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NO. COA01-359

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v.

RONALD EDWARD EVANS,
Defendant

Durham County
Nos. 99 CRS 71858
99 CRS 71859

Appeal by defendant from judgments entered 18 October 2000 and order entered 29 November 2000 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 24 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Brian Michael Aus for defendant.

BRYANT, Judge.

Defendant Ronald Edward Evans was arrested for robbery with a dangerous weapon and second degree kidnapping on or about 22 December 1999. On 1 May 2000, defendant was subsequently indicted for robbery with a dangerous weapon, second degree kidnapping and impersonating a peace officer, and was formally arraigned on 10 August 2000. This matter came for jury trial at the 17 October 2000 and 18 October 2000 criminal sessions of Durham County Superior Court with the Honorable Henry W. Hight, Jr. presiding.

On 18 October 2000, after being found guilty of all the

charges, defendant was sentenced to a presumptive active term of 117 - 150 months for robbery with a dangerous weapon; said sentence to run at the expiration of any sentence that the defendant was currently serving. In addition, defendant was sentenced to a concurrent, presumptive active term of 47 - 66 months for second degree kidnapping and impersonating a peace officer; said sentences to run at the expiration of the term of imprisonment for the robbery with a dangerous weapon conviction. Defendant gave notice of appeal from these judgments in open court on 18 October 2000.

On or about 27 October 2000, the State caused to have filed a motion for forfeiture of a computer seized from defendant's residence. A hearing on the motion was conducted at the 13 November 2000 criminal session of Durham County Superior Court with Judge Hight presiding. Over defendant's objection, the trial court ordered that the computer be forfeited to the Durham County Police Department. Defendant gave notice of appeal from the order in open court on 13 November 2000. The order of forfeiture was filed on 29 November 2000.

On 1 October 1999, Kelvin Jones, the prosecuting witness in the instant case, visited the home of Bryon Howard so that Howard could cut Jones' hair. As Jones drove onto Howard's driveway, a green Ford Explorer pulled onto the driveway behind Jones. A person that Jones later identified as the defendant and another man (defendant's partner) exited the Explorer. The two men were wearing army fatigue pants, boots, and black T-shirts and baseball

caps with the letters FBI inscribed on the shirts and caps. Both men were carrying firearms, and defendant approached Jones' vehicle and pointed what appeared to be a chrome .9mm pistol at Jones and ordered him out of the vehicle. Defendant displayed a badge near his waist.

Defendant told Jones that he had a warrant for the arrest of Maurice Jones, and showed Jones some paperwork. Jones replied that he was not Maurice Jones. After Jones complied with defendant's order for Jones to exit his vehicle, defendant frisked Jones while his partner searched Jones' car. Defendant continued to point his pistol at Jones while executing the frisk. Defendant removed approximately $3500 from Jones' pocket, handcuffed Jones, and then said "book him."

After Jones was handcuffed, he was put in the backseat of the Explorer and driven to a Super 8 motel while his partner drove Jones' car to the motel. At the motel, defendant told Jones that he was waiting for instructions on what to do with him. Defendant and his partner then took Jones' cellular phone, business phone and keys while Jones remained handcuffed.

Defendant and his partner used walkie-talkies, supposedly to communicate with a field operative. They took pictures of Jones and held him at the motel for several hours. Eventually, the defendant told Jones that "[y]ou're not who we are looking for." Defendant told Jones that after some paperwork was completed, Jones would get his money back. In addition, defendant instructed Jones to contact the Durham Police Department to secure the return of his

car. Defendant and his partner then drove Jones to an intersection on Cleveland Street, removed the handcuffs, and released Jones. Jones subsequently retrieved his car based on a tip received from Howard.

On 2 October 1999, Jones went to the Durham Police Department and spoke with Officer J. A. Pickett, Jr. concerning the prior day's incidents. At the police department, Jones went through books containing photos of possible suspects, but was unable to identify his assailants. In mid-December and approximately six weeks following the incident, Jones saw a picture of defendant on television and recognized him as one of his assailants.

Jones called investigator Delois West of the Durham Police Department, who was investigating Jones' incident report taken by Officer Pickett, and informed her that he had seen on television the man who abducted and robbed him, and the man's name was announced as Ronald Evans. At trial, Officer Pickett and Investigator West presented testimony concerning the information Jones provided the police regarding the incident.

Evidence was introduced at trial that on 16 June 1999, Regional Acceptance Corporation entered into a contract with defendant to finance a green 1997 Ford Explorer. Evidence was introduced that the following items were seized from a Dodge pickup truck that defendant was driving at the time of his arrest: (1) a pistol with a full magazine and one round in the chamber (State's exhibit 5A), (2) several papers clipped together with words "order for arrest, Durham County versus Maurice Jones, alias" captioned

(State's exhibit 74A), (3) handcuffs (State's exhibit 15A), and (4) walkie-talkies (State's exhibits 2A and 2B).

Jones testified that he recognized some of the writing on State's exhibit 74A and that State’s exhibit 5A looked like the pistol that one of the assailants was carrying on the day of the incident. Jones testified that State’s exhibits 2A and 2B looked like the walkie-talkies the assailants used at the motel. In addition, a handwritten statement that Jones prepared for the police was read in evidence detailing the incident.

Defendant did not testify nor present any evidence on his behalf.

I.

First, defendant argues that there exists insufficient evidence of the crimes charged. He argues that the trial court therefore erred in denying his motion to dismiss the charges. We disagree.

“In reviewing a motion to dismiss, ‘the trial court is to determine whether there is substantial evidence [(1)] of each essential element of the offense charged, or of a lesser offense included therein, and [(2)] of defendant[] being the perpetrator of the offense.’” *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *aff’d as modified by* ___ N.C. ___, ___ S.E.2d ___ ___, 2002 WL 355999 (2002) (citation omitted). “In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Fritsch*,

351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied by Fritsch v. North Carolina*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

A person is guilty of robbery with a dangerous weapon if that person, having in his possession or with the use or threatened use of any weapon, unlawfully takes personal property from another at any time, whereby the life of the other person is endangered or threatened. *See* N.C.G.S. § 14-87(a) (1999).

As relates to the robbery with a dangerous weapon charge, defendant does not dispute that he, while having in his possession a firearm, took money from Jones. Rather, defendant argues that Jones testified that he did not feel threatened by defendant's action. Based on Jones' testimony, defendant argues that there exists insufficient evidence to support the charge of robbery with a dangerous weapon. We disagree.

On numerous occasions our Supreme Court has held, in regard to a robbery with a deadly weapon charge, the determinative question to be answered by the jury is whether the victim's life was *in fact* endangered or threatened; and not whether the victim subjectively believed his life was endangered or threatened. *See State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982); *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978); *State v. Moore*, 279 N.C. 455, 459, 183 S.E.2d 546, 548 (1971). Moreover, this Court held in *State v. Wiggins* that when a defendant uses a dangerous weapon in the commission of a robbery, absent evidence to the contrary, there attaches the presumption that the victim's life was in fact endangered or threatened. *State v. Wiggins*, 78 N.C.

App. 405, 408, 337 S.E.2d 198, 199-200 (1985).

In the case at bar, evidence was presented that Jones saw defendant point at him what appeared to be a .9mm pistol. Defendant continued to point the pistol at Jones when he frisked him. Defendant presented no evidence to the contrary. In addition, evidence was presented that money was taken from Jones' person. Jones testified that the assailant drove a green Explorer. Evidence was presented that defendant had previously financed a green Explorer. Moreover, recovered from the Dodge pickup that defendant was driving at the time of his arrest were what appeared to be an arrest warrant for a Maurice Jones, handcuffs, walkie-talkies, and a pistol. Based on the evidence, we find that the trial court properly denied defendant's motion to dismiss as to the charge of robbery with a dangerous weapon.

As relates to the second degree kidnapping charge, defendant makes two arguments. First, defendant argues that there exists insufficient evidence of the underlying charge of robbery with a dangerous weapon, therefore the restraint and movement of Jones was not in the furtherance of the underlying felony. Second, defendant argues that the restraint and movement of Jones was an inherent feature of the robbery and cannot support a separate conviction for second degree kidnapping. We disagree.

Defendant was indicted for second degree kidnapping in violation of N.C.G.S. § 14-39 (1999), which reads in pertinent part:

> (a) 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 . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
> . . .
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony . . . .

Defendant argues that the State has failed to prove the "danger or threat to life" element required for the charge of robbery with a dangerous weapon. Therefore, defendant argues that there exists insufficient evidence that the restraint and movement of Jones was in the furtherance of the underlying crime. As we previously stated, however, when a person commits a robbery with the use of a dangerous weapon, a presumption attaches that the victim's life was *in fact* in danger and was threatened. We must therefore disagree with defendant's first argument relating to his conviction of second degree kidnapping.

As relates to defendant's second argument, we find that the restraint and movement of Jones was sufficient to sustain a conviction of second degree kidnapping. Our Court has held that the critical question to be addressed is whether the restraint and movement of the victim is separate from or an integral part of the commission of the robbery. *State v. Little*, 133 N.C. App. 601, 606, 515 S.E.2d 752, 756, *rev. denied by* 351 N.C. 115, 540 S.E.2d 741 (1999). In the case at bar, defendant had already removed money from Jones' person when defendant thereafter handcuffed Jones, ordered Jones in the back of the Explorer that defendant was driving, drove Jones to a motel, held him at the motel for several

hours, and finally drove Jones to another location where he was released. Defendant had already taken money from Jones, therefore any additional restraint and movement was unnecessary to complete the act of taking money from Jones. We find that the trial court properly denied defendant's motion to dismiss as relates to the charge of second degree kidnapping.

As relates to the charge of impersonating a peace officer, defendant argues summarily that there exists insufficient evidence to support the charge. We disagree.

Defendant was indicted for impersonating a peace officer in violation of N.C.G.S. § 14-277 (1999), which reads in pertinent part:

> (a) No person shall falsely represent to another that he is a sworn law-enforcement officer. As used in this section, a person represents that he is a sworn law-enforcement officer if he:
> . . .
> (2) Displays any badge or identification signifying to a reasonable individual that the person is a sworn law-enforcement officer, whether or not the badge or other identification refers to a particular law-enforcement agency;
> . . .
> (b) No person shall, while falsely representing to another that he is a sworn law-enforcement officer, carry out any act in accordance with the authority granted to a law-enforcement officer. For purposes of this section, an act in accordance with the authority granted to a law-enforcement officer includes:
> (1) Ordering any person to remain at or leave from a particular place or area;
> (2) Detaining or arresting any person . . . .

Evidence was introduced at trial that defendant, while wearing a black T-shirt and baseball cap with the FBI logo on them, and while displaying a badge at his waist, pointed a gun at Jones and ordered him out of his vehicle. Evidence was introduced that defendant told Jones that he had a warrant for the arrest of Maurice Jones, and then showed Jones what appeared to be an arrest warrant. Evidence was introduced that defendant frisked Jones, and that he handcuffed Jones and then said "book him." In addition, upon a search of a Dodge pickup truck that defendant was driving at the time of his arrest, handcuffs, papers with the caption "order for arrest, Durham County versus Maurice Jones", and a pistol were discovered. We find that the trial court properly denied defendant's motion to dismiss as to the charge of impersonating a peace officer.

II.

Defendant next argues that the trial court erred in overruling his objection to a statement made by the prosecution during closing arguments. We disagree.

Counsel is generally granted wide latitude in the scope of its jury arguments. *See State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied by Gregory v. North Carolina*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). The scope of this latitude lies within the sound discretion of the trial court. *Id.* On appellate review, prosecutorial arguments are not viewed as though they exist in a vacuum. *State v. Gibbs*, 335 N.C. 1, 64, 436 S.E.2d 321, 357 (1993), *cert. denied by Gibbs v. North Carolina*,

512 U.S. 1246, 129 L. Ed. 2d 881 (1994). "'Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred.'" *Id.* (citations omitted). For a new trial to be ordered, it is not sufficient that the prosecutor's remarks were undesirable. Rather, the party challenging the remarks must show that the remarks were both improper and prejudicial. *State v. Jones*, ___ N.C. ___, ___, 558 S.E.2d 97, 107-08 (2002).

Defendant states that in the prosecution's closing arguments, the prosecution said that Bryon Howard was obviously involved in orchestrating the 1 October 1999 incident. Defendant contends that by making this remark, the prosecution improperly gave the jury the impression that if Howard had testified at trial, he would not have provided testimony favorable to the defendant's case. Defendant contends that the prosecution's remarks prejudiced the outcome of the hearing and he is therefore entitled to a new trial.

In reviewing the record, we find there exits substantial evidence supporting the jury's verdict. Specifically, there exists the testimony of Jones identifying the defendant as the assailant, and evidence found in defendant's vehicle that were the same as or similar to items used in the robbery. In addition, evidence was introduced that the assailant was driving a green Explorer, and that defendant previously entered into a contract to finance a green Explorer. Even assuming that it was error for the trial court to allow the prosecution's remarks concerning Howard, defendant has not shown that those remarks prejudiced the jury's

verdict. We therefore find that defendant is not entitled to a new trial based on the prosecution's remarks concerning Howard's possible involvement in the 1 October 1999 incident.

III.

Finally, defendant argues that the trial court's order of forfeiture was not authorized by law. In its brief, the State concedes that it has been unable to locate either a statutory basis or case law authorizing forfeiture of defendant's computer. This Court has also performed an independent search, and has been unable to locate either a statutory basis or any other authority which would justify the forfeiture of the computer seized from defendant's residence. We therefore reverse the 13 November 2000 order (filed 29 November 2000) allowing forfeiture of the above-referenced computer to the Durham Police Department.

Mandate

We find no error as to defendants convictions on the charges of robbery with a dangerous weapon, second degree kidnapping and impersonating a peace officer. We reverse the order of forfeiture filed on 29 November 2000.

No error in part; reversed in part.

Judges MARTIN and TIMMONS-GOODSON concur.

Report per Rule 30(e).