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NO. COA02-182

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v.

Rutherford County
Nos. 01 CRS 003214-18,
and 005267

WALI FARAD MUHAMMAD BILAL

Appeal by defendant from judgments dated 12 October 2001 by Judge James L. Baker, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 29 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Granberry Corbett, for the State.

William D. Auman for defendant appellant.

GREENE, Judge.

Wali Farad Muhammad Bilal (Defendant) appeals judgments dated 12 October 2001 entered consistent with a jury verdict finding him guilty of two counts of robbery with a dangerous weapon, two counts of second-degree kidnapping, and one count each of simple assault and assault inflicting serious bodily injury.

Prior to trial, Defendant requested the removal of his leg restraints. The trial court found:

Unless one looks closely [the leather band around Defendant's ankle] is all that can be observed. I[] [am] going to recognize Defen[dant's] request to have the leg brace

removed. However, I believe it is in the interest of . . . [D]efendant being in custody and the nature of the offen[s]es to leave the leg brace on. I[] [will] also note that it is a normal security function to have those accused of serious offen[s]es who are in custody to have leg braces on even in normal courtroom situations.

I[] [will] note for the court record that we are not in what can be considered a normal courtroom situation, that we are holding court in the Stonecutter Mill or a vacant portion of the Stonecutter Mill, in a facility which has not been designed with any type of security in mind and is being used while the Rutherford County Courthouse is being renovated. All this together . . . justifies the use of the leg brace

The trial court further noted that Defendant's gate was normal even with the leg brace.

The evidence at trial revealed that, on the morning of 19 March 2001, Barbara Owens (Owens) arrived at McDonald's restaurant in Forest City where she worked as the breakfast manager. Danny Bradley (Bradley), another McDonald's employee, arrived as Owens unlocked the door. When Owens walked inside, with Bradley following behind her, they were knocked to the ground with such force that Owens' hip broke. Owens turned around and saw a man wearing gloves, dark looking pants, a mask over his face, and a blue and white bandana across his nose. Pointing a gun at Owens' head the man told her he would kill them if she did not get up and open the safe. Owens crawled to the store's safe but was unable to open it. She told the man this was the first time she had to open the safe since the death of her husband. The man responded by calling Owens by her nickname "Granny," which was known to all McDonald's employees.

Owens pleaded with the man to let them live and to instead take the \$5,000.00 she was carrying in her purse, which she intended to deposit in the bank that evening. After giving the safe another try, it finally opened. The man then dragged Bradley, who was still lying on the floor injured, into the cooler and demanded that Owens get in as well. The man locked the cooler and took off with the contents of the store safe and the \$5,000.00 from Owens' purse.

During the investigation, Owens told the police the man had "walked like he either had new shoes or his shoes were too tight." Owens described how she had seen black skin when one of the man's gloves had slipped off his hand during their attempt to open the safe. Moreover, Owens stated she had recognized the man's voice. Because Owens underwent extensive surgery on her hip after the robbery, it took her several days to put the voice and the corresponding face together. After making the connection, Owens told investigators the man's voice belonged to Defendant. Defendant, a black man, had worked with Owens at McDonald's prior to the robbery, and Owens was therefore familiar with the sound of his voice. Bradley did not recognize the man's voice. He did, however, testify that the man "sounded like a black man" and further noted that he wore black boots.

Donna Smith (Smith), Defendant's ex-girlfriend, testified Defendant had asked to borrow her car to use on 19 March 2001. Defendant planned to pick up the car on the evening of March 18. Sometime during the day, Defendant telephoned Smith and asked her

to check if his cell phone was in the car. Smith located the cell phone and placed it, as directed by Defendant, in a black duffel bag he had left at Smith's place. Upon opening the bag, Smith saw a gun, a mask, gloves, and a black and blue bandana. Smith testified the gun looked similar to the gun depicted in Defendant's pellet gun owner's manual. Defendant had instructed Smith to put the bag in the car so he would have it when collecting the car. After picking up the car that night, Defendant telephoned Smith to tell her he needed to go to the hospital sometime because he had hurt his foot.

On 19 March 2001, after the time of the McDonald's robbery, Defendant picked Smith up from work. Defendant was wearing one black boot at this time due to the problems he was having with his other foot. Smith and Defendant went to see Defendant's landlord, where Defendant paid \$635.00 in cash for his rent. They then proceeded to the courthouse to pay a court fine of \$295.00 owed by Defendant.

During cross-examination, Defendant asked Smith if she had ever worked for the police. The trial court sustained the State's objection to this question. Defendant explained his reason for asking this question was because Smith previously had referred to one of the investigating officers by his first name and he was wondering why. Smith testified she had done so because she had gone to school with the officer.

Sergeant Bob Ward (Sergeant Ward) testified he searched Defendant's apartment. During this search he found an owner's

manual for a pellet gun and two black boots. According to Bradley, the boots resembled those worn by the robber.

During the course of the trial, there came a time when Defendant walked past the jury wearing his leg brace. When the trial court inquired into this incident, Defendant opposed a jury instruction with respect to the restraint because there was a "good chance that no harm ha[d] been done." Defendant was "afraid that any instructions would possibly backfire even though they would be well meant." When Defendant thereafter asked to have his restraint removed so he could take the witness stand, his request was again denied.

At the end of the State's evidence and at the end of all the evidence, Defendant moved for dismissal. The trial court denied Defendant's motions.

The issues are whether: (I) the trial court committed prejudicial error in failing to remove Defendant's leg brace or, in the alternative, to give any instructions to the jury and (II) the evidence was sufficient to withstand Defendant's motion to dismiss.¹

I

Defendant contends it was error for the trial court to deny

¹Defendant also asserts the trial court erred in refusing to allow inquiry into whether Smith had previously worked for the police as either an employee or an informant. This argument has no merit as Smith stated the reason she was familiar with the investigating officer was because she had gone to school with him. This testimony in no way indicates a prior work relationship with the police that Defendant had a right to further explore.

his request to remove the leg brace because he "had not been unruly or disruptive, nor was he considered an escape risk."

Under N.C. Gen. Stat. § 15A-1031, "[a] trial court may order a defendant . . . subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons." N.C.G.S. § 15A-1031 (2001). Furthermore, the trial court must, "[u]nless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt." N.C.G.S. § 15A-1031(3) (2001).

Assuming without deciding that the trial court erred in this case by ordering Defendant to remain restrained, Defendant has failed to demonstrate prejudicial error. As the trial court noted, the leg brace was hardly visible and did not interfere with Defendant's ability to walk. See *State v. Holmes*, 355 N.C. App. 719, 729, 565 S.E.2d 154, 163 (where leg shackles were not visible to the jury, "the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors by suggesting that defendant is a dangerous person"), cert. denied, --- U.S. ---, --- L.E.2d --- 2002 WL 31246696 (Nov. 4, 2002) (No. 02-6483). In light of these factors and the evidence against Defendant discussed below, Defendant was not prejudiced by the trial court's ruling.

Defendant further argues the trial court should have at least instructed the jury that it was not to consider Defendant's

restraint in reaching its verdict. Defendant, however, waived his entitlement to any jury instruction when he declined to make such a motion, stating he was "afraid that any instructions would possibly backfire." See N.C.G.S. § 15A-1031(3); see also *State v. Tolley*, 290 N.C. 349, 371, 226 S.E.2d 353, 370 (1976) (the defendant's failure to request appropriate cautionary instructions on shackling had the effect of waiving as a basis for appeal the trial court's failure to instruct the jury on its own motion).

II

Defendant next assigns error to the trial court's denial of his motion to dismiss. Specifically, Defendant contends the evidence is insufficient to identify him as the perpetrator of the offenses charged.

In considering a defendant's motion to dismiss, the trial court must determine whether the evidence, viewed in the light most favorable to the State, is substantial as to all essential elements of the offense charged and whether the defendant was the perpetrator of the offense. *State v. Thompson*, 306 N.C. 526, 532, 294 S.E.2d 314, 318 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990).

In this case, Owens not only testified she recognized Defendant's voice, but the testimony, considered in the light most favorable to the State, further established the offenses were committed by a black man who: (1) called Owens by her work nickname

"Granny," (2) wore black boots, gloves, a mask, and a blue and white bandana, (3) and "walked like he either had new shoes or his shoes were too tight." Smith had observed a mask, gloves, and a black and blue bandana among Defendant's belongings the day before the robbery, and Sergeant Ward had found a pair of black boots, identified by Bradley as similar to those worn by the robber, in Defendant's apartment. Smith also testified she saw a gun in Defendant's bag prior to the robbery, and Sergeant Ward found the corresponding pellet gun owner's manual in Defendant's apartment. In addition, the testimony revealed Defendant had hurt his foot the day before the robbery and was unable to wear his black boot on his injured foot after the time of the robbery on 19 March 2001. Finally, Defendant was a former McDonald's employee who had worked with Owens and would have known her nickname. As the cumulative effect of this evidence is sufficient to allow a reasonable mind to conclude Defendant was the perpetrator of the offenses charged, the trial court did not err in denying Defendant's motion to dismiss.²

No error.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).

²We do not discuss Defendant's remaining assignments of error, which are based on testimony not objected to at trial, because Defendant did not specifically contend plain error in his assignments of error as required by our Rules of Appellate Procedure. See N.C.R. App. P. 10(c)(4); *State v. Moore*, 132 N.C. App. 197, 201, 511 S.E.2d 22, 25 (1999) (where a defendant fails to assert plain error in his assignments of error, he has waived even plain error review).