IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-771

No. COA22-294

Filed 15 November 2022

Wilkes County, No. 20 CRS 224

STATE OF NORTH CAROLINA

v.

KYI SOE, Defendant.

Appeal by Defendant from judgment entered 16 September 2021 by Judge John O. Craig, III, in Wilkes County Superior Court. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Lisa R. Atwater, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Brandon Mayes, for Defendant.

JACKSON, Judge.

¶ 1 Kyi Soe ("Defendant") appeals from judgment entered after a jury found him guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. After careful review, we find no error.

I. Background

¶ 2 On 12 April 2020, Defendant, Erick Gutierrez, Sergio Lopez, and Michael

Johnson were at Johnson's house when Defendant and Gutierrez began discussing robbing the Grocery Bag, a nearby convenience store. Defendant, Gutierrez, and Lopez left Johnson's house. Lopez drove Defendant and Gutierrez to the Grocery Bag. Gutierrez instructed Lopez to park at an abandoned building next door instead of the store.

¶ 3 Defendant and Gutierrez walked to the store while Lopez waited in the car. Once in the store, Gutierrez pointed a gun at the store clerk, N. Kosta, and demanded she give them the money from the register. Defendant was standing near the register holding what Kosta believed resembled a knife. Kosta walked to the register and handed Defendant the money inside. Upon confirming there was no additional money in the drawer, Defendant and Gutierrez ran from the store. Kosta grabbed the phone and called 911. Lopez, waiting nearby, saw Defendant and Gutierrez running away from the store in his rear-view mirror, drove to pick them up, and returned to Johnson's house.

¶ 4 On 8 September 2020, Defendant was indicted by a Wilkes County grand jury on one count of robbery with a dangerous weapon. Then, on 7 September 2021, a Wilkes County grand jury entered a superseding indictment charging Defendant with one count of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon.

¶ 5 Defendant's case came on for trial on 14 September 2021 in Wilkes County Superior Court before the Honorable John O. Craig. On 16 September 2021, a jury found Defendant guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The two charges were consolidated and Defendant was sentenced to 60 to 84 months' imprisonment.

¶ 6 Defendant entered an oral notice of appeal.

II. Discussion

¶ 7 On appeal, Defendant argues the trial court committed plain error by neglecting to instruct the jury on conspiracy to commit common law robbery, the lesser included offense of the crime for which Defendant was charged—conspiracy to commit robbery with a dangerous weapon. We disagree.

A. Standard of Review

¶ 8 This Court may review an issue, in a criminal case, which was not otherwise preserved for appeal, where the "judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). Plain error arises "only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal marks, emphasis, and citations omitted). Further, in congruence with our Supreme Court's ruling in *State v. Gregory,*

this Court will review an unpreserved issue for plain error when it involves an alleged error in the trial judge's instructions to the jury. 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

B. No Plain Error in Failing to Instruct on Conspiracy to Commit Common Law Robbery

¶ 9 Defendant specifically argues the State failed to provide evidence that Defendant expressly agreed to commit robbery with a dangerous weapon or that Defendant possessed a dangerous weapon.

¶ 10 A criminal conspiracy occurs when two or more persons agree to do an unlawful act. *State v. Carter*, 177 N.C. App. 539, 542, 629 S.E.2d 332, 339 (2006). Further, Under N.C. Gen. Stat. § 14-87(a), robbery with a dangerous weapon occurs when:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, . . . whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from . . . any place of business, . . . at any time, either day or night[.]

N.C. Gen. Stat. § 14-87(a) (2021). Thus, when two or more individuals agree to commit robbery with a dangerous weapon with the intent that the crime be carried out, they may be charged with conspiracy to commit robbery with a dangerous weapon. Conversely, common law robbery, a lesser included offense of robbery with a dangerous weapon, does not require the use of a firearm or other dangerous weapon. State v. Stewart, 255 N.C. 571, 572, 122 S.E.2d 355, 372 (1961). Thus, when two or

more persons agree to commit a robbery without the use of a firearm, they may be charged with conspiracy to commit common law robbery.

¶ 11 While conspiracy to commit common law robbery is a lesser included offense of conspiracy to commit robbery with a dangerous weapon, a trial judge "is not required to submit lesser included offenses for a jury's consideration when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence related to any element of the crime charged." *State v. Washington*, 142 N.C. App. 657, 660, 544 S.E.2d 249, 251 (2001).

¶ 12 "When [a] defendant is charged with robbery with a dangerous weapon and the uncontradicted evidence indicates that the robbery, if perpetrated, was accomplished by the use of what appeared to be a dangerous weapon, the trial judge is not required to submit an instruction on the lesser included offense of common law robbery." *State v. Johnson*, 164 N.C. App. 1, 16, 595 S.E.2d 176, 185 (2004) (internal marks and citations omitted). To that end, where there is uncontradicted evidence that a defendant pointed a gun at his victims during a robbery, "there is no evidence from which a jury could find that the defendant's actions during the robbery created an inference that [the] defendant conspired to commit common law robbery." *Id.* at 18, 595 S.E.2d at 186.

¶ 13 In *State v. Johnson*, the State presented evidence at trial that the defendant and his co-defendants expressly agreed to rob three victims who were standing at a

corner. *Id.* at 17, 595 S.E.2d at 186. There had been no previous discussion as to the use of a gun, but as the defendants approached the victims and demanded they turn over their wallets, the defendant pointed a sawed-off shotgun at the victims. *Id.* at 17, 595 S.E.2d at 186. The defendants obtained the wallets, drove away, split the money, and threw the wallets into the river. *Id.* On appeal, the defendant argued that the trial court erred in failing to instruct the jury on the lesser included offense of conspiracy to commit common law robbery where there was no evidence tending to show the defendants together agreed to the use of a dangerous weapon. *Id.* at 16, 595 S.E.2d at 185.

¶ 14 In rejecting the defendant's contention, this Court stated,

> it was not essential for the parties to expressly agree to use a dangerous weapon prior to the robbery in order to submit a charge of conspiracy to commit robbery with a dangerous weapon to the jury[.] Rather it was only essential that there be evidence that the parties had a mutual, implied understanding to commit robbery with a dangerous weapon.

Id. at 17, 595 S.E.2d at 185-86. Further, this Court found this evidence at trial was "sufficient to support a *prima facie* case that [the] defendant conspired with others to commit robbery with a dangerous weapon at the moment he pointed the gun at the victims." *Id.* at 17, 595 S.E.2d at 186. Therefore, not only was the lack of discussion as to the use of a weapon unnecessary to submit the charge of conspiracy of robbery with a dangerous weapon to the jury, but the uncontroverted evidence that the

defendant pointed a gun at the victims was sufficient to support a *prima facie* case of conspiracy to commit robbery with a dangerous weapon.

¶ 15 Similarly, in the instant case, Defendant argues that the State failed to provide evidence that Defendant expressly agreed to commit robbery with a dangerous weapon. As this Court reasoned in *Johnson*, it is not essential that the parties expressly agreed to the use of a dangerous weapon, only that there was a mutual, implied understanding to commit robbery with a dangerous weapon between Defendant and his co-conspirators. 164 N.C. App. at 17, 595 S.E.2d at 185-86.

¶ 16 Here, Johnson testified at trial he was present during Defendant's conversation with Gutierrez stating:

> A. We was just sitting around talking and, I don't know, it somehow came into the conversation about robbing the store.
>
> Q. Okay. Who was talking about that?
>
> A. [Defendant] and Erick.
>
> Q. Okay. And with as much detail as you can, just—what was discussion about? Like, what were they saying?
>
> A. I'm not exactly sure. They were talking about just robbing the store[.]

This evidence is indicative of Defendant entering into an agreement with Gutierrez to commit the robbery. Further, while on direct examination, the store clerk, Kostka, testified "[t]hey didn't get but maybe 2 foot in the store when he put the gun up . . .

he put the gun up[.]" Likewise, Defendant concedes to use of the gun by Defendant's co-conspirator in his brief stating, "[h]ere, the State presented positive evidence that Mr. Gutierrez used a revolver while perpetrating the robbery in question."

¶ 17 Because it is not essential to provide evidence that co-conspirators expressly agreed to the use of a dangerous weapon prior to a robbery in order to support a charge of conspiracy to commit robbery with a dangerous weapon and because uncontroverted evidence of the use of a gun is sufficient to support a *prima facie* case that a defendant conspired to commit robbery with a dangerous weapon at the moment he pointed the gun at the victims, the trial court did not commit plain error by not submitting a lesser included instruction on conspiracy to commit common law robbery to the jury.

¶ 18 As to Defendant's argument that the State failed to show he possessed a dangerous weapon, conspiracy to commit robbery with a dangerous weapon does not require the State to prove Defendant possessed a weapon, only that he agreed with another to commit the crime with the intent that the crime be committed. *See Carter,* 177 N.C. App. 539, 542, 629 S.E.2d 332, 339. Likewise, in line with this argument, Defendant asserts *Johnson* is not analogous to this case because the defendant in *Johnson* pointed the gun while Defendant here only stood by while a co-conspirator pointed the gun—again asserting Defendant himself did not possess a dangerous

weapon. Not only was the State not required to prove Defendant possessed a dangerous weapon, but this Court has also specified that

> [in order] for a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit robbery, each of them, if actually or constructively present, is not only guilty of that crime if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit armed robbery, or as a natural or probable consequence thereof.

Johnson, 164 N.C. App. 1, 12, 595 S.E.2d 176, 183 (2004). Hence, Defendant's mere agreement to commit the robbery along with his co-conspirator's use of a dangerous weapon alone is enough to convict Defendant of conspiracy to commit robbery with a dangerous weapon. For the foregoing reasons, we reject Defendant's arguments and hold the trial court did not commit plain error by not instructing the jury on the lesser included offense of conspiracy to commit common law robbery.

III. Conclusion

¶ 19 We therefore hold the trial court, in omitting the instruction as to the lesser included charge of conspiracy to commit common law robbery, did not err, much less commit plain error.

NO ERROR.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).