NO. COA09-1488

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 07 CRS 241669-71

KELVIN JEFFREY JONES

Appeal by Defendant from judgments entered 4 June 2009 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General K.D. Sturgis, for the State.

M. Alexander Charns, for Defendant.

BEASLEY, Judge.

Defendant appeals from the judgments entered after a jury found him guilty of robbery with a dangerous weapon, and one count each of false imprisonment and sexual battery. Defendant contends that the trial court erred when it denied his motion to dismiss the armed robbery charge, and that trial counsel rendered ineffective assistance by failing to request a complete recordation of the proceedings. We find no error.

On 5 September 2007, at about 11:00 a.m., Massiel Wingeier-Rayo was sitting on a park bench reading a book when Defendant walked up behind her and sat next to her on the bench. As he sat

down, Defendant grabbed Wingeier-Rayo's cell phone and car keys and put them in his pocket. While pointing a knife at her, Defendant told Wingeier-Rayo that he wanted her to masturbate him. Defendant told Wingeier-Rayo he did not want to hurt her, but that he would if he needed to. Defendant held the knife close to Wingeier-Rayo's side, and had her walk with him to another bench, which was located in a more secluded area of the park.

When Defendant took Wingeier-Rayo to the second bench, he told her to put her hand in his pants and masturbate him. Defendant also made a series of sexually suggestive remarks to Wingeier-Rayo. Wingeier-Rayo thought about trying to call for help on her cell phone, but it was still in Defendant's possession, and she repeatedly pleaded with Defendant not to rape her. The second bench was near a bathroom, and when Defendant heard people in the bathroom, he told Wingeier-Rayo that they needed to move. Wingeier-Rayo offered Defendant money and her car, but Defendant said he was more interested in sexual contact than those items. Defendant still had possession of Wingeier-Rayo's keys and phone.

When it appeared that Defendant would try to take her to a third, even more secluded area, Wingeier-Rayo fled. Wingeier-Rayo ran toward other people in the park. Hollie Martin, who was in the park with his daughter and granddaughter, saw Defendant sitting on the park bench with Wingeier-Rayo. About five minutes later, Martin heard screams and saw Wingeier-Rayo running out of the bushes. Wingeier-Rayo told Hollie that someone was trying to rape her, and he called 911. Defendant then emerged from the bushes and

initially walked toward Wingeier-Rayo, but quickly turned and ran. When Defendant ran away, Hollie chased him. Police officers soon arrived on the scene and joined in the chase.

Defendant jumped in a lake attempting to evade his pursuers, but was unable to cross it. When Defendant came out of the lake and returned to shore, Sergeant Tim Wilson apprehended him and made him lie on the ground until other officers arrived. Retracing Defendant's route from the park benches, Wilson found Wingeier-Rayo's cell phone, a folding knife, and car keys near the bathroom. When officers searched Defendant, they found a set of keys in his pocket.

Defendant testified on his own behalf, and did not refute the basic facts of the incident. Defendant testified that he had "exposed [himself] in public . . . for a long time, a very long time," but said that he did not intend to take Wingeier-Rayo's property. Defendant contended that he put the keys, phone, and knife behind the bathroom because he panicked, and because he needed to hide the knife.

The trial court denied Defendant's motion to dismiss the charges at the close of the State's evidence and again after the conclusion of all the evidence. The jury found Defendant guilty of robbery with a dangerous weapon, and one count of false imprisonment and sexual battery. Based on Defendant's prior record level of III, the trial court imposed a term of 103 to 133 months imprisonment for robbery with a dangerous weapon, 150 days imprisonment for sexual battery to run consecutive to the sentence

for robbery with a dangerous weapon, and 120 days imprisonment for false imprisonment to run consecutive to the sentence for sexual battery. Defendant entered notice of appeal in open court.

In his first argument on appeal, Defendant contends that the trial court erred when it denied his motion to dismiss because there is insufficient evidence that he intended to permanently deprive Wingeier-Rayo of her property. We disagree.

"When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the 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. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004)(quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003).

"Armed robbery has the following essential elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." *State v. Willis*, 127 N.C. App. 549, 551, 492 S.E.2d 43, 44 (1997). "In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property." *State v. Jones*, 57 N.C. App. 460, 463, 291 S.E.2d 869, 871 (1982)(citing

State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966)). The intent to permanently deprive a victim of her property can be inferred when the defendant abandons the property. *State v. Mann*, 355 N.C. 294, 304, 560 S.E.2d 776, 783 (2002).

Here, viewing the evidence in the light most favorable to the State, there is ample evidence to withstand Defendant's motion to dismiss the armed robbery charge. Defendant acknowledged in his own testimony that he pointed a knife at Wingeier-Rayo, took the cell phone and keys from Wingeier-Rayo, never returned them to her at any point during the incident, and hid them behind the bathroom. Defendant's abandonment of the property demonstrates, at the very least, an indifference as to whether Wingeier-Rayo recovered her property. *Id*. Accordingly, we hold that the evidence sufficiently demonstrates Defendant's intent to permanently deprive Wingeier-Rayo of her property.

Defendant's remaining argument is that trial counsel rendered ineffective assistance by failing to request a complete recordation of the proceedings. Appellant concedes that he cannot demonstrate prejudice from this purported error based on the appellate record, and that he makes this argument for "preservation purposes" only. As Defendant suggests, this argument is without merit.

We have previously addressed this exact issue in *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675 (2005). In *Verrier*, as in this case, the defendant contended that his trial counsel rendered ineffective assistance by failing to request a complete recordation. In *Verrier*, we declined to find that counsel rendered

ineffective assistance, and noted that N.C. Gen. Stat. § 15A-1241 (2009) does not require a complete recordation:

> We recognize that appellate counsel may be at a disadvantage when preparing an appeal for a case in which he did not participate at the trial level, as appellate counsel is somewhat bound by the decisions and strategies of trial counsel. However, this Court cannot grant defendant the relief he seeks on this issue. It is outside the realm of this Court's function as the judiciary to modify statutory law. That role is reserved for the legislature.

Id. at 130, 617 S.E.2d at 680.

Accordingly, we hold that Defendant's argument, as it did in *Verrier*, lacks merit.

No Error.

Judges STEPHENS and ERVIN concur.

Reported per Rule 30(e).