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NO. COA03-1320

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA

v.

RAYMOND LEE PATRICK, JR.,
Defendant.

Forsyth County
Nos. 01 CRS 40375
01 CRS 62182
02 CRS 20683

Appeal by defendant from judgment entered 19 July 2002 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 10 June 2004.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn J. Thomas, for the State.

Marjorie S. Canaday, for defendant-appellant.

GEER, Judge.

Defendant Raymond Lee Patrick, Jr. was convicted of second degree kidnapping, robbery with a dangerous weapon, and possession of a firearm by a felon; he pled guilty to having obtained the status of habitual felon. As the State concedes, the trial court erred in instructing the jury as to a different purpose for the kidnapping than that alleged in the indictment. Defendant is, therefore, entitled to a new trial on the charge of kidnapping. Because the trial court consolidated all of the charges for sentencing, we must also remand for a new sentencing hearing.

Facts

The State's evidence tended to show the following. On the night of 23 November 2001, defendant approached Gaston Watlington while George Patrick and Torez Black sat in a nearby car. Defendant forced Watlington at gunpoint into the back seat of the car. Defendant held the gun on Watlington while Patrick drove for 45 minutes to an hour. When Patrick stopped the car, defendant robbed Watlington of \$50.00 and hit him in the face. Patrick then drove them for another 45 minutes. Patrick ultimately stopped the car a second time on a dark, dead-end street, where no houses or businesses were located. After removing him from the car, the three men (defendant, Patrick, and Black) beat Watlington with fists and guns, stripped him naked, and left him on the road.

Watlington walked down the road until he found a house. The homeowner gave him a blanket to cover himself and called the police. When the police arrived, Watlington told them he recognized Black from school and that he thought defendant was Black's uncle. Watlington identified defendant and Black in a photographic identification lineup. He also identified defendant in court as the person who held a gun on him, beat him, and took his money.

Defendant was indicted with robbery with a dangerous weapon, second degree kidnapping, and possession of a firearm by a felon. He was separately indicted as having attained the status of habitual felon. Following conviction on all three felony charges, defendant pled guilty to having obtained the status of habitual felon. At sentencing, the trial court heard evidence regarding

aggravating and mitigating factors, but ultimately consolidated the three felonies and sentenced defendant within the presumptive range to a term of 111 months to 143 months in prison.

Second Degree Kidnapping

Defendant contends – and the State concedes – that the trial court erred by giving the jury an instruction on second degree kidnapping that recited a purpose for the kidnapping that did not match the purpose identified in the indictment. The indictment charged that defendant "unlawfully, willfully and feloniously did confine and restrain Gaston [Watlington] . . . without his consent and against his will by force and for the purpose of terrorizing him." The court instructed the jury, however, that the State was required to prove:

First, that the defendant unlawfully either restrained the person – that is, restricted his freedom of movement – or removed the person from one place to another. Second, that the person did not consent to this restraint or removal. *Third that the defendant restrained or removed the person for the purpose of facilitating the commission of armed robbery*, which I've already defined for you those seven elements of armed robbery. And, fourth, that this restraint or removal was a separate, complete act independent of and apart from the armed robbery.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with other persons, unlawfully restrained a person or removed a person from one place to another, that the person did not consent to the restraint or removal *and that this was done for the purpose of facilitating the commission of armed robbery* and that this restraint or removal was a separate and complete act independent of and apart from the armed

robbery, it will be your duty to return a verdict of guilty of second degree kidnaping.

(Emphasis added.) Thus, the indictment charged defendant with kidnaping the victim for the purpose of terrorizing him, but the jury instruction stated that the purpose was for facilitating the commission of an armed robbery.

As the State acknowledges, this variance between the indictment and the instructions as to the purpose of the kidnaping is error. Our Supreme Court "has held such error to be prejudicial when the trial court's instruction as to the defendant's underlying intent or purpose in committing a kidnaping differs from that alleged in the indictment." *State v. Tirado*, 358 N.C. 551, 574-75, 599 S.E.2d 515, 532 (2004). See *State v. Brown*, 312 N.C. 237, 247, 321 S.E.2d 856, 862 (1984) (new trial required as to first degree kidnaping charge when trial court instructed the jury that it must find that the defendant kidnaped the victim "for the purpose of terrorizing her," but the indictment charged that the purpose of the kidnaping was facilitation of commission of a felony); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 841 (1977) (new trial required where trial court instructed that defendant could be convicted if he kidnaped the victim for the purposes of ransom, obtaining a hostage, sexually assaulting the victim, or facilitating flight, but the indictment charged kidnaping for the purpose of terrorizing and feloniously assaulting the victim). Accordingly, we hold that defendant is entitled to a new trial on the charge of second degree kidnaping.

Defendant has also pointed out that the trial court's

kidnapping instructions varied from the indictment in another respect that constitutes error. The indictment alleged that defendant kidnapped the victim by "confin[ing] and restrain[ing]" him while the court instructed the jury that defendant could be found guilty of kidnapping if he "restrained" or "removed" the victim. This variance - like the variance as to purpose - improperly would permit the jury to convict upon a theory not supported by the bill of indictment. See *State v. Lucas*, 353 N.C. 568, 586, 548 S.E.2d 712, 725 (2001) (trial court erred when kidnapping indictment charged confinement, but trial court instructed only on removal; no plain error); *State v. Tucker*, 317 N.C. 532, 537, 346 S.E.2d 417, 420 (1986) (new trial required when defendant was indicted for removing the victim, but the trial court instructed the jury that defendant could be found guilty for restraining the victim); *State v. Smith*, 162 N.C. App. 46, 53, 589 S.E.2d 739, 744 (2004) (new trial required when indictment charged kidnapping by removal, while instructions allowed conviction based on "confining, restraining, or removing").

In the new trial as to the kidnapping charge, the trial court must take care to ensure that the jury instructions match the indictment. The instructions should address only the purpose and the method of kidnapping identified in the indictment.

Possession of Firearm by a Felon

In order to establish that defendant was a felon for purposes of the charge of possession of a firearm by a felon, the State introduced evidence of defendant's 1996 conviction of the felony of

possession of a firearm by a felon. Relying on *Old Chief v. United States*, 519 U.S. 172, 174, 136 L. Ed. 2d 574, 584, 117 S. Ct. 644, 647 (1997), defendant contends that the trial court erred in admitting evidence of his prior conviction when defendant was willing to stipulate to the fact that he was a felon. In *Old Chief*, the United States Supreme Court held, applying Rule 403 of the Federal Rules of Evidence:

Subject to certain limitations, 18 USC § 922(g)(1) . . . prohibits possession of a firearm by anyone with a prior felony conviction, which the Government can prove by introducing a record of judgment or similar evidence identifying the previous offense. Fearing prejudice if the jury learns the nature of the earlier crime, defendants sometimes seek to avoid such an informative disclosure by offering to concede the fact of the prior conviction. *The issue here is whether a district court abuses its discretion if it spurns such an offer and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction. We hold that it does.*

Id. (emphasis added).

Here, although counsel for defendant offered to stipulate to the 1996 conviction, he also stated he had no objection to admission of the evidence. Counsel never mentioned Rule 403 of the North Carolina Rules of Evidence. As a result, the question before this Court is whether the trial court committed plain error in (1) not exercising its discretion to accept defendant's proposed stipulation and (2) not excluding the evidence of defendant's prior conviction. Before granting relief under the plain error rule,

"the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Based on our review of the record, we do not believe that there is any likelihood that the jury would have found defendant not guilty of possession of a firearm if the trial court had admitted only the stipulation.

In order for the jury to render a guilty verdict on the charge of possession of a firearm by a felon, the jury was required to find: (1) that defendant had previously been convicted of a felony and (2) that he had a handgun in his possession, custody, or control. N.C. Gen. Stat. § 14-415.1 (2003). At the trial below, there was no dispute that defendant had previously been convicted of a felony. If the trial court had accepted defendant's proposed stipulation to that fact – as defendant argues it should have – then the jury would have been instructed that defendant had stipulated to the first element. In applying the plain error doctrine, we must determine whether the admission of defendant's 1996 conviction of the felony of possession of a firearm by a felon likely caused the jury to determine that defendant had a handgun in his possession, custody, or control. Given the testimony of Watlington, Black, and George Patrick – each stating that defendant had a gun in his possession during the commission of the crimes – we do not believe that admission of defendant's 1996 conviction tilted the scales so as to cause the jury to reach its verdict. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83 ("[T]he appellate court

must determine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant."). We, therefore, find no error in defendant's conviction of possession of a firearm by a felon.¹

Habitual Felon

Defendant next argues that the trial court erred in allowing the 1996 conviction for possession of a firearm to be used both to prove the "felon" element of the firearm-possession charge for which he was being tried and as a basis for the habitual felon charge. *State v. Glasco*, 160 N.C. App. 150, 585 S.E.2d 257, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003) resolves this issue:

[D]efendant argues that he was impermissibly subjected to double jeopardy because the court used the offense of possession with intent to sell and deliver cocaine to support both the underlying substantive felony (the "felon" portion of the offense of felon in possession of a firearm) and the habitual felon indictment. Our courts have determined that elements used to establish an underlying conviction may also be used to establish a defendant's status as a habitual felon. *State v. Misenheimer*, 123 N.C. App. 156, 158, 472 S.E.2d 191, 192-93 (1996), *cert. denied*, 344 N.C. 441, 476 S.E.2d 128 (1996). As the relevant statutes do not indicate otherwise, we are bound to follow this ruling and reject defendant's argument.

Id. at 160, 585 S.E.2d at 264. Because we are bound by *Glasco*, this assignment of error is overruled.

¹Since we have ordered a new trial on the kidnapping charge, we need not address the effect on that charge of the admission of the 1996 conviction. We observe that this conviction will not, in any event, be admissible in any retrial unless defendant should choose to testify.

Sentencing

Since the trial court consolidated all of the charges for sentencing and we have ordered a new trial as to the kidnapping charge, there will necessarily need to be a new sentencing hearing. We nonetheless address defendant's assignments of error regarding sentencing in order to ensure that these errors are not repeated.

We are concerned that the trial judge's remarks could suggest that he gave defendant a harsher punishment because he chose to proceed to trial rather than enter into a plea agreement. A defendant has the right to plead not guilty, and he should not and cannot be punished for exercising that right. *State v. Gantt*, 161 N.C. App. 265, 271, 588 S.E.2d 893, 897 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004).

Prior to trial – and before the State offered defendant the opportunity to enter into a plea agreement – the judge made clear that he would consider a sentence in the mitigated range if defendant entered into a plea agreement, but that he would be sentenced in the presumptive range if he chose to go to trial. Later, during the sentencing phase, the following exchange occurred:

THE COURT: . . . Now, I took my time with you before the trial, didn't I?

DEFENDANT: Yes, sir.

THE COURT: I told you that the mitigated range, if you go to trial, you just wave bye-bye to that. I told you that, didn't [I]?

DEFENDANT: Yes.

THE COURT: So you know I'm not going to

sentence you in the mitigating range. You already know that, don't you?

DEFENDANT: Yes, sir.

THE COURT: I told you in advance. And you're charged with three felonies. If the jury went back there and said well, he may have did this, he may have did that, but he didn't do all of them, we'll just find him guilty of one, if they only find you guilty of one felony, you're still in the same boat as if you've been found guilty of all three of them, because of your prior record. You're an habitual felon and regardless to how incredulous [sic] you may have thought these witnesses may be, you're just gambling with too much, with too much to go to trial on charges like these.

The trial court announced defendant's sentence of 111 months to 143 months, then said the following:

That's a ten year sentence and I think that's a substantial break considering what you could have been looking at. And also the fact that I gave you an opportunity that you could have served less but you wanted us to sit here for the past couple of days knowing the evidence that was going to be presented against you.

. . . .

. . . But, you know, there's nothing I can do. The Court's hands are tied when you have a record like yours and you've been indicted as an habitual felon and the jury returns a verdict of guilty as to a felony, the Court's hands are tied in matters like this. Nothing I can do for you. I've done about as much as I can do. I gave you an opportunity. I could have done you better. Excuse my English. But you decided to go to trial.

This colloquy suggests that the trial court may have based defendant's sentence, at least in part, on defendant's decision to be tried by a jury. That would be improper. See *State v. Boone*,

293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977) ("The statement of the trial judge, expressed by him in open court, indicated that the sentence imposed was in part induced by defendant's exercise of his constitutional right to plead not guilty and demand a trial by jury. This we cannot condone.").

We also are concerned with the trial court's refusal to allow defendant to speak in his own behalf prior to sentencing. N.C. Gen. Stat. § 15A-1334(b) (2003) provides: "The defendant at the hearing may make a statement in his own behalf." The statute "expressly gives a non-capital defendant the right to 'make a statement in his own behalf' at his sentencing hearing," provided he effectively requests that opportunity to be heard. *State v. Rankins*, 133 N.C. App. 607, 613, 515 S.E.2d 748, 752 (1999) (quoting N.C. Gen. Stat. § 15A-1334(b) (1999)). In this case, defendant asked immediately before sentence was imposed, "Can I say something, Your Honor?" The judge replied, "No, you don't need to say anything. You can't say anything that's going - at all." The trial court should have allowed defendant to make a statement.

In conclusion, we remand for a new trial on second degree kidnapping, but find no error as to the convictions of robbery with a dangerous weapon and possession of a firearm by a felon. Because the charges were consolidated for sentencing, we also remand for a new sentencing proceeding.

New trial in part, no error in part, and remand for resentencing.

Judges HUDSON and THORNBURG concur.

Report per Rule 30(e).