IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-36

Filed: 5 September 2017

Wilkes County, Nos. 15 CRS 527-28 and 51294

STATE OF NORTH CAROLINA

v.

JEROME JAMES CARLTON

Appeal by defendant from judgments entered 27 July 2016 by Judge John O. Craig III in Wilkes County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Gilda C. Rodriguez for defendant.

ARROWOOD, Judge.

Jerome James Carlton ("defendant") appeals from judgments entered upon his convictions for robbery with a dangerous weapon, second degree kidnapping, and possession of a firearm by a felon. For the following reasons, we find no error.

I. Background

Defendant was arrested on 21 May 2015 for an armed robbery occurring 17 May 2015. On 8 September 2015, a Wilkes County Grand Jury indicted defendant on charges of robbery with a dangerous weapon, second degree kidnapping, and possession of a firearm by a felon. The State also noticed an intent to prove non-statutory aggravating factors.

On 26 July 2016, defendant was tried in Wilkes County Superior Court before the Honorable John O. Craig III. The State's evidence tended to show that two armed men robbed the Double Deuce Internet Café in Millers Creek around ten o'clock p.m. on 17 May 2015, taking approximately $9,000. The only employee working in the café at the time of the robbery, testified that two black men with masks entered the café with guns, one man had a handgun and one man had a short shotgun. When the men entered the café, there were four customers in the store. The employee testified that the man with the handgun pointed the handgun at her and demanded money. The employee put money from the register and from a safe beneath the register in a bag and gave the bag to the man with the handgun. As the men began to leave with the money, instead of getting down as the men told her to do, the employee started out from behind the register to check on one of the older customers in the café. The men then turned around and pointed the guns at the employee and ordered her to get down. Despite the café employee's interaction with the men, the employee was unable to identify defendant in a photo lineup because the men were wearing masks.

Defendant's father then testified that, the week before the robbery, he overheard defendant talking with another man about robbing a gaming place. Defendant's father also testified that when defendant came back to the house the night of the robbery, defendant was out of breath, sweating, and went straight to his bedroom. Defendant's father recalled seeing a bag stuffed in defendant's clothes and a black and silver gun in the back of defendant's pants. More importantly for the State's case, defendant's father identified defendant in surveillance video of the robbery from the café. Defendant's father claimed he was certain that his son was the man in the surveillance video with the money bag and the handgun, explaining that he recognized defendant's clothes, he recognized defendant's distinct walk with a limp, and that the handgun seen in the video was the same gun that defendant had when defendant returned home. Defendant's father also testified that defendant threatened him for snitching.

Defendant's grandmother and uncle also testified they each saw defendant come back to the house with a bag on the night of the robbery. Defendant's grandmother stated that defendant went straight to the bedroom when he got home and she saw him put a sack under the mattress. Defendant's uncle recalled seeing defendant on the night of the robbery with a gun on his side and a bag of money. Defendant's uncle testified that he saw money in the bag and defendant told him that he got the money from "the game room[.]" Defendant's uncle also identified defendant

in the surveillance video from the café. Defendant threatened to kill his grandmother and his uncle if they told anyone about the bag.

At the conclusion of the State's evidence, defendant moved to dismiss the charges. As the State was recounting the evidence to support the charges, the trial court interrupted to indicate that it would not grant defendant's motion to dismiss the robbery with a dangerous weapon and possession of a firearm by a felon charges. The court explained that most of defendant's arguments were arguments for the jury, not the type of arguments that lead to dismissal of charges. The court, however, asked to hear more about the second degree kidnapping charge. The State responded that the robbery was over when the café employee stepped out from behind the counter and was ordered to get down at gun point. The State reiterated that, at that point, the perpetrators already had the money and were fleeing the café. The State classified the perpetrator's orders for the café employee to get down as a restraint by threat separate from that inherent in the robbery and argued the restraint increased the danger because it impeded the café employee's ability to run away if shots were fired.

The trial court denied defendant's motions to dismiss. Defendant did not offer any evidence and renewed his motions to dismiss all charges, which were denied.

On 27 July 2016, the jury returned verdicts finding defendant guilty on all charges. Defendant moved for a judgment notwithstanding the verdict but offered no

additional argument. That motion was denied. Defendant then entered a plea stipulating to two aggravating factors and the trial court found that an aggravated sentence was justified based on those factors. The robbery with a dangerous weapon and second degree kidnapping offenses were consolidated for judgment and judgment was entered sentencing defendant to a term of 100 to 132 months imprisonment. A separate judgment was entered sentencing defendant to a consecutive term of 20 to 33 months imprisonment for the possession of a firearm by a felon offense. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant contends the trial court erred in denying his motions to dismiss and for judgment notwithstanding the verdict for the following three reasons: (1) the trial court did not give an acting in concert instruction for the second degree kidnapping charge and the State failed to produce evidence that defendant personally committed the alleged kidnapping; (2) the State failed to produced evidence that defendant was one of the perpetrators; and (3) the State failed to establish that defendant was a felon for purposes of possession of a firearm by a felon.

At the outset, we note that this Court has held that "the motion for judgment notwithstanding the verdicts is not a proper procedure in a criminal action." *State v. Brown*, 9 N.C. App. 534, 538, 176 S.E.2d 907, 910 (1970); *see also State v. Witherspoon*, 293 N.C. 321, 327, 237 S.E.2d 822, 826 (1977). Yet, even if such a

motion was proper, the motion raises a question regarding the sufficiency of the evidence and is governed by the same considerations as a motion to dismiss. *See Witherspoon*, 293 N.C. at 327, 237 S.E.2d at 826 (explaining that even if a motion for judgment notwithstanding the verdict was proper in a criminal action, "its allowance is governed by the same considerations as apply to a motion for a directed verdict and a motion for judgment of nonsuit[]") (citation omitted); *see also State v. Long*, 20 N.C. App. 91, 94, 200 S.E.2d 825, 827 (1973) ("In a criminal case the motion for a directed verdict of not guilty, like the motion for judgment of nonsuit, challenges the sufficiency of the evidence to take the case to the jury[.]") (citation omitted). Therefore, we only address the denial of defendant's motions to dismiss.

A. Standard of Review

"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). " 'Upon defendant's motion for dismissal, 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). "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). "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).

However, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." S*tate v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1).

> Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts. When a party changes theories between the trial court and an appellate court, the [issue] is not properly preserved and is considered waived.

State v. Shelly, 181 N.C. App. 196, 206-207, 638 S.E.2d 516, 524 (2007) (internal quotation marks and citations omitted).

B. Kidnapping

Defendant first contends that the trial court erred in denying his motion to dismiss the kidnapping charge. Under our general statutes,

> [a]ny 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 . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of . . . [f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]

N.C. Gen. Stat. § 14-39(a)(2) (2015). "If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree . . . ." N.C. Gen. Stat. § 14-39(b).

On appeal, defendant does not challenge the sufficiency of the evidence of any particular element of kidnapping, but instead claims the State failed to prove that he personally committed the alleged kidnapping. Although defendant did not make this argument to the trial court, defendant asserts this issue is preserved for appeal because he made a general motion to dismiss based on the insufficiency of the evidence. A review of the transcript, however, shows that defendant asserted specific arguments as to the dismissal of each charge.

Regarding the dismissal of the kidnapping charge, defendant specifically argued to the trial court that there was no confinement, restraint, or removal separate and apart from that inherent in the armed robbery and the victim was not exposed to greater danger than that inherent in the armed robbery. *See State v. Cartwright*, 177 N.C. App. 531, 535, 629 S.E.2d 318, 322 (2006) ("To be sufficient as an element of kidnapping the confinement, restraint, or removal must not be an inherent or inevitable element of another felony with which the defendant is

charged. . . . The key principle governing whether a kidnapping charge will lie is whether . . . the victim is . . . exposed to greater danger than that inherent in the armed robbery itself[.]") (internal citations and quotation marks omitted). Because defendant does not raise the issue argued below, he has waived that issue on appeal. Similarly, by failing to raise below the argument now asserted on appeal challenging the kidnapping charge, defendant also failed to preserve that argument for review. Defendant may not "swap horses between courts[.]" *Shelly*, 181 N.C. App. at 206, 638 S.E.2d at 524.

Nevertheless, even if defendant's argument had been properly preserved for appeal, there was sufficient evidence to allow the jury to decide the kidnapping charge. Defendant contends, and the State concedes, that the trial court did not instruct the jury on acting in concert. Therefore, the theory of guilt presented to the jury was that defendant personally committed the elements of second degree kidnapping. This court is required to review the sufficiency of the evidence with respect to the theory of guilt upon which the jury was instructed. *See State v. Roberts* 176 N.C. App. 159, 162-63, 625 S.E.2d 846, 849 (2006). Moreover, "defendant's conviction may be upheld only if the evidence supports a finding that he personally committed each element of the offense." *State v. McCoy*, 79 N.C. App. 273, 274, 339 S.E.2d 419, 420 (1986).

Here, defendant contends the evidence that he was the perpetrator of the alleged kidnapping was lacking. Defendant specifically refers to the surveillance video of the robbery introduced into evidence and claims that the video shows that only one of the perpetrators turned and gestured for the café employee to get down. Upon review of the evidence, we disagree with defendant's characterization of the evidence. First, the surveillance video does not show precisely what defendant describes. While one of the perpetrators is closer to the café employee when it appears she is ordered to get down, both perpetrators turn around and point guns at the café employee as she comes around the register and gets down on the ground. Moreover, the surveillance video is not the only evidence. The café employee testified that after she had given the perpetrator with the handgun the bag of money,

> *[t]hey* started to leave and then I started out from behind the counter because [one of the customers] was an older lady and I thought I should check on her, but I didn't get down like I was told so *they* turned back around and put the *guns* back on me and I had to get down. (Emphasis added).

As discussed more below, testimony was elicited identifying defendant as the perpetrator with the handgun and the bag of money.

Viewing the evidence in the light most favorable to the State, we hold there was substantial evidence that after defendant robbed the café, he personally restrained the café employee by threatening her with a gun in order to facilitate his flight from the robbery.

C. Identification Evidence

More generally than in his first argument on appeal, defendant also argues the trial court failed to dismiss all of the charges because there was insufficient evidence that he was one of the perpetrators. Specifically, defendant contends "the State did not present the jury with substantial evidence that [defendant] was one of the men in the surveillance video robbing the Double Deuce Internet Café on the night of May 17, 2015." We disagree.

As detailed in the background above, defendant's father identified defendant as the man with the handgun in the surveillance video of the robbery. Defendant's father explained that he was able to identify defendant because defendant was wearing the same clothes and shoes when he left the house, and defendant had the same gun seen in the video when defendant returned to the house. Defendant's father also noted that he recognized defendant by his distinct walk with a limp. Defendant's father indicated he was "a hundred percent sure."

Defendant acknowledges that his father identified him in the surveillance video, but contends his father's identification was not substantial evidence because the testimony was uncorroborated and contradicted by testimony of other witnesses. Defendant's arguments are misguided.

"Whether the evidence is sufficient to require its submission to the jury is a question of law. The court does not pass upon the credibility of the witnesses or the

weight of their testimony." *High v. Atl. Coast Line R.R. Co.*, 248 N.C. 414, 415, 103 S.E.2d 498, 498 (1958). "The credibility of the witnesses and the weight to be given their testimony are jury questions." *State v. McPeak*, 243 N.C. 273, 274, 90 S.E.2d 505, 506 (1955). Similarly, "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Barnes*, 334 N.C. at 75, 430 S.E.2d at 918. Defendant recognizes that "[t]he question whether the testimony of the prosecuting witness, tending to identify [defendant] as one of the robbers, has any probative force [is] for the jury." *State v. Guffey*, 265 N.C. 331, 332, 144 S.E.2d 14, 16 (1965). Yet, relying on *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967), defendant contends that rule does not apply in this case because the evidence identifying him is inherently incredible. We are not convinced because *Miller* is easily distinguishable.

In *Miller*, the Court stated that the rule in *Guffey* "does not apply . . . where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred." *Id.* at 731, 154 S.E.2d at 905. Thus, in *Miller*, where the only evidence implicating the defendant was an identification made in a suggestive police lineup by a witness who did not previously know the defendant and who was never closer than 286 feet to the perpetrator, the Court held the trial court erred in denying the defendant's motion for judgment of nonsuit. *Id.* at 732, 154 S.E.2d at 905-906. The Court

explained that based upon the physical conditions shown by the State's evidence, "it [was] apparent that the distance was too great for an observer to note and store in memory features which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of the guilt of such person to the jury." *Id*. at 732, 154 S.E.2d at 905. The Court, however, reiterated that "[w]here there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury[.]" *Id*. at 732, 154 S.E.2d at 906.

In stark contrast to *Miller*, the identification of defendant in the present case was made by defendant's father, who was very familiar with defendant and who was able to explain why he was "a hundred percent sure" defendant was the perpetrator in the surveillance video with the money bag and handgun.

Viewing defendant's father's identification, along with other evidence tending to implicate defendant as one of the perpetrators, in the light most favorable to the State, there was ample evidence from which the jury could find defendant guilty of the charged offenses. Any contradictions or discrepancies in the State's evidence were properly left for the jury to resolve.

D. Possession of a Firearm by a Felon

In defendant's final argument on appeal, he contends the trial court erred in denying his motion to dismiss the possession of a firearm by a felon charge. The

offense of possession of a firearm by a felon is set forth in N.C. Gen. Stat. § 14-415.1, which provides that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . . ." N.C. Gen. Stat. § 14-415.1(a) (2015). Defendant now specifically argues that the State failed to produce evidence of a prior felony. This argument, however, like defendant's first argument on appeal, was not made to the trial court. Below, defendant argued that although the surveillance video showed a gun and the café employee stated that she saw a gun, there was no evidence that there was, in fact, a firearm. Because defendant does not raise on appeal the argument made to the trial court, and because the argument now raised on appeal was not argued to the trial court, defendant has waived both issues. It appears defendant is once again trying to "swap horses between courts[,]" which he may not do. *Shelly*, 181 N.C. App. at 206, 638 S.E.2d at 524.

Nevertheless, we note that it is clear from the record that defendant stipulated to a prior felony conviction prior to the State putting on evidence. The trial court referenced that stipulation at various times in the record. First, out of the presence of the jury and before the State began to present its case, the trial court indicated the first thing it would do "is read into the record the rulings and the stipulations made yesterday, so that the court reporter . . . will be able to take this down and put it in the record." The trial court then stated, "[f]irst of all, counsel for [defendant] have

agreed to stipulate to [defendant's] convicted felon status . . . ." Defendant did not object. In fact, before proceeding to the evidence, both parties agreed that the trial court had not overlooked any matters previously discussed. Had defendant objected, or contested the stipulation, the State could have put on evidence of defendant's prior felony convictions. Second, the trial court instructed the jury on the elements of possession of a firearm by a felon and that they may accept that defendant had a prior felony conviction without further proof because defendant stipulated to the element. Again, defendant did not object.

Where it appears from the record that defendant did stipulate to a prior felony conviction, he cannot now contest that stipulation for the first time when doing so works to his benefit.

III. Conclusion

For the forgoing reasons, we hold the trial court did not err in denying defendant's motions to dismiss.

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).