NO. COA11-75
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Cleveland County
No. 09 CRS 001457-59

SIMON LAMAR CLARK

Appeal by defendant from judgments entered 1 May 2010 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 18 August 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant.

ELMORE, Judge.

A jury convicted Simon Lamar Clark (defendant) of possession of a firearm by a felon, first degree kidnapping, and robbery with a dangerous weapon. He appeals these convictions, arguing that the trial court erred by denying his motion to dismiss the kidnapping charge, giving improper jury instructions, and committing various evidentiary errors. We

disagree and hold that defendant received a trial free from error.

I. Background

Around 2:20 a.m. on 13 October 2008, Jim Daves was awakened by a loud banging on the door of his home. He answered the door holding a .357 Magnum. A young woman stood on the other side of the threshold and told him that she had run over his sign and wanted to get his "information," presumably to compensate for the sign. When Daves turned around to get something to write on, putting his gun down in the process, the woman ran into the house and pointed a gun at Daves. She told him to get on the floor, and he did, though he struggled because he was seventy years old at the time and recently had one of his hips replaced. The woman continued pointing the gun at him while he was on the floor, and she repeatedly told him, "I'll kill you."

From his position on the floor, Daves saw three young men run into his home, though he could not see their faces. The men then put duct tape over Daves's eyes and nose. They also bound his hands and then his feet using the duct tape. One man kicked Daves to warn him to stay still, though the kick was "not enough to hurt you," according to Daves.

The intruders ransacked Daves's house, taking twenty-one guns, four watches, and a camera. When they finished, they left, closing the door behind them. At that point, Daves was still lying on the floor, bound. He got his hands loose and then removed the tape from his face and feet. Daves could not call the police because the intruders had pulled all the phone jacks out of the wall and taken his cell phone. Daves drove to his nephew's house and called the police from there.

In addition to defendant, three other men were charged with the robbery: Preston Wilson, Jonathan Chapman, and David Lowe. Sasha Borders was identified as the young woman involved in the robbery. Wilson, Chapman, and Lowe all testified at defendant's trial pursuant to plea agreements.

Following his convictions, defendant was sentenced as a Level IV offender to 133 to 169 months' imprisonment for first degree kidnapping and 117 to 150 months' imprisonment for robbery with a dangerous weapon, to run concurrently. Defendant was further sentenced to twenty to twenty-four months' imprisonment for possession of a firearm by a felon, to run consecutively to the other sentences.

II. Arguments

A. Motion to Dismiss the First Degree Kidnapping Charge

Defendant first argues that the trial court erred by denying his motion to dismiss the first degree kidnapping charge at the conclusion of all the evidence. He argues that the State failed to prove two elements of first degree kidnapping, restraint and failure to release Daves to a safe place. We disagree.

"When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator." *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997) (citation omitted). "If substantial evidence of each element is presented, the motion for dismissal is properly denied." *Id.* at 717, 483 S.E.2d at 434. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "In considering the motion, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in favor of the State." *State v.*

Anderson, 181 N.C. App. 655, 659, 640 S.E.2d 797, 801 (2007) (citation omitted).

Our General Statutes define kidnapping, in relevant part, as follows:

> 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:
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> * * *
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]

N.C. Gen. Stat. § 14-39(a) (2009). "If the person kidnapped . . . was not released by the defendant in a safe place," then the kidnapping is considered to be first degree kidnapping. N.C. Gen. Stat. § 14-39(b) (2009).

> A person may not be convicted of kidnapping and another felony if the restraint or removal is an inherent and inevitable element of the other felony, such as robbery with a dangerous weapon. "The key question is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping exposed the victim to greater danger than that inherent in the armed robbery itself." *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (citation and quotations omitted).

State v. Ly, 189 N.C. App. 422, 427, 658 S.E.2d 300, 304 (2008) (additional quotations and citation omitted). Our courts have repeatedly held that "the restraint necessary and inherent to [an] armed robbery [is] exercised by threatening the victim with [a] gun." *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992); *see also Ly*, 189 N.C. App. at 427-28, 658 S.E.2d at 304-05 (holding that binding the victim was not "necessary to effectuate the armed robbery and the victims were placed in greater danger than that inherent in the offense of robbery with a dangerous weapon").

Here, defendant argues that it was necessary to bind Daves's hands and feet to "restrict [Daves's] movement in order to search the house and then carry the guns and other items out of the house. Otherwise, he could have tried to reach one of his guns or even escape, thereby thwarting the robbery." Because binding defendant's hands and feet went well beyond the restraint necessary and inherent to an armed robbery, namely threatening the victim with a gun, defendant's argument as to this element lacks merit.

Defendant also argues that the State failed to show that he did not release Daves to a safe place. As defendant stated it in his brief, "All the evidence showed th[at] Jimmie Daves was

left in the safest place possible after the robbery - his own home." Though we agree that all the evidence showed that Daves was left in his own home following the robbery, merely leaving a seventy-year-old kidnapping victim bound and blindfolded on the floor of his own home without access to a telephone does not constitute a "release" to a safe place.

> Releasing a person in a safe place implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety. Mere relinquishment of dominion or control over the person is not sufficient to effectuate a release in a safe place.
>
> . . . . This Court held that "the mere departing of a premise" was not an affirmative action sufficient to effectuate a release in a safe place.

Ly, 189 N.C. App. at 428, 658 S.E.2d at 305 (quotations and citations omitted). In *Ly*, we specifically noted that the defendants in that case "departed the premises" — the victim's home — "leaving the victims bound, blindfolded, and without access to a telephone." *Id.* Because the defendants took no action besides leaving the premises, we held that the trial court properly denied the defendants' motions to dismiss the first degree kidnapping charges.

Here, as in *Ly*, defendant merely departed the premises. He took no conscious, willful action to assure that Daves was released in a place of safety. That Daves was able to escape

his bonds and drive to a place of safety is irrelevant to the question of whether *defendant* released Daves in a safe place. Accordingly, we hold that the trial court properly denied defendant's motion to dismiss the first degree kidnapping charge.

B. Non-Corroborative Hearsay Evidence by Detective Curry

Defendant next argues that it was plain error for the trial court to permit Detective T.O. Curry of the Cleveland County Sheriff's Office to "read into evidence a statement Daves made shortly after the robbery." He argues that "the statement should not have been admitted in its entirety because" the information it allegedly contained — "that there were four male intruders rather than three" — did not corroborate Daves's trial testimony because it changed the important detail of how many male intruders entered Daves's house.

We need not address the merits of this argument because there is no evidence that the trial court admitted Daves's statement in its entirety during Curry's testimony. The transcript pages to which defendant directs our attention show only that Curry consulted his "handwritten notes," not that he was reading from a statement or that the trial court admitted

the statement. This Court reviewed the rest of Curry's testimony without finding evidence that Curry read the statement into evidence or that the statement was otherwise admitted into evidence.

C. Jury Instruction on First Degree Kidnapping

Defendant next argues that the trial court committed plain error by not adequately clarifying the term "release" for the jury. The jury, during its deliberations, asked the trial court to clarify the meaning of "release" in the instructions for first degree kidnapping. After consulting with counsel, who both agreed to the approach, the trial court made the following statement to the jury:

> I gave you what you are to consider about release within the instructions earlier. That's a part of the fifth element of first degree kidnapping that's contained in that paper I sent in with you.
>
> You would otherwise find release to be what you find it to be. It says, and fifth, the person was not released by the defendant or by someone with whom he was acting in concert in a safe place.
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> Releasing a person in a safe place requires more than mere relinquishment of dominion or control over a person. Release to a safe place requires a conscious, willful action on the part of the defendant to assure that the victim is released in a place of safety.
>
> The general assembly has not defined

> the term safe place. However, factors you may consider include but are not limited to whether the place was familiar to the victim, whether the victim had access to immediate assistance or help, and/or whether the area protects the victim or is a wooded, isolated, or otherwise dangerous place.

Defendant argues that "[t]his instruction was inadequate to apply the law to the facts of this particular case, was unnecessarily misleading and confusing to the jury, and potentially allowed a conviction on an improper basis."

"'Plain error is error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (2007) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)); *see also* N.C.R. App. P. 10(a)(4) (2011). "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Garcell*, 363 N.C. 10, 48, 678 S.E.2d 618, 642 (2009) (quotations and citation omitted).

Here, the trial court did not err in its instruction. As this Court has observed before, "the kidnapping statute[] does

not define the term "release.'" *State v. Morgan*, 183 N.C. App. 160, 173, 645 S.E.2d 93, 103 (2007). As noted above,

> Releasing a person in a safe place implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety. Mere relinquishment of dominion or control over the person is not sufficient to effectuate a release in a safe place.

Ly, 189 N.C. App. at 428, 658 S.E.2d at 305 (quotations and citations omitted). The trial court included those established concepts of "release" in its instruction to the jury, and the trial court did not err by declining to invent a new definition of "release" to respond to the jury's request.

D. Hearsay Statements by David Lowe

Defendant argues that the trial court committed plain error by admitting David Lowe's videotaped interview with Detective Curry into evidence. He argues that it was improper for the trial court to admit the interview for impeachment purposes under Rule 607 because the State's true motive was to put the substance of Lowe's statement before the jury. He explains that the State knew that Lowe's testimony would differ from his initial statement because Lowe had told prosecutors the day before that he had lied when giving his initial statement, and, thus, the only reason to put Lowe on the stand was to impeach

him with his prior inconsistent statement, thereby putting the contents of that statement before the jury. We disagree.

Rule 607 of our Rules of Evidence states that "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2009). "[I]mpeachment by prior inconsistent statement may not be allowed when used merely for the purposes of placing evidence that would not otherwise be admissible before the jury." *State v. Walters*, ___ N.C. App. ___, ___, 703 S.E.2d 493, 495 (2011) (citing *State v. Hunt*, 324 N.C. 343, 349, 378 S.E.2d 754, 757 (1989)). A court may admit a witness's prior statements as corroborative evidence "if they tend to add weight or credibility to the witness' trial testimony." *State v. Williams*, 363 N.C. 689, 704, 686 S.E.2d 493, 503 (2009) (quotations and citation omitted).

"Where the witness admits having made the prior statement, impeachment by that statement has been held to be permissible." *State v. Banks*, ___ N.C. App. ___, ___, 706 S.E.2d 807, 815 (2011) (quotations and citation omitted). However, "once a witness denies having made a prior statement, the State may not impeach that denial by introducing evidence of the prior statement." *Id.* (quotations and citations omitted). But, when

"a witness fails to remember having made certain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, our courts have allowed the witness to be impeached with the prior inconsistent statement." *State v. Riccard*, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323 (2001). In *Riccard*, two witnesses admitted making statements to a detective "in which they discussed details of the robbery [at issue] and assault of the victim and implicated [the] defendant." *Id.* at 304, 542 S.E.2d at 323. One witness, "however, testified that certain parts of his statement were inaccurate, and that he did not remember making certain parts of his statement." *Id.* The other witness "also testified that certain parts of his statement were inaccurate." *Id.* We held that the trial court did not err by allowing the State to impeach both of these witnesses pursuant to Rule 607.

Here, Lowe did not deny making the prior statement. Indeed, he acknowledged making the prior statement. However, he testified that he could not remember making some parts of the statement and denied that he had made other parts of the statement. As in *Riccard*, we conclude that the trial court did

not err by allowing the State to impeach Lowe using his prior statement.

As for defendant's claim that the State impeached Lowe as subterfuge for putting Lowe's prior statement before the jury, we hold that the facts here indicate good faith and a lack of subterfuge.

> Circumstances indicating good faith and the absence of subterfuge . . . have included the facts that the witness's testimony was extensive and vital to the government's case; that the party calling the witness was genuinely surprised by his reversal; or that the trial court followed the introduction of the statement with an effective limiting instruction[.]

Hunt, 324 N.C. at 350, 378 S.E.2d at 758 (citations omitted). Here, the trial court gave a limiting instruction to the jury before showing it the recording of the prior statement.

Accordingly, we cannot conclude that the trial court committed plain error by admitting Lowe's prior recorded statement.

III. Conclusion

We hold that defendant received a trial free from error.

No error.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).