NO. COA07-75

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2007

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 04 CRS 58346-57

SHAWN DEMETRIUS KIRK COMMODORE
and BENJAMIN LAVON MYERS

Appeal by defendants from judgments entered 29 June 2006 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 11 September 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jay L. Osborne, for the State (Defendant Commodore).

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberly W. Duffley, for the State (Defendant Myers).

Parish & Cooke, by James R. Parish, for Shawn Demetrius Kirk Commodore, defendant-appellant.

James N. Freeman, Jr., for Benjamin Lavon Myers, defendant-appellant.

JACKSON, Judge.

Shawn Commodore ("defendant Commodore") and Benjamin Myers ("defendant Myers") (collectively, "defendants") appeal from judgments entered upon convictions for misdemeanor assault with a deadly weapon, first-degree burglary, three counts of robbery with a dangerous weapon, and five counts of first-degree kidnapping. For the reasons stated herein, we hold no error.

On the evening of 3 July 2004, Michelle Kimball ("Kimball") and her fiancé, Paul Tilley ("Tilley"), who lived together with their eighteen-month-old son, hosted several friends at their house. By the early morning hours of 4 July 2004, only Golden Watson ("Watson") and Kristen Lauren Fann ("Fann") remained. After Kimball put her son to bed, Kimball and Fann stayed in the house, conversing with one another, while Tilley and Watson were outside the house, smoking cigarettes, listening to music, and shooting Tilley's guns.

As Tilley exited Watson's vehicle, in which Tilley and Watson were listening to music, Tilley was struck twice on the left side of his face, first by a pistol and then by a shotgun. Tilley observed that the initial assailant — defendant Commodore — "was a black male, tall and skinny, with a black bandana . . . over his nose"; Watson also observed that the assailant that struck Tilley with a pistol was "a tall, slender fellow." After Tilley was struck by the pistol, Watson turned and saw "the other guy with the — with the double-barrel shotgun, and his facial mask was up on his forehead. And he realized shortly after that that he didn't have his mask on and he pulled it down." Watson recognized the second assailant as defendant Myers, and defendant Myers said to Watson, "[D]on't make a sound or I will kill you[;] we're going to kill you." Myers gave a similar warning to Tilley, and defendants walked Tilley and Watson back to the house at gunpoint.

As Tilley was nearing the door, he attempted to warn Kimball and yelled, "Go honey; go honey[;] go honey." Kimball heard his

cries, but as she got up to go to the door, she saw defendant Myers holding a shotgun to the back of Tilley's head and defendant Commodore holding a gun to Watson. Kimball sat back down, and defendants informed everyone in the house (collectively, "the victims"), "This is a robbery . . . ." The family dog then began barking and woke up Kimball's son, who was in his bed at the other end of the house. Kimball asked for permission to retrieve her son, and defendant Commodore accompanied her to the bedroom. Meanwhile, defendant Myers forced Tilley, Fann, and Watson onto the living room floor and began duct-taping their hands and ankles. Defendant Commodore put Kimball and her son in the bathroom, with the door shut and the lights out. Defendant Myers, however, insisted that Kimball and her son return to the living room with the others. Defendant Myers then attempted to put Kimball on the floor and her son on the couch. Kimball insisted that her son stay with her and placed him on her lap while she sat on the floor. Defendant Myers duct-taped Kimball's ankles together and duct-taped her and her son together.

Defendants brought Tilley into the kitchen, where they duct-taped him to a chair. Defendant Myers remained with Tilley in the kitchen for much of the time that defendants were in the house, and Tilley recognized defendant Myers, asking, "Ben, why are you doing this to me?" Tilley testified that he and defendant Myers might have played basketball together when they were children, and Tilley also recognized defendant Myers as a result of the way defendant Myers talked, walked, and grinned.

Defendants remained in the house for approximately forty-five minutes, "ransacking the house," looking for items to steal, throwing couch cushions on top of the victims, and dumping videotapes on top of Watson's head. Defendants "ripped [] phone cords out of the wall," "drowned [the] house phone in a sink full of water," and "broke[] [the victims'] cell phones in half." Defendants took everyone's identification cards, and after taking Tilley's identification card, warned him, "If you call the law, we'll come back and kill your whole family." Defendants ultimately stole Kimball's jewelry, all of the victims' wallets, several of Tilley's collectible firearms, and Fann's car keys and car. After departing, defendants left the victims duct-taped inside the house.

Shortly after defendants left the house, the victims freed themselves from the duct tape and contacted the police. When the police arrived, Kimball informed Sergeant Terry Gray ("Sergeant Gray") that she recognized defendants, and she showed Sergeant Gray pictures of defendants from her middle school yearbook. Kimball also informed Sergeant Gray that she had seen defendants together a week earlier at a nearby gasoline station. Kimball and Tilley later identified defendants in a photographic lineup.

On 27 September 2004, defendants were indicted for larceny of a motor vehicle, assault with a deadly weapon inflicting serious injury, first-degree burglary, felony conspiracy, three counts of robbery with a dangerous weapon, and five counts of first-degree kidnapping. Defendants' cases were joined for trial, and at the close of the State's evidence, the trial court dismissed the felony

conspiracy charge. The State voluntarily dismissed the felony larceny charge at the close of all the evidence, and a jury found defendants guilty of the remaining charges. The trial court sentenced defendant Commodore as a prior record level III offender to three consecutive terms of 100 to 129 months followed by two consecutive terms of eighty-two to 108 months; all other sentences ran concurrently with the five consecutive terms. The trial court sentenced defendant Myers as a prior record level II offender to three consecutive terms of 100 to 129 months followed by two consecutive terms of seventy-seven to 102 months; all other sentences ran concurrently with the five consecutive terms. Defendants gave timely notice of appeal.

On appeal, both defendants contend that the trial court erred in failing to dismiss the first-degree kidnapping charge with respect to Kimball's son. We disagree.

It is well-established that

> [t]he standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal quotation marks and citations omitted). "'In

"borderline" or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals.'" *State v. Manning*, __ N.C. App. __, __, 646 S.E.2d 573, 577 (2007) (alteration omitted) (quoting *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986)).

North Carolina General Statutes, section 14-39(a) provides in pertinent part:

> 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, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of . . . [f]acilitating the commission of any felony . . . .

N.C. Gen. Stat. § 14-39(a) (2005). A defendant is guilty of first-degree kidnapping when the State proves that the victim either (1) was not released by the defendant in a safe place, (2) was seriously injured, or (3) was sexually assaulted. *See* N.C. Gen. Stat. § 14-39(b) (2005). "In the absence of one of the elements set forth in [North Carolina General Statutes, section] 14-39(b), the defendant is guilty of second degree kidnapping." *State v. Anderson*, __ N.C. App. __, __, 640 S.E.2d 797, 801 (2007).

In the instant case, both defendants contend that the State failed to present substantial evidence that Kimball's son was restrained "without the consent of a parent or legal custodian of such person." N.C. Gen. Stat. § 14-39(a) (2005). The crux of their

argument is that (1) "but for the request of the mother the child would have been left in the back bedroom"; and (2) once the child was brought to the living room, "the child was with the mother on the floor restrained with her at her request." This argument is without merit.

Defendants did not obtain Kimball's consent to restrain her son, and Kimball specifically testified that defendants did not have her permission to tie him up. Although the evidence showed that Kimball's son was with Kimball at her request, defendants duct-taped him to her. In the process, defendants got duct tape on the child's face, which Kimball removed. As the State correctly notes in its brief, "Mother Michelle Kimball no more consented to the restraint of young Paul Tilley than she consented to her own restraint." The State presented substantial evidence that Kimball's son was not restrained with Kimball's consent, and accordingly, defendants' assignment of error is overruled.

Defendant Commodore also contends that Kimball's son was not restrained for the purpose of facilitating the commission of a felony. *See* N.C. Gen. Stat. § 14-39(a)(2) (2005). Specifically, defendant Commodore argues that "[t]he presence or absence of the child was immaterial to the assailants for the purposes of facilitating the robbery of the house." This argument also is without merit.

Defendant Commodore's attorney at trial expressly acknowledged during her motion to dismiss at the close of the State's evidence that "it was in this case necessary for the people to be bound for

the armed robbery to happen. Otherwise, there would have been a control issue; they wouldn't have been able to effectuate the robbery." Additionally, the evidence showed that Kimball repeatedly insisted that the child remain with her, and therefore, in order to control Kimball, defendants restrained the child with Kimball. The restraint of Kimball's son was done for the purpose of facilitating the robbery, and accordingly, this assignment of error is overruled.

Defendants next contend that the trial court erred in denying their motions to dismiss the first-degree kidnapping charges as to all of the victims, including Kimball's son, on the grounds that the State failed to prove that the victims were not released in a safe place. Specifically, defendants contend that they relinquished control over the victims and that the victims were released in a safe place because the victims (1) were left inside a house, not exposed to the elements; (2) easily removed the duct tape after defendants left; and (3) were able to contact the police within minutes after defendants left. We disagree.

In the case *sub judice*, the State presented substantial evidence that defendants failed to *release* the victims at all, and therefore, the State satisfied its burden of showing that defendants failed to release the victims in a safe place. *See* N.C. Gen. Stat. § 14-39(b) (2005). Our Supreme Court has held that although section 14-39(b) "does not expressly state that defendant must *voluntarily* release the victim in a safe place, we are of the opinion that a requirement of 'voluntariness' is inherent in the

statute. . . . This implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983) (emphasis in original). More recently, this Court held "that 'release' inherently contemplates an affirmative or willful action on the part of a defendant" and that an affirmative action requires more than the mere departure from the victim's premises. *State v. Love*, 177 N.C. App. 614, 626, 630 S.E.2d 234, 242, *disc. rev. denied*, 360 N.C. 580, 636 S.E.2d 192 (2006); *accord State v. Morgan*, __ N.C. App. __, __, 645 S.E.2d 93, 100 (2007); *Anderson*, __ N.C. App. at __, 640 S.E.2d at 801.

Here, the evidence is uncontroverted that the victims were left duct-taped inside the house — Watson, Fann, and Kimball, along with Kimball's son, were left on the living room floor, and Tilley was left duct-taped to a chair in the kitchen. Defendants may have departed the premises and relinquished immediate control over the victims, but they by no means "released" the victims in a safe place. Therefore, the trial court did not err in denying defendants' motions to dismiss the kidnapping charges, and accordingly, this assignment of error is overruled.

Defendant Commodore next contends that the trial court erred in instructing on flight on the grounds that the instruction was not supported by the evidence. We disagree.

"As to the issue of jury instructions, we note that choice of instructions is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion."

State v. Nicholson, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). As our Supreme Court has explained, "[a] flight instruction is proper where some evidence in the record reasonably supports the theory that defendant fled after commission of the crime charged." *State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000) (internal quotation marks, alteration, and citation omitted), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). "The fact that there may be other reasonable explanations for defendant's conduct does not render the [flight] instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). "Where there is some evidence supporting the theory of the defendant's flight, the jury must decide whether the facts and circumstances support the State's contention that the defendant fled." *State v. Norwood*, 344 N.C. 511, 535, 476 S.E.2d 349, 360 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997). Ultimately, "[t]he relevant inquiry is whether the evidence shows that defendant left the scene of the crime and took steps to avoid apprehension." *Grooms*, 353 N.C. at 80, 540 S.E.2d at 732.

In the instant case, defendant Commodore both left the scene of the crime and took steps to avoid apprehension. After receiving a tip from Crime Stoppers, police visited a residence suspected of housing defendant Commodore. Inside the apartment, police found defendant Commodore hiding "in a closet in the back of the residence behind some clothing." Our courts consistently have held that evidence that a defendant hid from police is sufficient to

warrant an instruction on flight. *See, e.g.*, *State v. Abraham*, 338 N.C. 315, 362, 451 S.E.2d 131, 156 (1994) (hiding in a closet); *State v. Green*, 321 N.C. 594, 607, 365 S.E.2d 587, 595 (same), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). The trial court did not abuse its discretion in instructing the jury on flight, and accordingly, defendant Commodore's assignment of error is overruled.

Next, defendant Myers argues that the trial court erred in permitting Kimball to testify as to the contents of her middle school yearbook on the grounds that such testimony constituted inadmissible hearsay and violated the best evidence rule. We disagree.

First, we note that the only basis for defendant Myers' objection at trial was hearsay. Although defendant Commodore objected on the basis of the best evidence rule, defendant Myers failed to join this objection. By failing to object on this basis at trial and by failing to specifically and distinctly argue plain error on appeal, defendant Myers has failed to preserve this issue for appellate review. *See* N.C. R. App. P. 10(b), (c) (2006); *State v. Bell*, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005).

Additionally, defendant Myers, citing *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), argues that Kimball's testimony on the contents of her middle school yearbook violates defendant Myers' rights under both the Confrontation Clause and Due Process Clause. However, defendant Myers did not make such an

argument at trial, and it is well-settled that "'[c]onstitutional questions that are not raised and passed upon in the trial court will not ordinarily be considered on appeal.'" *State v. Smith*, 359 N.C. 199, 208–09, 607 S.E.2d 607, 615 (quoting *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001)), *cert. denied*, 546 U.S. 850, 163 L. Ed. 2d 121 (2005). Therefore, defendant Myers has failed to preserve this issue for our review.

Defendant Myers further contends that Kimball's testimony about the yearbook photographs constituted inadmissible hearsay. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). Our Supreme Court has explained that a photograph itself is not a statement and cannot constitute hearsay, but a witness' statements about a photograph may be subject to the rule against hearsay. *See State v. Patterson*, 332 N.C. 409, 418, 420 S.E.2d 98, 102 (1992) (citing *United States v. Moskowitz*, 581 F.2d 14, 21 (2d Cir. 1978)). Nevertheless, not all statements describing a photograph constitute hearsay, and as our Supreme Court has explained, "'[i]f a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay.'" *State v. Chapman*, 359 N.C. 328, 354, 611 S.E.2d 794, 815 (2005) (quoting *Irick*, 291 N.C. at 498, 231 S.E.2d at 844-45).

In the instant case, Kimball testified on direct and cross that she saw defendants' photographs and names in her middle school yearbook. During re-direct, she was asked about specific details of defendants' photographs:

> [PROSECUTOR]: Michelle, you showed the yearbook to Detective Gray . . . on July 4th of 2004. . . . The photos in your yearbook, were they of adult males, an adult Benjamin Myers or an adult —
>
> [COUNSEL FOR DEFENDANT MYERS]: Your Honor —
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> [PROSECUTOR]: — Shawn Commodore?
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> [COUNSEL FOR DEFENDANT MYERS]: — I object to what was in the yearbook. That's hearsay at this point.
>
> [COUNSEL FOR DEFENDANT COMMODORE]: I will also, Your Honor, and best evidence.
>
> THE COURT: Overruled.

After the court overruled the objection, Kimball testified that the photographs in the yearbook were of defendants as children and that the photographs had defendants' names beside the photographs.

Kimball's testimony that defendants' yearbook photographs did not depict adult males did not constitute hearsay since it was not offered for the truth of the matter asserted. *See* N.C. Gen. Stat. § 8C-1, Rule 801 (2005). First, this testimony helped to explain the basis for Kimball's identification to Detective Gray describing defendants as the assailants. Additionally, shortly after defendants' objection, the prosecutor asked Kimball, "When you looked at the lineup with Detective Gray, did he have the middle school photos in the lineup?" Kimball responded, "No." Kimball's testimony describing the yearbook photographs differentiated

between the photographs from which she recognized defendants and the photographs of defendants included in the lineup, and therefore, her testimony also served to show that the photographic lineup was not impermissibly suggestive. *See, e.g.*, *State v. Davis*, 294 N.C. 397, 405, 241 S.E.2d 656, 661 (1978) ("[I]n order to be deemed impermissibly suggestive, the feature which distinguishes a defendant's photograph from the others used must somehow point to the defendant as the perpetrator of, or otherwise connect him with, the crime."). Kimball's testimony did not constitute hearsay, and the trial court did not err in overruling defendant Myers' objection. Accordingly, this assignment of error is overruled.

Finally, defendant Myers contends that the trial court erred in permitting Officer Gray to identify the middle school yearbook during re-direct examination on the grounds that the testimony exceeded the scope of cross-examination. We disagree.

"Redirect examination is usually limited to clarifying the subject matter of the direct examination, and dealing with the subject matter brought out on cross-examination. It is in the discretion of the trial court to permit the scope of the redirect to be expanded.'" *State v. Friend*, 164 N.C. App. 430, 436–37, 596 S.E.2d 275, 281 (2004) (alteration omitted) (quoting *State v. Pearson*, 59 N.C. App. 87, 89, 295 S.E.2d 499, 500 (1982)). As discussed *supra*, Sergeant Gray testified on direct that Kimball had shown him pictures of defendants from her middle school yearbook. Therefore, it was reasonable for the trial court to permit the introduction of the yearbook pages to clarify Sergeant Gray's

testimony on re-direct examination. *See State v. Waters*, 308 N.C. 348, 354, 302 S.E.2d 188, 192 (1983) ("[T]he trial judge ha[s] within his discretion the authority to permit the State to introduce new evidence on re-direct examination."). The trial court's decision to overrule defendant Myers' objection and permit the State to introduce the relevant pages of the yearbook on re-direct was not "'manifestly unsupported by reason'" or "'so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Lasiter*, 361 N.C. 299, 301–02, 643 S.E.2d 909, 911 (2007) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). Accordingly, defendant Myers' assignment of error is overruled.

Defendant Commodore has expressly abandoned his assignments of error numbers 3, 5, 7, and 8, and defendant Myers has failed to present arguments with respect to his assignments of error numbers 1 and 3. Accordingly, we decline to review these assignments of error. *See* N.C. R. App. P. 28(a), (b)(6) (2006).

No Error.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).