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NO. COA01-625

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

STATE OF NORTH CAROLINA

v. New Hanover County
Nos. 00 CRS 16209,
01 CRS 48, 49

JAMES GIRLEE HARDY

Appeal by defendant from judgments entered 11 January 2001 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 13 February 2002.

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

Sofie W. Hosford, for defendant-appellant.

TYSON, Judge.

I. Facts

On 1 August 2000, Bryan Hampton, Kelly Abney, and Lee Stegal were working at Papa John's Pizza, in Wilmington, North Carolina, when a man wearing an orange ski mask came in and robbed them at gun point.

Donquill Suell ("Suell") testified that he and James Girlee Hardy ("defendant") stopped at Papa John's Pizza to rob it. Suell also testified that defendant, wearing an orange mask, got out and ran into the store behind another man. Suell further stated that they split approximately $5000 from the robbery and that he later learned that defendant's motive for the robbery was to get money

for his bail for another offense.

The State also presented testimony by Maurice Sharpe ("Sharpe") that he and defendant's brother, Michael Hardy ("Hardy"), robbed the Scotchman on 4 August 2000 to obtain bail money for defendant. Defendant presented the testimony of two witnesses: Hardy and Bryan Smith ("Smith"). Hardy testified that defendant did not tell him to rob the Scotchman. Smith testified that he loaned defendant approximately $2,500.

Defendant was convicted of second-degree kidnapping and two counts of robbery with a firearm. Defendant appeals. We find no error.

II. Issues

The issues presented are whether: (1) the trial court committed plain error in admitting evidence of the Scotchman robbery, (2) the trial court erred in failing to sanction the State for discovery violations, and (3) the trial court erred in denying defendant's motion to dismiss the charge of second-degree kidnapping.

Defendant set out six assignments of error in the record on appeal. Two of these assignments of error are not argued in defendant's brief and are deemed abandoned. N.C.R. App. P. 28(b)(5) (1999).

III. Scotchman Robbery

Defendant argues that the evidence of the Scotchman robbery by his brother and Sharpe, to raise money for defendant's bail, was improper character evidence under Rule 404(b) and its admission was

unfairly prejudicial under Rule 403 of the North Carolina Rules of Evidence.

Defendant acknowledges that he failed to object to the admission of this evidence at trial. Defendant argues plain error in the admission of this testimony on appeal. N.C.R. App. P. 10(c)(4) (1999) (providing that "a question which was not preserved by objection noted at trial . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error").

Plain error may be found where the trial court has committed "'*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)). Defendant has the burden of proving that the trial court committed plain error. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

Sharpe testified for the State that he talked with defendant on the phone while defendant was in jail. Sharpe further testified that defendant told him to rob the Dairy Queen to get him more bail money. Sharpe stated that he and Hardy were unable to rob the Dairy Queen because they did not have a gun. After returning to defendant's girlfriend's house, they obtained a gun and Hardy decided that they would rob the Scotchman.

Hardy testified for defendant that he and Sharpe robbed the

Scotchman because he needed money to get his brother, defendant, out of jail. Hardy further testified that he and Sharpe robbed Papa John's Pizza on 1 August 2000 and not defendant.

Detective Steven Thomas Maillard testified for the State that, defendant stated, during an interview, that he did not go inside the Papa John's, that he was merely a lookout in this robbery, and that he received $2,400 from the robbery. Detective Maillard read defendant's written statement to that effect to the jury.

The trial court instructed the jury that testimony regarding the Scotchman robbery was received for the limited purpose of establishing a motive for the robbery of Papa John's. As a general rule, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999). Such evidence may, however, "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

Evidence of defendant's wrongs or acts are relevant under Rule 404(b) to prove defendant's motive in robbing the Papa John's Pizza. The admission of this testimony was not error and did not constitute plain error.

<u>IV. Discovery Violations</u>

Defendant argues that the State failed to comply with a discovery request. The State notified defendant on the day of trial that an S.B.I. agent was going to testify regarding a hair

analysis performed on samples taken from the orange ski mask found at Papa John's Pizza. Defendant contends that the trial court, as a sanction, should have excluded this evidence as permitted under N.C.G.S. § 15A-910(3).

Defendant moved to suppress evidence of the hair analysis. The trial court held that the State would not be permitted to introduce the hair analysis evidence until defendant had an opportunity to interview the expert witness and prepare for cross-examination. Defendant reported to the court that they had interviewed the expert witness and did not request any additional time to prepare.

The decision of whether the State failed to comply with discovery is left to the sound discretion of the trial court. *State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995). "The choice of which sanction, if any, to impose is left to the sound discretion of the trial court. A trial court will not be reversed on appeal absent a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Banks*, 322 N.C. 753, 761, 370 S.E.2d 398, 404 (1988) (citation omitted.) Additionally, "discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986).

The State sought hair samples from both defendant and Suell in response to defendant's statement that he was just a lookout during

the robbery. There was a delay due to the fact that Suell was incarcerated in another jail. Once Suell became available, a search warrant was obtained and hair samples were taken. The State immediately notified defendant of the test results on the Friday before trial.

Defendant has not argued unfair surprise or bad faith on the part of the State. Defendant has failed to demonstrate the trial court abused its discretion in delaying admission of the evidence until defendant had an opportunity to interview the witness and prepare for cross-examination. This assignment of error is overruled.

V. Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss the second-degree kidnapping charge as to Kelly Abney. Defendant contends there was insufficient evidence of restraint to support the kidnapping charge separate from that inherent to the armed robbery charge. We disagree.

N.C.G.S. 14-39(a) provides:

> (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, 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:
>
> . . . .
>
> (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)(2) (1999).

Defendant correctly states that a person cannot be convicted of kidnapping when the only evidence of restraint is that "which is an inherent, inevitable feature" of another felony such as armed robbery. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). "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. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)).

In considering a motion to dismiss, "[t]he evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence." *State v. Roseborough*, 344 N.C. 121, 126, 472 S.E.2d 763, 766 (1996) (citation omitted).

Bryan Hampton ("Hampton") testified that the robber, wearing an orange mask and pointing a gun, ordered him and another employee to get down onto the floor. The robber then had Hampton go to the register and remove the money. After Hampton responded that he could not open the register, the robber asked who could. Hampton testified that at that moment the assistant manager, Kelly Abney ("Abney"), came out front. Abney opened the register, the safe, removed the money, and gave it to the robber.

Hampton further testified that the robber then ordered him and

Abney to the back of the store. Upon reaching the back of the store, the robber demanded "give me your money" at which point Hampton threw his wallet and money into the bag. The robber then ordered both Abney and Hampton into the bathroom, onto the floor, and to start counting.

Here, defendant threatened Abney with a gun and forced her to lie face down on the bathroom floor but took nothing from her. Terrorizing Abney in the bathroom was not an inherent part of the robbery taking place in the store. *See State v. Brice*, 126 N.C. App. 788, 791, 486 S.E.2d 719, 720 (1997). Defendant's threatening Abney with a gun in the bathroom, "exposed [her] to greater danger than that inherent in the armed robbery" that was taking place in the store. *See State v. Allred*, 131 N.C. App. 11, 21, 505 S.E.2d 153, 159 (1998) (removal was not an integral part of the robbery where defendant's accomplice removed the victim from his bedroom to the living room and nothing was taken from the victim); *State v. Davidson*, 77 N.C. App. 540, 543, 335 S.E.2d 518, 520 (1985) (upholding denial of motion to dismiss kidnapping charge where defendant forced victims into dressing room to remove them from view of passersby who might impede commission of robbery).

Defendant also argues that there was insufficient evidence that Abney was over sixteen years of age, as alleged in the indictment. Our Supreme Court has held that the victim's age is not an essential element of the crime of kidnapping itself, but is a factor which relates to the State's burden of proof regarding consent. *State v. Hunter*, 299 N.C. 29, 40, 261 S.E.2d 189, 196

(1980). Ms. Abney testified before the jury and it was competent for the jury to look upon her and draw reasonable inferences as to her age from her appearance and growth. *Id*. (citing *State v. McNair*, 93 N.C. 628 (1885); *State v. Arnold*, 35 N.C. 184 (1851)).

Defendant does not argue that there was insufficient evidence that Abney was restrained without her consent and we conclude that there was sufficient evidence of this fact. This assignment of error is overruled.

No error.

Judges WYNN and TIMMONS-GOODSON concur.

Report per Rule 30(e).