NO. COA05-1482

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v. Wake County
Nos. 02CRS085870-71

LEWIS DEON PARTRIDGE

Appeal by defendant from judgments entered 12 March 2004 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General A. Danielle Marquis, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

HUNTER, Judge.

Lewis Deon Partridge ("defendant") appeals from judgments entered consistent with jury verdicts finding him guilty of first degree murder and robbery with a dangerous weapon. For the reasons stated herein, we find no error.

The State's evidence tends to show that defendant, Tiffani Martin ("Tiffani"), Sherri Martin ("Sherri"), and James Garrett ("Garrett") devised a plan in September of 2002 to rob a Sonic restaurant on Atlantic Avenue in Raleigh, North Carolina, where Tiffani and her sister Stephanie had previously worked. After two aborted attempts to rob the store, a third attempt was made on 29

September 2002. The group decided to first steal a getaway car, as Garrett's car was not reliable. Defendant, carrying a gun and wearing a black ski mask, and Garrett, wearing a plastic hockey mask, approached Kevin Dixon ("Dixon"), who was washing his BMW at a car wash on New Bern Avenue. Defendant and Garrett approached Dixon. Defendant, holding his gun drawn, stated, "'Don't make this an emergency, homeboy. We just want the car.'" Dixon backed away from the car and defendant and Garrett drove away in the BMW.

Garrett's car, driven by Tiffani and Sherri, was parked at a residential complex on Millbrook Road. Tiffani and Sherri joined defendant and Garrett in the BMW and drove to the Sonic. After parking the BMW on the street behind the restaurant, defendant, wearing the black ski mask and carrying the gun, and Garrett, wearing the plastic hockey mask, entered the Sonic. Tiffani waited outside, also wearing a mask. Sherri remained in the car.

Defendant and Garrett entered the restaurant as it was preparing to close and forced the employees remaining in the restaurant to the rear of the store near the freezer at gunpoint. Defendant demanded that one employee, Boise Smith ("Smith"), get the manager, Douglas Toledo ("Toledo"), who had exited the restaurant to use the exterior restroom. Smith yelled out the door for Toledo. Another employee, Cherita Turnage ("Turnage"), was pushed towards the freezer, and Kamel Kersey ("Kersey"), Turnage's fiancée and another employee, turned towards the freezer. Defendant then shot Kersey in the left side of the head and Turnage began to scream. Smith and another employee then ran from the

store. Toledo exited the restroom and found Turnage running from the store. Toledo and Turnage crossed the street and contacted the police.

A former State Highway Patrolman, Kenneth Alfred Reid ("Reid") noticed three people in dark clothing and masks walking from a parked BMW as he drove past on his way to work. Reid contacted authorities with his suspicions that a robbery was about to occur when he arrived at work, but was informed that someone had already been shot. Officer Z. A. Morse arrived at the Sonic in response to a police dispatch call and found Kersey still alive. Kersey was unable to answer questions, however, and later died from the gunshot wound.

Defendant, Garrett, and Tiffani returned to the BMW. Sherri testified that they appeared scared and surprised, and that defendant claimed he slipped, causing the gun to go off and shoot someone in the back of the head. Garrett assured defendant of the group's silence. The group returned to Garrett's car, wiped down the BMW, and dropped defendant off at the Skate Ranch.

Defendant met three long-time friends at the Skate Ranch, Arthur Lee Moore ("Arthur"), Curtis Devonn Harris ("Harris"), and Omar Moore ("Omar"). Omar testified that defendant did not appear to be acting normally, and when Omar questioned him, defendant told Omar he had just shot someone. Defendant also told Harris he had just shot someone that night.

Arthur drove Harris, Omar, and defendant to a nightclub, where the group stayed until 11:30 p.m. Defendant asked Arthur to take

him to get his "new car," and claimed that he bought the car from a "crackhead" and that the tag wasn't right. Defendant asked Arthur to follow him to Fuquay-Varina so that the tags were not visible. Defendant allowed both Omar and Harris to drive the BMW on the way to Fuquay-Varina. The car was taken to a wooded area near a dirt road off of Spence Farm Road and hidden after defendant, Harris, and Omar wiped away their fingerprints.

Arthur then drove defendant and the others to the home of Charity Johnson ("Johnson"). Defendant gave Johnson the gun wrapped in a shirt, and told her to "put it up for him," and that he would return for it the next day.

Defendant confronted Arthur in the days following the murder in regards to the rumor that Arthur had told people defendant had shot Kersey. Defendant threatened to kill Arthur, stating "[i]f I find out, I already got one body up under my belt. You're going to be the next."

Defendant was arrested in October 2002 in Georgia, following a high-speed vehicular chase in which defendant was a passenger in a stolen vehicle driven by a third party.

Defendant was found guilty by a jury of first degree murder and robbery with a dangerous weapon. Defendant was sentenced to life imprisonment without parole for the first degree murder conviction, and 100 to 129 months for the conviction of robbery with a dangerous weapon. Defendant appeals.

I.

Defendant first contends that the trial court erred in admitting a two-page police incident report prepared by a witness who did not testify. We find this admission to be harmless error.

Defendant contends and the State concedes that the admission of a police incident report from a Georgia officer, who did not testify and had not previously been cross-examined by defendant, was a violation of defendant's Sixth Amendment right to confrontation under the United State Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004) (holding that testimonial evidence made by a non-testifying person is only admissible when the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination); *State v. Bell*, 359 N.C. 1, 34-36, 603 S.E.2d 93, 116 (2004), *cert. denied*, *Bell v. North Carolina*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005).

"Because this error is one with constitutional implications, the State bears the burden of proving that the error was harmless beyond a reasonable doubt." *Bell*, 359 N.C. at 36, 603 S.E.2d at 116; N.C. Gen. Stat. § 15A-1443(b) (2005). The North Carolina Supreme Court has held that "the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (finding error harmless when evidence of the defendant's guilt, even without regard to the inadmissible evidence, was indeed overwhelming).

Defendant contends this error was not harmless, as the police report detailing defendant's arrest in Georgia the month following Kersey's murder tended to establish flight. The trial court instructed the jury that "[e]vidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt." Defendant also contends that the police report established defendant as a "violator of the law" as it contained details that defendant fled arrest and lied to the Georgia officers once apprehended.

A review of the evidence in this case shows that the admission of the police report, although error, was harmless beyond a reasonable doubt, as ample other evidence was offered to show defendant's flight from the scene of the crime immediately following its commission.

"[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.'" *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (citation omitted). "[E]vidence tending to show that defendant, after shooting the victim, ran from the scene of the crime, got in a car waiting nearby, and drove away . . . is sufficient evidence of flight to warrant the instruction." *State v. Reeves*, 343 N.C. 111, 113, 468 S.E.2d 53, 55 (1996). Evidence that a defendant ordered an accomplice to wipe fingerprints off of a murder weapon and throw it into a nearby river shortly after the

murder also was found to support an instruction on flight. *Levan*, 326 N.C. at 165, 388 S.E.2d at 434. Here, evidence was offered that defendant ran from the Sonic following the shooting, got into the waiting BMW parked on a side street, and drove away with Tiffani, Sherri, and Garrett. Evidence was also offered that defendant wiped down the BMW before changing to Garrett's car following the attempted robbery and shooting, and again wiped down the BMW shortly before abandoning it later that night.

As the State presented overwhelming evidence of defendant's flight from the scene of the crime, as well as defendant's commission of the crime itself, admission of the report was harmless. *See Bell*, 359 N.C. at 36, 603 S.E.2d at 116. Defendant's assignment of error is therefore overruled.

II.

Defendant next contends that the trial court erred in allowing a State's witness to explain the lack of significance in the absence of fingerprint evidence. We disagree.

Our Supreme Court has previously addressed this issue. In *State v. Holden*, 321 N.C. 125, 147, 362 S.E.2d 513, 527-28 (1987), our Supreme Court found no error when an SBI fingerprint examiner was questioned as to whether latent fingerprints that could be examined and compared were always left when an individual touched an object. *Id.* The examiner responded that it depended on several factors, including the environment, the object, and the bodily secretions of the person handling the object. *Id.* at 147, 362 S.E.2d at 528. *Holden* found that such testimony was not an

assumption, but rather was an explanation of the mechanics of the field of expertise, and the admission of the testimony was not error. *Id.*

Similarly in *State v. Armstrong*, 345 N.C. 161, 165-66, 478 S.E.2d 194, 197 (1996), our Supreme Court found that testimony by a detective that it was common not to find identifiable fingerprints at a crime scene was not error, as it was an admissible statement of fact based on the detective's employment and experience. *Id.*

However, in *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991), our Supreme Court found that testimony by a fingerprint expert that "he had discovered identifiable fingerprints in only three percent of the criminal cases in which he had been involved" was irrelevant, but determined such evidence was not prejudicial. *Id.* at 23, 409 S.E.2d at 300. *Robinson* concluded that "[t]he fact that other defendants did not leave identifiable prints at other crimes [sic] scenes can be explained by a myriad of reasons[,]" and reiterated its prior holding in *Holden* that explanations of the mechanics of fingerprinting were permissible. *Id.* at 23, 409 S.E.2d at 301.

Here, the State questioned Agent Johnny Leonard ("Agent Leonard"), of the City/County Bureau of Investigation, regarding what the absence of fingerprints showed about the person to whom the prints belonged. Agent Leonard responded that:

> It only tells me that at the point of processing that particular item that there was not enough residue or ridge detail or whatever left on that item that you could process and

> record that particular individual's fingerprint. That's what it tells me at that time. However, it does not mean that -- that an item was not -- necessarily handled or not handled. You can't determine that from the absence of fingerprints.
>
> I -- I have -- I am holding this right now in my hand, but actually I am not exerting much pressure on it. I can reach over with my right hand and snatch it out. So once you handle an item with enough pressure, now I can't pull it out. That is a better chance of actually leaving a fingerprint because you're leaving enough pressure, and it may not even leave it then, because if you don't have moisture or foreign objects, such as oils or grease on your hands, you may not leave it even then.
>
> So it -- it doesn't mean anything to me that that person -- I cannot determine that a person either handled or did not handle an object simply because there were no fingerprints left on an item. In my career I've processed many, many cases where I've known that -- not only the agent that was involved but also that the evidence was passed, such as in hand-to-hand drug buys, and I -- sometimes I make prints, and sometimes I don't, but in that case I knew that the item was passed, but neither the agent nor the individual left prints. So in my case it doesn't mean that I can prove that it was not touched.

The expert testimony in the instant case, unlike the testimony in *Robinson*, was an explanation of the mechanics of fingerprinting, similar to the explanation offered in *Holden*, focusing on the factors necessary to provide a print sufficient for identification, such as pressure, moisture, and bodily secretions. Agent Leonard's example of hand-to-hand drug buys which had not resulted in usable fingerprints served only to further illustrate his explanation of

the mechanics. The trial court's admission of the relevant testimony was therefore not error.

We also note that the record reveals that defendant questioned Agent Leonard extensively as to the same evidence and conclusions during cross-examination. As is well established, "[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995); *see also State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984); *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984). Defendant therefore waived his right to raise these objections on appeal. This assignment of error is overruled.

III.

Defendant finally contends that the trial court erred in submitting to the jury the theory of kidnapping in support of the charge of felony-murder, as there was insufficient evidence of removal to support a charge of kidnapping. We disagree.

N.C. Gen. Stat. § 14-39(a)(2) (2005) states that:

> (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[.]

Id. The unlawful restraint which constitutes the kidnapping must, however, be "a separate, complete act, independent of and apart from" another felony arising from the same occurrence. *State v. Fulcher*, 294 N.C. 503, 524, 243 S.E.2d 338, 352 (1978). Our Supreme Court has recently reaffirmed that: "[I]n determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, [a trial court] must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was 'a mere technical asportation.'" *State v. Ripley*, 360 N.C. 333, 340, 626 S.E.2d 289, 293-94 (2006). Defendant contends that movement of the employees by defendant from the front of the store to the rear towards the freezer was an inherent part of the commission of the attempted armed robbery, a separate felony offense, and therefore insufficient evidence was offered to support a theory of kidnapping.

Our Supreme Court considered under what circumstances the movement of victims in a robbery or attempted robbery is a mere technical asportation in the case of *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). In *Irwin*, the evidence showed that the victim was walked at knife point from the front to the rear of the store, where the prescription drugs, the object of the robbery, were stored. *Id.* Such movement did not expose the victim "to greater danger than that inherent in the armed robbery itself, nor [was she] subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.* *Irwin* concluded

that the removal to the rear of the store "was an inherent and integral part of the attempted armed robbery." *Id.*

However, in *State v. Davidson*, 77 N.C. App. 540, 542-43, 335 S.E.2d 518, 520 (1985), this Court considered whether there was sufficient evidence of kidnapping when victims of a robbery were forced to walk from the front of the store to dressing rooms in the rear, before the store and the victims were robbed. *Id.* The Court noted that as none of the property that was the object of the robbery was kept in the dressing room, removal of the victims was not an inherent and integral part of the robbery, but rather was done to remove victims from view. *Id.* at 543, 335 S.E.2d at 520.

Here, defendant's movement of the Sonic employees at gunpoint from the front of the restaurant, where the restaurant safe was located, to the freezer in the rear of the restaurant was not necessary to commit the robbery, as none of the property which defendant sought to steal was located in the rear of the store. Similar to *Davidson*, removal of the victims to the freezer in the rear of the story was not an inherent and integral part of the robbery, and was therefore sufficient evidence of asportation to sustain the theory of kidnapping for the offense of felony-murder.

Although the trial court erred in admission of a police incident report as testimonial evidence where the declarant did not testify and was not previously available for cross-examination, we find such error to be harmless. We further find no error in the trial court's admission of testimony by an expert witness regarding the lack of significance in fingerprint evidence, and the

submission of the charge of felony-murder on the theory of kidnapping to the jury.

No error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).