

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-1072-3
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v.

Orange County

Nos. 09 CRS 543

BRYANT LAMONT BOYD

09 CRS 51487-89

Appeal by defendant from judgment entered 14 April 2010 by Judge Abraham P. Jones in Orange County Superior Court. The case was originally heard before this Court on 10 March 2011. See *State v. Boyd*, __ N.C. App. __, 714 S.E.2d 466 (2011) (hereinafter "*Boyd I*"). On remand by order of the North Carolina Supreme Court, a second opinion was filed by this Court on 7 August 2012. See *State v. Boyd*, __ N.C. App. __, 730 S.E.2d 193 (2012) (hereinafter "*Boyd II*"). Upon remand again from the Supreme Court, *State v. Boyd*, __ N.C. __, 742 S.E.2d 798 (2013), this opinion filed 3 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott and Agency Legal Specialist Brian C. Tarr, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Bryant Lamont Boyd ("Defendant") appealed from a sexual battery conviction and from having attained habitual felon status. The case was originally heard before this Court on 10 March 2011. See *Boyd I*, __ N.C. App. at __, 714 S.E.2d at 466. Defendant argued that the trial court erred by (1) instructing the jury on a theory of second degree kidnapping that was not charged in the indictment or supported by evidence; (2) instructing the jury on a theory of sexual battery Defendant claims was unsupported by evidence; (3) deviating from the pattern jury instructions on the first degree burglary charge; (4) overruling Defendant's objection to, and failing to intervene *ex mero motu* during, the State's closing argument; (5) allowing Defendant to be shackled in view of the jury during the habitual felon stage of the trial; and (6) permitting the introduction of evidence in the habitual felon phase that Defendant claims was irrelevant and impermissibly prejudicial. *Id.* at __, 714 S.E.2d at 468-69.

This Court found no error in part, granted a new trial in part, vacated in part, and remanded. *Id.* at __, 714 S.E.2d at 476. We found no error on issues two through four above, but found error with the trial court's jury instructions on second

degree kidnapping, though we did not apply plain error review. *Id.* at ___, 714 S.E.2d at 469. Accordingly, we vacated Defendant's conviction for kidnapping and remanded for a new trial. *Id.* Because Defendant's kidnapping conviction was one of the predicate felonies for Defendant's habitual felon conviction, we also vacated and remanded that judgment. *Id.* As a result, we did not reach Defendant's last two arguments related to the administration of his habitual felon hearing. *Id.*

The State petitioned our Supreme Court for discretionary review, and on 13 June 2012, our Supreme Court allowed the State's petition only "for the limited purpose of remanding to the Court of Appeals for application of plain error review pursuant to *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012)," which clarifies the appropriate standard of review for plain error. *State v. Boyd*, 366 N.C. 210, 739 S.E.2d 838 (2012). As per our Supreme Court's order, we conducted a new analysis under plain error review on issue one: whether the trial court erred by instructing the jury on a theory of second degree kidnapping that was not charged in the indictment or supported by evidence. *Boyd II*, ___ N.C. App. at ___, 730 S.E.2d at 195-96. After review, the majority vacated Defendant's

kidnapping conviction and granted Defendant a new trial. *Id.* at ___, 730 S.E.2d at 197-98. Accordingly, we again declined to address Defendant's arguments regarding his habitual felon status. Judge Stroud, dissenting by separate opinion, argued that application of plain error review "require[d] us to find no plain error as to defendant's conviction for second-degree kidnapping." *Id.* at ___, 730 S.E.2d at 198 (Stroud, J., dissenting). Judge Stroud's dissent also addressed the remaining issues regarding Defendant's habitual felon status. *Id.* at ___, 730 S.E.2d at 201 (Stroud, J., dissenting).

The State once again sought review, this time from the decision of a divided panel pursuant to N.C. Gen. Stat. § 7A-30(2) (2011). On 13 June 2013, our Supreme Court filed a *per curiam* opinion reversing the majority in *Boyd II* "for the reasons stated in the dissenting opinion" and remanded the case "for consideration of the remaining issues." *State v. Boyd*, ___ N.C. ___, 742 S.E.2d 798 (2013). Therefore, in accordance with the Supreme Court's mandate, our earlier decision granting Defendant a new trial on the kidnapping charge is reversed, and Defendant's conviction is affirmed.

This leaves us to review the remaining issues of Defendant's appeal. After careful review, and for the reasons

stated in Judge Stroud's dissent in *Boyd II*, ___ N.C. App. at ___, 730 S.E.2d at 201-03, we find no abuse of discretion with the trial court's decision to shackle Defendant during his habitual felon hearing, and no plain error with regard to the introduction of Defendant's criminal record during the same. We further note that the portion of our opinion filed 2 August 2011 addressing issues two through four of Defendant's appeal remains in full force and effect.

NO ERROR.

Judges STROUD and DILLON concur.

Report per Rule 30(e).