An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1105

Filed: 19 June 2018

Cleveland County, No. 15 CRS 50051

STATE OF NORTH CAROLINA

v.

JOEY LEE RABORN, JR.

Appeal by defendant from judgment entered 23 February 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James Bernier, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

ELMORE, Judge.

Defendant Joey Lee Raborn, Jr. appeals from a judgment entered after a jury convicted him of robbery with a dangerous weapon. He contends the trial court plainly erred by failing to instruct the jury, absent a special request, on the lesser-included offenses of common law robbery and assault with a deadly weapon. Because

the State presented positive and uncontroverted evidence of each challenged element of armed robbery, the trial court was not required to instruct on these lesser-included offenses. Accordingly, we conclude that defendant received a fair trial, free of error.

I. Background

The State's trial evidence tended to show the following facts. Around 4 January 2015, nineteen-year-old Abreanna Bowen enlisted help from her child's father, Dominic Stroud, and Stroud's friend, defendant, to retaliate against Terry Maddox for allegedly robbing her cousin. That day, Bowen messaged Maddox through Facebook and invited him to meet her at Optimist Park in Shelby to "chill" and smoke marijuana. When Maddox arrived, Bowen was sitting on a park bench rolling a "blunt" and Maddox sat down next to her. Maddox was wearing a watch and a pair of orange Air Jordan's, and had brought his cellphone.

As Maddox and Bowen were talking, Maddox observed two masked men approaching, one holding an assault rifle, the other holding a handgun. These men were later identified as defendant and Stroud. Defendant immediately struck Maddox on the head with a handgun, causing a bullet to discharge. The men then demanded Maddox's shoes. After removing his shoes, Maddox quickly ran away without his cellphone, eventually encountered a highway patrol officer, and reported that he had just been assaulted and robbed.

Shelby Police Department officers responding to a shots-fired call at Shelby Optimist Park were eventually linked up with Maddox. An officer searching the area in the park where Maddox reported the incident occurred discovered, *inter alia*, a small amount of marijuana and a spent .45 caliber shell casing. The officers also later found part of a gold-and-silver watch, with its watchband missing, in some leaves nearby.

Meanwhile, other Shelby Police Department officers arrived at 904 Hampton Street to investigate a report that there might be a gunshot victim inside the residence. Officers entering the residence discovered defendant and another male in the living room, a male in a bedroom, and Bowen lying down in another bedroom. Officers searching inside the residence discovered, *inter alia*, two gun-fired rounds, a rifle, a 9 millimeter handgun, and a gold-and-silver watchband on the living room floor. The broken watchband found in the residence matched the broken watch located at Optimist Park. Additionally, the officers searched outside the residence and discovered a .45 caliber Glock wrapped in a blanket sitting underneath the driver's side of a Cadillac parked in a carport next to the residence. After Bowen was arrested, she turned over Maddox's cellphone, but his shoes were never recovered.

On 12 January 2015, defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. At trial, the trial court instructed the jury on both charges and the law of acting in concert but did

not instruct the jury on any lesser-included offense of armed robbery. The jury found defendant guilty of armed robbery but deadlocked on the conspiracy charge. After the trial court declared a mistrial on the conspiracy charge, it entered a judgment sentencing defendant to sixty-six to ninety-two months in prison based on the armed robbery conviction. Defendant appeals.

II. Analysis

On appeal, defendant asserts the trial court erred by failing to instruct the jury on armed robbery's lesser-included offenses of common law robbery and assault with a deadly weapon because conflicting evidence was presented on two of the elements of armed robbery. We disagree.

Defendant concedes that because his trial counsel neither objected to the jury instructions nor requested instructions on these lesser offenses, he is entitled only to plain error review. Under plain error review, a defendant bears the burden of showing that, absent the alleged error, "the jury would have probably reached a different verdict[.]" *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). It follows that absent actual error, a defendant cannot establish plain error.

"The elements of armed robbery 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 (3) whereby the life of a person

is endangered or threatened.' " *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (quoting *State v. Small*, 358 N.C. 175, 181, 400 S.E.2d 413, 416 (1981); other citation omitted).

"[A] judge must declare and explain the law arising upon the evidence." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985) (citing N.C. Gen. Stat. § 15A-1232 (1983)). "This duty necessarily requires a judge to charge upon a lesser[-]included offense, even absent a special request, where there is evidence to support it." *Id.* (citing *State v. Wright*, 304 N.C. 349, 283 S.E.2d 502 (1981)). "The sole factor determining the judge's obligation to give such an instruction 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." *Id.* (quoting *Wright*, 304 N.C. at 351, 283 S.E.2d at 503).

However, "[w]here 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) (citing *Peacock*, 313 N.C. at 558, 330 S.E.2d at 193). Thus,

> [t]he 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. Wright, ___ N.C. App. ___, ___, 798 S.E.2d 785, 789 (2017) (quoting *State v. Covington*, ___ N.C. App. ___, ___, 788 S.E.2d 671, 675 (2016)).

A. Common Law Robbery Instruction

Defendant first asserts the trial court plainly erred by failing to instruct the jury on the lesser-included offense of common law robbery. We disagree.

"Common law robbery is a lesser-included offense of robbery with a dangerous weapon." *State v. Clevinger*, ___ N.C. App. ___, ___, 791 S.E.2d 248, 255 (2016) (citation omitted). The two offenses differ in "that robbery with a dangerous weapon is 'accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened.' " *Id.* (quoting *Peacock*, 313 N.C. at 562, 330 S.E.2d at 195).

Defendant contends conflicting evidence was presented as to "whether a dangerous weapon was used to threaten or endanger Mr. Maddox'[s] life in order to accomplish a robbery." Defendant argues that where, as here, the evidence showed a defendant used a gun as a blunt instrument to commit an assault but not to threaten the victim, an instruction on common law robbery is required. Viewing the evidence in the light most favorable to him, defendant contends, showed that although he used the handgun to strike Maddox's head, he did not point that handgun at Maddox or verbally threaten to shoot him. Defendant's argument is foreclosed by *Wright*, ___ N.C. App. at ___, 798 S.E.2d at 789–90.

In *Wright*, the defendant robbed two stores while visibly holding a handgun, *id*. at ___, 798 S.E.2d at 787; was convicted of, *inter alia*, two counts of armed robbery; and argued on appeal that he was entitled to a common law robbery instruction because conflicting evidence was presented as to the "endangered or threatened" element of armed robbery, since the evidence did not show he pointed the gun at the store clerks. *Id.* at ___, 798 S.E.2d at 788–89. In rejecting the defendant's argument, we acknowledged that merely possessing a gun during a robbery, without more, does not establish this third element of armed robbery. *Id.* (citing *State v. Gibbons*, 303 N.C. 484, 488, 279 S.E.2d 574, 577 (1981); *State v. Whisenant*, ___ N.C. App. ___, ___, 791 S.E.2d 122, 125 (2016); other citation omitted). But we distinguished those " 'mere possession' line of cases" because, there, no victims or bystanders actually saw the defendant's gun. *Id.* at ___, 798 S.E.2d at 790. Contrarily, we explained, this Court has held that where the State's evidence established victims or witnesses to a robbery actually saw the defendant holding a gun, the "endangered or threatened" element of armed robbery was satisfied. *Id.* (citing *State v. Blair*, 181 N.C. App. 236, 242, 638 S.E.2d 914, 919 (2007); *State v. Melvin*, 53 N.C. App. 421, 433, 281 S.E.2d 97, 105 (1981)). Accordingly, we held that because "uncontradicted evidence presented at trial showed that Defendant held a gun in his hand while robbing [the stores]," by way of the two store clerks testifying that they observed the defendant

holding a gun while committing the robberies, an instruction on common law robbery was not required. *Id*. at ___, 798 S.E.2d at 791.

Here, as in *Wright*, the State presented uncontradicted evidence that an alleged victim saw the perpetrator holding a gun before the alleged robbery. Maddox testified that as the two men approached him in the park, he saw one man carrying an assault rifle and the other holding a handgun, and that after he was immediately struck in the head with what "felt like a pistol," a bullet discharged. Bowen's testimony also established that Maddox knew defendant had a gun. Although she testified that she had her back turned as the men approached, she knew Maddox had been struck with a gun "[b]ecause the gun went off . . . and the bullet went right past [her] head . . . ." As the challenged third element of armed robbery was satisfied by positive and uncontradicted evidence that Maddox knew defendant was holding a handgun before the alleged robbery, the trial court was not required to instruct on common law robbery on this basis. This argument is overruled.

B. Assault with a Deadly Weapon Instruction

Defendant next asserts the trial court plainly erred by failing to instruct the jury on the lesser offense of assault with a deadly weapon. We disagree.

"[A]ssault with a deadly weapon is a lesser[-]included offense of robbery with a dangerous weapon." *State v. Hinton*, 361 N.C. 207, 210, 639 S.E.2d 437, 440 (2007). The elements 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. Floyd*, 369 N.C. 329, 345 n.2, 794 S.E.2d 460, 470 n.2 (2016) (citations omitted).

Defendant contends that where, as here, "there is conflicting evidence on the element of intent to permanently deprive, the court must instruct on the lesser-included offense of assault with a deadly weapon." Specifically, defendant argues the evidence showed he intended only to assault Maddox, not to rob him; that he took Maddox's keys and tossed them aside only to prevent him from chasing them; that Bowen took Maddox's cellphone; and that no evidence established that he took Maddox's broken watch band. However, defendant fails to point to any conflicting evidence about the intent to permanently deprive Maddox of his shoes.

"In robbery, . . . the taking of the property must be with the felonious intent *permanently* to deprive the owner of his property." *State v. Smith*, 268 N.C. 167, 170, 150 S.E.2d 194, 198 (1966) (citations omitted). However,

> when the circumstances of the alleged armed robbery reveal defendant intended to permanently deprive the owner of his property and the taking was effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction.

State v. Fields, 315 N.C. 191, 203, 337 S.E.2d 518, 525 (1985).

Here, the State presented positive and uncontroverted evidence that defendant intended to permanently deprive Maddox of at least his shoes. Maddox testified that after he was pistol whipped, the men demanded he remove his shoes, which were taken and never recovered. Additionally, Officer Styers testified that during defendant's recorded police interview, he admitted "the shoes were supposed to be a trophy for somebody." As the challenged first element of armed robbery was satisfied by positive and uncontradicted evidence that defendant intended to permanently deprive Maddox at least of his shoes, the trial court was not required to instruct on assault with a deadly weapon on this basis. This argument is overruled.

III. Conclusion

Because the State presented positive and uncontroverted evidence of each challenged element of armed robbery, the trial court was not required to instruct the jury on the lesser-included offenses of common law robbery or assault with a deadly weapon. Accordingly, we conclude defendant received a fair trial, free of error.

NO ERROR.

Judges HUNTER, JR. and ZACHARY concur.

Report per Rule 30(e).