sheriff M.J. Ward roped off the area in which Mabel said that the rape had occurred. On 1 July 2007, Forsyth County Sheriff's Investigators Myra Hanes and Randy Horton photographed the area in which Mabel had been raped. However, the area in question was too muddy to permit the collection of physical evidence, such as hairs or fibers. Several days later, Investigators Hanes and Horton collected two bags of grass and debris from the area in which the attack had occurred using a Shop-Vac. The bags collected by Investigators Hanes and Horton were sealed and submitted for forensic examination.

On 5 July 2007, Detective Briles obtained a surveillance video depicting the interior of the Food Lion store at which Mabel shopped from the time that it opened on the morning of 1 July 2007 until Mabel called 911 at 10:14 a.m. The surveillance video showed that Defendant entered the store at 9:20 a.m. and left without having purchased anything two minutes later. In addition, the surveillance video showed Mabel entering the store at 9:27 a.m. and leaving at 9:46 a.m.

On 10 January 2008, Lieutenant Scott Miller of the Forsyth County Sheriff's Department showed Defendant photos prepared from the Food Lion surveillance video. Defendant acknowledged that he was the person depicted in the photos; however, Defendant told Lieutenant Miller that he thought he was eating at a Chinese restaurant "next door" on 1 July 2007. In addition, Defendant said that he might have had access to a friend's Lexus on the date in question; Lieutenant Miller testified that Lexus and Toyota vehicles are manufactured by the same company. Defendant told Lieutenant Miller that he did not know Mabel, was not familiar with Langdon Drive, and had not seen Mabel or been to her house on 1 July 2007.

B. Attack Upon Clara

On 8 October 2007, C.L.[2] was sixty-four years old and lived alone in Winston-Salem. On that date, Clara worked at a Lowes food store until 2:00 p.m. to 2:15 p.m., and then drove to a Walmart store on Peters Creek Parkway. Clara did not notice anything unusual during the thirty or forty-five minutes that she spent shopping in Walmart.

After leaving the Walmart store, Clara drove directly to her home, which was located about two miles away. Clara parked in front of her house and entered the front door, which she left unlocked. After setting her purse down, Clara went to the kitchen in order to retrieve her cell phone. As she reached her cell

[2] Clara is a pseudonym that will be used throughout the remainder of this opinion for ease of reading and to protect C.L.'s privacy.

phone, Clara heard the front door slam, turned, and saw an African-American male with his head and face covered. When Clara asked the man what he wanted, he ran over and punched her face, causing her to fall to her knees. After Clara and the intruder "started scuffling," her assailant told Clara to remove her pants. As the struggle continued, the intruder pushed Clara onto the floor and ripped off her pants. At that point, Clara's dog began barking, causing the intruder to jump up, spray Clara with a liquid cleaning product, grab her purse, and run out the door. As soon as her assailant fled, Clara changed clothes and called 911.

Detective John Collins of the Winston-Salem Police Department was dispatched to Clara's house on 8 October 2007. When Detective Collins arrived, Clara provided a description of her assailant to law enforcement officers. Winston-Salem Police Department Officer Charlea Ingram collected items of Clara's clothing for forensic testing.

During her review of a surveillance videotape of the Walmart store and parking lot, Investigator M.S. Lovejoy of the Winston-Salem Police Department noticed that a burgundy car had been parked near Clara's van and had followed her out of the parking lot. Investigator Lovejoy identified the vehicle as a 1995 burgundy Lexus that was owned by a Mr. Richardson of 1224 Brookwood Street in Winston-Salem. Mr. Richardson told Investigator Lovejoy that Defendant was the only person to whom he had loaned his car.

On 24 October 2008, Investigator Lovejoy went to Mr. Richardson's house. Defendant was present at Mr. Richardson's

residence at the time of Investigator Lovejoy's arrival and agreed to meet with law enforcement officers. As a result, Investigator Lovejoy made arrangements to meet with Defendant two days later. During her visit to Mr. Richardson's residence, Investigator Lovejoy noticed that a black Lexus owned by a Mr. Elliott was parked nearby.

On 26 October 2008, Defendant met with Investigator Lovejoy at the law enforcement center. In the course of their conversation, Defendant admitted having borrowed Mr. Richardson's car and driven it to the Peters Creek Parkway Walmart on 8 October 2007. He also admitted having borrowed Mr. Elliott's Lexus on several occasions.

C. Forensic Evidence

Special Agent Kristen Crawford of the State Bureau of Investigation, an expert in trace evidence analysis, found twelve "Negroid" body hairs in the vacuum bags that contained the material vacuumed from Mabel's yard. Special Agent Crawford also removed three "Negroid" hairs from Clara's clothing. Special Agent Crawford mounted the hairs on slides, which were transferred to an evidence technician for further testing.

Special Agent Michelle Hannon, another expert in trace evidence analysis, described various kinds of DNA testing. According to Special Agent Hannon, while nuclear DNA analysis produces a profile that is unique to a particular individual or to identical twins, mitochondrial DNA testing results in a profile that is common to all persons in the tested individual's maternal line. Since Special Agent Hannon could not isolate any nuclear DNA

from the hairs that had been collected from Mabel's yard and Clara's clothing, she delivered the hair samples to LabCorp for further testing along with blood and hair samples obtained from Defendant pursuant to a search warrant.

Shawn Weiss, associate technical director of LabCorp's forensic DNA department, explained that DNA is a chemical found in human cells, that nuclear DNA is inherited from both parents, and that mitochondrial DNA is inherited solely from an individual's mother. As a result, all individuals in the same maternal line, "such as brothers, sisters, mother, grandmother . . . are all going to have the same mitochondrial sequence." LabCorp personnel performed mitochondrial DNA testing on the hair and blood samples taken from Defendant and the hairs taken from Mabel's yard and Clara's clothing. Based on the results of this testing, Mr. Weiss concluded that "[Defendant] and his maternal relatives cannot be excluded as the source of the hairs" taken from these two sources. However, given the fact that mitochondrial DNA is shared by all persons in the same maternal line, such testing, unlike nuclear DNA testing, does not allow calculation of the exact statistical frequency with which individuals have the same mitochondrial DNA.

Under cross-examination, Mr. Weiss explained that mitochondrial DNA testing was used "more [as an] exclusionary test[]" because "if the individual does not match in the sequencing they are one hundred percent excluded." In response to cross-examination questions concerning the number of individuals who might share the same mitochondrial DNA as that found in the tested

hairs, Mr. Weiss testified that, as a general proposition, such a group would consist of fewer than one percent of a given population. In addition, Mr. Weiss testified on cross-examination that:

> [DEFENSE COUNSEL]: Based on your expertise as a mitochondrial or as a DNA expert, do you know how many African Americans could possibly be a contributor of the mitochondrial DNA sequence that was found in that hair?
>
> [MR. WEISS]: The exact number, no.
>
> [DEFENSE COUNSEL]: Is there any way to know that?
>
> [MR. WEISS]: I can say with 95 percent confidence, less than one percent of it [is] occurring in the African American population.

II. Procedural History

On 26 February 2008, warrants for arrest were issued charging Defendant with the first degree rape of Mabel and the felonious larceny of money and clothing from Mabel. On 23 June 2008, the Forsyth County grand jury returned bills of indictment charging Defendant with first degree rape, common law robbery, and first degree kidnapping in connection with the assault upon Mabel. On that same date, the Forsyth County grand jury returned a bill of indictment charging Defendant with having attained the status of an habitual felon. On 17 April 2009, a warrant for arrest was issued charging Defendant with breaking or entering into Clara's residence, the attempted second degree rape of Clara, and the felonious larceny of Clara's purse. On 27 April 2009, the Forsyth County grand jury returned bills of indictment charging Defendant

with attempted second degree rape, felonious breaking or entering, and felonious larceny in connection with the assault upon Clara. On 7 May 2009, the State notified Defendant that it would seek to establish as aggravating factors for purposes of sentencing that "[t]he victim was . . . very old," that "[t]he offense was committed against a victim because of the victim's race, color, religion, nationality, or country of origin;" that "[t]he victim . . . suffered serious injury that is permanent and debilitating;" and, in the case of Clara, that "[t]he victim was handicapped."

The cases against Defendant came on for trial before the trial court and a jury at the 13 July 2009 criminal session of the Forsyth County Superior Court. On 21 July 2009, the jury returned verdicts convicting Defendant of first degree rape, first degree kidnapping, and common law robbery in connection with the assault upon Mabel and of attempted second degree rape, felonious breaking or entering, and felonious larceny in connection with the assault upon Clara. The following day, the jury found Defendant guilty of having attained the status of an habitual felon and found as an aggravating factor that Mabel was "very old."

At the sentencing hearing, the trial court found that Defendant had fifteen prior record points and should be sentenced as a Level V offender. In addition, the trial court found that there were no mitigating factors and that the aggravating factor found by the jury justified the imposition of an aggravated sentence in the case involving Mabel. Based upon these determinations, the trial court sentenced Defendant to life

imprisonment without parole based upon his conviction for first degree rape, to a consecutive term of a minimum of 188 months and a maximum of 235 months based upon his conviction for first degree kidnapping, to a consecutive term of a minimum of 167 months and a maximum of 210 months based upon his conviction for common law robbery, to a consecutive term of a minimum of 133 months and a maximum of 169 months based upon his conviction for attempted second degree rape, to a consecutive term of a minimum of 133 months and a maximum of 169 months based upon his conviction for felonious breaking or entering, and to a consecutive term of a minimum of 133 months and a maximum of 169 months based upon his conviction for felonious larceny, all to be served in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgments.

III. Legal Analysis

A. Sufficiency of the Evidence

On appeal, Defendant initially contends that the trial court erred by denying his motions to dismiss the first degree rape, common law robbery, first degree kidnapping, attempted second degree rape, felonious breaking or entering, and felonious larceny charges that were brought against him, on the grounds that the evidence was insufficient to support the submission of the issue of his guilt of those offenses to the jury. We conclude, however, that Defendant's challenges to the sufficiency of the evidence to support his convictions lack merit.

1. Standard of Review

"In ruling on a defendant's motion to dismiss for insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the crime charged and of the defendant's identity as the perpetrator." *State v. Noffsinger*, 137 N.C. App. 418, 423, 528 S.E.2d 605, 609 (2000) (citing *State v. Barrett*, 343 N.C. 164, 469 S.E.2d 888, *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259, 117 S. Ct. 369 (1996)). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). In determining the sufficiency of the evidence to support a criminal charge:

> '[T]he trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.' 'If substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to deny the motion.' . . . Supporting evidence may be 'direct, circumstantial, or both.'

State v. Wilkerson, 363 N.C. 382, 426-27, 683 S.E.2d 174, 201 (2009), *cert. denied*, __ U.S. __, 176 L. Ed. 2d 734, 130 S. Ct. 2104 (2010) (quoting *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed.2d 79, 126 S. Ct. 47 (2005) (citations omitted), and *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). "Thus, 'if there is substantial evidence - whether direct, circumstantial, or both - to

support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.'" *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quoting *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005)). "The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991), and *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478, 617 S.E.2d 61, 64 (2005), *aff'd*, 361 N.C. 137, 638 S.E.2d 197 (2006)).

2. Specific Offenses

a. First Degree Rape of Mabel

First, Defendant contends that the trial court erred by denying his motion to dismiss the charge that he committed first degree rape against Mabel by arguing that "the evidence was insufficient to establish every element of this crime and the Defendant's identity as the perpetrator[.]" A careful reading of Defendant's brief establishes, however, that Defendant's challenge to his first degree rape conviction is focused solely on the sufficiency of the evidence to establish Defendant's identity as the perpetrator of the assault. As a result, we will limit our discussion of Defendant's challenge to his first degree rape conviction to the identity issue.

Review of the evidentiary record establishes that a videotape depicting the interior of the Food Lion store from the time that it

opened until the time that Mabel called 911 showed that Defendant was the only customer entering the store during this interval who closely matched Mabel's description of her assailant. According to the videotape, Defendant entered the store at around 9:20 a.m., walked around for about two minutes, and left without buying anything. Mabel entered the Food Lion about five minutes after Defendant's departure. Defendant admitted having been at the Food Lion on 1 July 2007, although he told law enforcement officers that he thought he had been eating in a Chinese restaurant during his visit to the area. A reasonable juror could doubt the credibility of this explanation, since Defendant was in the Food Lion store relatively early on a Sunday morning. In addition, the record contains evidence tending to show that the vehicle driven by Mabel's assailant resembled a black Toyota. Defendant admitted that he sometimes borrowed a black Lexus. There was other testimony that Toyota and Lexus automobiles are made by the same company. Finally, DNA testing established that hairs taken from Defendant "had the same mitochondrial sequence" as the hairs taken from Mabel's yard, which meant that Defendant or someone in his maternal line could not be excluded as the source of the hairs. When asked "how many African Americans could possibly be a contributor of the mitochondrial DNA sequence" found in the hairs retrieved from Mabel's yard, Mr. Weiss opined "with 95 percent confidence" that "less than one percent of . . . the African American population" would fit that description.

The evidence summarized above was directly pertinent to the issue of Defendant's identity as Mabel's assailant. In addition, the record indicates that evidence of the assault on Clara was admitted for the purpose of showing Defendant's identity as Mabel's assailant pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b), which provides, in pertinent part, that "[e]vidence of other crimes, wrongs, or acts . . . [may] be admissible for . . . proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." The theory behind using "other bad acts" evidence for the purpose of "showing defendant's identity as the perpetrator" is that the two events show the existence of a "*modus operandi* [that] is similar enough to make it likely that the same person committed both crimes." *State v. Sokolowski*, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999) (citing *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263, 115 S. Ct. 2256 (1995).[3] As a result, the trial court was entitled

[3] Defendant has not, on appeal, challenged the admission of the evidence of the offenses committed against each victim as evidence of Defendant's identity as the individual who assaulted the other victim. In addition, Defendant never asked the trial court to instruct the jury concerning the limited purpose for which the evidence of the attack on each victim could be considered in the case involving the other victim. "'[T]he admission of evidence, competent for a restricted purpose, will not be held error in the absence of a request by defendant for a limiting instruction. Such an instruction is not required to be given unless specifically requested by counsel.'" *State v. Williams*, 355 N.C. 501, 562, 565 S.E.2d 609, 645 (2002) (quoting *State v. Chandler*, 324 N.C. 172, 182, 376 S.E.2d 728, 735 (1989)), *cert. denied*, 537 U.S. 1125, 154 L. Ed.2d 808, 123 S. Ct. 894 (2003). Thus, the trial court was entitled to consider this "other crimes" evidence in ruling on Defendant's dismissal motion.

to consider the evidence that Defendant committed the assault on Clara in determining the sufficiency of the evidence to support Defendant's first degree rape conviction.

The "other bad acts" evidence admitted at trial established distinct factual similarities between the assault on Clara and the assault on Mabel. Both Mabel and Clara were older white women who were accosted shortly after returning home from shopping. Both women were sexually assaulted by an African American man who covered his face and head. Following each assault, the perpetrator sprayed liquid on the victim; Mabel's attacker used a garden hose and Clara's attacker sprayed her with a liquid cleaning product. In both cases, the assailant fled with the victim's purse following the attack. Store security videos showed that Defendant was at the same store at which Mabel had been shopping, and had been at Walmart near the time that Clara shopped there. Defendant admitted borrowing a car associated with each attack. In both cases, forensic testing of hairs from the crime scene revealed that the mitochondrial DNA sequence present in those hairs was the same as Defendant's. Finally, a forensic expert testified that he was "95 percent" certain that fewer than one percent of the African-American population would have the same mitochondrial DNA sequence as Defendant. As a result, we conclude that the evidence directly implicating Defendant in the attack on Mabel, when considered in conjunction with the evidence tending to show that Defendant attacked Clara in a similar manner, was

sufficient to support the submission of the first degree rape charge to the jury.

We have carefully considered Defendant's arguments to the contrary in reaching this result. Among other things, Defendant argues that, "[i]n cases where there is no witness who can identify the perpetrator of the crime, the State typically will, at a minimum, offer proof of a scientific test, *e.g.*, blood test, fingerprint, DNA, connecting the defendant to the crime or crime scene and, in addition, will offer evidence of 'suspicious circumstances' and/or a motive." However, Defendant cites no cases holding that the presentation of such scientific evidence is a prerequisite for obtaining a conviction. In addition, the State did present scientific evidence in the form of mitochondrial DNA test results. Furthermore, the State elicited considerable evidence concerning "suspicious circumstances," including evidence tending to show Defendant's presence at the Food Lion and the Walmart at the time that Mabel and Clara shopped in these two stores, the fact that Defendant did not buy anything in the Food Lion, and his proffer of an inherently implausible explanation for his presence in the area around the Food Lion shortly before the attack upon Mabel. Thus, the record contains both scientific evidence and "suspicious circumstances" linking Defendant to the crimes in question.

Furthermore, Defendant contends that mitochondrial DNA testing "could only indicate that 'Fred Goins Miller and his maternal relatives cannot be excluded as the source of the

hairs'[.]" Although both Special Agent Hannon and Mr. Weiss testified that mitochondrial DNA evidence did not permit the identification of a specific individual as the source of a particular DNA sample, Mr. Weiss testified on cross-examination that he was 95 percent certain that fewer than one percent of the African American population shared the same mitochondrial DNA sequence as Defendant. In addition, Defendant's argument does not note the fact that Defendant could not be excluded as the source of the mitochondrial DNA evidence derived from the assault on Clara, a fact which logically lengthens the odds that anyone other than Defendant perpetrated both offenses. Thus, we do not find Defendant's attack on the convincing force of the mitochondrial DNA evidence to be persuasive.

Finally, Defendant cites a number of appellate decisions in which the Supreme Court or this Court held that the evidence was insufficient to support the submission of the issue of the defendant's guilt to the jury. We do not believe that any of these cases is controlling here. For example, in *State v. Cutler*, 271 N.C. 379, 384, 156 S.E.2d 679, 682 (1967), the Supreme Court noted that:

> The evidence of the State is not sufficient to show any blood from the body of the deceased upon the person, clothing, knife or vehicle of the defendant. The hair found upon the bloody knife blade was, in the opinion of the expert offered by the State, similar to hair taken from the chest of the deceased, but the expert was not able to state that in his opinion it came from the body of the deceased. There is no evidence as to whether this hair was similar to the defendant's own hair.

Similarly, in *State v. Bell*, 65 N.C. App. 234, 309 S.E.2d 464, (1983), *aff'd,* 311 N.C. 299, 316 S.E.2d 72 (1984), the forensic testing merely showed the blood types of the victim and the defendant. The mitochondrial DNA evidence presented in this case coupled with the other "suspicious circumstances" discussed above provide a much stronger inference of guilt than the evidence presented in cases like *Cutler* and *Bell*. Similarly, the only evidence tying the defendant to the crimes at issue in *State v. Scott*, 296 N.C. 519, 526, 251 S.E.2d 414, 419 (1979), and *State v. Bass*, 303 N.C. 267, 273-74, 278 S.E.2d 209, 213 (1981), were fingerprints on a metal box in the victim's home and on a window screen frame, respectively. The mitochondrial DNA evidence presented in this case coupled with the other "suspicious circumstances" discussed above is significantly stronger than the limited fingerprint evidence available in *Scott* and *Bass*, necessitating the conclusion that none of the decisions upon which Defendant relies control the outcome of the present case. As a result, for the reasons discussed above, we find that the evidence presented at trial was sufficient to support the issue of Defendant's guilt of the first degree rape of Mabel to the jury.

b. First Degree Kidnapping and Common Law Robbery of Mabel

In challenging his convictions for the first degree kidnapping and common law robbery of Mabel, Defendant again argues that the evidence identifying him as the perpetrator of these offenses is insufficient to support the submission of the issue of his guilt to the jury. In advancing this contention, Defendant

relies on the same essential argument utilized in his challenge to the sufficiency of the evidence to support his first degree rape conviction. As a result, for the reasons set forth above, we conclude that Defendant's challenge to the sufficiency of the evidence to support his first degree kidnapping and common law robbery convictions lacks merit.

c. Offenses Committed Against Clara

Similarly, in challenging the sufficiency of the evidence to support his convictions for the attempted second degree rape of Clara, feloniously breaking or entering Clara's residence, and felonious larceny from Clara, Defendant focuses exclusively upon the sufficiency of the evidence to support a finding that he was the perpetrator of these crimes. In advancing this position, Defendant has made the same basic arguments that he advanced in challenging the sufficiency of the evidence to support a finding that he attacked Mabel. As a result, for the reasons discussed above,[4] we conclude that the evidence was sufficient to support the submission of the issue of Defendant's guilt of the attempted second degree rape of Clara, feloniously breaking or entering into Clara's residence, and felonious larceny from Clara to the jury.

B. Admissibility of Mr. Weiss' Testimony

Secondly, Defendant argues that the trial court erred by "allowing the State's expert in forensic DNA analysis, Mr. Shawn

[4] Obviously, the evidence tending to show that Defendant assaulted Mabel is relevant to support the jury's finding that he was Clara's assailant for the same reasons that the evidence tending to show that Defendant was Clara's assailant was relevant to show that Defendant assaulted Mabel.

Weiss, to testify and give his opinion as to the results of the mitochondrial DNA testing and analysis[.]" A careful review of the record demonstrates, however, that Defendant failed to properly preserve this issue for appellate review.

N.C.R. App. P. 10(a)(1) provides, in pertinent part, that:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

For that reason:

> Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence must be made "at the time it is actually introduced at trial." It is insufficient to object only to the presenting party's forecast of the evidence. As such, in order to preserve for appellate review a trial court's decision to admit testimony, "objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence" and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony.

State v. Ray, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quoting *State v. Thibodeaux,* 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976, 121 S. Ct. 1106 (2001)). A proper application of these basic principles to the facts of this case establishes that Defendant did not properly object to the admission of Mr. Weiss' testimony.

At trial, Mr. Weiss was called as a witness for the State and qualified, without objection, as an expert in forensic DNA testing. In the initial part of his testimony, Mr. Weiss provided a general discussion of the characteristics of DNA and the nature of DNA testing. After this introductory testimony, the State sought the admission into evidence of State's Exhibit No. 43, a suspect evidence collection kit. At that point, the following proceedings occurred:

> [PROSECUTOR]: . . . [T]he State would move to introduce into evidence State's Exhibit 43.
>
> [DEFENSE COUNSEL]: Object to it coming in, Your Honor.
>
> . . . .
>
> [DEFENSE COUNSEL]: And to the testimony of this witness any further.
>
> THE COURT: State your grounds please.
>
> [DEFENSE COUNSEL]: As to the issue of mitochondrial DNA evidence coming in under Rule 403, and I think he may be trying to testify as to hearsay, Your Honor.
>
> . . . .
>
> [DEFENSE COUNSEL]: Your Honor, . . . first I'd ask to be heard outside the presence of the jury.

Thereafter, the trial court excused the jury for the purpose of conducting a hearing on Defendant's objections.

Once the jury had departed, Defendant elicited testimony from Mr. Weiss that two other lab technicians, Kelly Pegram and Michael Mauney, actually performed the "hands-on . . . extraction procedure and [ran] the PCR analysis." The "raw data" resulting

from the performance of these tests was analyzed by Mr. Weiss and two other LabCorp technical directors. According to Mr. Weiss, the lab technicians "find out how much DNA is there. . . . [and] actually do the sequencing[,]" so that "[t]hey are doing the hands-on of running the machines, doing the pipetting[], generating the raw data."

At the hearing held before the trial court, Defendant argued that he had a right to cross-examine the forensic technicians who actually performed the necessary DNA sequencing pursuant to the Confrontation Clause of the Sixth and Fourteenth Amendments to the United States Constitution as construed in *Melendez-Diaz v. Massachusetts*, __ U.S. __, 174 L. Ed. 2d 314, 129 S. Ct. 2527 (2009). The State responded by arguing that, even after *Melendez-Diaz*, an expert witness "can give an opinion based on any kind of underlying data from wherever he got that" and that the "fact that he did not actually conduct the physical test but used that underlying information . . . [to] come up with his opinion is still perfectly lawful." At the conclusion of this hearing, the trial court overruled Defendant's objections, at which point the following proceedings transpired:

> THE COURT: Okay, thank you. The objection is overruled. Let's bring our jury back in.
>
> [DEFENSE COUNSEL]: Note the exception, Your Honor.
>
> THE COURT: Yes, sir.

Following the jury's return to the courtroom, the State sought and obtained the admission of State's Exhibit No. 43 into evidence without further objection by Defendant:

> THE COURT: Thank you, Ladies and Gentlemen, for your patience. And we will resume the trial. The objection is overruled. Go ahead.
>
> [PROSECUTOR]: If Your Honor please, I will renew my motion to introduce into evidence State's Exhibit 43.
>
> THE COURT: Anything further?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: Okay. It's admitted into evidence. Thank you.

After the admission of State's Exhibit No. 43, Mr. Weiss testified that mitochondrial DNA is found outside cell nuclei, that it is inherited exclusively through a person's maternal ancestors, that it does not permit the identification of a specific individual as the source of the DNA in question, and that it can help establish whether an individual (and his or her maternal lineage) can be excluded as the source of that DNA. Based upon the results of the mitochondrial DNA testing performed by LabCorp, Mr. Weiss testified that "Fred Goins Miller and his maternal relatives cannot be excluded as the source of the hairs" found during the investigation of the assaults on Mabel and Clara. In addition, the State introduced the slides containing the questioned hair samples into evidence. Defendant did not object to the admission of these slides into evidence or to any other aspect of Mr. Weiss' testimony.

On cross-examination, Defendant elicited additional testimony from Mr. Weiss about the mitochondrial DNA testing performed in this case. Moreover, Defendant revisited Mr. Weiss' testimony to the effect that, unlike nuclear DNA, mitochondrial DNA does not permit the identification of specific individuals as the source of the questioned materials. In the course of his cross-examination, Defendant elicited evidence that went beyond the testimony that Mr. Weiss provided on direct examination. For example, the prosecutor did not question Mr. Weiss about the statistical likelihood that other individuals shared the same mitochondrial DNA as Defendant, or about the percentage of the population who, like Defendant, could not be excluded as the source from which the hair samples were derived. During that process, Defendant elicited testimony from Mr. Weiss that fewer than one percent of a given population would likely share the same mitochondrial DNA as that found in the tested hairs. Moreover, Defendant cross-examined Mr. Weiss about the frequency of such persons in the African-American population:

> [DEFENSE COUNSEL]: Based on your expertise as a mitochondrial or as a DNA expert, do you know how many African Americans could possibly be a contributor of the mitochondrial DNA sequence that was found in that hair?
>
> [MR. WEISS]: The exact number, no.
>
> [DEFENSE COUNSEL]: Is there any way to know that?
>
> [MR. WEISS]: I can say with 95 percent confidence, less than one percent of it occurring in the African American population.

Although Defendant initially objected to the testimony of Mr. Weiss and to the introduction of State's Exhibit No. 43 into evidence, he did not renew his objection to the admission of this evidence when it was presented in the presence of the jury, did not object to the introduction of exhibits similar to State's Exhibit No. 43 or to any of Mr. Weiss' further testimony,[5] and elicited additional testimony about the mitochondrial DNA testing on cross-examination.

The Supreme Court of North Carolina has recently held:

> In the case *sub judice* defendant objected to the admission of evidence regarding [prior bad acts] only during a hearing out of the jury's presence. In other words, defendant objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was "actually introduced at trial." Thus, defendant failed to preserve for appellate review the trial court's decision to admit [this] evidence[.] . . . Moreover, defendant lost his remaining opportunity for appellate review when he failed to argue in the Court of Appeals that the trial court's admission of this testimony amounted to plain error.

---

[5] At the conclusion of all the evidence, the trial court excused the jury. At that point, Defendant stated, among other things, "Your Honor, renew the objection to the confrontation issue[.]" Although this comment is not entirely clear, we presume that Defendant was attempting to renew his earlier objection to the admission of that part of Mr. Weiss' testimony which he had previously challenged on Confrontation Clause grounds. However, the only objection Defendant had made and could later "renew" was the objection that he lodged before the evidence was actually presented to the jury. Since Defendant never objected to the presentation of this evidence in the presence of the jury, his "renewal" of the objection that he lodged outside the presence of the jury does not suffice to preserve the issue of the admissibility of the disputed evidence for purposes of appellate review.

Ray, 364 N.C. at 277, 697 S.E.2d at 322 (quoting *Thibodeaux*, 352 N.C. at 581-82, 532 S.E.2d at 806). After a careful review of the record, we conclude that the facts of this case are indistinguishable from *Ray* in any material way. As in *Ray*, Defendant initially objected to the introduction of State's Exhibit No. 43 and to the testimony of Mr. Weiss at a hearing held out of the presence of the jury, but failed to renew his objections when the evidence in question was presented for the jury's consideration. In addition, Defendant failed to object to the introduction of additional exhibits relating to the mitochondrial DNA analysis performed in this case or to additional testimony by Mr. Weiss that went beyond the information that he discussed during *voir dire*. As a result, we conclude that Defendant failed to properly preserve his challenge to the admissibility of Mr. Weiss' testimony or the exhibits offered during his testimony for purposes of appellate review and that we will not reach that issue on the merits.[6]

C. "Short Form" Indictment

Finally, Defendant argues that the trial court erred by refusing to dismiss the "short form" indictment returned against

---

[6] In addition, since Defendant did not explicitly argue that the trial court committed plain error by allowing the admission of the challenged testimony, we decline to consider the extent to which Defendant is entitled to relief as the result of the admission of this testimony under the plain error doctrine. N.C.R. App. P. 10(a)(4) (stating that, "[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error").

him in the case in which he was charged with first degree rape and by "entering judgment thereon for the reason that [the indictment] was unconstitutional in violation of defendant's rights under the 5th, 6th, and 14th Amendments to the U.S. Constitution and Article I, [§§] 19 and 23 of the North Carolina Constitution and failed to vest jurisdiction in the trial court, since it failed to allege all the essential elements of first degree rape." Although Defendant "acknowledges that this issue has been decided against his position," he "requests this Court to re-examine and reverse its prior adverse rulings." We decline Defendant's invitation.

"North Carolina courts have consistently held, post-*Jones* [*v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999),] that short-form indictments for first degree rape and first degree sex offense comport with the requirements of both the United States and North Carolina Constitutions." *State v. Randle*, 167 N.C. App. 547, 553, 605 S.E.2d 692, 695 (2004); *see also State v. Wallace*, 351 N.C. 481, 505, 528 S.E.2d 326, 342, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498, 121 S. Ct. 581 (2000) (stating that "short-form" indictments "have been held to comport with the requirements of the North Carolina and United States Constitutions").

> The judicial policy of *stare decisis* is followed by the courts of this state. Under this doctrine, "[t]he determination of a point of law by a court will generally be followed by a court of the same or lower rank[.]" . . . Moreover, this Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions "until otherwise ordered by the Supreme Court."

Musi v. Town of Shallotte, __ N.C. App. __, __, 684 S.E.2d 892, 896 (2009) (quoting *Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992), *rev'd on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993)). As a result, we conclude that Defendant's contention lacks merit.

IV. Conclusion

Thus, for the reasons set forth above, none of Defendant's challenges to the trial court's judgments have merit. Since Defendant had a fair trial, free from prejudicial error, we conclude that the trial court's judgments should remain undisturbed.

NO ERROR.

Judges McGEE and STROUD concur.

Report per Rule 30(e).