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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-9

Filed: 3 September 2019

Wake County, Nos. 17CRS215380, 1482

STATE OF NORTH CAROLINA,

v.

WILLIE TREMAINE BOBBITT, Defendant.

Appeal by defendant from judgments entered 23 April 2018 by Judge Henry W. Hight Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General G. Mark Teague, for the State.

Office of the Public Defender, by Assistant Public Defender Brendan O'Donnell, for defendant-appellant.

BERGER, Judge.

Willie Tremaine Bobbitt ("Defendant") was found guilty of common law robbery, second degree kidnapping, misdemeanor breaking or entering, and having attained habitual felon status. Defendant appeals, arguing that the trial court erred when it denied Defendant's motion to dismiss the kidnapping charge and when it

denied Defendant's request to instruct on the lesser-included offense of misdemeanor larceny. We find no error.

Factual and Procedural Background

David Deyton ("Deyton") and Dwight Robinett ("Robinett") were friends who lived together. In the early morning hours of August 10, 2017, Deyton heard a knock on the door. Deyton was the only one home, and he opened the door. Defendant forced his way into the home and told Deyton to get on the floor. Deyton testified that when Defendant first came in the door, he could not tell what Defendant was holding because there was a rag over his arm. However, once Deyton grabbed what he thought felt like a barrel, Defendant responded "let go of my gun." Deyton complied with Defendant's order. Defendant then took an electric cord off of a fan near-by and "hog-tied" Deyton on the couch face down.

Defendant removed Deyton's wallet from his pocket, and looked through the contents after he threw them on the floor. Afterwards Defendant cut Deyton loose, picked up the landline phone, Deyton's cellphone and wallet, told him "don't call anybody," and left. This entire encounter took place in the living room and lasted about ten to twelve minutes.

Once Defendant left, Deyton emailed Robinett to let him know what had occurred. However, Robinett was working, and he did not receive the email until later

that morning. Once he got home, Robinett called the police and checked the surveillance video from a front door camera.

At trial, Defendant admitted that he visited Robinett's residence on the night of August 10 and rushed into the residence as soon as the door opened. He went there to ask for money, and to make amends for a 2006 incident in which Defendant falsely imprisoned Robinett and forced him to withdraw money from an ATM. Defendant testified that he had to calm Deyton down because Deyton kept yelling.

According to Defendant, he told Deyton that he was looking for money from Robinett. Deyton replied, "maybe I can help you," and proceeded to rub Defendant's crotch. Defendant testified that he had not resisted and allowed Deyton to take his belt and shorts off. Then Deyton began to give Defendant oral sex. Defendant testified he stopped Deyton and requested the money first. When Deyton responded he didn't have any, Defendant pushed Deyton away. Defendant noticed that Deyton had obtained a hammer and was swinging it at Defendant. Defendant hit Deyton and grabbed the hammer.

Defendant then took the electric cord from the nearby fan and tied Deyton's hands. He testified that he loosely tied-up Deyton's arms because he wanted to "keep him calm," but that he had no intention of robbing or terrorizing him. Defendant also testified that he did not remove Deyton's wallet from his pocket, but that he did grab and take the landline phone and Deyton's cellphone before exiting the residence. He

also grabbed his belt, the hammer, the electric cord, and a pair of pants to wrap everything in before leaving. Defendant testified that after left, he discarded the items he had taken from the residence.

Robinett's surveillance video confirmed that Defendant did in fact have a piece of clothing or cloth over his right hand and that he did rush in as soon as the door opened. The video also confirmed that Defendant left the residence holding his belt, the electric cord, and a couple articles of clothing.

Defendant was indicted for first-degree burglary, robbery with a dangerous weapon, second-degree kidnapping, and having attained habitual felon status. The jury found Defendant guilty of common law robbery, second degree kidnapping, misdemeanor breaking or entering, and having attained habitual felon status. Defendant was sentenced as an habitual felon on the robbery and kidnapping counts to consecutive prison terms of 146-188 months, and 120 days for the misdemeanor conviction. Defendant appeals.

Analysis

I. Motion to Dismiss

Defendant contends that the trial court erred when it denied his motion to dismiss the kidnapping charge because there was insufficient evidence that he had the specific intent to terrorize Deyton. We disagree.

"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 (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). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (citations and quotation marks omitted).

Section 14-39 of the North Carolina General Statutes states in pertinent part:

> 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 . . . [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C. Gen. Stat. § 14-39 (a)(3) (2017).

> "[T]he 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 745, 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. *See, e.g., id.*, 315 N.C. at 745, 340 S.E.2d at 406 (where victim testified that she was "very scared" and "horrified"); *State v. Williams*, 127 N.C. App. 464, 468, 490 S.E.2d 583, 586 (1997) (witnesses testified that the victim was crying and hysterical throughout the ordeal). Terrorizing requires not only the intent to place the victim in a state of fear, but requires "putting [the victim] 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 (citing *State v. Jones*, 36 N.C. App. 447, 244 S.E.2d 709 (1978)). The presence or absence of the defendant's intent or purpose to terrorize . . . may be inferred by the fact-finder from the circumstances surrounding the events constituting the alleged crime. *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 271 (1982).

State v. Baldwin, 141 N.C. App. 596, 604-05, 540 S.E.2d 815, 821 (2000).

Here, the State's evidence showed that Defendant forced himself into Deyton's residence while threating him with a gun. Even if Defendant did not have a gun, the video surveillance supports an inference that Defendant was hiding something

underneath the article of clothing covering his right arm. As Defendant was forcing himself inside, Deyton can be heard yelling on the surveillance video. According to Defendant, once inside he tied-up Deyton's hands in order to calm him down. Defendant later un-tied Deyton, threatened him and left. A reasonable juror could conclude that Defendant's purpose was to cause "intense fright or apprehension," or place whomever answered the door in a state of fear.

Furthermore, Deyton testified that Defendant's threat of using his gun "scared [him] the most," and that the entire encounter made him too "scared to go out" because he was "still in shock" and "amazed by what happened." Deyton's feelings are not dispositive, but they are relevant and support an inference that Defendant had put Deyton in a state of intense fright or apprehension. *Baldwin*, 141 N.C. App. at 604-05, 540 S.E.2d at 821. Also, despite Defendant's contention that Deyton's restraint was of "short duration," confinement or restraint need not be for a substantial period of time. *State v. Surrett*, 109 N.C. App. 344, 349, 427 S.E.2d 124, 127 (1993).

Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence of Defendant's intent to terrorize Deyton when Defendant forced himself into Deyton's residence with a gun, threated him, and subsequently tied him up. Thus, the trial court did not err in denying Defendant's motion to dismiss.

II. Jury Instructions

Defendant also argues that the trial court erred when it denied his request to instruct the jury on misdemeanor larceny as a lesser included offense of common law robbery. He specifically contends that "the evidence that property was taken from Deyton's person or presence was conflicting, subject to conflicting inferences, or lacking." We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "It is well-settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Porter*, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009) (citation and quotation marks omitted). In making this determination, "courts must consider the evidence in the light most favorable to [the] defendant." *State v. Debiase*, 211 N.C. App. 497, 504, 711 S.E.2d 436, 441 (2011) (alterations in original citation) (citation and quotation marks omitted). "However, '[i]f the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense.' " *Id.* (citation omitted). "The mere contention that the jury might accept the State's

evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *Porter*, 198 N.C. App. at 189, 679 S.E.2d at 171 (citation and quotation marks omitted).

> Common law robbery is defined as the non-consensual taking of money or personal property from another by means of violence or fear. Larceny from the person is a lesser included offense of common law robbery. The only difference between the two crimes is that common law robbery has the additional requirement that the victim be put in fear by the perpetrator.

State v. White, 142 N.C. App. 201, 204, 542 S.E.2d 265, 267 (2001) (citations omitted). Misdemeanor larceny, which "is a lesser included offense of felony larceny [from the person] . . . lacks the essential element[ ] . . . that the larceny was from the person." *State v. Henry*, 57 N.C. App. 168, 170, 290 S.E.2d 775, 776 (1982).

> For the crime of larceny from the person, the property must be taken " 'from one's presence and control[,]' " which our Supreme Court has stated means "the property stolen must be in the immediate presence of and under the protection or control of the victim at the time the property is taken." *State v. Barnes*, 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996) (emphasis omitted) (quoting *Buckom*, 328 N.C. at 317-18, 401 S.E.2d at 365).

State v. Carter, 186 N.C. App. 259, 264, 650 S.E.2d 650, 654 (2007) (emphasizing that "our courts' holdings as to when larceny from the person has been committed have concentrated on the physical proximity of the victim to the property when it was taken."). In *State v. Hull*, this Court held that the trial court did not err in denying the defendant's requested instruction on the lesser included offense of misdemeanor

larceny where there was sufficient evidence of larceny from the person. *State v. Hull*, 236 N.C. App. 415, 423, 762 S.E.2d 915, 920-21 (2014). There, the defendant took a laptop when the victim momentarily took a break from looking at the screen. *Id.* at 422-23, 762 S.E.2d at 920-21. This Court stated that because the laptop was in close proximity to the victim and still under her control, the elements shown by the State qualified as larceny from the person. *Id.*

In the present case, Defendant does not challenge the presence of violence or fear. Defendant's sole argument is that the evidence of the "from the person or presence" element needed to convict for common law robbery was either conflicting, ambiguous, or lacking. Defendant argues that this case is similar to *State v. Boston*, which concluded that the trial court erred by refusing to instruct on the lesser included offense of misdemeanor larceny where the theft of property was not in the immediate presence of and under the protection or control of the victim. *State v. Boston*, 165 N.C. App. 890, 893, 600 S.E.2d 863, 865 (2004).

However, here, there was sufficient evidence that the wallet and telephones were under Deyton's control, or in his presence. Deyton testified that his wallet had been removed from his pocket by Defendant. After removing the wallet, Defendant threw its contents on the floor and looked through them. An investigator testified that when he arrived on the scene, Deyton informed him that his wallet and cell phone had been taken, and that the photographs he had taken of the living room

revealed that gift cards or store cards, and some bus passes were found on the floor. Defendant contends that Deyton staged this scene. However, "[D]efendant's denial that he committed the offense" alone is insufficient to require an instruction on a lesser included offense. *Debiase*, 211 N.C. App. at 504, 711 S.E.2d at 441 (citation and quotation marks omitted).

Moreover, there was sufficient evidence that Defendant took Deyton's cellphone and the landline phone from his presence. Although Deyton did not specify how far the items were in relation to his position, Defendant conceded that the entire encounter had taken place in the living room. Deyton testified that he saw Defendant pick them up and take them, and Defendant admitted that he picked up and took both phones when he left the residence.

Even in the light most favorable to Defendant, there was sufficient evidence that Defendant did in fact take three items within Deyton's presence and control. The State satisfied its burden of proving each element of the greater offense and Defendant's denial that he committed the offense is not sufficient to entitle him to an instruction on the lesser offense of misdemeanor larceny. Accordingly, we find no error.

Conclusion

Defendant received a fair trial, free from error. The trial court did not err when it denied Defendant's motion to dismiss the kidnapping charge, and when it did not instruct on the lesser included offense of misdemeanor larceny.

NO ERROR.

Chief Judge MCGEE and Judge COLLINS concur.

Report per Rule 30(e).