NO. COA05-259

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

STATE OF NORTH CAROLINA

v. Union County
No. 02 CRS 55109-111
LARRY DARNELL ANDERSON 02 CRS 55235
03 CRS 2101

Appeal by defendant from judgment entered 4 May 2004 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 14 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Julie Ramseur Lewis, for defendant-appellant.

ELMORE, Judge.

Larry Darnell Anderson (defendant) appeals from judgments entered on jury verdicts finding him guilty of second-degree kidnapping, second-degree rape, and two counts of common law robbery. We find no prejudicial error at trial and uphold the judgments against defendant.

In 2001, defendant had been a guest in the home of Torrey and Janice Phillips. Mr. and Mrs. Phillips had taken defendant in off the street and tried to help him get back on his feet. Defendant was asked to move out after he threatened Mrs. Phillips with a

hammer. The Phillips' pastor took defendant's belongings so that defendant would not need to return to the home. However, defendant did return for his belongings, at which time he barged into the home with a box-cutter knife and threatened to kill both Torrey and Janice Phillips.

On 24 September 2002, defendant entered the Phillips' home at approximately 7:30 a.m. while Mrs. Phillips slept. She awoke to find defendant standing by her bed showing her a knife and threatening to kill her if she did not do what he said. Defendant ordered Mrs. Phillips to lift her gown and when she hesitated, he held up the knife until she complied. He kissed her vagina and ordered her to kiss his penis. Defendant then took a piggy bank and about $30.00 in church money from the Phillips' home and had Mrs. Phillips get in her car with him.

Defendant drove to a BB&T bank where he demanded that Mrs. Phillips remove $40.00 from her account via an automatic teller machine (ATM). He then drove back roads to a mobile home. Defendant took the keys to the car with him as he went in the trailer and told Mrs. Phillips not to leave. When he returned to the car, he again drove back roads to a gas station where the two purchased gas and defendant made Mrs. Phillips get additional money from her bank account through an ATM that was near the station. While driving the car from the trailer to the gas station defendant was fondling Mrs. Phillips and smoking a pipe that she testified smelled bad.

Defendant continued to fondle Mrs. Phillips as he returned to the trailer at least one more time. At some point, he stopped the car and had Mrs. Phillips get out, face the car, bend over, and pull her pants down. When she complied, he raped her and committed various sexual acts. After these actions, defendant cried, apologized, and threatened suicide. Mrs. Phillips prayed with him. After driving some more, defendant stopped the car and fled. Mrs. Phillips reported the robberies the next day and the rape on 26 September 2002.

Among other charges, the jury was presented with one count of first-degree kidnapping and three counts of robbery with a dangerous weapon. Defendant was convicted of first-degree kidnapping, second-degree rape, and three counts of common law robbery. The jury also determined that defendant was an habitual felon. The trial court reduced the kidnapping charge to a second-degree offense and arrested the sentence on one robbery charge. Defendant was then sentenced in the presumptive range to four consecutive terms of 151 to 191 months imprisonment.

I.

Defendant first argues that his kidnapping indictment was improperly amended. It is true that a bill of indictment may not be amended, *see* N.C. Gen. Stat. § 15A-923(e) (2005), but "amendment" has been specifically defined to only include those alterations that "would substantially alter the charge set forth in the indictment." *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *disc. review denied*, 294 N.C. 737, 244 S.E.2d 155

(1978). The indictment, prior to its alteration, essentially tracked the language of the kidnapping statute:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did kidnap Janice Denise Phillips, a person who had attained the age of 16 years, by unlawfully confining, restraining and moveing [sic] the victim from one place to another without the consent of that victim and for the purpose of facilitating the commission of a felony, Armed Robbery. Janice Denise Phillips was sexually assaulted.

The alleged improper amendment by the State was changing the word "moveing" to "removing." Defendant argues that the terms "move" and "remove" are substantially different, and the trial court erred in allowing the change. We disagree.

First, the plain meaning of "move" is "to change in position from one point to another," The American Heritage College Dictionary 893 (3d ed. 1997), while the primary definition of "remove" is "to move from a place or position occupied," *id.* at 1155. This technical change does not *substantially* alter the charge set forth. *See, e.g., State v. Brinson*, 337 N.C. 764, 766-69, 448 S.E.2d 822, 824 (1994) (an indictment for assault with a deadly weapon was not "amended" where the object serving as the deadly weapon was altered the day of jury selection). In fact, if any alteration exists, it operates in defendant's favor: the term "move" is arguably broader than the term "remove," such that the alteration narrows the scope of the charge from its original form. Second, the guiding purpose of an indictment is to "identify clearly the crime being charged, thereby putting the accused on

reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). The State's alteration of the word "moveing" in this case did nothing to upset defendant's understanding or preparation for trial, and we find defendant's arguments to the contrary to be meritless. *See State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735 ("A change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges."), *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999).

II.

Next, defendant argues that the trial court erred by admitting evidence of prior bad acts, thus prejudicing his case. This argument is also without merit. Rule 404(b) clearly states that evidence of prior bad acts is not admissible in order to show that a person acted in conformity with his character. Yet, 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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005).

Rule 404(b) is thus a "general rule of *inclusion* of relevant evidence of [prior bad acts], subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an

offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). In *State v. Smith*, 152 N.C. App. 29, 34-35, 566 S.E.2d 793, 798 (2002) (relying on *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990)), this Court applied Rule 404(b) and determined that evidence establishing a chain of circumstances leading up to the crime charged may be admissible if "linked in time and circumstances [] or if it forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." Further, in *State v. Young*, 317 N.C. 396, 413, 346 S.E.2d 626, 636 (1986), our Supreme Court determined that where the offense in question requires proof of lack of consent or that the offense was committed against the will of the victim, evidence of a victim's awareness of prior bad acts by the defendant may be admitted in order to show that the victim's will had been overcome by her fears for her safety.

In this case, evidence of defendant's previous threats against Mr. and Mrs. Phillips was necessary to explain why Mrs. Phillips feared for her safety. The previous threats of violence support how defendant was able to keep Mrs. Phillips from fleeing even though at times she was left unattended. Also, the evidence was neither so remote in time nor so dissimilar in form as to render it inadmissible.

III.

Defendant last argues that the trial court erred in failing to grant his motion to dismiss two of the robbery charges under the

theory that all three charges arose out of one continuous transaction, thereby giving rise to just one charge.

The trial court's analysis of a motion to dismiss is well settled: it must review the evidence presented in the light most favorable to the State—giving it the benefit of every reasonable inference—to determine if there is substantial evidence supporting each essential element of the offense and the fact that defendant was the perpetrator. *State v. Mitchell*, 342 N.C. 797, 811, 467 S.E.2d 416, 424 (1996). Here, defendant was charged with three counts of robbery with a dangerous weapon. Thus, in order to withstand a motion to dismiss these charges, the State was required to submit substantial evidence that on three separate occasions: 1) defendant unlawfully took personal property either directly from Mrs. Phillips or in her presence, 2) by use or threatened use of a dangerous weapon, 3) whereby her life was endangered or threatened. *See State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (2003); *see also* N.C. Gen. Stat. § 14-87(a)(2005).

We find *State v. Jordan*, 128 N.C. App. 469, 495 S.E.2d 732 (1998), particularly informative as to the issue of multiple takings from a single victim. In *Jordan*, the defendant stole from the victim while in her house. He then left her house and stole her car. Because of the lapse of time between the two takings, the Court concluded that two separate takings had occurred, providing proper grounds for the separate charges of robbery with a dangerous weapon and larceny. *Id.* at 474-75, 495 S.E.2d at 736; *see also State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995) (two separate

charges were supported when defendant took victim's wallet, then after walking around a park came back and took victim's car); *State v. Barton*, 335 N.C. 741, 441 S.E.2d 306 (1994) (defendant taking victim's wallet then later taking a gun from the victim's car supported robbery and larceny).

Here, defendant stole money from Mrs. Phillips in her house. He then left her house and took money from her at a BB&T ATM. After that he took from her again at a Wachovia ATM, a separate and distinct locale. In between these takings, and over the course of several hours, he drove around on back roads, stopped to buy gas, and stopped at a mobile home several times. Applying *Jordan* to these facts, we find sufficient evidence of three separate and distinct takings. Since there was evidence of three distinct robberies, the trial court did not err in failing to dismiss two of the three counts of robbery with a dangerous weapon.

We find defendant's "one continuous transaction" argument unpersuasive. It is true that "the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction." *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992). However, the cases defendant cites to support robbery with a dangerous weapon as a continuing offense merely show that for a defendant to be guilty of robbery with a dangerous weapon, it is not necessary that each element occur simultaneously or in rapid succession so long as each occurs in "one continuous transaction." *See State v. Sumpter*, 318

N.C. 102, 347 S.E.2d 396 (1986) (the elements of violence and taking were so joined in time and circumstances as to be inseparable); *State v. Bellamy*, 159 N.C. App. 143, 582 S.E.2d 663 (2003) (the exact time relationship between the violence and the taking is unimportant so long as they are so joined by time and circumstances as to be inseparable). Neither of these cases support defendant's application. Instead, *Jordan* expresses the better rule that under the circumstances where there exists substantial time between takings, or the armed takings are from different locales, a defendant can be charged with multiple counts of robbery with a dangerous weapon, even if all acts were committed against the same victim.

Accordingly, we find that defendant received a trial free from error and uphold the judgment against him.

No error.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).