NO. COA07-220

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2007

STATE OF NORTH CAROLINA

v. Halifax County
Nos. 06 CRS 052077
06 CRS 052083

HERBERT EARL WARREN, JR.

Appeal by defendant from judgment entered 3 November 2006 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 19 September 2007.

Attorney General Roy Cooper, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Mary March W. Exum for defendant-appellant.

TYSON, Judge.

Herbert Earl Warren, Jr., ("defendant") appeals from judgment entered after a jury found him to be guilty of assault by pointing a gun pursuant to N.C. Gen. Stat. § 14-34 and second degree kidnapping pursuant to N.C. Gen. Stat. § 14-39. We find no error.

I. Background

A. State's Evidence

1. Glover's Testimony

The State's evidence tended to show Etta Sherree Glover ("Glover") and defendant were involved in a romantic relationship from October 2004 to March 2006. Defendant and Glover resided

together at Glover's grandmother's house during part of this time. Defendant and Glover were told that Glover's grandmother's house was going to be sold. Defendant and Glover moved into a house on Monroe Street in Roanoke Rapids, North Carolina. They resided there along with friends, Yvette Jackson ("Jackson") and Kyle Green ("Green").

Glover testified she and defendant suffered an abusive relationship. On the night of 25 or 26 March 2006, defendant and Glover argued. Defendant exited the house and went to a club with a friend. Glover traveled to a different club in Virginia with Jackson and another female friend. They stayed at that club until 1:00 or 1:30 a.m., and then traveled to the same club in Rocky Mount, North Carolina where defendant was present. Defendant was standing in the parking lot of the club in Rocky Mount when Glover and the other women arrived. Glover testified that defendant was yelling and brandishing a silver handgun.

Jackson, Green, and another friend left the club while Glover stayed behind, hoping to calm defendant. Glover was able to calm defendant down for awhile, but eventually they began arguing again. Glover told defendant that she was leaving the club and found a friend who would give her a ride.

Glover was about to enter her friend's vehicle when defendant placed his gun into her ribs and told her she would leave with him. Glover testified she entered the vehicle with defendant because she was scared he would shoot her. Glover and defendant rode in the backseat of the vehicle while another man drove them to the

Sunshine Motel in Rocky Mount. Defendant sat next to Glover with his gun on his lap. After a two minute drive, they arrived at the Sunshine Motel around 4:00 or 5:00 a.m.

Once inside the motel room, Glover asked defendant "why he was acting like that." Glover testified defendant was quiet at moments, but would start yelling and screaming and waving the gun around, threatening her, her family, and her children. Glover also testified defendant hit her leg and arm in front of the other people inside the room.

Glover testified defendant hit her every twenty to thirty minutes. Defendant eventually went to sleep. Glover could not sleep because she was too scared. After checkout the next morning, defendant and Glover were driven to their house on Monroe Street in Roanoke Rapids.

While walking onto the porch, defendant started yelling at Glover because he could not find his cellular telephone. Glover believed she could escape from defendant while he looked for his cellular telephone and ran to the backyard. Defendant caught up with her in the backyard and put his gun to her head and stated, "I can kill you right now." Defendant smacked Glover on the back of her head and knocked her onto the ground. Glover testified she begged defendant to allow her to leave, but he refused. Defendant pulled Glover up off the ground, told her to go inside, and pushed her inside the house. Once inside the house, defendant let go of Glover's arm, and she was able to move about freely. Glover

believed defendant still possessed the gun, but was unsure of its location.

Glover secretly grabbed a cordless telephone on the way to the bathroom, telephoned her mother and asked to speak with her father, Chester Proctor ("Proctor"). Glover told her mother it was an emergency, she was scared, defendant had a gun, and asked for her father to come and pick her up immediately. Glover testified she did not telephone the police because she was scared.

Glover informed defendant her father was coming to pick her up and defendant "calm[ed] down a little bit." With his gun in his hands, defendant informed Glover she was not going to leave with her father. Glover responded, "Well, I made him come all this way. At least let him go ahead and take my stuff to their house. . . ." Defendant stated, "That's fine." Glover testified she secretly planned to escape by getting into her father's van and leaving with him.

While Glover waited for her father to arrive, defendant continued to threaten Glover and her family. Glover testified that she took defendant's threats seriously because he had admitted to her he had burned property and the interior of a shed she owned.

When Glover's father arrived, defendant allowed Glover to take her belongings out to her father's van. As Glover packed her belongings into the van, defendant walked out onto the porch with his gun in his hand. On her first trip to the van, Glover told her father, "[W]hen I bring this next box, I am jumping in, and just pull off." On her next trip to the van, Glover got in, closed the

door, and her father drove away. Proctor also testified and corroborated Glover's testimony.

On 27 March 2006, Glover's mother telephoned Glover and told her defendant had burned down her grandmother's house also located on Monroe Street in Roanoke Rapids. However, no one witnessed defendant burn the house. Glover contacted Detective Jeffrey Wayne Baggett ("Detective Baggett"), went to the police station, and told him what she knew about both the above events and her grandmother's house being burned.

2. Detective Baggett's Testimony

Detective Baggett testified he interviewed Glover at 10:30 a.m. on 27 March 2006 and showed her to the Magistrate's office. Glover spoke with the Magistrate and requested that defendant be arrested for her safety. Defendant was arrested and transported to the police station. Detective Baggett testified defendant was very irate, agitated, and he could not be interviewed. Detective Baggett began to testify about a statement defendant made about burning a shed. Counsel for defendant objected, and a *voir dire* hearing was conducted outside the presence of the jury.

During *voir dire*, Detective Baggett testified defendant went on a tangent while being processed at the station and stated that the charges were "bulls--t" and that Glover was "trumping s--t up." Detective Baggett responded, "[w]ell, you need to stop setting fire to her house and her shed." Defended stated, "I didn't set fire to no house or shed. The shed ain't burned up anyway. The fire kept going out." After a brief pause, Detective Baggett testified

defendant then stated, "It must have been a crackhead smoking in there and set the paper on fire. They sold the shed anyway."

Detective Baggett also testified defendant had not been given *Miranda* warnings at the time these statements were made. When asked why he responded to defendant's statement, Detective Baggett testified, "[b]ecause I was getting tired of listening to his statements. . . .I wasn't really looking for a response. What I was looking for was to get him to just be quiet is what I was looking for." When directly asked whether he knew his statement may elicit an incriminating response, Detective Baggett testified, "I did not know. I was looking for him just to be quiet."

The trial court overruled defendant's objection and Detective Baggett testified before the jury. Detective Baggett also testified he had originally charged defendant with burning the shed, but those charges were ultimately dismissed. At the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court denied defendant's motion.

B. Defendant's Evidence

Defendant called LaPage Foster ("Foster"), who testified she was present at the club and the motel with defendant and Glover. Foster stated she did not witness any physical violence between defendant and Glover either at the club or the motel. Foster did see a silver colored gun, but only when defendant took it from Glover. Foster believed defendant gave the gun to another male.

On 3 November 2006, a jury found defendant guilty of assault by pointing a gun and second degree kidnapping. The trial court

sentenced defendant to a minimum of thirty-four months and a maximum of fifty months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to suppress testimony made by him while he was in custody and without being read his *Miranda* rights and (2) denying his motion to dismiss the charge of second degree kidnapping.

III. Motion to Suppress

A. Standard of Review

The standard of review for a motion to suppress "is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (citations and quotations omitted), *disc. rev. denied*, 357 N.C. 166, 580 S.E.2d 702 (2003). "The court's findings 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *Id.* (quoting *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

B. Analysis

1. *Miranda* Warnings

Defendant argues his *Miranda* rights were violated and the trial court erred by denying his motion to suppress Detective Baggett's testimony about an incriminating statement. We disagree.

Whether a defendant was subject to a custodial interrogation is a question of law reviewable by this Court *de novo*. *State v. Patterson*, 146 N.C. App. 113, 120, 552 S.E.2d 246, 253, *disc. rev. denied*, 354 N.C. 578, 559 S.E.2d 246 (2001). "'*Miranda* warnings are required only when a defendant is subjected to custodial interrogation.'" *State v. Johnston*, 154 N.C. App. 500, 502, 572 S.E.2d 438, 440 (2002) (quoting *Patterson*, 146 N.C. App. at 121, 552 S.E.2d at 253 (2001)). When examining the circumstances surrounding an alleged custodial interrogation, courts focus on the suspect's perceptions rather than the intent of law enforcement officers. *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (citing *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

"The term 'interrogation' is not limited to express questioning by law enforcement officers, but also includes 'any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Golphin*, 352 N.C. at 406, 533 S.E.2d at 199 (quoting *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308).

"However, because 'the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.'"

Id. at 406, 533 S.E.2d at 199 (quoting *Innis*, 446 U.S. at 301-02, 64 L. Ed. 2d at 308)).

> Factors that are relevant to the determination of whether police "should have known" their conduct was likely to elicit an incriminating response include: (1) "the intent of the police;" (2) whether the "practice is designed to elicit an incriminating response from the accused;" and (3) "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . ."

State v. Fisher, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003) (quoting *Innis*, 446 U.S. at 302, 64 L. Ed. 2d at 308.).

On 27 March 2006, police officers arrested defendant and transported him to the police station. Defendant was uncooperative, cursing, irate, and agitated with the police and Glover. Defendant was not interviewed at this time.

Detective Baggett testified that while being processed at the police station defendant went on a tangent stating that the charges were false. Detective Baggett responded, "[w]ell, you need to stop setting fire to her house and her shed." Defendant replied, "I didn't set fire to no house or shed. The shed ain't burned up anyway. The fire kept going out." Defendant then stated, "It must have been a crackhead smoking in there and set the paper on fire. They sold the shed anyway."

Defendant had not been given any *Miranda* warnings at the time he made these statements. Detective Baggett testified he responded to defendant's statement because he was tired of listening to defendant and was not looking for a response. Detective Baggett

stated he did not know whether his statement would elicit an incriminating response.

The trial court properly overruled defendant's objection to Detective Baggett's testimony. Although clearly in custody, defendant was not being interrogated within the meaning of *Miranda* and *Innis*. Detective Baggett testified he did not interview defendant at the time due to his unruly behavior. Detective Baggett posed no questions to defendant and nothing tends to show Detective Baggett knew or should have known that his statement was likely to elicit an incriminating response. *Id*. In addition, no evidence in the record suggests Detective Baggett had any knowledge of defendant's "unusual susceptibility . . . to a particular form of persuasion." *Id*. Detective Baggett's statement was not designed to elicit an incriminating response.

2. Harmless Error

Even if this Court were to find merit in defendant's assertion that his statements were obtained in violation of his *Miranda* rights, the violation would be reviewed for harmless error. This Court has held:

> Evidence admitted in violation of Miranda is subject to harmless error analysis. . . However, before a federal constitutional error can be held harmless, the court must . . . declare a belief that it was harmless beyond a reasonable doubt. . . The burden is on the State to demonstrate that the error was harmless beyond a reasonable doubt.

State v. Johnston, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002) (quotations omitted). The State argues any error was harmless beyond a reasonable doubt because the charges associated

with the burning of the shed were ultimately dismissed, as Detective Baggett testified at trial. Defendant also denied any knowledge of or setting the house or shed on fire.

Presuming defendant was subjected to custodial interrogation when he made the statements regarding the fire in the shed, we hold any error in the admission of those statements was harmless beyond a reasonable doubt. This assignment of error is overruled.

IV. Motion to Dismiss

Defendant argues the trial court erred by denying his motion to dismiss the charge of second degree kidnapping. We disagree.

A. Standard of Review

This Court has stated:

> The standard of review for a motion to dismiss in a criminal trial is:
>
> Upon defendant's motion for dismissal, the question for the Court 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. If so, the motion is properly denied.
>
> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury. But, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.
>
> In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State

> the benefit of every reasonable inference from the evidence. The trial court must also resolve any contradictions in the evidence in the State's favor. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness's credibility. It is concerned only with the sufficiency of the evidence to carry the case to the jury. Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

State v. Ellis, 168 N.C. App. 651, 656-57, 608 S.E.2d 803, 807 (2005) (internal citations and quotations omitted).

B. Analysis

Defendant argues insufficient evidence shows Glover was confined or terrorized or that he intended to terrorize her. We disagree.

N.C. Gen. Stat. § 14-39 (2005) provides, in pertinent part:

> (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:
>
> . . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . .

The term *confine* "connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

"Terrorizing is defined as 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. Davis*, 340 N.C.

1, 24, 455 S.E.2d 627, 639 (citations and quotations omitted), *cert. denied*, 15 U.S. 846, 133 L. Ed. 2d 83 (1995).

"In determining the sufficiency of the evidence, the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize the victim." *Id.* "[T]he victim's subjective feelings of fear, while not determinative of the defendant's intent to terrorize, are relevant." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). "The presence or absence of the defendant's intent or purpose to terrorize may be inferred by the factfinder from the circumstances surrounding the events constituting the alleged crime." *Id.* at 605, 540 S.E.2d at 821.

Here, the State's evidence tended to show Glover's confinement by defendant and her state of fright began at approximately 4:00 a.m. in Rocky Mount and ended about 2:00 p.m. in Roanoke Rapids on 26 March 2006. At approximately 4:00 a.m., defendant prevented Glover from leaving a club with her friends by placing a gun into her ribs and insisting she leave with him. Glover was forced into another vehicle by defendant.

At approximately 4:45 a.m., defendant forced Glover into a motel room in Rocky Mount, where he threatened her family, hit her with enough force to leave bruises, and grabbed her by the leg when she attempted to escape the room. At approximately 11:00 a.m., defendant forced Glover into a vehicle to ride to their home in Roanoke Rapids.

Glover attempted to escape by running away after she and defendant reached the house on Monroe Street. Defendant caught and stopped Glover in the backyard, placed the gun to her head, called her vulgar names, threatened to kill her, struck her on the head, and knocked her to the ground. Defendant pulled Glover up off the ground and pushed and pulled her into the house. Glover asked to be released ten to fifteen times, but defendant prevented her from leaving the house.

While inside the house, defendant told Glover, on at least four occasions, that she could not leave the house and continued to threaten her and brandish the gun. Glover testified she believed that defendant had immediate access to the gun throughout this period. Glover finally escaped by contacting her parents and having her father come to her aid.

Viewed in the light most favorable to the State, substantial evidence of confinement and terror exists to prove second degree kidnapping. The determination of defendant's guilt or innocence of second degree kidnapping was a question of fact for the jury. The trial court properly denied defendant's motion to dismiss the charge of second degree kidnapping. This assignment of error is overruled.

V. Conclusion

The trial court properly denied defendant's motion to suppress Detective Baggett's testimony and motion to dismiss the second degree kidnapping charge. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).