NO. COA07-1116

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v. Montgomery County
No. 05CRS050832

WALTER CLEVELAND NOOE

Appeal by defendant from judgment entered 28 March 2007 by Judge Lindsay R. Davis, Jr. in Montgomery County Superior Court. Heard in the Court of Appeals 21 April 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Ted Williams and Assistant Attorney General Brandon L. Truman, for the State.

Paul M. Green for defendant-appellant.

HUNTER, Judge.

Walter Cleveland Nooe ("defendant") appeals from a judgment entered on verdicts finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury and first degree kidnapping. After careful review, we find no prejudicial error.

Gwendolyn Nooe testified that she married defendant on 9 May 2005 and that they resided in a tack room in his brother's barn. Defendant came in on 11 May 2005 "angry about something." He punched her in the face several times over the course of several hours. At one point defendant laid a hammer on a shelf next to

their bed and told her that he could strike her one time with the hammer and kill her. Defendant then punched her again, told her to remove her clothes, and to perform sexual acts because she "was his wife now." She complied with his commands. After several hours of this abuse, she tried to escape past defendant, who was blocking the only door to the tack room. Defendant pushed her into a chair, which flipped backwards. She got up from the floor, grabbed a can of hair spray and attempted to spray defendant in the eyes. Defendant picked up the hammer and beat her in the head with it. At some point she blacked out and when she regained consciousness, she had a blood-soaked towel wrapped around her head. She ultimately persuaded defendant to transport her to the hospital for medical treatment. Defendant carried her into the hospital and told hospital personnel that she had been in an automobile accident. As the nurses and doctors attended to her, she saw defendant start to leave. She told a physician to stop defendant because he was the one who had injured her. She told the physician that defendant had struck her with a hammer. She heard the physician call hospital security. She did not see defendant again.

Deputy Michael Concannon of the Montgomery County Sheriff's Department testified that on 12 May 2005 he received a dispatch to go to Montgomery Hospital. Deputy Concannon then encountered defendant in the emergency room parking lot. Defendant was distraught and "crying and making several references to being sorry for what he did to -- to his wife at the time, Ms. Nooe there." Defendant said he was sorry "for beating Gwen Nooe; his words, 'for

beating my wife.'" He entered the emergency room and talked with Mrs. Nooe, who told him that her husband had assaulted her with a hammer. He photographed Mrs. Nooe's injuries, which included lacerations and bruises to her head, face, eye, ear, neck, arm, and chest.

Dr. William Ralph Greenwood testified that he was the attending physician on duty in the emergency department of Montgomery Memorial Hospital on 12 May 2005. He examined Mrs. Nooe and found multiple significant lacerations to her scalp, a few minor lacerations to her extremities, facial contusions, a subconjunctivial hemorrhage on the right side of her face, and a nondisplaced nasal bone fracture. He closed the larger lacerations with approximately twenty surgical staples. Mrs. Nooe told him that her "boyfriend" struck her with a hammer. In his opinion a blunt object of some sort caused Mrs. Nooe's injuries.

The acting director of the Crisis Council, a program to assist victims of domestic violence and sexual assault, testified that Mrs. Nooe told her on 12 May 2005 that defendant beat her around the head with a hammer earlier that day.

Defendant's brother testified on defendant's behalf that defendant and Mrs. Nooe lived in a tack room behind his house and that he did not hear any arguments or screaming emanating from the tack room on the evening/morning in question.

Defendant's former attorney testified that Mrs. Nooe called his office in February 2005 and offered to drop the charges against defendant if she received $2,000.00 in cash and a pickup truck.

Defendant testified that on the evening in question, Mrs. Nooe consumed cocaine and "went to cutting up." Mrs. Nooe slapped him, struck him in the groin, and hit him with a pocketbook. He grabbed her and they stumbled over a chair, after which he observed that Mrs. Nooe's head was bleeding. He wrapped a towel around her head and transported her to the hospital. He denied striking Mrs. Nooe with a hammer or confining her.

The sole issue before us is whether the court committed plain error by instructing on a theory of kidnapping not charged in the indictment. The indictment charged that defendant "unlawfully, willfully and feloniously did kidnap Gwen M. Nooe . . . by unlawfully confining and restraining said victim . . . for the purpose of facilitating the commission of a felony, to-wit: assault with a deadly weapon with intent to kill inflicting serious injury (and any lesser-included felony[.])" The court instructed the jury that the State had to prove "defendant unlawfully confined a person -- that is, imprisoned her in a given area . . . for the purpose of doing serious bodily injury to that person."

Because defendant did not object to the court's instruction, our review is for plain error. N.C.R. App. P. 10(b)(2), (c)(4) (2007). Under this standard of review, defendant must show that absent the erroneous instruction, a jury probably would have returned a different verdict. N.C. Gen. Stat. § 15A-1443(a) (2007). Our Supreme Court has stated that "'[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial

court.'" *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977) (alteration in original)). To warrant appellate relief, the instructional error must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

As a general rule, a variance between a kidnapping indictment and the charge given to the jury as to the theory of the confinement or restraint constitutes error. *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986). Such error, however, will not amount to plain error if the evidence of the defendant's guilt is compelling or the erroneous instruction holds the State to a higher burden of proof. *State v. Tirado*, 358 N.C. 551, 576, 599 S.E.2d 515, 532-33 (2004).

We hold the court did not commit plain error. The evidence of defendant's guilt is compelling. Defendant's testimony tending to indicate that Mrs. Nooe accidentally injured herself when she fell over the chair is overwhelmingly contradicted by the objective documentary evidence of Mrs. Nooe's extensive multiple injuries. In addition, defendant confessed to Deputy Concannon that he beat Mrs. Nooe.

Moreover, the term "serious bodily injury" is defined as a "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or

protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-32.4(a) (2007). The term "serious injury" is defined simply as an injury that is serious but falls "short of causing death." *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). Thus, proof of a more severe injury is required to show serious bodily injury as compared to serious injury. *State v. Hannah*, 149 N.C. App. 713, 719, 563 S.E.2d 1, 5, *disc. review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002). The instruction given by the court thus inured to defendant's benefit because it required the State to meet a higher standard of proof.

No error.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).