NO. COA06-592

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v. Durham County
Nos. 04 CRS 54070 & 54073

MICHAEL ANTHONY TART

Appeal by Defendant from judgment dated 7 November 2005 by Judge Ronald L. Stephens in Superior Court, Durham County. Heard in the Court of Appeals 13 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Anne Bleyman for Defendant-Appellant.

McGEE, Judge.

Michael Anthony Tart (Defendant) was convicted of first-degree kidnapping and robbery with a dangerous weapon. The trial court sentenced Defendant to a term of 133 months to 169 months in prison. Defendant appeals.

At trial, Jose Medina (Mr. Medina) testified that he drove his 1995 Chevrolet Lumina automobile (the vehicle) to pick up his girlfriend, Nancy Pechecko (Ms. Pechecko), from work between 8:15 p.m. and 8:30 p.m. on 21 August 2001. The couple's three-year-old daughter (the child) was in a car seat in the back of the vehicle. Mr. Medina testified that two people approached his vehicle at the

intersection of Geer and Foster Streets in Durham; one went behind the vehicle and the other, who had a gun, went to the driver's side of the vehicle.

Mr. Medina testified that the gunman yelled at him and told him to get out of the vehicle. Mr. Medina told the gunman that he could not get out of the vehicle because his daughter was in the back seat. The gunman said he did not care and again told Mr. Medina to get out. As Mr. Medina opened the door to get out, the gunman grabbed Mr. Medina's hair and pushed his head down. Mr. Medina testified that the person who went behind the vehicle was not far away and kept turning around, causing Mr. Medina to think he was the gunman's accomplice.

Mr. Medina further testified that the gunman got in the vehicle and started to drive away. Mr. Medina jumped on the hood but was thrown off. Mr. Medina then saw the person who had been behind the vehicle walking down the road, beyond the intersection. Mr. Medina saw the vehicle stop beyond the intersection and saw the light come on inside the vehicle. The vehicle drove away and Mr. Medina no longer saw the person who had been walking down the road.

Mr. Medina ran to Ms. Pechecko's workplace and Ms. Pechecko called the police. Mr. Medina told Ms. Pechecko that two black people had mugged him. However, at trial, Mr. Medina testified that he thought only one of the attackers had been black. Mr. Medina testified that the person who walked behind his vehicle had been wearing a light colored tee shirt. Mr. Medina said the gunman was wearing a long-sleeved, dark colored shirt.

Durham Police Department Investigator Nikki Byrd (Investigator Byrd) testified that when she spoke with Mr. Medina on 21 August 2004, he described the vehicle and said the suspects were two black males wearing white tee shirts, blue jeans, and black doo-rags. Investigator Byrd broadcast a report that a vehicle had been stolen with a small child inside and she described the suspects. Durham Police Officer Dallas Myatt (Officer Myatt) testified that he heard a broadcast over the dispatch channel and then contacted the Amber Alert system. An Amber Alert was issued for the child.

Alamance County Sheriff's Deputy Adam Nicholson (Deputy Nicholson) testified that he was dispatched to a Budget Inn in Mebane around 9:30 p.m. or 10:00 p.m. on 21 August 2004, where he talked with a man who was holding a little girl. The man told Deputy Nicholson that he was passing through the area on his motorcycle when he saw the little girl crying in a field and picked her up. Deputy Nicholson testified the little girl was hysterical and nervous and was wet from both rain and urine. Deputy Nicholson learned of the Amber Alert issued from Durham County. Deputy Nicholson's corporal contacted Durham Police to let them know they had found a female child. When Ms. Pechecko arrived with a Durham Police officer, Deputy Nicholson gave Ms. Pechecko the child, who held on to her mother "for dear life."

North Carolina State Highway Patrol Trooper Steven Smith (Trooper Smith) testified that he was on duty on the night of 21 August 2004, observing traffic from the shoulder of I-85 near Butner. Trooper Smith stopped a white male for speeding around

11:20 p.m. on 21 August 2004. Trooper Smith testified that the person he stopped was wearing a white tee shirt. At trial, Trooper Smith identified Defendant as the person he stopped on 21 August 2004. He testified that Defendant was driving a Chevrolet Lumina, the same vehicle that had been stolen from Mr. Medina earlier in the evening. Although Trooper Smith ran a check on the license plate of the vehicle, the vehicle was not listed as stolen. However, Trooper Smith testified that the next day he received a delayed notification that the vehicle had been stolen in a kidnapping and carjacking in Durham.

Jesse Battle (Mr. Battle) testified that he was the director of the men's program at Triangle Residential Options for Substance Abusers (TROSA) in Durham. TROSA is a two-year residential substance abuse recovery program. Mr. Battle testified that Defendant was a resident at the TROSA facility at 1001 North Street in Durham, and that the log book indicated that Defendant left the facility voluntarily at 8:20 p.m. on 21 August 2004. However, Mr. Battle acknowledged that, based on another notation in the log book, Defendant may have left the facility at 8:30 p.m. on 20 August 2004. The TROSA facility was in the vicinity of the intersection where the crimes occurred.

Valerie House testified Defendant called her in late August 2004 to tell her he was coming to Harnett County to visit her daughter in a car he had borrowed from a friend. Valerie House testified that Defendant arrived in a Chevrolet Lumina and spent a few days in the area. Valerie House's mother, Elsie Hollins, also

testified that she saw Defendant in Dunn in August 2004. Elsie Hollins testified that Defendant said he borrowed the vehicle he was driving from a friend. Defendant further told Elsie Hollins that when "he was leaving Durham, [he] made a missed turn and ended up in Virginia and that was where he was coming from[.]"

Defendant gave a statement to Durham Police Department Investigator Michelle Soucie (Investigator Soucie) in which Defendant said he left TROSA around 8:30 p.m. on 21 August 2004 and started walking downtown. Defendant also told Investigator Soucie that he had taken a bus from Durham to Dunn after he left TROSA that evening. However, Investigator Soucie testified there were no buses running to Dunn after 5:00 p.m. on 21 August 2004. Defendant did not present any evidence.

I.

Defendant argues the trial court erred in denying his motions to dismiss and by instructing the jury on the charges of first-degree kidnapping and robbery with a dangerous weapon. Specifically, Defendant argues there was insufficient evidence of intent to terrorize to support the kidnapping charge and insufficient evidence that Defendant was the perpetrator of either crime.

We first note that although Defendant argues the trial court erred by instructing the jury on first-degree kidnapping and robbery with a dangerous weapon, Defendant did not object at trial to the instructions on these charges. Moreover, although Defendant alleges plain error in his assignments of error, he does not argue

in his brief that the trial court committed plain error. Therefore, Defendant has waived appellate review of these assignments of error. *State v. Scercy*, 159 N.C. App. 344, 354, 583 S.E.2d 339, 345, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003).

We review only Defendant's argument that the trial court erred by denying his motions to dismiss. In ruling on a motion to dismiss, a trial court must determine "'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" *State v. Williams*, 150 N.C. App. 497, 501, 563 S.E.2d 616, 618 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). Substantial evidence is evidence "which a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). A trial court must consider the evidence in the light most favorable to the State and give the State the benefit of the reasonable inferences to be drawn from the evidence. *Williams*, 150 N.C. App. at 501, 563 S.E.2d at 619.

Defendant argues there was insufficient evidence of an intent to terrorize the child. The elements of first-degree kidnapping relevant to the present case are: (1) the unlawful removal from one place to another; (2) of any person under 16 years of age without the consent of such person's parent; (3) for the purpose of terrorizing that person or another; and (4) that person was not

released by the defendant in a safe place. N.C. Gen. Stat. § 14-39(a)(b) (2005). The term terrorizing means "more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986).

"Intent is a condition of the mind ordinarily susceptible of proof only by circumstantial evidence." *State v. Pigott*, 331 N.C. 199, 211, 415 S.E.2d 555, 562 (1992). "The presence or absence of [a] defendant's intent or purpose to terrorize . . . may be inferred by the fact-finder from the circumstances surrounding the events constituting the alleged crime." *Baldwin*, 141 N.C. App. at 605, 540 S.E.2d at 821. Moreover, the victim's subjective feelings of fear are relevant when determining whether a defendant acted with intent to terrorize. *Id.* at 604, 540 S.E.2d at 821.

In the present case, there was sufficient evidence that Defendant had the intent to terrorize the child when he participated in the kidnapping. The State proceeded on a theory of acting in concert. Under this theory,

> "'[i]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."'"

State v. Mann, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (citations omitted), *cert. denied*, *Mann v. North Carolina*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). When Mr. Medina told the gunman that he could not get out of his vehicle because his daughter was in the

back seat, the gunman said he did not care and told Mr. Medina to get out of the vehicle anyway. These actions tended to show that the gunman, and his accomplice, were indifferent to the fact that the child was in the vehicle. Moreover, when Deputy Nicholson arrived at the Budget Inn in Mebane, the child was crying and was soaking wet from both rain and urine. The child had been found crying in a field and was hysterical and nervous. These facts tend to show that the child was in a high state of fear and was intensely frightened as a result of being kidnapped, driven to Mebane, and left in a field. This was substantial evidence that a reasonable juror could consider sufficient to establish Defendant's intent to terrorize the child.

Defendant also argues there was insufficient evidence that he was a perpetrator of either first-degree kidnapping or robbery with a dangerous weapon. Defendant argues that the doctrine of recent possession does not apply in the present case because the trial court did not instruct the jury on this doctrine. However, in reviewing a motion to dismiss at the close of the State's evidence and at the close of all the evidence, we do not review the instructions given to the jury. When a defendant moves to dismiss, no instructions have yet been given. Rather, as we stated earlier, in reviewing the denial of a motion to dismiss we determine only "'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" *Williams*, 150 N.C. App. at 501, 563 S.E.2d at 618 (quoting *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925).

Therefore, whether or not the trial court subsequently instructed the jury on the doctrine of recent possession is not relevant to our determination of whether the trial court erred by denying Defendant's motions to dismiss.

We hold that under the doctrine of recent possession, with circumstantial evidence placing Defendant at the scene of the crime, there was sufficient evidence that Defendant was the perpetrator of first-degree kidnapping and robbery with a dangerous weapon. Our Supreme Court has recognized that

> [i]t is well established that the "possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others[,] affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission."

State v. Joyner, 301 N.C. 18, 28, 269 S.E.2d 125, 132 (1980) (quoting *State v. Patterson*, 78 N.C. 470, 472-73 (1878)). Additionally,

> [w]hen the evidence strongly suggests that "all [of] the crimes including the larceny occurred as a part of the same criminal enterprise" by the same assailant, a defendant's recent possession of stolen property is a relevant consideration in determining whether the defendant is guilty of all the crimes charged against him.

State v. Poole, 82 N.C. App. 117, 121, 345 S.E.2d 466, 469 (1986) (quoting *Joyner*, 301 N.C. at 29, 269 S.E.2d at 132), *disc. review denied*, 318 N.C. 700, 351 S.E.2d 757 (1987).

Mr. Medina testified that the kidnapping and robbery occurred between 8:15 p.m. and 8:30 p.m. on 21 August 2004. Defendant was

driving the vehicle that had been stolen from Mr. Medina earlier in the evening, when Trooper Smith stopped Defendant for speeding around 11:20 p.m. on 21 August 2004. From Defendant's possession of the vehicle less than three hours after the robbery, it can be inferred that Defendant was the thief. *See Joyner*, 301 N.C. at 28, 269 S.E.2d at 132. It can further be inferred from this evidence that Defendant was guilty of both the robbery with a dangerous weapon and first-degree kidnapping. *See Poole*, 82 N.C. App. at 121, 345 S.E.2d at 469.

Moreover, there was evidence that Defendant was in the area where the crimes occurred. Mr. Battle testified that Defendant left the TROSA facility voluntarily around 8:20 p.m. on 21 August 2004. Additionally, Defendant gave a statement to Investigator Soucie in which Defendant said he left TROSA around 8:30 p.m. on 21 August 2004 and started walking downtown. The TROSA facility was in the vicinity of the intersection where the crimes occurred. Defendant had previously called Valerie House to tell her that he was coming to Harnett County to visit her daughter. Defendant told Investigator Soucie that he took a bus from Durham to Dunn after he left TROSA on 21 August 2004. However, Investigator Soucie testified that there were no buses running to Dunn after 5:00 p.m. on 21 August 2004. We hold that there was substantial evidence that Defendant was the perpetrator of the crimes for which he was convicted. Specifically, there was substantial evidence that Defendant was the gunman's accomplice. Under the doctrine of acting in concert, Defendant is liable for the acts of the gunman,

and we therefore hold that the trial court did not err in denying Defendant's motions to dismiss.

II.

Defendant argues the trial court erred by instructing the jury on the theory of acting in concert. Specifically, Defendant argues that because there was insufficient evidence that Defendant was present at the scene of the crimes, there was insufficient evidence to support a jury instruction on acting in concert. However, as we stated in section I, there was sufficient evidence that Defendant was the perpetrator of first-degree kidnapping and robbery with a dangerous weapon. Therefore, this argument is without merit.

Defendant also argues there was no evidence of a common purpose between the two perpetrators. We disagree. Mr. Medina testified that two people approached his vehicle at the intersection of Geer and Foster Streets; one went behind the vehicle and the other, who had a gun, went to the driver's side of the vehicle. Mr. Medina testified that the person who went behind the vehicle was not far away and kept turning around, causing Mr. Medina to think that person was the gunman's accomplice. This tends to show that the two people were working together. Mr. Medina further testified that after the gunman forced Mr. Medina out of the vehicle, got into the vehicle, and drove away, Mr. Medina saw the other person walking down the road, beyond the intersection. Mr. Medina then saw the vehicle stop beyond the intersection and saw the light come on inside the vehicle. After the vehicle drove away, Mr. Medina no longer saw the other person

who had been walking down the road. This evidence tends to show that the gunman stopped the vehicle, allowed the other person to get in, and drove away. Based upon this evidence, there was substantial evidence that the two perpetrators were acting with a common purpose. We overrule these assignments of error.

III.

Defendant argues the trial court committed plain error by failing to instruct the jury on false imprisonment. Because Defendant failed to request this instruction at trial, we apply the plain error rule. *See* N.C.R. App. P. 10(c)(4).

> Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to [the] appellant of a fair trial.

State v. Gregory, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[I]n order to prevail under the plain error rule, [a] defendant must convince this Court that (1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

"False imprisonment is a lesser included offense of kidnapping." *State v. Kyle*, 333 N.C. 687, 703, 430 S.E.2d 412, 421 (1993). "The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement,

restraint, or removal of another person. The offense is kidnapping if the reason for the restraint was to accomplish one of the purposes enumerated in the kidnapping statute." *State v. Mangum*, 158 N.C. App. 187, 197, 580 S.E.2d 750, 757, *disc. review denied*, 357 N.C. 510, 588 S.E.2d 378 (2003). In the absence of evidence of a statutorily-enumerated purpose, the offense is false imprisonment. "Where the State presents evidence of every element of the [greater] offense, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, then no lesser-included offense need be submitted." *Id.*

In the present case, there was no evidence to negate the element of intent to terrorize. Defendant argues there was insufficient evidence that he committed any crime, effectively denying that he committed false imprisonment. With no other evidence to negate the elements of the crime other than defendant's denial, the trial court was not required to instruct the jury on false imprisonment. We overrule this assignment of error.

No error.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).