IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-149

Filed: 17 November 2015

Wake County, No. 13 CRS 651

STATE OF NORTH CAROLINA

v.

SHABAR MARSHALL

Appeal by Defendant from judgment entered 15 November 2013 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 26 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

INMAN, Judge.

Shabar Marshall ("Defendant") appeals from judgment entered after a jury found him guilty of first degree burglary, second degree kidnapping, and felony larceny. On appeal, Defendant argues that the trial court erred by: (1) instructing the jury that it could convict Defendant of second degree kidnapping if it found that he moved the victim from her bedroom to the kitchen for the purpose of terrorizing

her and (2) failing to intervene *ex mero motu* to prevent or correct prosecutorial misconduct.[1]

After careful review, we conclude that the trial was free of error.

Factual & Background

The following evidence was presented at trial: On 11 December 2012 at approximately 5:00 a.m., Defendant forced entry into the Raleigh residence of Kortney Shearin. Ms. Shearin awoke in her bedroom to a flashlight shining in her face. She saw the silhouette of a man in the doorway and yelled at him to get out of the house. Ms. Shearin's four year-old son was sleeping in the bedroom across the hall and her nine year-old daughter was sleeping in the room next to her. Defendant walked into Ms. Shearin's bedroom, pulled out what appeared to be a gun, and said "Give me your money." Ms. Shearin stood up and Defendant held the gun to her neck while continuing to shine the flashlight in her face. She told Defendant that her money was in her purse in the kitchen "because [she] just wanted [Defendant] to be out of the hallway so [her] kids wouldn't see him."

Defendant held the gun to Ms. Shearin's neck and pushed her down the hall toward the kitchen. As they walked, Ms. Shearin realized the gun felt plastic.

[1] Defendant initially raised a third issue on appeal, alleging that the trial court erred in denying jurors' request to review certain testimony. In his reply brief, Defendant withdrew this argument.

When they arrived in the kitchen, Ms. Shearin noticed her purse was open on the kitchen table and appeared to have been rummaged. Defendant demanded more money. Ms. Shearin explained that she was a school teacher who didn't have any money, but offered Defendant her television. Defendant continued to demand more money. Ms. Shearin then grabbed the gun, "kind of shoved [Defendant]," and told him to leave her house. A physical altercation ensued which Ms. Shearin described as "pushing back and forth," and which allowed her to see Defendant's face. Defendant said "why do you have to make this difficult?" and proceeded to hit her over the head with the gun three or four times. Ms. Shearin fell and the plastic gun shattered to pieces on the kitchen floor. After attempting to scoop up the pieces, Defendant fled the house through the mudroom door. Ms. Shearin "immediately ran to [her] bedroom where [her] phone was charging and called 911."

The police arrived and Ms. Shearin identified the following items as missing from her home: approximately $10.00 to $15.00 in cash, a cloth shopping bag, $2.00 from her son's change purse, $2.00 from the console in the living room, and two laptop computers. She described the intruder to police as a black male in his mid-twenties with a smooth face, wearing a burgundy hoodie and grey pants. She explained Defendant's hoodie was pulled over the top half of his head. At trial, Ms. Shearin testified that the intruder's hoodie covered his eyes but that she saw his nose, mouth, and chin.

A few days later, officers brought Ms. Shearin several photographs to review for a photograph lineup. Ms. Shearin told the detectives that one of the men pictured had the same jaw line and a complexion similar to the intruder, but was not the person who broke into her house. At trial, Ms. Shearin was shown a picture of Defendant's brother, Jahaad Marshall. Ms. Shearin did not recall whether the photograph was among the array that she had previously been shown, but she testified it was not a picture of Defendant. After Ms. Shearin's testimony, Detective Brian Scioli of the Raleigh Police Department identified the picture of Jahaad Marshall.

On 31 December 2012, Officer Phillip Matthews responded to a call from a local Walmart and encountered Defendant. Defendant explained to Officer Matthews that he "lived with his brother and his girlfriend at a hotel and didn't know his parents."

On 7 January 2013, pursuant to a search warrant, Detective Scioli searched room 201 of the Raleigh Inn Hotel. The room contained both women's and men's clothing and documents relating to Jahaad Marshall, and a woman named Camisha Sanders. Detective Scioli also recovered an HP silver laptop computer.

On 7 January 2013, Ms. Shearin was called to the police station, where she identified the HP silver laptop computer as one of the two taken from her home. Upon opening the laptop, Ms. Shearin observed a photograph on the computer screen and told officers, "I think that's the guy." Forensic analysis of the laptop showed a new

operating system was installed on 13 December 2012. The background image appearing when the computer was turned on was a photograph of Defendant, uploaded 21 December 2012. The internet history showed the computer had been used by Defendant, Jahaad Marshall, and other people to access Facebook and other social media websites.

Defendant was charged with one count each of first degree burglary, second degree kidnapping, common-law robbery, and felonious possession of stolen goods. At trial, Judge Hight instructed the jury on the charges alleged in the indictment. On 15 November 2013, a jury found Defendant guilty of first degree burglary, second degree kidnapping, felonious larceny, and felonious possession of stolen goods. The trial court sentenced Defendant to consecutive prison sentences of 64 to 89 months for first degree burglary, 25 to 42 months for second degree kidnapping, and 6 to 17 months for felonious larceny. Defendant timely appealed.

I. Jury Instructions

Defendant argues the trial court erred in instructing the jury that it could convict Defendant of second degree kidnapping if it found Defendant moved Ms. Shearin from her bedroom to the kitchen for the purpose of terrorizing her because the evidence did not support that instruction. He contends this error violated his right to a unanimous jury verdict or constituted plain error.

We note that Defendant failed to object to the jury instructions at trial. As a general rule, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . . ." N.C.R. App. P. 10(a)(2); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000).

Defendant argues his failure to object at trial to the violation of his constitutional right to a unanimous jury did not waive his right to appeal the issue. *See State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("[w]here … the error violates [a] defendant's right to a trial by a jury of twelve, [a] defendant's failure to object is not fatal to his right to raise the question on appeal."); *see also State v. Brewer*, 171 N.C. App. 686, 691, 615 S.E.2d 360, 363 (2005). However, our Supreme Court held in *State v. May* that constitutional arguments related to unanimous jury rights are preserved as a matter of law only where the instructions were given to "less than all the jurors." __ N.C., __, __,772 S.E.2d 458, 462 (2015) (citing *State v. Wilson*, 363 N.C. 478, 486, 681 S.E.2d 225, 331 (2009)). Here, the alleged constitutional error occurred during the trial court's instructions to the *entire* jury panel. Thus, this Court can review only for plain error. *See id.*

"This Court has elected to 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). To show plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quotation marks and internal citations omitted) (first alteration in the original).

"A prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986). "It is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence." *State v. Moore*, 315 N.C. 738, 749, 340 S.E.2d 401, 408 (1986).

Defendant contends the trial court erred in instructing the jury that he would be guilty of second degree kidnapping if he removed Ms. Shearin for the purpose of either facilitating commission of common law robbery or for the purpose of terrorizing her. He contends the evidence failed to show that Defendant removed Ms. Shearin from her bedroom for the purpose of terrorizing her.

In North Carolina, kidnapping is defined by statute as, *inter alia*:

> (a) 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 . . . if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C. Gen. Stat. § 14-39 (2013). Because the State presented evidence from which a reasonable juror could infer that Defendant acted with the purpose to terrorize, the evidence was sufficient to support the trial court's jury instruction.

"In determining the sufficiency of the evidence to support the jury's verdict on that question, the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her." *Moore*, 315 N.C. at 340 S.E.2d at 405. "Nonetheless, the victim's subjective feelings of fear, while not determinative of the defendant's intent to terrorize, are relevant." *State v. Baldwin*, 141 N.C. App. 596, 604-05, 540 S.E.2d 815, 821 (2000).

"Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *Moore*, 315 N.C. at 745, 340 S.E.2d at 405 (citation and internal quotation marks omitted). "Intent, for the purpose of this statute, "may be inferred from the

circumstances surrounding the event and must be determined by the jury." *State v. Moore*, 77 N.C. App. 553, 558, 335 S.E.2d 535, 538 (1985) *aff'd*, 317 N.C. 144, 343 S.E.2d 430 (1986) (citation omitted); *see also State v. Surrett*, 109 N.C. App. 344, 349-50, 427 S.E.2d 124, 127 (1993) (following *Moore* and concluding that evidence was sufficient to show that defendant, who forced his victim into a car and told her to "lay down and stay quiet," had kidnapped her for the purpose of terrorizing her even though she escaped the car within less than a minute).

Here, the State presented the following evidence from which a jury could infer that Defendant had a specific intent to place Ms. Shearin in a state of intense fright or apprehension so that she would give him money. Defendant surprised Ms. Shearin at 5:00 a.m. in her bedroom, shining a flashlight in her face. He displayed what appeared to be a gun and stood in close proximity to the rooms where her nine-year-old daughter and four-year-old son were sleeping. Although he had already taken money from Ms. Shearin's purse and acquired money and other items to steal, Defendant still entered Ms. Shearin's bedroom, demanded more money, and pushed her down the hall to the kitchen. Defendant then demanded more money, which Ms. Shearin did not have, in the kitchen. Until they engaged in a physical altercation, Ms. Shearin was unable to see Defendant's eyes, as his hooded sweatshirt covered them.

Defendant attempts to distinguish this case from *Surrett*, because the victim in that case screamed loudly and repeatedly when being forced into a car, was so frightened that she jumped out of the car after it was moving, and testified that she was "scared to death." 109 N.C. App. at 350, 427 S.E.2d at 127. Defendant notes that in contrast to the victim in *Surrett*, Ms. Shearin did not appear frightened when the police responded to her emergency call, she did not testify she was frightened at trial, and she did not scream or struggle to escape the intruder or exhibit any fear during the robbery. However, given the context of the encounter, Ms. Shearin's calm demeanor and failure to flee would not prohibit a reasonable juror from finding that Defendant intended to terrorize her. Ms. Shearin had two children sleeping in the house whom she did not want to wake up or frighten, and it is reasonable to infer that she would not have left her children in danger by fleeing and leaving Defendant inside the house. Ms. Shearin testified that she offered Defendant her television, and then engaged in a physical altercation, to get him out of her house. We disagree with Defendant's contention that "[t]hese actions were not those of a person in fear, much less a high degree of fear or state of intense fright or apprehension." Furthermore, because Defendant had already taken money from Ms. Shearin's purse and elsewhere in the house when he woke her up and displayed what appeared to be a gun, it would be reasonable to infer that he intended to frighten Ms. Shearin into leading him to more money in her house. We conclude that the State presented sufficient evidence

from which the jury could reasonably infer that Defendant specifically intended to terrorize Ms. Shearin, and the trial court did not err in instructing the jury that it could convict Defendant of second degree kidnapping if it found that he moved Ms. Shearin from her bedroom to the kitchen for the purpose of terrorizing her.

II. *Ex Mero Motu* Intervention

Defendant contends the trial court erred by failing to intervene *ex mero motu* during the prosecutor's direct examination of Detective Scioli. Specifically, Defendant contends the prosecutor asked leading questions that assumed facts not in evidence and mischaracterized the testimony of Ms. Shearin.

Because Defendant failed to object to the prosecutor's questions at trial, the trial court's failure to intervene is reviewable for plain error. "Under the plain error rule, [a] 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).

Following Ms. Shearin's testimony at trial, the prosecutor, on direct examination of Detective Scioli, elicited the following exchange:

> Prosecutor: Detective, were you present in the courtroom a couple minutes ago when Mr. Kelly cross-examined Ms. Shearin?
> Detective Scioli: Yes, I was.
> Prosecutor: And did you see Mr. Kelly show Ms. Shearin a picture and he asked if she saw this person that night?
> Detective Scioli: Yes, I did.

> Prosecutor: I show you Defendant's Exhibit 2. Is that the picture that was shown to Ms. Shearin?
> Detective Scioli: I believe so, yes.
> Prosecutor: Does that list the name of that person?
> Detective Scioli: Yes, it does.
> Prosecutor: And who is that person that that [sic] picture was shown to Ms. Shearin?
> Detective Scioli: It's Jahaad Marshall.
> Prosecutor: So Ms. Shearin was shown a picture of Jahaad Marshall, and just Jahaad Marshall with no name, and said that that was not the person that came in that apartment that night?
> Detective Scioli: Yes, sir.

Defendant argues that the prosecutor asked questions that presupposed facts not in evidence and grossly misrepresented and distorted Ms. Shearin's testimony. The State contends the prosecutor's questions to Detective Scioli were based upon facts already in evidence and did not distort Ms. Shearin's testimony.

On direct examination, Ms. Shearin positively identified Defendant as the man who broke into her house in the following exchange:

> Prosecutor: Do you recognize that person that you saw that morning here in court?
> Ms. Shearin: Yes.
> Prosecutor: Could you point him out to the court by an [sic] indicating an item of clothing he's wearing?
> Ms. Shearin: Sitting at the defendant's table in the white shirt.
> . . .
> Prosecutor: Your Honor, may the record reflect that the witness identified the defendant.

Further, during cross-examination, when shown a picture of Jahaad Marshall, Ms. Shearin testified it was not a picture of Defendant. Because Ms. Shearin identified Defendant as the intruder, and then testified that a picture of Jahaad Marshall was not Defendant, the prosecutor's leading questions did not presuppose facts not in evidence.

In addition to the evidence discussed above, the jury was also presented with Ms. Shearin's testimony describing the intruder to investigators and Ms. Shearin's statement that "I think that's the guy" after viewing the background photograph on her stolen laptop. We note that "[i]t is generally recognized that an examining counsel should not ask his own witness leading questions on direct examination." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 235 (1974). However, based on the evidence presented prior to the questions at issue, we conclude that the prosecutor did not grossly misrepresent Ms. Shearin's testimony, and that it was not error for the trial court not to intervene.

Furthermore, given the overwhelming evidence independent of eyewitness identification implicating Defendant in this case, Defendant cannot meet the burden of showing that absent the error, the jury probably would have reached a different result.

Conclusion

We conclude that Defendant received a trial free of error.

NO ERROR.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).