

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-36

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 04CRS054242

ROBERT DENARD POLLARD

Appeal by defendant from judgments entered 24 August 2004 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 14 September 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Fred C. Lamar, for the State.

M. Alexander Charns for defendant-appellant.

HUNTER, Judge.

Robert Denard Pollard ("defendant") appeals from judgments dated 24 August 2004 entered consistent with a jury verdict finding him guilty of attempted robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. For the reasons stated herein, we find no error in the trial, but remand for resentencing.

The evidence tends to show that on 3 April 2004, defendant entered an ABC Store located in Winston-Salem. While another customer was being checked out by Anthony Tamer ("Tamer"), a clerk working behind the counter in the store, defendant came around the

corner behind Tamer and reached into the cash register till, taking a twenty dollar bill.

Tamer reached for defendant's arm, but was only able to grasp defendant's jacket sleeve, which began to slide off. Tamer called for assistance from his co-worker, Coleman Hastings ("Hastings"), as defendant attempted to leave the store. Hastings helped Tamer wrestle defendant to the ground. Defendant bit Tamer in his struggle to escape. Once defendant was subdued on the ground, Hastings noticed that defendant had a pocketknife in his hand, and that Tamer had blood on his back. Tamer did not see the knife before defendant took the money from the cash register. Tamer received treatment for the wound and the bite at Baptist Hospital. The knife in question was introduced into evidence and a videotape of the incident which showed defendant stabbing Tamer was shown to the jury.

Defendant presented no evidence. Defendant was convicted of both charges and was sentenced to consecutive sentences of 117 to 150 months for attempted robbery with a dangerous weapon and forty-six to sixty-five months for assault with a deadly weapon inflicting serious injury. The trial court recommended that both sentences run at the expiration of a federal sentence which had not yet been activated. Defendant appeals.

I.

Defendant first contends the trial court erred in failing to instruct the jury as to the lesser-included offenses of attempted common law robbery and larceny of the person. We disagree.

The trial judge must charge on a lesser included offense if: (1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified.

State v. Whitaker, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982). However, "[t]he trial court may decline to submit the lesser offense to the jury if 'the State's evidence is positive as to each element of the crime charged' and there is no 'conflicting evidence relating to any of [the] elements.'" *State v. Ray*, 149 N.C. App. 137, 146, 560 S.E.2d 211, 217 (2002) (citation omitted).

A. Attempted Common Law Robbery

Defendant concedes that no request was made for the lesser-included offense of common law robbery and that no objection was made to the instruction for attempted robbery with a dangerous weapon. Defendant therefore appropriately requests this Court review the instructions for plain error. See *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). To reach the level of plain error, "the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *Id.* (citations omitted).

Defendant, citing *State v. Smallwood*, 78 N.C. App. 365, 337 S.E.2d 143 (1985), argues that the trial court should have submitted a common law robbery instruction to the jury because the evidence did not compel a finding that the weapon used was a dangerous weapon as a matter of law. Defendant contends that

factual issues existed as to whether the knife was a deadly weapon and as to whether a weapon was used in the attempted robbery.

"The essential elements of attempted armed robbery, as set forth in G.S. sec. 14-87(a), are: (1) the unlawful attempted taking of personal property from another; (2) the possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim." *State v. Rowland*, 89 N.C. App. 372, 376, 366 S.E.2d 550, 552 (1988). "Common law robbery is a lesser included offense of armed robbery." *Smallwood*, 78 N.C. App. at 370, 337 S.E.2d at 146.

Although our Supreme Court has recognized that "[a] pocketknife is . . . unquestionably capable of causing serious bodily injury or death[,]" *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 726 (1981), it is the "circumstances of the case, rather than the physical description of the knife itself, [which] ultimately determine this issue." *Smallwood*, 78 N.C. App. at 368, 337 S.E.2d at 145. In *Smallwood*, the Court noted that the knife in question was not introduced into evidence and no physical injury had occurred. The Court further noted that contradictory evidence was offered as to whether the knife was used in the robbery. *Smallwood* recognized authority that the determination of whether a knife was a deadly weapon was solely for the court when the weapon had been "either introduced into evidence or described in detail without contradiction." *Id.* at 369, 337 S.E.2d at 145. *Smallwood* also stated that a knife was a dangerous weapon *per se*, absent production of the knife or a detailed description, when the victim

had in fact suffered serious bodily injury or death. *Id.* Because in *Smallwood* neither the knife itself nor evidence of serious injury was presented to the trial court, and contradictory evidence was given as to the use of the knife, the Court held that the issue of whether the knife was a deadly weapon was a question for the jury to resolve, and determined under those facts that the jury should have been instructed on the lesser-included offense of common law robbery. *Id.* at 371, 337 S.E.2d at 146.

The Court's holding in *Smallwood* is distinguishable on its facts from the instant case. Here, the State introduced into evidence the pocketknife used by defendant to stab Tamer. Further, Tamer's injuries were sufficiently serious to require hospital treatment. Under the circumstances of the case, the trial court did not err in finding the knife was a dangerous weapon. *Smallwood*, 78 N.C. App. at 369, 337 S.E.2d at 145.

Additionally, the evidence shows that defendant's use of the knife was part of the transaction of the attempted robbery. In *State v. Bellamy*, 159 N.C. App. 143, 582 S.E.2d 663, cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003), the defendant entered a video store and stole two adult videos and a donation can. *Id.* at 145, 582 S.E.2d at 665. The defendant made no threats and did not display a weapon to the clerks in the store. *Id.* One of the clerks gave chase when the defendant left without paying for the videos, ending at the entrance to a dead-end road approximately twenty feet from the store. *Id.* The defendant then produced a pocketknife, brandished it at the clerk, and asked "[y]ou want a

piece of this?'” *Id.* The Court in *Bellamy* stated “‘the exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction[,]’” and that “‘the taking is not over until after the thief succeeds in removing the stolen property from the victim’s possession.’” *Id.* at 149, 582 S.E.2d at 668 (citations omitted). Because “[d]efendant’s brandishing of a weapon . . . was necessary to complete the taking of the videos,” *Bellamy* held that the “taking and threatened use of force was so joined by time and circumstances so as to constitute a single transaction.” *Id.*

Similarly, here Tamer attempted to stop defendant immediately after he took the money, and defendant was still inside the premises when he used the pocketknife to assault Tamer in an attempt to effectuate his escape. Defendant’s taking of the money and use of force in stabbing Tamer with a pocketknife were joined by time and circumstance so as to constitute a single transaction. Therefore, evidence that the knife was used as a weapon during the course of the robbery was presented to the trial court.

Uncontradicted evidence was presented that the knife was used as a weapon in the course of the robbery, and the circumstances of the case support the trial court’s finding, as a matter of law, that the knife was a dangerous weapon. We therefore find no error in the trial court’s failure to instruct the jury on the lesser-included offense of common law robbery, and do not reach a plain error analysis.

B. Larceny from the Person

Defendant also contends that the trial court erred in failing to give the requested instruction for the lesser-included offense of larceny from the person.

As discussed *supra*, the evidence was uncontradicted that defendant used a knife during the course of the robbery to stab Tamer. As positive evidence was presented as to each element of the crime of robbery with a dangerous weapon, the trial court did not err in refusing to instruct the jury on the lesser-included offense of larceny from the person. This assignment of error is without merit.

II.

Defendant next contends that the trial court committed reversible error by peremptorily instructing the jury that a knife is a deadly weapon over the objection of defense counsel. We disagree.

It has long been the law of this state that "[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring."

State v. Torain, 316 N.C. 111, 119, 340 S.E.2d 465, 470 (1986) (citations omitted).

For the reasons discussed *supra* in Section I, we find that the trial court, under the circumstances of the case, properly concluded as a matter of law that the knife used was a deadly weapon. This assignment of error is without merit.

III.

Defendant next contends that the trial court committed reversible error by instructing the jury that the temporal order of using a weapon was immaterial on the attempted robbery with a dangerous weapon charge. We disagree.

Our Supreme Court has addressed the issue of the temporal nature of use in a charge of robbery or attempted robbery with a dangerous weapon. In *State v. Green*, 321 N.C. 594, 365 S.E.2d 587 (1988), the Supreme Court held:

The commission of armed robbery as defined by N.C.G.S. § 14-87(a) does not depend upon whether the threat or use of violence precedes or follows the taking of the victims' property. Where there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the takings is immaterial. Further, provided that the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after force was used upon the victims.

Id. at 605, 365 S.E.2d at 594 (citations omitted).

As discussed *supra*, the evidence presented in the instant case showed that defendant's use of the weapon was a part of the continuous transaction of the robbery, and therefore "the temporal order of the threat or use of a dangerous weapon and the takings is immaterial." *Id.* This assignment of error is without merit.

IV.

Defendant next contends the trial court erred as a matter of law in not granting defendant's motion to dismiss both charges due to insufficient evidence. We disagree.

The substantial evidence test is the appropriate standard of review for a motion to dismiss based on insufficiency of the evidence. "\"The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense.\"\" State v. Buff, ___ N.C. App. ___, ___, 612 S.E.2d 366, 370 (2005) (citations omitted). In ruling on a motion to dismiss, the evidence must be considered in the light most favorable to the State. Id.

As discussed *supra*, defendant was charged with attempted robbery with a dangerous weapon. The elements of robbery with a dangerous weapon are: \"(1) the unlawful attempted taking of personal property from another; (2) the possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim.\" Rowland, 89 N.C. App. at 376, 366 S.E.2d at 552. Defendant contends that insufficient evidence was offered that the knife was a dangerous weapon.

For the reasons stated *supra* in Sections I and II, we find, when taken in the light most favorable to the State, sufficient evidence was presented that the knife used in the course of the robbery was a deadly weapon.

Defendant was also charged with assault with a deadly weapon inflicting serious injury. \"The essential elements of the charge of assault with a deadly weapon inflicting serious injury are (1) an assault (2) with a deadly weapon (3) inflicting serious injury

(4) not resulting in death." *State v. McCree*, 160 N.C. App. 200, 205-06, 584 S.E.2d 861, 865 (2003); N.C. Gen. Stat. § 14-32(b) (2003). Defendant contends insufficient evidence was offered that the knife was a deadly weapon and that a serious injury was inflicted.

As discussed *supra*, sufficient evidence was presented that the knife used in the course of the robbery was a deadly weapon. We therefore turn to defendant's contention that insufficient evidence of serious injury was shown.

"The term 'serious injury' as employed in N.C.G.S. § 14-32(a) means physical or bodily injury resulting from an assault with a deadly weapon." *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988). A determination of whether a serious injury has occurred must be determined according to the facts of each case. *Id.* at 688, 365 S.E.2d at 586-87. Factors such as "'hospitalization, pain, loss of blood, and time lost at work'" may be considered in determining whether an injury is serious. *State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994) (citations omitted).

Cases that have addressed the issue of the sufficiency of evidence of serious injury appear to stand for the proposition that as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious.

Id.

Here, evidence was presented that the victim, Tamer, sustained a physical injury, a knife wound in the back which was treated at

a hospital. Further, Tamer testified that soreness from the injury continued for about a week. As sufficient evidence of physical injury was presented by the State to reach the jury, the trial court properly denied defendant's motion to dismiss both charges for insufficient evidence.

V.

Defendant next contends the trial court erred in aggravating defendant's sentence by a fact not set out in the indictment and determined by the jury beyond a reasonable doubt. We disagree.

Defendant contends that the trial court's increase in defendant's prior record level points for commission of the crime during probation, which defendant concedes did not increase his prior record level, is an aggravating factor not submitted to the jury in violation of defendant's Sixth Amendment rights.

In *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), our Supreme Court considered North Carolina's structured sentencing laws in light of the recent United States Supreme Court decisions in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000).

The Supreme Court of North Carolina held that, "[a]ppplied to North Carolina's structured sentencing scheme, the rule of *Apprendi* and *Blakely* is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 395 N.C. at 437, 615 S.E.2d at 264-65.

Here, defendant had twelve points from prior felony convictions. The trial court added an additional point for commission of an offense on post-release supervision, for a total of thirteen points. As defendant's prior record points were between nine and fourteen, defendant was sentenced as a Prior Record Level IV. The trial court then made no findings of aggravating or mitigating factors and sentenced defendant within the presumptive range. As defendant was sentenced within the presumptive range, this assignment of error is without merit.

VI.

Defendant next contends trial counsel provided ineffective assistance in the course of the trial. We disagree.

"Attorney conduct that falls below an objective standard of reasonableness and prejudices the defense denies the defendant the right to effective assistance of counsel." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001). "An [ineffective assistance of counsel] claim must establish both that the professional assistance defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance." *Id.*

Defendant concedes that an ineffective assistance of counsel claim cannot be raised at this time based on the record. Defendant argues that the trial counsel's ineffective assistance cannot be determined because of the lack of complete recordation of jury selection, bench conferences, and arguments of counsel.

When the merits of an ineffective assistance claim cannot be determined by the cold record, ancillary proceedings such as an evidentiary hearing may be required. "In this situation the appropriate remedy, if any, is for a defendant to file, either before or after direct appeal, a motion for appropriate relief in the superior court based upon ineffective assistance of counsel pursuant to N.C.G.S. § 15A-1415(b)(3)." *State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995). We, therefore, dismiss this claim without prejudice to defendant's right to file a motion for appropriate relief.

VII.

Defendant next contends the trial court committed plain error in its instructions to the jury as to the standard of proof. We disagree.

As discussed *supra*, for a trial court's jury instructions to reach the level of plain error, the error "must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *Collins*, 334 N.C. at 62, 431 S.E.2d at 193 (citations omitted).

Here, defendant contends that the trial court's use of the North Carolina Criminal Pattern Jury Instruction 101.36 provided a lower standard of proof to the jury than reasonable doubt. The trial court instructed the jury:

I charge you that the highest aim of every legal contest is the ascertainment of the truth. Somewhere within the facts of every case the truth abides. And where truth is

justice steps in garbed in its robes and tips the scale. Now, in this case you have no friend to reward, you have no anger to appease or sorrow to assuage. Yours is a solemn duty to let your verdict speak the everlasting truth.

In *State v. Garner*, 330 N.C. 273, 410 S.E.2d 861 (1991), our Supreme Court considered the challenge that the trial court's use of N.C.P.I. Crim. 101.36 permitted jurors to convict the defendant using a lower standard than reasonable doubt. *Id.* at 296, 410 S.E.2d at 874. The *Garner* Court held that the instruction was proper when construed as a whole, as the trial court had previously instructed the jury as to the standard of reasonable doubt, and had defined the term reasonable to the jury. *Id.*

Similarly here, the trial court gave the pattern jury instructions verbatim after instructing the jury as to the standard of reasonable doubt and reiterated the standard of proof throughout the instructions. Defendant fails to show any possibility that the trial judge confused the jurors concerning the reasonable doubt standard. This assignment of error is without merit.

VIII.

Defendant finally contends the trial court erred as a matter of law in imposing a consecutive sentence to a federal sentence that was not yet activated. We agree.

N.C. Gen. Stat. § 15A-1354(a) (2003) states that:

When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the

sentences may run either concurrently or consecutively, as determined by the court.

Id. In interpreting section 15A-1354 in *State v. Campbell*, 90 N.C. App. 761, 370 S.E.2d 79 (1988), this Court stated, "[i]t is clear from the reading of G.S. 15A-1354(a) that the statutory language does not mean any term of imprisonment to which defendant *might* become subject in the future." *Id.* at 763, 370 S.E.2d at 80. *Campbell* held that at the time of sentencing, defendant's sentence could only be ordered to "run consecutively or concurrently with any *undischarged term of imprisonment to which defendant was 'already' subject at that time[,]*" not to a sentence imposed more than a year after the first sentence. *Id.*

Here, the record shows that defendant was on probation for a federal felony conviction at the time he committed the crimes at issue in the instant case. The State informed the trial court that defendant's federal probation officer intended to seek a reinstatement of defendant's federal sentence, but that such action had not yet been taken. The trial court then instructed that defendant's sentences for the instant crimes run "at expiration of Federal bank robbery case # 1:98CR207-1." As the record reflects that defendant was not already subject to an undischarged term of imprisonment at the time his sentences in the instant case were entered, we remand for resentencing as to the date of the commencement of defendant's sentences.

We find the trial court did not err in instructing the jury, or in denying defendant's motion to dismiss for insufficient evidence, and dismiss defendant's assignment of error as to

ineffective assistance without prejudice. We remand, however, for resentencing as to the date of the commencement of defendant's sentences.

Remanded for resentencing.

Judges TYSON and STEELMAN concur.

Report per Rule 30(e).