IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-575-2

Filed: 2 August 2106

Mecklenburg County, Nos. 12 CRS 248690-99, 248701

STATE OF NORTH CAROLINA

v.

DAMARIO MONTREAL COXTON

Appeal by Defendant from judgments entered 10 October 2014 by Judge Timothy S. Kincaid in Superior Court, Mecklenburg County. Heard in the Court of Appeals originally on 16 November 2015, and opinion filed 1 March 2016. Remanded to the Court of Appeals by order of the North Carolina Supreme Court to allow Defendant's petition for writ of *certiorari.*

Attorney General Roy Cooper, by Special Deputy Attorney General David L. Elliott, for the State.

Mark Montgomery for Defendant.

McGEE, Chief Judge.

I. Background

Damario Montreal Coxton ("Defendant") was indicted on 26 November 2012 on three counts of first-degree rape, three counts of first-degree sexual offense, first-degree kidnapping, second-degree kidnapping, robbery with a dangerous weapon,

first-degree burglary, and conspiracy to commit robbery with a dangerous weapon.[1] All of the indictments arose out of a home invasion robbery and sexual assaults committed by Defendant and Davious Boyd ("Boyd") on the evening of 7 November 2012. At trial, Boyd testified that Defendant raped the complainant during the robbery. Boyd further testified that Defendant told Boyd to "go ahead" as soon as Defendant had finished, at which point Boyd raped the complainant as well.

Defendant moved to dismiss numerous charges against him at the close of the evidence, including a first-degree rape charge and two first-degree sex offense charges that arose from Boyd's sexual assault of the complainant. Those charges were brought against Defendant pursuant to an acting in concert theory. Defendant argued the State had presented "no evidence . . . that [] Boyd and [Defendant] were acting in concert with regard to those sexual assaults." The trial court denied Defendant's motion as to the acting in concert charges. A jury found Defendant guilty of those charges, as well as two more counts of first-degree rape, another count of first-degree sex offense, first-degree kidnapping, felonious restraint, common law robbery, conspiracy to commit common law robbery, and first-degree burglary. Defendant was sentenced to a minimum of 568 months in prison, followed by lifetime satellite-based monitoring. Defendant appealed.

[1] A grand jury issued superseding indictments on first-degree burglary and conspiracy to commit robbery with a dangerous weapon on 22 January 2013.

II. Appellate Process

The State filed a Motion to Dismiss Defendant's Appeal to this Court on 1 July 2015. In its motion, the State noted, and Defendant conceded, that there was no indication in the record that Defendant gave either oral or written notice of appeal with the trial court. There is an appellate entry in the record in which the trial court checked a box indicating that Defendant "has given Notice of Appeal to the N.C. Court of Appeals[.]" However, "mere appellate entries are insufficient to preserve the right to appeal." *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 778 (2011). We therefore lacked jurisdiction to consider Defendant's appeal. *Id.* at 485, 707 S.E.2d at 779.

However, even where a defendant has failed to give proper notice of appeal, this Court may exercise its "discretion to consider the matter by granting a petition for writ of *certiorari*" under Rule 21 of the North Carolina Rules of Appellate Procedure. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320–21 (2005); *see* N.C.R. App. P. 21. A petition for writ of *certiorari* needs to "be filed without unreasonable delay[.]" N.C.R. App. P. 21(c). The petition also "must show merit or that error was probably committed below[,] . . . [and the writ is] to be issued only for good and sufficient cause shown[,]" *State v. Rouson*, 226 N.C. App. 562, 563–64, 741 S.E.2d 470, 471 (2013), or when "a failure to issue [the] writ . . . would be manifestly unjust" to a defendant, *State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012).

In the present case, Defendant filed his petition for a writ of *certiorari* with this Court on 24 June 2015, more than eight months after entry of the judgments against him and without any explanation for the delay. After reviewing the record on appeal and the possible merit – if any – to Defendant's argument in the present case, we found that Defendant had failed to establish "good and sufficient cause" for this Court to issue a writ of *certiorari*. *See Rouson*, 226 N.C. App. at 563–64, 741 S.E.2d at 471; *see also* N.C.R. App. P. 21. For these reasons, this Court granted the State's motion to dismiss Defendant's appeal, and denied Defendant's petition for writ of *certiorari*.

Defendant appealed to the Supreme Court on 4 April 2016, based upon an alleged "substantial question arising under the Constitution of the United States[.]" N.C. Gen. Stat. § 7A-30(1) (2015). Specifically, Defendant argued that because this Court had granted *certiorari* in a number of other cases where the notice of appeal had been fatally defective, refusal to do so for Defendant in this matter violated Defendant's "right to appellate review of his conviction. U.S. Const. Amends. VI, VIII, XIV." The State filed a motion to dismiss Defendant's appeal on 14 April 2016, arguing that Defendant had failed to argue any legitimate constitutional question in his appeal to the Supreme Court. By order entered 13 June 2016, the Supreme Court allowed the State's motion to dismiss Defendant's appeal to the Supreme Court. However, "on its own motion," the Supreme Court "vacate[d] the denial of

[D]efendant's petition for writ of *certiorari* at the Court of Appeals and remande[d] . . . to the Court of Appeals with directions to allow [D]efendant's petition for writ of *certiorari*[.]" We therefore grant Defendant's 24 June 2015 petition for writ of *certiorari*, and consider the merits of Defendant's appeal.

III. *Analysis*

Defendant argues that the "trial court erred in denying Defendant's motion to dismiss the charges of rape and sexual offense committed by [ ] Boyd, inasmuch as there was insufficient evidence that [Defendant] and Boyd were acting in concert[.]" We disagree.

This Court has explained the law of acting in concert as follows:

> If "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . *or* as a natural or probable consequence thereof."

State v. Bellamy, 172 N.C. App. 649, 667-68, 617 S.E.2d 81, 94 (2005) (citations and quotation marks omitted) (emphasis added). The State did not need to prove that Boyd's sexual assault against complainant was in pursuance of the common purpose to rob complainant and that it was *also* a natural or probable consequence thereof; the State needed to prove only that Boyd's sexual assault of complainant was *either* in pursuance of the common purpose to rob complainant *or* that it was a natural or probable consequence thereof. *Id.* However, Defendant failed to make a required

argument on appeal, and further failed to support the argument he did make with citations to required legal authority.

A. *Failure to Make Necessary Argument*

N.C.R. App. P. Rule 28(b)(6) provides the following:

> (b) *Content of appellant's brief*. An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:
>
> . . . .
>
> (6) An argument, to contain the contentions of the appellant with respect to each issue presented. *Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned*.
>
> The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.
>
> The body of the argument and the statement of applicable standard(s) of review *shall contain citations of the authorities upon which the appellant relies*.

N.C. R. App. P. 28(b)(6) (2016) (some emphasis added).

In his brief, Defendant argues that the evidence was insufficient to prove that "Defendant and Boyd had a *common purpose* for Boyd to rape [complainant]." However, Defendant presents no argument that the State failed in its burden of proof with respect to acting in concert based upon the theory that Boyd's sexual assault of

complainant was a *natural or probable consequence* of the 7 November 2012 home invasion robbery.[2] Defendant has therefore abandoned this argument. *Id.*

B. *Failure to Include Citations to Legal Authority*

In addition, Defendant only includes citations in support of three legal propositions: (1) Defendant provides a citation for his statement that this Court reviews *de novo* a trial court's denial of a motion to dismiss for insufficiency of the evidence; (2) Defendant includes a citation in support of his statement that the trial court correctly instructed the jury that "[i]f two or more persons join in a common purpose to commit any crime, each of them, if actually or constructively present, is guilty of that crime even if only one of them actually commits the crime[;]" and (3) Defendant provides two citations in support of his general contention that convicting him on insufficient evidence constituted violations of both the North Carolina and United States constitutions.

Defendant cites to no authority in support of his argument that the *facts of this case* were insufficient to submit the acting in concert charges to the jury. Defendant contends that the evidence was insufficient to show there was a common scheme or plan between Boyd and Defendant with respect to Boyd's rape and sexual assault of the complainant. However, Defendant includes no citation to authority supporting

[2] Though Defendant includes the "natural or probable consequence" language in a number of headings in his brief, and makes a few conclusory statements related to this theory of acting in concert, he fails to make any cognizable argument with regard to this theory.

these arguments, nor any citations indicating what would constitute sufficient evidence of a common plan in this matter, or why the evidence in this matter failed to meet that threshold. "Failure to cite to supporting authority is a violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and constitutes abandonment of th[e] argument. N.C.R. App. P. 28(b)(6)." *State v. Velazquez-Perez*, 233 N.C. App. 585, 595, 756 S.E.2d 869, 876, *disc. review denied*, 367 N.C. 509, 758 S.E.2d 881 (2014). "[I]t is not the role of the appellate courts . . . to create an appeal for an appellant." *State v. Johnston*, 173 N.C. App. 334, 338, 618 S.E.2d 807, 809 (2005), citing *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

C. *Defendant's Argument also Fails on the Merits*

Even assuming *arguendo* Defendant had not abandoned his arguments on appeal, they would still fail. A motion to dismiss in a criminal case

> requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and [the motion to dismiss] should be denied.

State v. McKinney, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975) (citations omitted).

Evidence in the light most favorable to the State[3] tended to show that Defendant and Boyd made a plan to rob someone as they were walking around on the night of 7 November 2012. Boyd was carrying a "BB" handgun that resembled a handgun that would fire actual bullets. They decided to approach complainant's house, and they noticed there was a light on inside. Boyd testified that before he kicked down the door to complainant's house, Defendant said "are we ready, and I was, like, it's whatever. And he said let's do it, and I kicked the door in and we both walked in." Defendant and Boyd walked into the house, down a hallway, past on open doorway through which they could see complainant's daughter sleeping, and all the way to complainant's bedroom where they saw her sitting on her bed working on her laptop. Boyd shut the door to complainant's daughter's bedroom before reaching complainant's bedroom.

Boyd pointed the gun at complainant, threatened to kill her if she moved, and both he and Defendant demanded money from her. Defendant started searching complainant's bedroom for valuables while Boyd was threatening complainant with the gun. As Boyd was taking jewelry from a dresser, Defendant was disconnecting a flat screen television. Together, Defendant and Boyd took complainant's jewelry,

[3] Though some of the following evidence was contradicted, we only review the evidence that does not contradict the State's evidence. *Id.*

watch, two televisions, and laptop computer. They also demanded the keys to complainant's car. Complainant testified that: "I guess they already had a plan because they was just doing whatever. They was just taking and do whatever they wanted."

Defendant and Boyd handed the gun back and forth between them as events transpired. Complainant testified "when somebody wanted to have power they would have the gun." When complainant could not find her keys, Boyd dragged her by her hair into her sleeping daughter's room and threatened to kill her in front of her daughter if she did not find her keys. Complainant finally found her keys in a laundry basket, and Boyd took the keys and began putting the stolen property into complainant's car. While Boyd was loading the car with complainant's possessions, Defendant, who had the gun, ordered complainant into her bedroom and proceeded to rape her vaginally, and forced her to perform oral sex on him. Boyd returned as complainant was being forced to perform oral sex on Defendant. Defendant ejaculated and Boyd banged on the door to the bedroom telling Defendant to hurry up. Defendant then told Boyd "go ahead." Boyd demanded that complainant perform oral sex on him as Defendant was pulling up his pants. Complainant begged Boyd not to force her to perform oral sex, and Boyd slapped her in the face. At some point Defendant left the bedroom, but handed the gun to Boyd before leaving. Boyd forced complainant to perform oral sex on him. Boyd then forced anal intercourse, and

vaginally raped the complainant until Defendant returned, knocked on the door, and told Boyd that they had been in the house too long and needed to leave.

Boyd then informed complainant that he and Defendant were going to drive her in her car to a bank so she could withdraw money from an ATM machine, and that if she did not fully cooperate, they would kill her. Boyd drove with complainant in the front passenger seat and Defendant in the back pointing the gun at complainant. Complainant was forced to withdraw $500.00 and hand it over to Boyd. Defendant and Boyd made complainant drive her car back to her house, threatened to return and kill her and her daughter if she called the police, and then they drove away in her car with her money and possessions.

Although we agree with Defendant that there was insufficient evidence presented at trial that Defendant and Boyd had formulated a *common purpose*[4] to sexually assault complainant *before* they broke into complainant's house, we hold that the evidence in this case was sufficient to submit to the jury on the theory that Defendant and Boyd joined in a common purpose to sexually assault complainant after they had broken into complainant's house.[5] *See State v. Joyner*, 297 N.C. 349, 358, 255 S.E.2d 390, 396 (1979) ("In this case before us the evidence is plenary that

[4] As noted above, Defendant failed to argue that the State failed in its burden to prove Boyd's sexual assault of complainant was a natural or probable consequence of the common scheme to break into complainant's home and rob her, so Defendant's conviction stands upon this theory alone.

[5] According to Defendant: "The State's theory was that [Defendant] was acting in concert with Boyd to commit . . . the sex crimes committed by Boyd."

all five of these men were acting together pursuant to a common plan to assault, terrorize, sexually abuse, and steal from Mrs. Lincoln. The evidence tended to show that they were all together riding around before the crimes took place. Two of them first entered Mrs. Lincoln's home together, followed shortly by the other three. Once inside they did nothing other than to assault Mrs. Lincoln, terrorize her, sexually abuse her, and steal from her. Afterwards they left together. . . . . The jury could find from this evidence that all of these men are equally guilty of all crimes committed by any one pursuant to their common purpose."). In the present case, it is not necessary that the common purpose to sexually assault complainant was conceived prior to entering complainant's house, only that it was conceived prior to Boyd committing the acts for which Defendant was convicted on a theory of acting in concert. Defendant's argument is without merit.

NO ERROR.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).