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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-251

No. COA21-507

Filed 5 April 2022

New Hanover County, No. 20CRS50146

STATE OF NORTH CAROLINA, Plaintiff,

v.

MALIK AMAR POINT, Defendant.

Appeal by Defendant from criminal judgment entered 16 February 2021 and civil judgment entered 23 March 2021 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 9 February 2022.

The Law Office of Sandra Payne Hagood, by Sandra Payne Hagood, for Defendant-Appellant.

Joshua H. Stein, Attorney General, by Assistant Attorney General Brent D. Kiziah, for the State.

CARPENTER, Judge.

¶ 1 Defendant Malik Amar Point ("Defendant") appeals from judgment entered after a jury found him guilty of robbery with a dangerous weapon. Defendant argues the trial court erred in failing to instruct the jury on the lesser included offense of common law robbery. Defendant further contends the trial court erred in entering a

civil judgment for attorneys' fees against him, as he was not provided notice and opportunity to be heard. Upon careful review, we find no error in the trial court proceedings as to the delivery of jury instructions but vacate the civil judgment for attorneys' fees and remand for a hearing on the issue.

I. Factual and Procedural Background

¶ 2 Evidence presented at trial tended to show the following: on 5 January 2020, Bruce MacKenzie ("MacKenzie") walked from his home to a nearby convenience store. At check-out, Defendant was in line in front of MacKenzie. Defendant was wearing a red hooded jacket and inside-out sweatpants. MacKenzie made a purchase and left the store. MacKenzie began walking home when he noticed Defendant and another individual walking slowly in front of him. MacKenzie slowed his pace to allow additional space between himself and the pair. Once the pair was out of sight, MacKenzie cut into his backyard. MacKenzie heard someone running and saw a shadow quickly approaching. Defendant then pointed a handgun at MacKenzie and told him to empty his pockets and put everything on the ground. MacKenzie followed Defendant's command. The other individual—who had been walking with Defendant—ran up to MacKenzie and took the items. Defendant and his accomplice ran away, and MacKenzie went to his neighbor's home to borrow a phone and call the police. Soon after, Defendant and his accomplice were detained by police. Sergeant Travis Williams drove MacKenzie to the location where Defendant was

detained to identify the potential suspects. MacKenzie made a positive identification. Defendant was arrested and charged with possession of a firearm by a felon, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon pursuant to N.C. Gen. Stat. §§ 14-415.1 and 14-87 (2021).

¶ 3 The matter was tried in New Hanover County Superior Court before the Honorable R. Kent Harrell. Defendant requested the jury be instructed on common law robbery, the lesser included offense of robbery with a dangerous weapon. Defendant's request was denied, and the jury was charged. Defendant was convicted of robbery with a dangerous weapon but acquitted on the charges of possession of firearm by a felon and conspiracy to commit robbery with a dangerous weapon. Defendant gave notice of appeal in open court. On 23 March 2021, the trial court entered a civil judgment against Defendant for attorneys' fees.

¶ 4 On 3 November 2021, Defendant filed a petition for writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure seeking review of the civil judgment against him, erroneously giving the date of the criminal judgment. N.C. R. App. P. 21. On 9 December 2021, Defendant filed a second petition for writ of certiorari fixing the date of the judgment, effectively seeking review of the civil judgment against him.

II. Jurisdiction

¶ 5 This Court has jurisdiction to address Defendant's appeal regarding his criminal judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2021) and N.C. Gen. Stat. § 15A-1444(a) (2021).

¶ 6 On 9 December 2021, Defendant filed a second petition for writ of certiorari seeking review of the civil judgment against him. Defendant contends the trial court erred in entering a civil judgment for attorneys' fees against him, as he was not provided notice and an opportunity to be heard. The State concedes this issue. "A petition for [writ of certiorari] must show merit or that error was probably committed below." *State v. Killette*, 268 N.C. App. 254, 256, 834 S.E.2d 696, 698 (2019) (citation and quotation marks omitted). We deny Defendant's first petition for writ of certiorari, as it was filed in error. Because we find merit in Defendant's contentions, however, we grant his second petition for writ of certiorari to review the civil judgment against him.

III. Issues

¶ 7 The issues presented on appeal are whether the trial court erred in: (1) denying Defendant's request to instruct the jury on the lesser included offense of common law robbery; and (2) entering a civil judgment for attorneys' fees against Defendant.

IV. Standard of Review

¶ 8 This Court reviews a "challeng[e to] the trial court's decisions regarding jury instructions . . . *de novo*. . . ." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144,

149 (2009). "'Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

V. Analysis

A. Criminal Judgment

¶ 9 Defendant contends the trial court erred in denying his request to instruct the jury on the lesser included offense of common law robbery, as evidence existed to support a finding the implement used was not a firearm.

¶ 10 Under North Carolina law, a conviction of robbery with a dangerous weapon requires the State to prove the following elements beyond a reasonable doubt:

> (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. Small, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citations omitted); N.C. Gen. Stat. § 14-87(a).

¶ 11 Common law robbery is a lesser included offense of robbery with a dangerous weapon. *State v. Faulkner*, 5 N.C. App. 113, 118, 168 S.E.2d 9, 13 (1969). The difference between robbery with a dangerous weapon and common law robbery is "common law robbery does not require proof that the defendant used a firearm or

dangerous weapon." *State v. Wise*, 269 N.C. App. 105, 107, 837 S.E.2d 193, 195 (2019) (quoting *State v. Langley*, 371 N.C. 389, 396, 817 S.E.2d 191, 197 (2018)).

¶ 12 At trial, a jury must be instructed on a lesser included offense when there is evidence to support a conviction arising from the lesser included offense. *See State v. Wise*, 269 N.C. App. 105, 108, 837 S.E.2d 193, 196 (2019). "The test is whether there '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. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)). The evidence must be viewed in the light most favorable to the defendant, and all reasonable inferences must be drawn in his favor. *See State v. Allbrooks*, 256 N.C. App. 505, 509, 808 S.E.2d 168, 172 (2017). However, "[w]here the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

¶ 13 In the instant case, Defendant requested the trial court instruct the jury on the lesser included offense of common law robbery. The trial court denied Defendant's request, stating:

> [W]ith regard to robbery, our Supreme Court has instructed that: When the implement used appears to be a firearm, the law presumes, in the absence of any evidence

> to the contrary, that the implement is, in fact, a firearm. Whereupon, no instruction for common law robbery need be given. Only if there's evidence offered by the State or by the defendant that the implement used was not, in fact, a deadly weapon is the trial court instructed to provide the lesser-included offense. So I'm going to deny the defense's request for the common law robbery instruction.

¶ 14 Defendant concedes the State offered evidence tending to show MacKenzie believed a real firearm was used in the robbery. However, Defendant argues the following information elicited during the Defendant's cross-examination of MacKenzie, viewed in the light most favorable to Defendant, could have led a jury to conclude the implement used was not a firearm or other dangerous weapon:

> Q. But given your inaccuracy about facial hair, boots, jacket, you feel absolutely certain you could tell that the item in his hand was an actual handgun and not a BB gun?
> A. Yes, I could.
> Q. Despite the fact that you told police that it was small enough to be covered completely by his hand and could only make out that it was dark in color?
> A. That's right.

Defendant's argument, however, is directly contradicted by the opinion of the North Carolina Supreme Court in *State v. Thompson,* which instructs:

> Whether an instrument is a dangerous weapon or a firearm can only be judged by the victim of a robbery from its appearance and the manner of its use. We cannot perceive how the victims in instant case could have determined with certainty that the firearm was real unless defendant had actually fired a shot. We would not intimate, however, that a robbery victim should force the issue merely to determine the true character of the weapon. Thus, when a witness

> testified that he was robbed by use of a firearm or other dangerous weapon, his admission on cross-examination that he could not positively say it was a gun or dangerous weapon is without probative value.

State v. Thompson, 297 N.C. 285, 288–89, 254 S.E.2d 526, 528 (1979); s*ee also State v. Quick*, 60 N.C. App. 771, 773, 299 S.E.2d 815, 816 (1983) ("[The victim] was not bound to test the character of the projectile which would emanate from the barrel of what appeared to her to be a sawed-off shotgun before handing over the money from the cash drawer.").

¶ 15 Defendant next argues evidence in the record existed to support a finding the implement used was not a firearm, as discrepancies in MacKenzie's testimony suggest he could have mis-identified the implement used against him as a firearm. However, this Court has held a victim is not required to test the character of the projectile which might emanate from the implement used against him. *See Quick*, 60 N.C. App. at 773, 299 S.E.2d at 816. Because the discrepancies in MacKenzie's testimony are not probative, Defendant's argument is without merit. *See Thompson*, 297 N.C. at 288–89, 254 S.E.2d at 528. The trial court did not err in denying Defendant's request to instruct the jury on the lesser included offense of common law robbery; therefore, we affirm the entry of the criminal judgment against Defendant.

B. Civil Judgment

¶ 16 Defendant contends the trial court erred in entering a civil judgment for attorneys' fees against him, as he was not provided notice and an opportunity to be heard. The State concedes this issue.

¶ 17 The trial court may enter a civil judgment for attorneys' fees against a partially indigent defendant who has been convicted of a crime, where the defendant is provided notice of the hearing in reference thereto and an opportunity to be heard. N.C. Gen. Stat. § 7A-455 (2021); *State v. Washington*, 51 N.C. App. 458, 459, 276 S.E.2d 470, 471 (1981). In *State v. Friend*, this Court held: "before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018). We further reasoned:

> Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Id. at 523, 809 S.E.2d at 907.

¶ 18 Here, at the conclusion of Defendant's trial, the trial court entered its judgment against Defendant stating, "I will order payment of attorney's fees in the amount of $2,475. That will be paid as a condition of post-release supervision." On 23 March

2021, absent a colloquy directly with Defendant pertaining to this issue, a civil judgment for attorneys' fees was entered against Defendant. Further, the record does not reflect Defendant was afforded notice and the opportunity to be heard as required by N.C. Gen. Stat. § 7A-455.

¶ 19 Because the trial court may not enter a civil judgment for attorneys' fees against a convicted defendant without providing them notice and an opportunity to be heard, and because there is no evidence Defendant was provided notice and an opportunity to be heard, the trial court erred in entering a civil judgment for attorneys' fees against Defendant. *See* N.C. Gen. Stat. § 7A-455; *see also Friend,* 257 N.C. App. at 523, 809 S.E.2d at 907.

¶ 20 Therefore, we vacate the trial court's civil judgment against Defendant and remand.

VI. Conclusion

¶ 21 The trial court did not err in not instructing the jury on the lesser included offense of common law robbery, as all probative evidence in the record suggested the implement used was a firearm, and there was no probative evidence to the contrary. The criminal judgment against Defendant will not be disrupted. We do find, however, error in the entry of the civil judgment for attorneys' fees against Defendant, as he was neither given notice nor the opportunity to be heard. We therefore affirm in part, and vacate and remand in part for a hearing in reference to attorneys' fees.

AFFIRM IN PART, VACATE AND REMAND IN PART FOR A HEARING ON ASSESSMENT OF ATTORNEYS' FEES.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).