

NO. COA14-997

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2015

STATE OF NORTH CAROLINA

v.

Wake County
No. 12CRS228467

JAMAR ISHMEAL WRIGHT
Defendant.

Appeal by Defendant from judgment entered 11 February 2014 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 February 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Kevin P. Bradley for Defendant-appellant.

DILLON, Judge.

Jamar Ishmeal Wright ("Defendant") appeals from a conviction of robbery with a dangerous weapon. For the following reasons, we find no error in Defendant's trial.

I. Background

Defendant was indicted for robbery with a dangerous weapon and other charges arising from an incident which occurred when allegedly he entered the residence of another and brandished a gun. Defendant was tried by a jury. At trial, the State offered

evidence which tended to show as follows: Chanel Brown asked Michael Kurz to repair her car by buying and installing a new alternator. She gave him \$150.00. However, on the day in question, Mr. Kurz used the \$150.00 to post bond for a crime he was charged with, planning to replace the money and repair Ms. Brown's car the next day. Hours after Mr. Kurz posted bond using Ms. Brown's money, Ms. Brown and two others forcibly entered the home of Mr. Kurz that he shared with his mother in order to get back Ms. Brown's money. After some discussion, Ms. Brown left the Kurz residence only to return soon later with Defendant. Defendant threatened the Kurzes, pulling out an automatic handgun. Mr. Kurz told Defendant that he would make arrangements with Ms. Brown for the next morning, but Defendant responded that Mr. Kurz' proposal was unacceptable.

Defendant and the others decided to take a computer belonging to Mr. Kurz' mother as "collateral[,] " which was worth approximately \$1,000.00. They informed Mr. Kurz that when he gave Ms. Brown the \$150.00 they would return the computer, "maybe," and that he "might get it back[.]" They further threatened to kill Mr. Kurz and his mother if Mr. Kurz called the police.

The next day police went to Ms. Brown's apartment, but she informed them that she and her companions had not taken anything

from the Kurz residence. However, in fact, Ms. Brown had hidden the computer from the police. The computer was never returned to the Kurzes.

Defendant did not present any evidence at trial.

The jury found Defendant guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to a term of 64 to 89 months of imprisonment. Defendant timely filed a written notice of appeal.

II. Analysis

Defendant argues on appeal that extortion, a Class F felony, is a lesser included offense of robbery with a dangerous weapon, a Class D felony, and that the trial court committed plain error in failing to instruct the jury on this lesser included offense. Essentially, Defendant contends that there was evidence from which a jury could have convicted Defendant of extortion based on the testimony that Defendant took the computer as collateral and brandished the gun to coerce Mr. Kurz to refund to Ms. Brown the \$150.00 she had given him. We disagree.

A. Lesser included offense

Defendant argues that "[b]ecause the essential elements of extortion—obtaining something of value by coercion—are essential elements of armed robbery, extortion is a lesser included offense

of robbery with a dangerous weapon." Defendant further contends that "[a]rmed robbery refines the elements of extortion by requiring the coercion to be by use or threatened use of a firearm or other dangerous weapon, by requiring property to be taken and not just anything of value, and by requiring intent to deprive the victim of the property permanently." As Defendant's argument presents a question of law, our standard of review is *de novo*. *State v. Nickerson*, 365 N.C. 279, 281, 715 S.E.2d 845, 846 (2011).

"It is well-settled that the trial court must submit and instruct the jury on a lesser included offense 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) (marks omitted).

Here, we must first determine whether extortion is a lesser included offense of robbery with a dangerous weapon. In *State v. Weaver*, our Supreme Court adopted a "definitional" test rather than a "factual" test for determining whether one crime is a lesser included offense of another crime:

We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential

elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (emphasis in original), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). Thus, the test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains at least one essential element that is *not* an essential element of the greater crime, then the lesser crime is not a lesser included offense.

On the one hand, N.C. Gen. Stat. § 14-118.4 (2012) provides, in pertinent part, that a person is guilty of extortion if that person "threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity" Although not defined in the statute, "obtain" means "[t]o succeed in gaining possession of as the result of planning or endeavor; acquire." The American Heritage College Dictionary 943 (3d ed. 1997). "The definition of extortion in G.S. 14-118.4 covers any threat made with the intention to wrongfully obtain 'anything of value or any

acquittance, advantage, or immunity.'" *State v. Greenspan*, 92 N.C. App. 563, 567, 374 S.E.2d 884, 886 (1989).

On the other hand, the elements necessary to constitute armed robbery under this section are: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; and (3) whereby the life of a person is endangered or threatened. N.C. Gen. Stat. § 14-87 (2012).

Both armed robbery and extortion involve a threat. However, the subject matter of the threat is much broader for the crime of extortion. Specifically, where armed robbery requires that the subject matter be *personal property* which is taken and carried away, extortion permits obtaining "*anything* of value or any acquittance, advantage, or immunity." See N.C. Gen. Stat. § 14-118.4. A thing "of value or acquittance, advantage, or immunity" could involve coercing someone not to file a civil suit or to go to the police rather than coercing someone to hand over an item of personal property. Therefore, Defendant's contention that the crime of extortion is a lesser included offense of armed robbery fails the definitional test adopted by our Supreme Court. See *Weaver*, 306 N.C. at 635, 295 S.E.2d at 378-79. Accordingly, we

hold that the trial court did not commit error, much less plain error, in failing to instruct the jury on the charge of extortion.

NO ERROR.

Judges GEER and STEPHENS concur.