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NO. COA11-442
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 09 CRS 218250; 52

MARTIN CORNELIUS MILLS

Appeal by defendant from judgment entered 22 April 2010 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

CALABRIA, Judge.

Martin Cornelius Mills ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of robbery with a dangerous weapon ("RWDW") and first degree kidnapping. We find no error.

I. Background

On 14 April 2009, Azzam Pendleton ("Pendleton") was selling shoes and clothing from his car at a McDonalds in Charlotte, North Carolina, while he waited for his brother, Rayheem Ball ("Ball"), to meet him. Defendant and two other men approached Pendleton about buying shoes. Defendant then asked Pendleton if they could have a ride and Pendleton agreed. Defendant sat in the front passenger seat, a man later identified as Brian Johnson ("Johnson") sat behind Pendleton, and an unidentified man also sat in the back seat (collectively "the men"). Ball followed the car in his own vehicle.

As Pendleton drove, Johnson pointed a gun at him and said, "You know what this is." Then defendant reached across the seat and emptied Pendleton's pockets, which contained money, keys, a wallet, a cell phone and a necklace. The men instructed Pendleton to keep driving because they wanted him to lose Ball. During a period of time between four and fifteen minutes, Pendleton was instructed to drive faster, and at one point drove 80-90 miles per hour. Nevertheless, Ball continued to follow the car.

When Pendleton noticed a police car driving in the opposite direction, he drove directly towards the police car causing the police car to swerve to avoid Pendleton's car. At that point,

Pendleton opened the driver's door, and fell out of the car into the street. Defendant moved to the driver's seat and continued driving. After escaping from the car, Pendleton informed law enforcement officers he had just been carjacked and jumped in Ball's car to follow his car. The officers joined the pursuit of Pendleton's car.

When defendant lost control of the car and crashed into a tree, he and the other unknown individual jumped out of the car and ran into the woods, while Johnson remained in the car because he was injured. Pendleton gave the officers a description of defendant and identified him after he was apprehended ten to fifteen minutes later. Defendant was subsequently arrested and charged with RWDW, conspiracy to commit RWDW, first degree kidnapping, possession of marijuana and resisting a public officer.

Prior to trial, the State dismissed the charges for possession of marijuana and resisting a public officer. The jury returned guilty verdicts for RWDW and first degree kidnapping, but found defendant not guilty of conspiracy to commit RWDW. The trial court consolidated the offenses and imposed an aggravated sentence of a minimum of 167 months and a

maximum of 210 months in the North Carolina Department of Correction. Defendant appeals.

II. First Degree Kidnapping

Defendant alleges the trial court erred by denying his motion to dismiss the charge of first degree kidnapping because the State failed to prove that defendant confined, removed, or restrained Pendleton for the purpose of facilitating the commission of RWDW. We disagree.

The proper standard of review is *de novo* "when considering whether the State presented substantial evidence to establish each element of the offense and demonstrate that defendant was the perpetrator." *State v. Kirby*, __ N.C. App. __, __, 697 S.E.2d 496, 501 (2010) (citation omitted). When ruling on a motion to dismiss, "the trial court must consider all evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that can be drawn from the evidence." *Id.* (citation omitted). "Any contradictions or discrepancies in the evidence are for the jury to resolve, and these inconsistencies, by themselves, do not serve as grounds for dismissal." *State v. Cole*, 199 N.C. App. 151, 156, 681 S.E.2d 423, 427 (2009) (citations omitted).

Kidnapping has been defined as:

- (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, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping 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....

N.C. Gen. Stat. § 14-39 (2011). Kidnapping "is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will." *State v. White*, 127 N.C. App. 565, 571, 492 S.E.2d 48, 51 (1997). "Confine" as used in the statute "connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). "Restraint" includes confinement, but also means "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 this statute." *Id.*

Certain felonies, such as armed robbery, involve "some restraint of the victim." *Id.* For purposes of double jeopardy, it is impermissible "to make...an inherent, inevitable element of another felony ... a distinct offense of kidnapping thus permitting conviction and punishment for both crimes." *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981). However, "there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate [for] which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony." *Fulcher*, 294 N.C. at 524, 243 S.E.2d at 352. In addition, a separate kidnapping charge would be allowed if the victim was "exposed to greater danger than that inherent in the armed robbery itself." *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446. "The test ... does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense." *State v. Williams*, 308 N.C. 339, 347, 302 S.E.2d 441, 447 (1983).

In *Irwin*, the defendant held the victim at knifepoint and forced her to walk to the back of the store to open a safe. *Irwin*, 304 N.C at 103, 282 S.E.2d at 446. The Court held that the movement was "an inherent and integral part" of the defendant's objective to obtain property and the removal was "a mere technical asportation and insufficient to support ... a separate kidnapping offense." *Id.* In *State v. Pigott*, where the defendant bound the victim twice and rendered him helpless during the robbery, the Court found the increased danger constituted additional restraint and satisfied the necessary element for kidnapping. 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (holding that all the restraint inherent in armed robbery may be "exercised by threatening the victim with [a] gun" and any additional conduct that increases "the victim's helplessness and vulnerability" may constitute "additional restraint as to satisfy that element of the kidnapping crime").

In the instant case, the indictment for kidnapping stated defendant confined, restrained and removed Pendleton and the crime was committed "for the purpose of facilitating the commission of a felony." The indictment for RWDW alleged defendant "did unlawfully, willfully and feloniously steal, take, and carry away another's personal property, a 1998 Pontiac

Bonneville automobile, a wallet and its contents, United States currency, a cellular phone, and a necklace, of value, from the person and presence of [Pendleton]." Therefore, when defendant made a motion to dismiss, the court had to determine if the State had met its burden by providing substantial evidence of each element of the offenses charged and that defendant was the perpetrator. For the first degree kidnapping charge, the State had to provide substantial evidence that defendant's purpose for confining, restraining and moving Pendleton was to steal, take and carry away his personal property and his car.

Although defendant disagrees, both the RWDW and kidnapping charges are justified because Pendleton was exposed to greater danger during the robbery. While Pendleton was driving, Johnson cocked the gun, which caused Pendleton to remove his hands from the steering wheel. In addition, the men forced Pendleton to continue driving. Pendleton testified that he requested that the men release him, but the men forced him to continue driving in order to lose Ball. Pendleton testified that Johnson pushed him to drive faster while another told him to slow down. Confining Pendleton to his vehicle, failing to release him, forcing him to drive recklessly, combined with the fact that he was held at gunpoint while operating his vehicle, increased

Pendleton's helplessness and vulnerability, exposed him to greater danger and thus satisfies the restraint element of the kidnapping charge.

Defendant cites *State v. Brooks* to support his argument that the State failed to prove intent to facilitate the commission of a felony. 138 N.C. App. 185, 530 S.E.2d 849 (2000). However, *Brooks* is distinguishable. In *Brooks*, the defendant picked up the victim, with her consent, and shot her after they were in the car together. *Id.* at 188, 530 S.E.2d at 851. The indictment alleged that the defendant kidnapped the victim "by unlawfully restraining her and removing her from one place to another" in order to facilitate "the commission of a felony." *Id.* at 190, 530 S.E.2d at 853. Since there was no evidence that the victim was with the defendant against her will prior to the felony, the Court reversed the kidnapping conviction. *Id.* at 192, 530 S.E.2d at 854.

We agree with defendant that there was no evidence that the men tricked Pendleton into giving them a ride. Therefore, the similarity to *Brooks* is that the victims in both cases entered vehicles of their own free will, and the crime occurred after they had voluntarily entered the vehicles. However, in *Brooks*, there was no evidence of the commission of a felony after the

defendant kidnapped the victim. *Id.* In the instant case, the kidnapping began when Johnson pointed the gun at Pendleton and the parties refused to allow him to exit the vehicle. See *White*, 127 N.C. App. at 571, 492 S.E.2d at 51. After Pendleton successfully jumped from the vehicle, defendant took control and drove away. In the light most favorable to the State, defendant's possession and movement of Pendleton's vehicle was substantial evidence that defendant took Pendleton's car. Therefore, since defendant was still attempting to steal the vehicle during the time Pendleton was held at gunpoint and forced to drive, there was substantial evidence that Pendleton was kidnapped in order to facilitate the commission of a felony. The State provided substantial evidence to establish all the necessary elements of kidnapping. Therefore, we find no error.

III. Closing Arguments

Defendant next argues the trial court erred in failing to intervene *ex mero motu* when the prosecutor asserted in closing arguments that defendant was lying and that defendant's theory was "trash." We disagree.

Since defendant failed to object during closing arguments, defendant must show "that the prosecutor's argument was so grossly improper that the trial court abused its discretion by

failing to intervene *ex mero motu*." *State v. Campbell*, 359 N.C. 644, 676, 617 S.E.2d 1, 21 (2005) (internal quotations and citation omitted). We must also determine if defendant has shown how the prosecutor's comments prejudiced him. "In order to reach the level of prejudicial error ... the prosecutor's comments must have so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Peterson*, 361 N.C. 587, 607, 652 S.E.2d 216, 230 (2007) (internal quotations and citations omitted).

The General Assembly has set out standards for closing arguments:

During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2011). While a lawyer may "argue to the jury that they should not believe a witness," "[i]t is improper" for the lawyer "to assert his opinion that a witness is lying." *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) (internal quotations and citations omitted). In

addition, the prosecutor may not give their personal opinion about the credibility of a witness. *Id.* at 218, 241 S.E.2d at 70. However, "[c]ounsel is allowed to respond to arguments made by defense counsel and restore the credibility of a witness who has been attacked in defendant's closing argument." *State v. Worthy*, 341 N.C. 707, 711, 462 S.E.2d 482, 484 (1995) (citation omitted).

In the instant case, during the prosecutor's closing argument, defendant contends the prosecutor relied on the inconsistencies between defendant's trial testimony and pretrial statements to assert that defendant lied. In doing so, the prosecutor argued that defendant "hear[d] what everybody else said" and then "craft[ed] a story to match what was said." In addition, the prosecutor stated that defendant "listen[ed] to what all the evidence was and then fashion[ed] a story as best he could." However, although defendant contends that the prosecutor repeatedly asserted that he was lying, the prosecutor never stated that defendant was lying or called him a liar. While it is improper for a prosecutor to say a defendant is lying, a prosecutor may argue to the jury that the witness is not believable. *See Locklear*, 294 N.C. at 217, 241 S.E.2d at 70. The prosecutor's statements, that defendant created a story

based on the testimony of other witnesses, were not improper and do not rise to the level of reversible error.

Defendant also contends the prosecutor bolstered the testimony of his own witnesses by asserting that because the officers "had no stake in this trial" they would not lie, as that would place "their jobs in jeopardy." However, this statement was made during the prosecutor's rebuttal argument responding to defense counsel's suggestion that the officers lied during their testimony. As the Court in *Worthy* recognized, it was appropriate for the prosecutor to "shore-up [the witness's] credibility in the eyes of the jury after [their] credibility had been attacked." *Worthy*, 341 N.C. at 711, 462 S.E.2d at 484. Therefore, the prosecutor's statement bolstering the officer's credibility was also not improper, did not require intervention by the trial court, and the trial court did not abuse its discretion by failing to intervene.

Defendant further contends that the trial court should have intervened when the prosecutor stated "what you have right now from [defendant] is trash. What you have showing the [d]efendant to be guilty is evidence." This statement, at the end of the prosecutor's rebuttal closing argument, attacked defendant's theory of the case. We agree that the prosecutor

improperly inserted his personal opinion of defendant's case during closing arguments.

A lawyer's personal opinion of the defendant's theory of the case cannot exceed proper boundaries. *State v. Matthews*, 358 N.C. 102, 111-12, 591 S.E.2d 535, 542 (2004) (while the case was reversed on other grounds, the Court still found it improper for the prosecutor to call the defendant's theory of the case "bull crap"). However, the "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Anderson*, 175 N.C. App. 444, 453-54, 624 S.E.2d 393, 400-01 (2006) (even when an attorney stated defendant's arguments were "just crazy[,] the Court concluded that the comment did not rise "to the level of fundamental unfairness" necessary to grant the defendant a new trial).

Just as the Court in *Matthews* found that the prosecutor's personal opinion of the defendant's theory of the case exceeded proper boundaries, we find the prosecutor in the instant case also exceeded proper boundaries. However, defendant must show how the prosecutor's statement of his personal opinion has prejudiced him and will not be granted a new trial unless he

shows how the comments from the prosecutor rendered his conviction fundamentally unfair.

Defendant testified to his theory of the case, that he had been somewhere else selling drugs on the day of the incident and did not participate in robbing Pendleton. Defendant claimed that he did not make a statement to the officers that he was in the vehicle at the time of the robbery and testified the reason he fled from the officers was because he possessed marijuana.

In contrast to defendant's evidence, the State presented witnesses Pendleton and a bystander who identified defendant as one of the perpetrators. After defendant was apprehended on the day of the incident, Pendleton identified him during a show up. The accuracy of Pendleton's identification is bolstered by his testimony that he recognized defendant when defendant approached him requesting a ride because he met defendant the night before the robbery. In addition, a woman who lived in the area where the accident occurred testified that she saw defendant leave the wrecked vehicle and run through her yard. Furthermore, the officers testified that when they apprehended defendant he told them he "was just in the car. [He] didn't do anything. [He] was just there." The State presented substantial evidence to

prove to the jury that defendant participated in kidnapping and robbing Pendleton.

Thus the jury was presented with two separate theories of what occurred on the day of the incident and it was their duty to determine whether to believe the State or defendant. See *State v. Pallas*, 144 N.C. App. 277, 286, 548 S.E.2d 773, 780 (2001) (the jury is the party that should resolve contradictions and discrepancies in the evidence). At the end of the prosecutor's rebuttal argument, he suggested to the jury that his theory of the case was supported by evidence while defendant's theory of the case was "trash." Subsequently, the judge instructed the jury to apply the law to the facts that they determined from the evidence.

Although it was improper for the prosecutor to give his personal opinion of defendant's theory of the case, the jury was instructed to rely on their recollection of the evidence. After hearing all the evidence and the jury instructions, the jury determined that defendant was guilty of first degree kidnapping and RWDW. Based on the totality of evidence indicating that defendant did participate in the robbery and kidnapping, the prosecutor's improper remark did not render the conviction fundamentally unfair. The State presented sufficient evidence

for the jury to determine defendant committed the alleged acts and defendant has failed to show how the prosecutor's improper statement was prejudicial rendering the conviction fundamentally unfair. Therefore, defendant was not prejudiced by the prosecutor's remark. The trial court was not required to intervene and did not err by failing to intervene *ex mero motu* during the prosecutor's closing arguments.

IV. Conclusion

The trial court did not err when it denied defendant's motion to dismiss because the State proved each element of the kidnapping charge. In addition, the trial court did not err by failing to intervene *ex mero motu* during closing arguments. No error.

No error.

Judges McGEE and HUNTER, Robert C. concur.

Report per Rule 30(e).