NO. COA07-1216

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v. Rockingham County
Nos. 06 CRS 53908, 5902-03

DAVID RAY BRANSON

Appeal by defendant from judgment dated 10 May 2007 by Judge John L. Holshouser in Rockingham County Superior Court. Heard in the Court of Appeals 1 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly D. Potter, for the State.

Leslie C. Rawls for defendant-appellant.

BRYANT, Judge.

David Ray Branson (defendant) appeals from a judgment dated 10 May 2007 entered consistent with a jury verdict finding him guilty of driving left of center, leaving the scene of an accident, second-degree kidnapping, and assault by pointing a gun. For the reasons given below, we find no error.

Facts

On 18 October 2006, at approximately 11:30 p.m., Andrew Nickelston was driving when he came across the scene of a single-car accident. Nickelston observed defendant dazed and standing alone near a wrecked vehicle. Nickelston exited his vehicle and

offered to call help for defendant. According to Nickelston, defendant told him he would not be calling anyone, and pointed a gun towards Nickelston. Defendant then told Nickelston to "take him where he needed to go." Defendant and Nickelston entered Nickelston's vehicle, and as Nickelston drove, defendant kept the gun pointed towards him. Defendant told Nickelston to drive him to a particular point and instructed Nickelston to stop. When Nickelston stopped, defendant exited the vehicle and walked away. Nickelston then drove back to the scene of the accident and spoke to law enforcement officers that had arrived at the scene.

On 9 May 2007, a jury returned a verdict finding defendant guilty of driving left of center, leaving the scene of an accident, second-degree kidnapping, and assault by pointing a gun. In a judgment dated 10 May 2007, defendant was sentenced to a minimum of 24 to 38 months imprisonment for the second-degree kidnapping charge. Defendant was also sentenced to a consecutive 75-day suspended sentence and placed on supervised probation for 36 months for the remaining charges. Defendant appeals the second-degree kidnapping conviction and the driving left of center conviction.

Defendant raises the following issues: (I) whether the trial court erred by denying his motion to dismiss the second-degree kidnapping charge; and (II) whether the trial court committed plain error by its instruction to the jury on the driving left of center charge.

I

Defendant argues the trial court erred by denying his motion to dismiss the second-degree kidnapping charge because there was insufficient evidence that defendant terrorized Nickelston or placed Nickelston in involuntary survitude.

The standard of review for a motion to dismiss in a criminal case is "'whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.'" *State v. Pointer*, 181 N.C. App. 93, 95, 638 S.E.2d 909, 911 (2007) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). In ruling on a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

Pursuant to N.C. Gen. Stat. § 14-39(a), second-degree kidnapping is the:

> unlawful[] confine[ment], restrain[t], or remov[al] from one place to another, [of] any other person 16 years of age or over without the consent of such person . . . if such confinement, restraint or removal is for the purpose of:
> . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
>
> (4) Holding such other person in involuntary servitude in violation of G.S. [14-43.12].

N.C. Gen. Stat. § 14-39(a) (2007). Involuntary servitude is defined in part as "[t]he performance of labor . . . [b]y . . .

coercion, or intimidation using violence or the threat of violence or by any other means of coercion or intimidation." N.C. Gen. Stat. § 14-43.10(3) (2007).

Defendant was indicted for kidnapping Nickelston "by unlawfully removing him from one place to another without his consent and for the purpose of terrorizing him [and] holding him in involuntary servitude." The jury found defendant guilty of second-degree kidnapping for the purpose of terrorizing and for the purpose of involuntary servitude. Viewing the evidence in the light most favorable to the State, we believe the evidence was sufficient to support the kidnapping for the purpose of involuntary servitude conviction.

In this case, evidence showed that when Nickelston arrived at the scene of the accident, he offered to call help for defendant but stopped when defendant told him he "wasn't calling nobody." Defendant pointed his gun at Nickelston and told Nickelston to drive him away from the scene of the accident. Nickelston drove defendant until defendant told him to stop and defendant exited the vehicle. While Nickelston was driving, defendant kept his gun pointed towards Nickelston. Nickelston did not volunteer to drive defendant to find help and only did so after defendant pointed the gun at Nickelston and demanded that he drive him away from the scene of the accident. The evidence was sufficient to show defendant removed Nickelston from one place to another for the purpose of involuntary servitude. Therefore, the trial court did not err by denying defendant's motion to dismiss. Because we hold

there was sufficient evidence to support the kidnapping for the purpose of involuntary servitude charge, and because the jury convicted defendant of second-degree kidnapping under both theories, we need not address the charge of kidnapping for the purpose of terrorizing. This assignment of error is overruled.

II

Defendant argues the trial court committed plain error in failing to instruct the jury on the doctrine of sudden emergency as a potential defense to the charge of driving left of center. He points to his own testimony that his right rear tire went flat and caused his vehicle to swerve across the road. Because of the evidence that his tire was flat, defendant argues the trial court's failure to instruct the jury *ex mero motu* on the doctrine of sudden emergency amounts to plain error.

As defendant concedes, his failure to request an instruction on sudden emergency or to object to the trial court's jury instructions requires him to show plain error by the trial court. *See* N.C. R. App. P. 10(b)(2), (c)(4) (2007). "Generally, a plain error is one which is obvious, which affects the substantial rights of the accused, and which, if uncorrected, would be an affront to the integrity and reputation of judicial proceedings." *State v. Thompson*, 59 N.C. App. 425, 430, 297 S.E.2d 177, 181 (1982) (quotations omitted), *disc. review denied*, 307 N.C. 582, 299 S.E.2d 650 (1983).

Defendant has failed to identify a single case in which our appellate courts have incorporated the tort doctrine of sudden

emergency into North Carolina criminal law. *See State v. Glover*, 156 N.C. App. 139, 144-45, 575 S.E.2d 835, 838 (2003) ("Although various civil cases have addressed the issue of sudden emergencies in relation to the reasonableness of a defendant's actions, defendant has failed to cite a single criminal case establishing such an exception specifically to G.S. § 20-146 (making it illegal to drive left of the center of a highway)."). Therefore, we conclude defendant has failed to meet the heavy burden of showing plain error. We will not attribute plain error to a court based upon its failure to adopt, *sua sponte*, a novel application of law without any precedent to support such an application. Finding plain error in this circumstance "would be departing from the fundamental requirements of the plain error rule of obviousness and apparentness of error." *State v. Holbrook*, 137 N.C. App. 766, 769, 529 S.E.2d 510, 511 (2000).

No error.

Judges WYNN and JACKSON concur.

Report per Rule 30(e).