NO. COA05-1313

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v.

Granville County
Nos. 04CRS050673
04CRS050675-77

TERRON RASHAD CHAVIS

Appeal by defendant from judgments entered 15 April 2005 by Judge Henry W. Hight, Jr. in Granville County Superior Court. Heard in the Court of Appeals 8 May 2006.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Dennis Myers, for the State.*

*J. Clark Fischer for defendant-appellant.*

HUNTER, Judge.

Terron Rashad Chavis ("defendant") was found guilty of felonious breaking or entering, first degree rape, two counts of robbery with a dangerous weapon, and two counts of second degree kidnapping. He was sentenced to consecutive sentences of 240 to 297 months for first degree rape, twenty-five to thirty-nine months for each count of second degree kidnapping, sixty-four to eighty-six months for each count of robbery with a dangerous weapon, and six to eight months for felonious breaking and entering. For the reasons stated herein, we find no error.

The State presented evidence tending to show that during the morning of 5 March 2004, a mother (hereinafter identified by her initials, "S.F.") was nursing her five-week-old baby at her home when a man came to the door and knocked. She opened the door just wide enough so the man could see her and the baby. The man, whom S.F. subsequently identified as defendant, inquired about the woods adjacent to her house. S.F. answered his question, and as she started to shut the door, defendant shoved his foot in the door and displayed a gun. Defendant pushed the door open, put clear plastic food handling gloves on his hands, and locked the door. S.F. begged defendant not to kill her. Defendant ordered S.F. to put the baby down. After she placed the baby on the sofa, defendant asked her where she kept her knives. S.F. took him into the kitchen, where he withdrew a knife out of the knife block. S.F. told defendant that she would give him anything or do anything if he would "just leave me and the baby alive and leave."

Defendant then instructed S.F. to walk to the bedroom and remove her clothes on the way. Defendant entered the bedroom and he removed his clothes. S.F. performed fellatio on defendant and engaged in vaginal intercourse with defendant. While S.F. was performing fellatio, defendant placed the gun to her neck. Defendant had S.F. reach into his pants and retrieve a condom. S.F. retrieved two red and white packages, removed a condom from one of them, and put it on defendant's penis. She then put the other packet back into his pants. Defendant resumed sexual

intercourse with her. Defendant kept the gun in his hand the entire time that they were engaged in sexual activity.

Defendant then asked her for money. S.F. gave him all of the money that she had in the house, a five-dollar bill and a twenty-dollar bill. She told him that she did not usually keep money in the house and that she usually went to an ATM to get cash whenever she needed it. Defendant then directed S.F. to drive to an ATM to withdraw money. Defendant "slunched" down in the backseat with S.F.'s baby as S.F. drove to the ATM. S.F. got out of the car and withdrew $200.00 from the machine. Defendant directed her to drive down an unfamiliar road back to her house. After returning to her house with defendant, S.F. noticed that defendant's gun did not have a clip. She attempted to take the knife away from defendant. The two engaged in a tussle, during which defendant cut a pinky finger on one of his hands. Defendant made S.F. go back into the house. Defendant departed after making S.F. "pinkie swear" not to call the police. S.F. then took a shower and called her husband, who called law enforcement.

Later in the day on 5 March 2004, Detective Vicki Reid Hicks ("Detective Hicks"), of the Granville County Sheriff's Department, interviewed S.F., who told Detective Hicks, among other things, that she retrieved a reddish and white condom packet out of the perpetrator's pocket, that she gave the perpetrator $25.00 in cash, and that she also withdrew $200.00 from the ATM and gave it to the perpetrator. S.F. described the perpetrator as wearing a white T-

shirt, dark jogging pants, white tennis shoes, and crystal or diamond earrings in each ear.

After interviewing S.F., Detective Hicks went to defendant's home on 5 March 2004, and with the written consent of defendant and his mother, searched defendant's residence. In defendant's room, she collected a white pair of tennis shoes and a pair each of light brown and dark brown sweat pants lying on the floor beside the bed. She also seized a reddish pinkish condom in a package and $225.00 in U.S. currency contained in a wallet, consisting of one five-dollar bill and the remainder in twenty-dollar bills. All but one of the twenty-dollar bills were "clean" or undamaged. Detective Hicks saw defendant at the sheriff's office later that evening. Defendant was wearing "crystal-like earrings, or diamond earrings" in each ear.

Detective Bryant Strother ("Detective Strother"), of the Granville County Sheriff's Department, testified that he saw defendant when he came to the sheriff's department on 5 March 2004. He took a photograph of a cut on defendant's little finger of his right hand.

Wendy Medlin, a certified sexual assault nurse examiner, examined S.F. at Maria Parham Hospital on 5 March 2004. She observed fresh tears in S.F.'s vagina, bruises on the vaginal wall, and bruising on the cervix.

S.F. testified that she had abstained from sexual activity, at the direction of her obstetrician, since the birth of her baby. S.F.'s obstetrician testified that he delivered S.F.'s baby

vaginally on 27 January 2004 and that S.F. sustained no injury to her vaginal area during delivery. He confirmed that he had instructed S.F. to abstain from vaginal intercourse for six weeks after the birth of her baby.

Three days later, S.F.'s husband found a pair of plastic gloves in weeds approximately 235 feet from the driveway of his house. Detective Jimmy Noblin ("Detective Noblin"), of the Granville County Sheriff's Department, responded to his call about the discovery of the gloves. Detective Noblin recovered the gloves, one of which contained what appeared to be a blood stain.

Agent Susie Barker, a forensic serologist with the State Bureau of Investigation ("SBI"), testified that she tested the glove and determined that the reddish stain was blood. She took a swab of the stain and forwarded it for DNA testing by another agent. Agent Amanda Daughtry, a forensic DNA analyst with the SBI, testified that she tested the swab taken from the glove and determined that the DNA in the swab matched a known DNA sample taken from defendant.

Defendant presented three witnesses who testified that they saw defendant or talked on the telephone with him on the morning of 5 March 2004.

Defendant testified and denied ever seeing S.F. or being at her house. He acknowledged that he knew S.F.'s stepdaughter, who had falsely accused him of coming to her house and having sex with her. He explained that he had the cut on his finger because his dog "nipped" him.

Defendant brings forward two arguments.

First, he contends the court committed plain error by allowing three witnesses to testify, for corroborative purposes, regarding statements made by S.F. to them. He argues the statements were not corroborative of her trial testimony, inasmuch as the witnesses testified that S.F. told them that the perpetrator threatened to kill her and her baby, to which S.F. did not testify at trial.

By assigning plain error, defendant concedes that he did not object to admission of the evidence in the court below. *See State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 312 (1983). Consequently, our review is limited to determining whether this case is

> "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has '"resulted in a miscarriage of justice or in the denial to appellant of a fair trial"' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'"

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)). Our review of the record persuades us that this case is not that exceptional case. Although S.F. did not testify in express words that defendant threatened to kill them, she did testify that she was afraid defendant was going to kill her

and her baby. Moreover, she testified that defendant displayed a gun and knife, two weapons capable of killing. Defendant's displaying of the gun and knife implied a threat to kill. Furthermore, the evidence of defendant's guilt is overwhelming. It is therefore highly improbable that if these statements had been excluded, a different verdict would have resulted.

Second, defendant contends the court erred in denying his motion to dismiss the charges of second degree kidnapping. He argues the State failed to present sufficient evidence of a restraint or removal separate from that inherent in the offense of robbery with a dangerous weapon.

> The offense of kidnapping is established upon proof of an unlawful, nonconsensual restraint, confinement or removal of a person from one place to another, for the purpose of: (1) holding the person for ransom, as a hostage or using them as a shield; (2) facilitating flight from or the commission of any felony; or (3) terrorizing or doing serious bodily harm to the person.

*State v. Smith*, 160 N.C. App. 107, 119, 584 S.E.2d 830, 838 (2003). If the restraint or removal is an inherent and inevitable element of the other felony, such as robbery with a dangerous weapon, then the defendant may not be convicted both of robbery with a dangerous weapon and kidnapping. *State v. Irwin*, 304 N.C. 93, 102-03, 282 S.E.2d 439, 446 (1981). In determining whether the restraint or removal is inherent in the robbery offense, courts have focused on two factors: (1) whether the person was forcibly removed for any other reason than commission of the robbery; or (2) whether the restraint or removal exposed the person to a greater danger than

inherent in the other offense. *State v. McNeil*, 155 N.C. App. 540, 545-46, 574 S.E.2d 145, 148-49 (2002).

We have found three cases that are factually similar to the case at bar. The first of the three is *State v. Little*, 133 N.C. App. 601, 515 S.E.2d 752 (1999), in which the defendant accosted the victim after the victim had withdrawn money from an ATM, forced the victim to withdraw more money from the ATM, took the money the victim withdrew from the ATM, then forced the victim to get back into his car and drive to a cul-de-sac where the defendant took the victim's wallet. *Id.* at 606-07, 515 S.E.2d at 756. The defendant unsuccessfully attempted to withdraw more money from the machine. We held that the removal of the victim away from the teller machine to the cul-de-sac, after the defendant had already taken the victim's money, was not a restraint or removal integral to commission of the robbery. *Id.* at 607, 515 S.E.2d at 756.

In *State v. McNeil,* 155 N.C. App. 540, 574 S.E.2d 145, the defendant pointed a gun at an employee of a dry cleaning business and forced the victim to walk to the rear of the building, where the defendant ordered the victim to kneel and give defendant his wallet. *Id.* at 541, 574 S.E.2d at 146. The defendant then, with the gun placed to the victim's back, walked the victim to the front of the store and ordered the victim to show him how to open the cash register. *Id.* The victim complied and the defendant opened the cash register. *Id.* After taking the money from the register, the defendant placed the gun to the victim's back and forced him to walk to the rear of the business. The defendant then fled. *Id.*

We held that the removal of the victim from the cash register to the back of the store constituted additional restraint beyond that necessary for facilitating flight. *Id.* at 547, 574 S.E.2d at 150.

Finally, in *State v. Burrell*, 165 N.C. App. 134, 598 S.E.2d 246 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 323, 611 S.E.2d 421 (2005), three men accosted the victim as he was getting out of his vehicle. *Id.* at 136, 598 S.E.2d at 247. The three men forced the victim back into his vehicle. *Id.* One perpetrator drove the vehicle while one of his accomplices held a gun to the victim's head and the second accomplice held the victim's hands behind his back. *Id.* The perpetrators took the victim's wallet, which contained bank cards, and drove to several ATMs in unsuccessful attempts to withdraw money. *Id.* The perpetrators ultimately pushed the victim out of the vehicle and left him on the side of the road on Interstate 85. *Id.* at 137, 598 S.E.2d at 248. We held that the robbery was complete when the perpetrators took control of the victim's vehicle and took his wallet. *Id.* at 140, 598 S.E.2d at 249-50. We also held that the victim was subjected to a greater amount of danger than that inherent in the offense of armed robbery because he was held for more than two hours, his arms were held behind his back, and a gun was continually pointed at his head after he had been dispossessed of his vehicle, cash, checks, and credit cards. *Id.* at 140, 598 S.E.2d at 250.

Here, defendant crouched in the back seat with S.F's five-week-old baby as he directed her to drive to the ATM. S.F.

testified that as she drove, "all [she] could think of was, he's sitting by my baby. He's sitting by my baby." When she got out of the vehicle to get money out of the ATM, defendant warned her that if she did "anything stupid," she knew what would happen to her baby, who remained in the backseat of the vehicle with defendant. After S.F. withdrew the money from the ATM, defendant directed S.F. to drive on an unfamiliar road on the way back to her house. S.F. attempted to persuade defendant to leave when they drove into the yard, but defendant forced her to go back into the house with him and defendant locked the door behind him. During all of this time defendant was armed with a knife and a gun.

The foregoing evidence shows that S.F. was subjected to restraint and greater danger beyond that inherent in the offense of robbery with a dangerous weapon. Defendant persisted in restraining S.F. after the robbery was completed. We thus conclude the trial court did not err in denying defendant's motion to dismiss the charges of second degree kidnapping.

We hold defendant received a fair trial, free of prejudicial error.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).