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NO. COA08-429

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 07 CRS 90975,77

JOHN DAVID WOOD

Court of Appeals

Appeal by defendant from judgments entered 30 November 2007 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 8 December 2008.

Slip Opinion

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finis, for the State.

Crumpler, Freedman, Parker, and Witt, by Vincent F. Rabil, for defendant-appellant.

BRYANT, Judge.

Defendant John Wood appeals from judgments entered 30 November 2007 after a jury found him guilty of robbery with a dangerous weapon and possession of a firearm after having been convicted of a felony. The trial court sentenced defendant to consecutive terms of 77 to 102 months, for the robbery with a dangerous weapon, and 15 to 18 months, for the possession of a firearm by a felon. For the reasons stated below, we hold no error.

The evidence at trial tended to show that at about midnight on 7 June 2007, Anthony White and Darlene Izzard left a pool hall in

Greensboro, North Carolina and stopped at Izzard's home on their way to another club. Behind Izzard's home they saw four men sitting in a parked car. Izzard recognized defendant and another man from the pool hall.

Izzard's house was a place to drink and play cards. So, Izzard let defendant and two men into her house. About ten minutes later, two other men Izzard and White knew, "Red" and "Fix," also came to Izzard's house. White noticed defendant sitting in the living room by himself, "just like casing the house." And, for about twenty to twenty-five minutes, defendant's two companions went in and out of the house. After that, defendant came into the room where White was playing cards with Red and Fix and yelled "Get down, get down on the ground." Defendant pointed what looked like a nine-millimeter hand gun at White, "Fix" and "Red." Defendant said, "Everybody lay down and give me what you got." Defendant also told White, "Fix," and "Red" to take off their clothes.

At that point, Izzard began arguing with defendant, and he pointed the gun at her. Izzard asked defendant why he was doing this to her, and then called out to one of defendant's companions to come and get him. One of defendant's companions came into the room and told defendant, "Look, we've got to go." Defendant took cigarettes and five or six \$1 bills from Izzard's pockets before he left. Izzard's neighbor called the police.

At approximately 2:40 a.m., defendant's car was stopped by Greensboro police officers who removed the occupants and searched the vehicle. In the interior of the car, they found three \$5.00

bills and ten \$1.00 bills. In the trunk, they found three weapons — a loaded .38 caliber handgun and two nine millimeter semi-automatic pistols.

Izzard was transported to the scene of the stopped car where she identified defendant as the man "who was armed with the black handgun and had pointed it at her."

Defendant was interviewed by police and admitted that he drove to Izzard's house after leaving the pool hall. He said that he and his two companions went inside Izzard's house and a fight erupted over whether one man had paid for a drink. Defendant said he was scared and pulled out a gun. Defendant said "he did not rob anybody," but admitted that he took the cigarettes. Defendant also admitted that all three guns in the car were his.

At trial, defendant did not present any evidence. Defendant moved to dismiss the charges at the end of the State's evidence and again at the close of all the evidence. The trial court denied both motions, and instructed the jury on the offenses of robbery with a dangerous weapon and possession of a firearm by a felon. The jury found defendant guilty of both charges, and the trial court entered judgment. Defendant appeals.

Defendant raises three issues on appeal by asserting: (I) the trial court erred by failing to dismiss the charge of robbery with a dangerous weapon; (II) the trial court committed plain error by not instructing the jury on the lesser included offenses of assault

with a deadly weapon and misdemeanor larceny; and (III) defendant received ineffective assistance of counsel.

I

First, defendant argues that the trial court erred when it denied his motions to dismiss the charge of robbery with a dangerous weapon because there is insufficient evidence that defendant intended to commit a robbery. We disagree.

When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.

State v. Earnhardt, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). "The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003).

An armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property.

State v. Davis, 301 N.C. 394, 397, 271 S.E.2d 263, 264 (1980).

Here, defendant entered Izzard's house armed with a gun. White saw defendant sitting in Izzard's house "casing the joint." A short time later, defendant pointed a gun at White and two other men and demanded that they get on the floor and give up money.

Defendant then turned the gun toward Izzard and demanded that she give him her money and cigarettes. While still pointing the gun at Izzard, defendant took her money and cigarettes and left. Viewing that evidence in the light most favorable to the State, the trial court properly denied defendant's motions to dismiss the charge of robbery with a dangerous weapon.

II

Next, defendant contends the trial court committed plain error by not instructing the jury on the offenses of assault with a deadly weapon and misdemeanor larceny as lesser-included offenses of armed robbery. We disagree.

Because defendant did not object to the trial court's jury instructions, we review the instructions for plain error. *State v. Finney*, 358 N.C. 79, 89, 591 S.E.2d 863, 869 (2004). Plain error is error "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.'" *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006).

"Assault with a deadly weapon is a lesser included offense of the crime of robbery by firearm." *State v. Davis*, 31 N.C. App. 590, 591, 230 S.E.2d 203, 204 (1976). "Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense." *State v. Mull*, 224 N.C. 574, 576, 31 S.E.2d 764, 765 (1944).

Larceny is also a lesser-included offense of robbery with a dangerous weapon. *State v. White*, 322 N.C. 506, 518, 369 S.E.2d

813, 819 (1988). "There is a special relationship between armed robbery and larceny. Both crimes involve an unlawful and willful taking of another's personal property. . . . [A]rmed robbery is an aggravated form of larceny." *Id.* at 516, 369 S.E.2d at 818.

The test for whether to give a jury instruction on a lesser-included offense "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). "A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it." *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). Where the evidence shows a completed armed robbery, and there is no conflicting evidence on the elements of that crime, the defendant is not entitled to a jury instruction on assault with a deadly weapon or larceny. *See State v. Cummings*, 346 N.C. 291, 327, 488 S.E.2d 550, 571 (1997); *see also, Davis*, 31 N.C. App. 590, 230 S.E.2d 203.

Here, defendant contends that the trial court was required to give jury instructions on the lesser included offenses based on Detective Miller's testimony that defendant claimed "he did not rob anybody" and that he only displayed his gun after a fight erupted. Contrary to defendant's argument, however, his general denial of the robbery did not create a need for instructions on lesser included offenses. Even if, as defendant contends, he did not have the intent to rob Izzard when he initially brandished his gun, the

uncontroverted testimony describing his actions after he displayed the gun demonstrated his intent. White and Izzard both testified that defendant demanded everyone get down on the ground and give him their money. Ultimately, defendant took money and cigarettes from Izzard while he pointed a gun at her and then fled the scene. The State's evidence established every element of robbery with a dangerous weapon, and the trial court did not err and did not commit plain error, when it did not instruct the jury on the offenses of assault with a deadly weapon or larceny. Accordingly, defendant's assignment of error is overruled.

III

Last, defendant argues that trial counsel rendered ineffective assistance by failing to request jury instructions on the lesser-included offenses. We disagree.

To prove a claim of ineffective assistance of counsel, a defendant must make two showings:

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*.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

As previously discussed, defendant was not entitled to jury instructions on assault with a deadly weapon or larceny. Thus, we cannot say that counsel's failure to request those instructions was deficient or prejudiced defendant. Accordingly, we find no error.

No error.

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Judges TYSON and ARROWOOD concur.

Reported per Rule 30(e).