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NO. COA10-143

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 07 CRS 54669, 54670-71

TERRANCE DEON JOHNSON

Appeal by defendant from judgment entered 20 August 2010 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 1 September 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard R. Slipsky, for the State.

Sue Genrich Berry for defendant-appellant.

BRYANT, Judge.

When the only evidence of alibi was defendant's denial that he was present at the crime scene and where the evidence does not reasonably exclude the possibility of defendant's presence at the crime scene, the trial court did not err in not instructing the jury on the law of alibi. Further, where it could not be determined that the amount of restitution was supported by evidence adduced during the trial, or at sentencing, we remand this matter to the trial court for further proceedings regarding restitution.

Facts

On 25 February 2008, a Pitt County grand jury indicted Defendant Terrance Deon Johnson for felonious possession of stolen goods, first degree sexual offense, first degree kidnapping, first degree burglary, robbery with a dangerous weapon, and larceny of a motor vehicle. On 20 August 2009, a jury found defendant guilty of possession of stolen goods, second degree sexual offense, first degree kidnapping, second degree burglary, robbery with a firearm, and misdemeanor larceny. The trial court arrested judgment on the misdemeanor larceny and entered judgment on possession of stolen goods, second degree sexual offense, second degree kidnapping, second degree burglary, and robbery with a dangerous weapon.

The evidence presented at trial tended to show that on Thursday, 17 May 2007, Samantha Learner[1], the victim — a twenty-four-year-old mother of two — came home from work at 10:20 p.m. with her two children — a three month old and an eighteen month old. When she entered her apartment, she turned on the television and observed several items scattered about. Two men wearing bandanas over the bottom portion of their faces then approached from the rear of the apartment; one man had a small gun. Ms. Learner did not recognize either intruder. One was a skinny black male with short hair; the other, more stout, was a black male of dark complexion wearing his hair in dredlocks with a ponytail. The stout intruder wore a black t-shirt, dark colored jeans, and brown Timberland boots. While in the apartment, the intruders passed the gun between them. Ms. Learner was ordered to hand over her jewelry

[1] A pseudonym has been used to protect the victim's identity.

and any money she had, and to sign over the title to her car. She later told police the intruders took "her keys to Burger King and her vehicle[, a 2001 black Dodge Durango,] . . . a Curves tin box full of coins along with a cellular flip phone telephone [sic] and $230 in cash." At gun point, the stout intruder forced the victim to perform fellatio and, after putting on a condom, attempted to engage in anal sex. Just before leaving, the stout intruder removed his bandana and kissed Ms. Learner's face. Ms. Learner testified that the intruder was one inch away and that she got "a clear look at his face[.]"

Patrol Officer Chad Harper of the Grifton Police Department was the first law enforcement officer to arrive at the scene. After speaking with Ms. Learner, Officer Harper called the Pitt County Sheriff's Office and advised them to be on the lookout for Ms. Learner's vehicle. Shortly thereafter, Officer Harper received a call that a vehicle matching the description of Ms. Learner's vehicle had been found. Police Chief Warren Morrisette was on the scene and remained with Ms. Learner while Officer Harper drove to a residence located at 4224 Martin Luther King Jr Street in Ayden, approximately 6 to 8 miles from Ms. Learner's residence. Upon his arrival, Officer Harper observed a black Dodge Durango matching Ms. Learner's description of her vehicle; except, the CD player had been removed. Officer Harper then applied for, received, and executed a search warrant for the premises. From a bedroom in the residence, law enforcement collected a duffel bag with Ms. Learner's name engraved on it, a Pioneer radio, one pair of tan

Timberland boots, one revolver, two sets of keys — one set with a "Burger King ring" and another set to a vehicle, a Curves metallic tin box, and a plastic bag full of coins. The name Terrance was written on the footboard of a bed in the room. A used condom was also seized from a trash can outside of the residence. The Dodge Durango was determined to be Ms. Learner's. Defendant, who resided at 4224 Martin Luther King Jr. Street, was detained by the Ayden Police Department and the Pitt County Sheriff's Office along with three other people who were in the front yard when law enforcement arrived.

The next day, approximately ten hours after the incident, Police Chief Morrisette presented Ms. Learner with an eight person photo array. Ms. Learner immediately picked defendant as one of the intruders in her apartment. At trial, she testified that she was "[o]ne thousand percent" sure that defendant was one of her two assailants. Defendant however testified that on the evening of 17 May 2007, he was in Greenville and did not return to his residence in Ayden until almost 11:00 p.m.

The jury returned verdicts finding defendant guilty of possession of stolen goods, second degree sexual offense, first degree kidnapping, second degree burglary, robbery with a firearm, and misdemeanor larceny. The trial court arrested judgment on the charge of misdemeanor larceny and awarded restitution to Ms. Learner in the amount of $4,935.22. The trial court then entered judgment consistent with the jury's verdicts on possession of stolen goods, second degree sexual offense, second degree burglary,

and robbery with a dangerous weapon. On the charge of first degree kidnapping, the trial court entered judgment for second degree kidnapping.[2] For possession of stolen goods, the trial court sentenced defendant to 120 days in the custody of the Department of Correction; 100 to 129 months for second degree sexual offense; 29 to 44 months for second degree kidnapping; 15 to 18 months for second degree burglary; and 77 to 102 months for robbery with a dangerous weapon. All sentences were to be served consecutively. Defendant appeals.

On appeal, defendant raises three issues: did the trial court err in (I) denying defendant's request for an alibi instruction; (II) awarding restitution; and (III) sustaining the State's objection to testimony regarding a seized condom.

I

Defendant first argues that the trial court erred in failing to give an alibi instruction per his request in violation of defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Article 1, sections 18, 19, 23, 24, and 26 of the Constitution of North Carolina. Defendant contends that his testimony supports the inclusion of an alibi instruction in the jury charge. We disagree.

Under North Carolina Rules of Appellate Procedure, Rule 10(b)

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[2] Defendant could not be convicted of second degree sexual offense and first degree kidnapping where the sexual offense was the basis for the first degree kidnapping conviction. *See State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997).

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(b)(2) (2009).

Here, during the charge conference, the following exchange occurred:

> THE COURT: [Defense counsel], anything else regarding the charge conference?
>
> . . .
>
> [Defense]: The--my defendant says to take note that he did have an alibi and he has a witness to it.
>
> . . .
>
> THE COURT: Do you wish to be heard regarding that?
>
> [Prosecutor]: No, sir. Your honor, there's been no evidence of an alibi other than the defendant's own testimony.
>
> THE COURT: I understand that.

The trial court did not instruct the jury on the defense of alibi. After the jury charge, the trial court made the following request for corrections:

> THE COURT: Now counsel, before sending the verdict forms to the jury and allowing them to begin their deliberations, I will consider any requests for corrections to the charge to the jury or any additional matters that you think are necessary or

> appropriate to submit a proper and accurate charge to the jury. Are there any specific requests for corrections or additions to the charge or any objection to the charge given?
>
> . . .
>
> [Defense]: Well, Judge, I had requested 101.36[, an instruction on the highest aim of every legal contest]. Your Honor chose not to give that. I had requested that only--I had requested that only felonious breaking and entering go, and Your Honor has already ruled on that. I'm just renewing that and do not care to be heard as to that.

Where a defendant fails to object to a trial court's instruction in the jury charge, our review is for plain error. *See State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (citing N.C. R. App. P. 10(c)(4)).[3] "Plain error analysis applies to evidentiary matters and jury instructions." *Garcell*, 363 N.C. at 35, 678 S.E.2d at 634 (citation omitted).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or

[3] We do not address defendant's Fifth, Sixth, and Fourteenth Amendment claims. "[C]onstitutional error will not be considered for the first time on appeal." *State v. Wilkerson*, 363 N.C. 382, 420, 683 S.E.2d 174, 198 (2009) (citation omitted).

> public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Cummings, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[I]n deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Pate*, 187 N.C. App. 442, 445, 653 S.E.2d 212, 215 (2007) (citation omitted).

> "To constitute an alibi, it must appear that the accused was at some other specified place at the time of the commission of the crime. . . ." 22 C.J.S., Criminal Law § 40 (1961) . . . . Furthermore, a defendant's mere denial that he was at the place when the crime was committed is insufficient to justify the giving of an instruction on alibi. 53 Am. Jur., Trial § 653 (1945).

State v. Green, 268 N.C. 690, 691-92, 151 S.E.2d 606, 608 (1966).

> An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal.

State v. Hunt, 283 N.C. 617, 619, 197 S.E.2d 513, 515 (1973) (citations omitted).

Here, defendant was the only witness to assert he was somewhere other than Grifton, North Carolina near the time Ms.

Learner was assaulted. The three people also detained by law enforcement upon discovering Ms. Learner's vehicle in front of defendant's residence — defendant's cousin and two of her friends — did not give alibi testimony. This was insufficient to trigger an instruction on alibi. *See Green*, 268 N.C. at 692, 151 S.E.2d at 608 ("If the evidence does not reasonably exclude the possibility of the presence of defendant at the scene of the alleged crime, it is not error to fail to instruct the jury on the law of alibi.").

We further note that even assuming arguendo the trial court's failure to give an alibi instruction was error, it cannot be fairly said the instructional mistake had a probable impact on the jury's finding that defendant was guilty. *See Cummings*, 361 N.C. at 470, 648 S.E.2d at 807. Accordingly, defendant's argument is overruled.

II

Next, defendant contends the trial court erred in awarding the victim restitution in violation of defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution; Article 1, section 27 of the North Carolina Constitution; and N.C. Gen. Stat. § 15A-1340 *et seq.* We remand this matter for further proceedings.

"[E]ven where a defendant does not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18)." *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) (citation and internal quotations omitted).

"If the defendant is being sentenced for an offense for which the victim is entitled to restitution . . . the court shall, in addition to any penalty authorized by law, require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(b) (2009). "In determining the amount of restitution to be made . . . the court is not required to make findings of fact or conclusions of law on these matters." N.C. Gen. Stat. § 15A-1340.36 (2009). However, "[t]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citing *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)). "Furthermore, this Court has held that the 'unsworn statements of the prosecutor . . . [do] not constitute evidence and cannot support the amount of restitution recommended.'" *State v. Replogle*, 181 N.C. App. at 584, 640 S.E.2d at 761 (2007) (citing *State v. Buchanan*, 108 N.C. App. 338, 341[,] 423 S.E.2d 819, 821 (1992)).

Here, during sentencing, defendant acknowledged receiving a copy of the prosecution's restitution worksheet. Subsequently, the trial court entered a Restitution Worksheet, Notice and Order ordering defendant to pay Ms. Learner $4,935.22. However, the record does not indicate how this amount was determined. While evidence was presented showing that Ms. Learner was taken to a hospital where a rape kit was performed and medication to prevent

the transmission of disease was administered, that significant damage was done to Ms. Learner's vehicle, and that a number of items were taken from her home, the record does not give any evidence of the cost of the services provided, the value of the items taken and not returned, or the cost to repair Ms. Learner's damaged property. Accordingly, we remand the matter for further proceedings as to the basis of the restitution amount.

III

Last, defendant argues that the trial court erred by sustaining the State's objection to defendant's cross-examination regarding the status of the condom seized by law enforcement. By sustaining the State's objections, defendant contends he was unable to show that law enforcement prematurely stopped their investigation with him. Defendant contends this violated his rights under the federal and state constitutions as well as our Rules of Evidence 401 and 402. We dismiss this argument.

> [I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. [Our Supreme Court] also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Raines, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (citing *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)) (brackets in the original).

Before the trial court, defendant made no offer of proof to establish the significance of the excluded evidence, and on appeal,

defendant makes no showing of prejudice based on the exclusion. Accordingly, defendant's argument is dismissed.

No error in part; remanded in part; dismissed in part.

Judges STEELMAN and BEASLEY concur.

Report per Rule 30(e).