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NO. COA05-161

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 02 CRS 74932

CARLOS RODRIQUEZ HALL

Appeal by defendant from judgment entered 20 July 2004 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 November 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen E. Long, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant.

SMITH, Judge.

Carlos Rodriquez Hall ("defendant") appeals his conviction for robbery with a dangerous weapon. For reasons stated herein, we conclude defendant received a trial free of prejudicial error.

The evidence presented by the State tends to show the following: On 11 June 2002, William Nixon ("Nixon") walked from his apartment to a BiLo store on Freedom Drive in Charlotte and withdrew \$100.00 from an ATM inside the store. Outside the store, a black male holding a gun out to the side approached Nixon and told Nixon to give him the money. Once Nixon gave up the money, the robber ran back into the parking lot and entered a vehicle. As

the robber drove out of the parking lot, Nixon got the license plate number. Nixon then ran to his apartment and called the police.

Officer Artis Glenn ("Officer Glenn") of the Charlotte-Mecklenburg Police Department responded to Nixon's 911 call concerning the robbery. Officer Glenn obtained a written statement from Nixon in which Nixon described the robber, stated he could identify the robber, and gave the license tag number on the vehicle the robber drove. Nixon later identified defendant as the robber from a photographic lineup.

Detective Randy Carroll ("Detective Carroll") of the Charlotte-Mecklenburg Police Department was assigned to investigate the case. Detective Carroll contacted Tarrah Clyburn ("Clyburn"), registered owner of the car bearing the license plate number Nixon memorized. Clyburn told Carroll that defendant had possession of her car on the day of the robbery.

Clyburn testified she and defendant lived together in June 2002. Defendant dropped her off at work at approximately 6:50 a.m. on 11 June 2002 and picked her up between 5 and 5:15 p.m. Clyburn stated she received a telephone call from Detective Carroll on 12 June 2002. Detective Carroll informed her that her car had been involved in a robbery and questioned Clyburn as to her whereabouts during the time in question. While Clyburn was talking with Detective Carroll, "in the background Carlos was like, I didn't have your car, it wasn't me, I didn't have your car you know." After speaking with Detective Carroll, Clyburn asked defendant what

occurred. "He said he asked the guy did he have change for a hundred dollars. And the guy said yeah and he said he took the guy's money and he left."

Defendant was arrested on 13 June 2002 and charged with armed robbery. The Grand Jury returned a true bill of indictment on the charge of robbery with a dangerous weapon on 28 October 2002. The matter was tried before a jury at the 19 July 2004 criminal session of Superior Court in Mecklenburg County. Defendant did not present any evidence. A jury found defendant guilty of robbery with a dangerous weapon on 20 July 2004.

Initially, we note defendant's brief contains arguments supporting only four of the original nine assignments of error in the record on appeal. The assignments of error for which no arguments are made are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). Therefore, we limit our review to the assignments of error properly preserved by defendant on appeal.

The issues on appeal are: (I) whether the trial court erred by failing to instruct the jury on the offense of common law robbery; (II) whether the trial court erred by failing to instruct the jury on the offense of larceny from the person; and (III) whether defendant was denied effective assistance of counsel for the reasons that defense counsel failed to request instructions on the two alleged lesser included offenses.

Defendant first contends the trial court "committed plain error in failing to instruct the jury on the lesser included offense of common law robbery[.]" We disagree.

Rule 10(b)(2) of the Rules of Appellate Procedure requires that a party must object to jury instructions before the jury retires to consider its verdict in order to preserve the issue for appellate review. Where the party fails to object at trial, this Court may review the alleged error under the plain error rule. The plain error rule

is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation and citation omitted). "A prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's action] constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L.Ed. 2d 77 (1986).

"[A] defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it."

State v. Johnson, 317 N.C. 193, 205, 344 S.E.2d 775, 782 (1986). "Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002).

"The elements of robbery with a dangerous weapon are: (1) the unlawful attempt to take or taking of personal property from a person or presence, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of the person is threatened or endangered." *State v. Gay*, 151 N.C. App. 530, 532, 566 S.E.2d 121, 124 (2002) (citation omitted).

"Common law robbery is a lesser included offense of armed robbery." *State v. Porter*, 303 N.C. 680, 686, 281 S.E.2d 377, 382 (1981). "The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985). "[T]he trial judge is not required to instruct on common law robbery when the defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery was perpetrated by the use or threatened use of . . . a dangerous weapon." *Porter*, 303 N.C. at 686-87, 281 S.E.2d at 382.

In the instant case, Nixon testified that he was outside the BiLo counting his money and about to put the money in his pocket when defendant came up to him. Nixon did not notice defendant's

approach until defendant was approximately two feet away from him. Nixon noted defendant was holding a gun "to the side like he was trying to conceal it but it was out in the open." Defendant told Nixon to give him the money and Nixon gave defendant the money. Nixon ran home to get to a safe place after the robbery before he called the police.

Defendant argues the evidence at trial was equivocal as to the possession, use, or threatened use of a dangerous weapon. Specifically, defendant contends the State presented sufficient evidence through the testimony of his former girlfriend, Tarrah Clyburn, from which one can reasonably infer no gun was used during the taking. Ms. Clyburn testified that when she asked him what happened on the date in question, defendant told her "he asked the guy did he have change for him and when the guy pulled it out he did tell me he took it." Clyburn also testified she had never seen defendant with a gun even though defendant lived with her for some months prior to the incident. Defendant states Clyburn's testimony is evidence of "a 'flim-flam' as opposed to a robbery with a dangerous weapon." We conclude the testimony of Clyburn, if believed, did not establish defendant's right to an instruction on common law robbery.

Defendant also contends the evidence was conflicting with regard to whether or not Nixon's life was threatened or endangered. Defendant argues "it is clear that defendant did not point the gun directly at Nixon or specifically threaten to use it on him." Defendant's argument is unpersuasive. A firearm is a dangerous

weapon *per se*. See *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984); *State v. Ross*, 31 N.C. App. 394, 395-96, 229 S.E.2d 218, 219 (1976), *disc. rev. denied and appeal dismissed*, 291 N.C. 715, 232 S.E.2d 206 (1977). "When a dangerous weapon is used in a robbery, the law presumes that the victim's life was threatened." *State v. Pratt*, 161 N.C. App. 161, 164, 587 S.E.2d 437, 439 (2003).

We conclude the State's evidence is positive for each element of armed robbery. Defendant took cash from the person of Nixon using a gun whereby Nixon's life was endangered or threatened. The trial court did not err in failing to instruct the jury on common law robbery. This assignment of error is overruled.

Defendant next argues that the trial court committed plain error in failing to instruct the jury on the lesser included offense of larceny from the person. Defendant contends there was evidence that defendant took Nixon's money without using a weapon and without putting Nixon in fear. Specifically, defendant contends Clyburn's testimony that defendant "asked the guy did he have change for him and when the guy pulled it out he did tell me he took it" would support a finding by the jury that defendant took the money from Nixon without possessing a firearm. We disagree.

Larceny is "the taking and carrying away of the property of another without the owner's consent and with the intent to permanently deprive the owner of his property." *State v. Washington*, 142 N.C. App. 657, 660, 544 S.E.2d 249, 251 (2001). "Larceny is a lesser included offense of robbery with a dangerous

weapon." *State v. Cummings*, 346 N.C. 291, 326, 488 S.E.2d 550, 571 (1997). As stated *supra*, "[a] 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. White*, 322 N.C. 506, 512, 369 S.E.2d 813, 816 (1988) (citation and quotation omitted). "The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements." *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990).

Application of the foregoing principles to the instant case leads us to conclude the State introduced positive evidence as to each essential element of the charge of robbery with a dangerous weapon and the trial court did not err by failing to instruct the jury on the lesser included offense of larceny. Accordingly, this assignment of error is also overruled.

Lastly, we consider defendant's contention that he received ineffective assistance of counsel. Defendant contends his trial counsel's failure to request submission of the lesser included offenses of common law robbery and larceny constitutes ineffective assistance of counsel.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct

fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). To meet this burden, defendant must satisfy a two-part test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "If a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

In the case *sub judice*, we have already concluded the trial court did not err in failing to instruct the jury on the lesser included offenses of common law robbery and larceny. Since there is no merit to the contention it was error for the court to fail to submit those charges to the jury, we also conclude trial counsel's failure to request submission of the lesser included offenses did not amount to ineffective assistance of counsel.

For the foregoing reasons, we hold defendant received a trial free of prejudicial error.

No error.

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Judges TYSON and JACKSON concur.

Report per Rule 30(e).