IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-993

Filed: 16 April 2019

Henderson County, Nos. 17 CRS 52120; 52477

STATE OF NORTH CAROLINA

v.

MICHAEL CALDWELL ANGRAM

Appeal by defendant from judgment entered 4 April 2018 by Judge Marvin P. Pope, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 26 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Bruce T. Cunningham, Jr. for defendant-appellant.

TYSON, Judge.

Michael Caldwell Angram ("Defendant") appeals from judgments entered after a jury returned a verdict convicting him being guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. We find no error.

I. Background

Marvin Price went to Mountain Credit Union on 11 May 2017 and withdrew approximately $25,000 from his accounts. He returned home. As he was getting out of his car in his driveway, a "young black guy" put a gun in his face and demanded Price give him the money. Price handed his wallet to the perpetrator, who found a few hundred dollars therein. When the perpetrator asked where the rest of the money was, Price directed him to about $400 more inside the wallet. The perpetrator demanded the $25,000, but Price told him he had taken it to another bank. The man forced Price to get onto the ground, patted him down, and rifled through Price's car and glove compartment, touching two checks Price had received from the bank in the process.

The assailant ran off with Price's wallet. Price called the police. The Henderson County Sheriff's Department collected two checks from the scattered contents of the glove compartment. Price described the perpetrator as being approximately 5'9" in height and weighing 175 pounds and wearing a red shirt. Price testified he did not get a good look at the perpetrator's face.

After interviewing the tellers at the credit union, a sheriff's deputy spoke with Defendant on the phone. A few weeks later, Defendant was arrested, *Mirandized*, and interviewed at the Henderson County Sheriff's Office. During the interview, Defendant admitted that his brother had asked him to drive to a residence "to do a snatch and grab." Defendant denied using a gun or stealing Price's wallet. Defendant

asserted he had intended to take a check from Price, but no checks were removed from the scene. No gun was recovered.

During the interview, Defendant stated he was the only person in Price's driveway. Subsequent analysis recovered and identified Defendant's fingerprints on the checks found at the scene.

Defendant was indicted for one count each of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The jury returned a verdict finding him guilty of each charge. The trial court sentenced Defendant as a prior record level II within the presumptive range to an active term of 65 to 90 months for robbery with a dangerous weapon and a consecutive term of 28 to 46 months for conspiracy to commit robbery with a dangerous weapon. Defendant timely appealed.

II. Jurisdiction

An appeal of right lies to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues the trial court erred by failing to instruct the jury on conspiracy to commit common law robbery or aggravated common law robbery. Defendant argues his trial counsel was ineffective when he failed to move to dismiss the charge of conspiracy to commit robbery with a dangerous weapon. Defendant also

argues it was improper for the trial judge to speak privately with the jury between the verdict and sentencing hearing, and his trial counsel should have objected.

VI. Standard of Review

Where a defendant fails to request an instruction for lesser-included offenses, his appeal is limited to plain error review. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citation omitted).

If the objection is preserved, this Court reviews the trial court's denial of a request for instruction on lesser-included offenses *de novo*. *State v. Laurean*, 220 N.C. App. 342, 345, 724 S.E.2d 657, 660 (2012).

V. Analysis

A. Lesser-Included Offenses

"A trial judge is required to instruct the jury on the law arising from evidence presented at trial." *State v. Washington*, 142 N.C. App. 657, 659, 544 S.E.2d 249, 251 (2001). If the State presents positive evidence of each element, and there is no conflicting evidence, the trial court need not submit instructions on lesser-included offenses. *Id.* at 659-60. The verdict sheet for the charge of robbery with a dangerous weapon contained lesser-included offenses of attempted robbery with a dangerous

weapon, common law robbery, and attempted common law robbery. For the charge of conspiracy to commit robbery with a dangerous weapon, the verdict sheet contained no lesser-included offenses, and presented the jury with the options of guilty or not guilty. Defendant asserts the omission of an instruction for conspiracy to commit common law robbery was error or plain error and requires a new trial.

During the charge conference, the following colloquy occurred between the trial court and defense counsel:

> [Defense Counsel]: And what I was just sharing with the District Attorney's office, I saw in your request for trial procedure for us to make a written request for lesser included. So I told them orally, but my office typed me up – I want to ask for common law robbery to be a lesser included. And so my office sent me this. Somebody in my office drafted it as a written request for common law robbery.
>
> THE COURT: Okay. I will consider it.
>
> [Defense Counsel]: Thank you very much. May I approach?
>
> THE COURT: Are you also -- you may approach. Are you also requesting conspiracy to commit common law robbery?
>
> [Defense Counsel]: Yes, sir. Even though that's not written in there. It looks like whoever wrote it in my office also put larceny from the person. I will let Your Honor make the best judgment on that.

A defendant must request the instruction on lesser-included offenses, or his purported error on appeal is limited to plain error review. *Collins*, 334 N.C. at 62, 431 S.E.2d at 193. The State asserts that because defense counsel failed to make his

request in writing, the trial court did not err in failing to give the requested instruction to the jury. *See, e.g.*, *State v. Martin*, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988); *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997*)*.

The requests in *Martin* and *McNeill* were "tantamount to a request for special instructions." *McNeill*, 346 N.C. at 240, 485 S.E.2d at 288. The State cites, and we find, no case law where our appellate courts held invalid a defendant's oral request for instructions on lesser-included offenses. Review of the records in other cases indicates this Court conducts a *de novo* review of oral requests for lesser-included offenses. *See, e.g.*, *State v. Allbrooks*, __ N.C. App. __, __, 808 S.E.2d 168, 171-72 (2017). We review Defendant's arguments on the trial court's failure to instruct on conspiracy to commit common law robbery *de novo*.

Defendant failed to request an instruction for aggravated common law robbery, either orally or in writing. We review that argument for plain error.

B. Conspiracy to Commit Common Law Robbery

Defendant asserts the trial court was required to submit an instruction of conspiracy to commit common law robbery to the jury in light of purported contradictory evidence. The State argues Defendant's argument for a lesser-included instruction on conspiracy to commit common law robbery has been addressed in and is controlled by *State v. Johnson*, 164 N.C. App. 1, 595 S.E.2d 176 (2004). We agree with the State's assertion.

This Court in *Johnson* found the trial court did not err in failing to instruct the jury on conspiracy to commit common law robbery. *Id.* at 18, 595 S.E.2d at 186. The defendant had also claimed the trial court erred in not submitting the lesser-included offense of common law robbery to the jury. *Id.* at 16, 595 S.E.2d at 185. Two witnesses testified the defendant had used a gun in the robbery and no contradictory evidence was admitted. *Id.* The defendant presented two witnesses, one of whom was his girlfriend, who testified as an alibi that the defendant was at home with her at the time of the armed robbery. *Id.* at 8, 595 S.E.2d at 180. This Court found the trial court was not required to submit the instruction for the lesser-included offense of common law robbery to the jury, in light of the uncontroverted evidence of a dangerous weapon being used in the robbery. *Id.* at 16, 595 S.E.2d at 185.

Following similar reasoning, this Court determined "the State's conspiracy charge against defendant was based on an inference that defendant formed a mutual, implied understanding with his co-conspirators to commit robbery with a dangerous weapon at the moment he pointed the gun at the victims." *Id.* at 18, 595 S.E.2d at 186. Because the evidence of the defendant pointing a gun at the victims was uncontradicted, no evidence existed from which the jury could find a conspiracy to commit common law robbery. *Id.*

Unlike the defendant in *Johnson*, Defendant herein did not present any evidence at trial. He relies upon purported contradictory evidence in the State's

evidence. Price, the victim, testified the man who accosted and robbed him in his driveway brandished a gun. A deputy testified concerning Defendant's statements to officers, wherein Defendant denied using a weapon and described the robbery as a "snatch and grab."

This Court's analysis in *Johnson* applies to the case at bar. Defendant's argument is overruled.

C. Aggravated Common Law Robbery

Defendant argues the trial court committed plain error by failing to submit an instruction for aggravated common law robbery as a lesser-included offense to robbery with a dangerous weapon. The State asserts this Court's holding in *State v. McFadden*, 181 N.C. App. 131, 638 S.E.2d 633 (2007), negates Defendant's argument.

In *McFadden*, this Court held that the offenses of robbery with a dangerous weapon and aggravated common law robbery were not fungible for the purposes of sentencing, because "robbery with a dangerous weapon contains an additional element: That the life of a person is endangered or threatened by the use of the dangerous weapon." *Id.* at 136, 638 S.E.2d at 636. It is unclear how this holding would refute Defendant's argument. If common law robbery is a lesser-included offense of robbery with a dangerous weapon, aggravated common law robbery should also be a lesser-included offense.

However, after review of the entire record, even if we were to agree with Defendant, we find no evidence tending to show this purported "instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). Defendant's argument is overruled.

VI. Ineffective Assistance of Counsel

Defendant asserts he was denied effective assistance when his trial counsel: (1) failed to move to dismiss the charge of conspiracy to commit robbery with a dangerous weapon; and, (2) failed to object to the judge meeting with members of the jury after the verdict was rendered, entered, and the jury had been released.

A. Failure to Move to Dismiss Conspiracy Charge

"To make a successful ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's 'performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 80 L. Ed. 2d 674, 693, 697-98 (1984)), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011). Defendant asserts his trial counsel's failure to move to dismiss the charge for conspiracy to commit robbery with a dangerous weapon constituted "deficient performance."

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001).

> It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant[s] to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and internal quotation marks omitted).

We disagree with Defendant that a determination of insufficient assistance of counsel is clear for this Court to rule from the cold record. We dismiss this claim without prejudice to Defendant's "right to reassert his claim in a motion for appropriate relief." *State v. Patel*, 217 N.C. App. 50, 64, 719 S.E.2d 101, 110 (2011).

B. Judge's Meeting with Jurors After Trial

Defendant also argues he received ineffective assistance when his trial counsel failed to object to the judge's meeting with the jury outside the presence of Defendant after the verdict was delivered and entered. Defendant asserts his trial counsel should have moved to have a new judge preside over the sentencing hearing. Within

this argument, Defendant asserts this "back room" conference between the judge and dismissed jurors violated his right to due process.

Defendant requests this Court to establish a bright line, where a judge and jurors can meet privately only after the sentence is imposed. Defendant cites to *State v. Henry*, 243 N.C. App. 433, 777 S.E.2d 166 (2015), as an example that this practice, of judges meeting with jurors after the verdict is returned but before the sentence is imposed, is not isolated. The meeting between the judge and jurors in that case was not an issue on appeal.

The State argues there was no improper communication between the judge and the jurors and asserts the facts at bar are analogous to our Supreme Court's holding in *State v. Laws*:

> By his first assignments of error, the defendant contends that his state and federal constitutional rights to be present at all stages of his trial were violated on two occasions when the trial court talked privately with jurors. The first such incident occurred during jury selection when the trial judge, at the end of the day, told some jurors to go home and then told others that he would be coming down to talk to them privately about their jury service. The defendant's contention concerning this incident is without merit, as the transcript shows that the trial judge sent all those who still were prospective jurors home and indicated that he was going to talk only to those whom he had dismissed from jury service. These "jurors" had no role in the defendant's trial.

State v. Laws, 325 N.C. 81, 96, 381 S.E.2d 609, 618 (1989).

Defendant asserts the facts are distinguishable, since the jury in this case did have a role in his trial. However, the trial had concluded, their verdict had been rendered and entered, and the jury had been dismissed from its service. The judge had extended the invitation to the alternate jurors to remain until after the verdict was rendered and to participate in the conversation:

> Thank you for your service as an alternate juror. At the conclusion of a trial I have always made a point to speak with the jury and answer any questions about the judicial system that I can, and you are welcome to stay and participate in that discussion if you would like to. But I will excuse you at this time. Leave your notes and your exhibits facedown. And you may wait in the courtroom if you wish. And after the jury has reached its -- finished its deliberations and we talk, you are welcome to join with us because you've been with us three days. Okay?

We find no violation of Defendant's due process rights in the conversation between the judge and the jury after their service had concluded. *See id.* at 81, 96, 381 S.E.2d at 618. Defendant's arguments are overruled.

VII. Conclusion

The trial court did not err in failing to instruct the jury on conspiracy to commit common law robbery. There was no plain error in the trial court's failure to instruct the jury on aggravated common law robbery. Further, Defendant's rights were not violated by a meeting between the judge and jury following the conclusion and release of the jurors from service.

Defendant's ineffective assistance of counsel claim concerning his counsel's failure to move to dismiss the conspiracy charge is premature, and is best asserted in a motion for appropriate relief. We dismiss that claim without prejudice. Defendant's other claim for ineffective assistance of counsel is without merit. *It is so ordered.*

NO ERROR IN PART, DISMISSED WITHOUT PREJUDICE IN PART.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).