NO. COA13-479
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

STATE OF NORTH CAROLINA

v. Wayne County
No. 10 CRS 55729-30, 11 CRS 5726

TRAVIS HARRIS

Appeal by defendant from judgments entered 20 September 2012 by Judge Walter H. Godwin, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 9 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant.

ELMORE, Judge.

On 7 November 2011, Travis Harris (defendant) was indicted by the Wayne County Grand Jury in three cases for a total of six criminal offenses: 1) felony breaking and entering (11 CRS 5726); 2) second degree kidnapping of George F. Peele, Jr. (10 CRS 55729); 3) assault with a deadly weapon inflicting serious injury of George Peele (10 CRS 55729); 4) armed robbery of

George and Mary Peele (10 CRS 55730); 5) conspiracy to commit armed robbery (10 CRS 55730); and 6) second degree kidnapping of Mary Peele (10 CRS 55730). These cases were tried together on defendant's not guilty plea; defendant noticed the affirmative defense of duress. A jury found defendant guilty of each offense as charged. On 20 September 2012, Judge Walter H. Godwin, Jr. sentenced defendant separately on each count and ordered the sentences to run consecutively for a total of 171 months minimum imprisonment. Defendant now appeals. After careful consideration, we vacate portions of the trial court's judgment and remand the case to the trial court to take appropriate action consistent with this opinion.

I. Background

George F. Peele, Jr. and Mary Peele are an elderly married couple who lived in a small house in Goldsboro and owned some rental property. A man named Bakari Teachey had rented property from the Peeles in the past; however, he had been evicted for not paying rent. On 4 November 2010, the Peeles were at home after lunch when Mrs. Peele heard a "strange noise" at the back door. She went to investigate while Mr. Peele remained in his recliner. Mrs. Peele testified that the "wood door kind of rattled" and then defendant and another man pushed it open and

entered the kitchen. Defendant pointed a rifle at Mrs. Peele, pushed her up against the china cabinet, and said "give me your money." She responded, "I do not have any money to give to you." Defendant walked to the recliner where Mr. Peele was sitting and "took the rifle, and he bursted [sic] his face open on the left side" and then delivered with his fists "blow after blow." Defendant removed Mr. Peele's belt and told Mrs. Peele to "tie him up." By then, Mr. Peele was "completely knocked out" and Mrs. Peele did not use the belt to restrain her husband.

Defendant grabbed Mrs. Peele's left wrist and led her to a bedroom in search of money. Mrs. Peele went to her filing cabinet and gave defendant a small box containing rent money collected from the Peeles' tenants. The other intruder found a pistol on the dresser and took it. The men exited through the back door. Defendant was discovered hiding in a barn and arrested without incident.

Mrs. Peele testified that she believed Bakari Teachey initiated the robbery because the Peeles "kicked him out" of their mobile home rental property, and Teachey "knew how things worked" as far as how the "house operated as far as the taking

of [rent] money." Mr. Peele's testimony corroborated Mrs. Peele's.

Mr. Peele was treated by emergency room physician Dr. Terry Grant, who testified that Mr. Peele sustained bruising, swelling and tenderness to his face, a cut lip, a bleeding nose, and had elevated blood pressure. Mr. Peele was released from the hospital that same day.

Detective Rick Farfour with the Wayne County Sheriff's Office interviewed defendant on the date of arrest and again in December 2010, at defendant's request. At the December interview, defendant was *Mirandized* for a second time. He then disclosed Teachey's involvement in the armed robbery to Detective Farfour, stating that he participated in the robbery under duress because Teachey had put a gun to his chest and said "this is what you have to do."

Defendant testified that he was home on 4 November when Teachey came by and asked him and his cousin, Alfonso Mack, to play basketball at the YMCA. The two agreed. However, Teachey instead drove them to a nearby residence and demanded that they rob it. Defendant said, "[h]old on. You didn't say anything about breaking into no house." When a man came to the door, defendant said "[w]e've got the wrong house" and walked off.

Thereafter, defendant alleged that Teachey put the gun to his chest and said, "[l]ook, this is what you're about to go do. You're about to go rob my old landlord." Defendant did not "want to risk saying no because [he] could have been dead on that man's living room floor." Based on these facts, defendant noticed the affirmative defense of duress.

II. Second Degree Kidnapping

Defendant argues that the trial court erred in denying his motion to dismiss the charges of second degree kidnapping because there was insufficient evidence of restraint to support both kidnapping convictions. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On a motion to dismiss for insufficiency of evidence, "'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.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the

trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose,* 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"A person is guilty of second degree kidnapping if, in addition to certain other elements, he is found to have unlawfully confine[d], restrain[ed], or remove[d] from one place to another, any other person 16 years of age or over without the consent of such person[.]" *State v. Thomas*, 196 N.C. App. 523, 533-34, 676 S.E.2d 56, 63 (2009) (alteration in original); *see* N.C. Gen. Stat. § 14-39 (2011). The term "restrain" includes a restriction "by force, threat or fraud, without a confinement. Thus, one who is physically seized and held, or whose hands or feet are bound, or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of [N.C. Gen. Stat. § 14-39]." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

Defendant relies on *Fulcher*, where our Supreme Court held:

> It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

Id.

Accordingly, defendant argues that the State failed to prove that defendant restrained Mr. Peele and Mrs. Peele beyond the restraint inherent in the commission of the armed robbery.

In ascertaining whether there is sufficient evidence of restraint to support a kidnapping charge:

> The court may consider whether the defendant's acts place the victim in greater danger than is inherent in the other offense, or subject the victim to the kind of danger and abuse that the kidnapping statute was designed to prevent. The court also considers whether defendant's acts cause additional restraint of the victim or increase the victim's helplessness and vulnerability.

Thomas, 196 N.C. App. at 534, 676 S.E.2d at 63.

In *State v. Featherson*, we held that the restraint of the victim was an inherent and integral part of the armed robbery where the robbers bound the victim loosely with duct tape "in such a manner as to allow [the victim] to escape quickly." 145 N.C. App. 134, 139, 548 S.E.2d 828, 832 (2001).

In the case *sub judice*, there is even less evidence of restraint than in *Featherson*. First, there is insufficient evidence that Mr. Peele was physically seized, bound, or threatened by the use of a deadly weapon. After assaulting Mr. Peele, defendant removed Mr. Peele's belt and ordered Mrs. Peele to tie him up. However, when asked whether she did so, Mrs. Peele responded, "no way." While deplorable, defendant's actions did not cause additional restraint of Mr. Peele or expose him to greater harm than that inherent in the armed robbery.

Second, while holding Mrs. Peele at gunpoint, defendant escorted her by the arm into a bedroom. Mrs. Peele turned over a small box containing money, and defendant left through the back door. At no time was Mrs. Peele confined in a room, bound, assaulted, or otherwise restrained. Thus, any restraint of Mr. and Mrs. Peele was for the purpose of facilitating the

commission of the armed robbery. Based on the record, we hold that the trial court erred in denying defendant's motions to dismiss the second degree kidnapping charges of Mr. and Mrs. Peele. Accordingly, we vacate the second degree kidnapping judgments (10 CRS 55729 and 10 CRS 55730) and remand for resentencing. Given our conclusion, defendant's second and fourth issues on appeal are moot.

III. Serious Injury and Deadly Weapon

Defendant argues that the trial court erred in submitting the charge of assault with a deadly weapon inflicting serious injury to the jury when there was insufficient evidence that he used a "deadly weapon" and insufficient evidence that Mr. Peele suffered a "serious injury." We disagree. We review this issue *de novo*. *Smith*, *supra*.

The elements of assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) are 1) an assault, 2) with a deadly weapon, 3) inflicting serious injury, 4) not resulting in death. A deadly weapon is "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Rogers*, 153 N.C. App. 203, 210, 569 S.E.2d 657, 662 (2002) (citations omitted). This Court has held that hands and fists can be deadly weapons, when the manner

in which they are used and the relative size and condition of the parties involved is taken into account. *Id.* at 211, 569 S.E.2d at 663. A "serious injury" is "physical or bodily injury resulting from an assault with a deadly weapon. The injury must be serious but it must fall short of causing death." *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 373-74 (1978) (citation omitted).

In the instant case, the State presented evidence that Mr. Peele was seventy-seven years old when defendant struck repeated blows to his head and face with his fists. Mr. Peele testified, "[defendant] knocked me out. I don't even remember when he left. I was knocked out." Mr. Peele suffered extreme facial bruising and swelling, bleeding from his nose, and an abrasion on his nose and lip as a result. Accordingly, there was substantial evidence put before the jury on the issues of 1) whether defendant used his fists as a deadly weapon, and 2) whether Mr. Peele suffered a serious injury. The trial court did not err.

IV. Lesser-Included Offense of Simple Assault

Defendant argues that the trial court erroneously failed to submit the lesser-included offense of simple assault to the jury. We agree.

Defendant did not request the lesser instruction of simple assault at trial. We review "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Here, the trial court did not instruct the jury that defendant's fists were a deadly weapon as a matter of law. Instead, it allowed the jury to decide: "In determining whether the fists were a deadly weapon, you should consider the nature . . . of the fist, the manner in which they were used, and the size and strength of the Defendant as compared to the victim." As such, the jury could have concluded that defendant's fists were not used as a deadly weapon.

In *State v. Palmer*, 293 N.C. 633, 635, 239 S.E.2d 406, 407 (1977), the defendant was found guilty of assault with a deadly weapon when he assaulted the victim with a "hard wooden club weighing two pounds and eleven ounces[.]" Our Supreme Court considered whether the trial court erred by refusing to submit

the lesser-included offense of simple assault to the jury when there was "a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary." *Id.* at 643, 239 S.E.2d at 413. The Supreme Court held that because the facts created a question as to whether the instrument constituted a deadly weapon, it was error not to instruct the jury on the lesser-included offense of simple assault. *Id.* at 643-44, 239 S.E.2d at 413. Moreover, the "[f]ailure to submit this option was not cured by the verdict finding that the stick was a deadly weapon" because "it cannot be known whether the jury would have convicted defendant of the lesser offense if it had been permitted to do so." *Id.* at 644, 239 S.E.2d at 413.

Similarly in *State v. Smith*, *supra*, the defendant, who was convicted of assault with a deadly weapon on a government official, argued that the trial court erred in failing to instruct the jury on the lesser-included offense of misdemeanor assault on a government official when it did not determine as a matter of law that the defendant used a deadly weapon. *Smith*, 186 N.C. App. at 65, 650 S.E.2d at 35. This Court agreed with

the defendant. We held that because the trial court properly submitted to the jury the question of whether defendant's use of "hands and water" constituted a deadly weapon, it committed prejudicial error by refusing to submit to the jury the lesser-included offense of misdemeanor assault. We reasoned that, if so instructed, the jury could have found that the defendant did not use a deadly weapon and was only guilty of misdemeanor assault on a government official. *Id.* at 66, 650 S.E.2d at 35-36.

Based on *Palmer* and *Smith*, because the trial court properly put the issue of whether defendant's fists constituted a deadly weapon before the jury, it should have instructed on the lesser-included offense of simple assault. While the jury found that defendant's fists were used as a deadly weapon, it could have found the opposite given the opportunity. We hold that the trial court erred. Furthermore, such error was sufficiently prejudicial to constitute plain error. *State v. Lowe*, 150 N.C. App. 682, 687, 564 S.E.2d 313, 316 (2002) (holding that it was plain error for the trial court not to instruct on the lesser-included offense of misdemeanor assault inflicting serious injury); *see also State v. Clark*, 201 N.C. App. 319, 327, 689 S.E.2d 553, 559 (2009) (holding that the trial court committed

plain error in failing to submit to the jury the lesser-included offense of assault on a government official). Accordingly, we vacate this judgment based upon the conviction of the assault with a deadly weapon inflicting serious injury charge (10 CRS 55729).

V. Right to Remain Silent

At trial, Detective Farfour was asked, "[d]id you ever receive any other requests from the defendant, Travis Harris, to come speak to him [after the December 2010 meeting]?" He replied, "No." Defendant now contends that he is entitled to a new trial in all six convictions because the admission of this testimony violated his Constitutional right to remain silent. We disagree.

The standard of review is plain error as defendant failed to object to the admission of this testimony at trial. *Gregory, supra*. We first note that the trial court might not have erred in admitting Detective Farfour's testimony. However, we need not answer that question to dispose of this issue on appeal. *See State v. Ray*, 364 N.C. 272, 278, 697 S.E.2d 319, 323 (2010) (determining whether the admission of the defendant's prior act was prejudicial error assuming *arguendo* that the court erred). Instead, we assume *arguendo* that the trial court erred in

admitting Detective Farfour's testimony and must now decide whether the error was prejudicial.

Defendant relies on *State v. Moore*, where the officer testified, "I read him his Miranda Rights, but he refused to talk about the case at that time[.]" 366 N.C. 100, 102, 726 S.E.2d 168, 171 (2012). Our Supreme Court held: "This testimony referred to defendant's exercise of his right to silence, and its admission by the trial judge was error." *Id.* at 105, 726 S.E.2d at 172. However, after conducting a plain error review, the *Moore* court concluded that the admission of the statement did not amount to plain error because:

> The prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy's prohibited responses; the prosecutor did not cross-examine defendant about his silence; the jury heard the testimony of all witnesses, including defendant; and the evidence against defendant was substantial and corroborated by the witnesses. For the above reasons, we hold that defendant has not carried his burden, and the admission of Officer Murphy's testimony referring to defendant's post-*Miranda* exercise of his right to remain silent, although error, was not plain error. Thus, defendant is not entitled to a new trial on this basis.

Id. at 109, 726 S.E.2d at 175. Similarly, here the State did not emphasize or capitalize on Detective Farfour's testimony or cross- examine defendant about his silence; the jury heard the

testimony of all witnesses, including defendant, and the evidence against defendant was substantial and corroborated by the witnesses. Accordingly, assuming *arguendo* that Detective Farfour's testimony was error, it was not plain error.

VI. Conclusion

In sum, the State failed to show sufficient evidence of restraint separate and apart from the restraint inherent in the underlying felony to support defendant's second degree kidnapping convictions. We vacate the second degree kidnapping judgments (10 CRS 55729 and 10 CRS 55730) and remand for resentencing. Furthermore, we hold that the trial court did not err in denying defendant's motion to dismiss the assault with a deadly weapon inflicting serious injury charge: the issues of whether defendant's fists constituted a deadly weapon and whether Mr. Peele suffered a serious injury were properly placed before the jury. However, because the jury was in the position to discern whether defendant's fists were used as a deadly weapon, the trial court committed plain error in failing to instruct the jury on the lesser-included offense of simple assault. We vacate the judgment for assault with a deadly weapon inflicting serious injury charge (10 CRS 55729). Finally, the trial court did not commit plain error in admitting

the testimony of Detective Farfour. Accordingly, we vacate parts of the trial court's judgments and remand the case to the trial court to take appropriate action consistent with this opinion.

Vacated; new trial; no error; no prejudicial error; all in part.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).