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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-901

Filed 4 June 2024

Craven County, Nos. 21CRS050247, 22CRS000643

STATE OF NORTH CAROLINA

v.

AUGUSTUS PALMER

Appeal by Defendant from judgment entered 17 November 2022 by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 16 April 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Rebecca E. Lem, for the State-Appellee.*

*Joseph P. Lattimore for Defendant-Appellant.*

COLLINS, Judge.

Defendant Augustus Palmer appeals from a judgment entered upon a jury verdict finding him guilty of common law robbery, interfering with an emergency communication, and assault on a female. Defendant argues that the trial court erred by allowing him to proceed pro se without ensuring that he knowingly and intelligently waived his right to counsel and by declining to instruct the jury on

misdemeanor larceny, a lesser-included offense of common law robbery. For the following reasons, Defendant received a fair trial free from error.

### **I. Background**

Defendant was indicted for common law robbery, interference with an emergency communication, and assault on a female arising from an altercation between him and his ex-girlfriend that occurred on 19 January 2021. Defendant was later charged by a separate indictment with attaining habitual felon status. On 22 September 2022, Defendant filed a handwritten motion expressing his dissatisfaction with his court-appointed attorney and requesting that the trial court allow the attorney to withdraw.<sup>1</sup> The motion was heard on 14 November 2022, where Defendant stated that he wished to represent himself:

THE COURT: Mr. Palmer, are you able to hear and understand me?

[DEFENDANT]: Yes, sir.

THE COURT: It appears maybe back in September at some point you had written the Court concerning [your court-appointed attorney's] representation of you, is that correct?

[DEFENDANT]: Yes, sir.

THE COURT: What are you asking that the Court do?

[DEFENDANT]: I asked the Court to remove him from my case. I can represent myself, sir.

THE COURT: You want to represent yourself?

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<sup>1</sup> Defendant's counsel informed the trial court that he was Defendant's third court-appointed attorney. The record does not indicate how or why Defendant's previous court-appointed attorneys withdrew.

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[DEFENDANT]: Yes, sir.

THE COURT: Do you have any legal training?

[DEFENDANT]: No, sir. But I worked on my case, it's been 22 months now. I'm ready. The DA said he's ready. I'm ready to go to trial, ready to handle it. I think I can best defend myself, sir.

The trial court then informed Defendant of the maximum penalties for each charge

Defendant faced:

THE COURT: So Mr. Palmer, in these cases you're charged with common law robbery which is a Class G felony. If you're convicted of that, and not found to be a habitual felon, you would face a maximum punishment of 47 months in prison. You're also charged with assault on a female which is an A1 misdemeanor; 150 days in jail. Interfering with emergency communication is a Class [A]1 . . . which would also be 150 days exposure. Do you understand that?

[DEFENDANT]: I mean if you're saying that's in the guidelines of level six, I don't understand that because I'm not a level six.

THE COURT: I'm saying for any human being in the world that is charged in North Carolina with common law robbery, that would be somebody with a criminal record level six, top of the aggravated range. I'm not saying that you fall into any of those categories because I don't know. But for someone who did the maximum punishment on the felony would be 47 months in prison if that person were not a habitual felon.

[DEFENDANT]: Uh-huh.

THE COURT: Do you understand that?

[DEFENDANT]: I understand that.

THE COURT: You're also charged with being a habitual felon. If the Court or the jury were to determine that was true and found you guilty of having obtained the status of being a habitual felon, you would be facing -- well, not you, but you could be facing, again, it would be someone that's

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a record level six, top of the presumptive range would be facing a maximum punishment of 231 months in prison.

[DEFENDANT]: Uh-huh.

THE COURT: Do you understand that?

[DEFENDANT]: I understand that.

The trial court then informed Defendant of his right to an attorney and confirmed his capacity to represent himself:

THE COURT: Okay. You have a right to represent yourself. You also have a right to a lawyer. Your right to a lawyer includes your right to hire one of your choice as well as your right to apply to the Court for court-appointed counsel. Do you understand those rights?

[DEFENDANT]: Yes, sir, I do.

THE COURT: Now, what would you like to do about a lawyer?

[DEFENDANT]: Well, sir, like I said, you gave me this lawyer and he haven't even been substandard representation. You know, I can't afford no attorney.

THE COURT: I understand that you don't want [your court-appointed attorney] to represent you.

[DEFENDANT]: Exactly. But I don't want to put the case off any further. I'm ready to represent myself. Like I say, it's just going on too long, you know. And like I say, he haven't even gave me substandard representation so -- it's nonexistent to be honest with you. You know what I'm saying?

THE COURT: You understand if you represent yourself, you would be held to the same legal standards?

[DEFENDANT]: I understand.

THE COURT: Okay. Same rules of evidence.

[DEFENDANT]: I understand.

THE COURT: Same rules of procedure and so forth.

[DEFENDANT]: I understand.

The trial court then allowed Defendant's attorney to withdraw, Defendant executed a written waiver of his right to counsel, and the case proceeded to trial.

At trial, Defendant's ex-girlfriend, Kim Johnson, testified about the altercation with Defendant. Johnson testified that she went to the courthouse on 19 January 2021 to apply for a protective order against Defendant because Defendant had, on multiple prior occasions, been violent with her, broken into her home, taken her phone from her, and destroyed her property, including her phone. When Johnson returned from the courthouse that day, she encountered Defendant, who blocked her car in the driveway with his, ignored her request that he leave, and demanded to know who she was "f-ing." Defendant then grabbed Johnson by her hair and began beating her. Johnson attempted to flee, but Defendant caught up to her, continued beating her, and took her phone from her to prevent her from calling for help. After Defendant took the phone, Johnson managed to get up and run towards the nearby road to flag down a car for help, fearing for her life. A passerby saw Johnson and called 911, at which point Defendant left the scene in his car. Responding officers arrived, documented Johnson's injuries, and took Johnson's statement. Johnson told the officers that she did not know where her phone was, and the officers helped her search for the phone but were unable to find it.

At the charge conference, Defendant requested a jury instruction on the lesser-included offense of misdemeanor larceny which the trial court denied:

THE COURT: Okay. Anything else we need to cover in the charge conference?

. . . .

[DEFENDANT]: I would like to talk about a lesser charge than common law robbery.

THE COURT: What would the lesser charge be?

[DEFENDANT]: Ah, misdemeanor larceny. . . . I still contend I didn't take no phone. . . . But you know, I agree I guess as far as with regards to this. Still, taking of a phone that's just lesser than the common law robbery.

THE COURT: I'm not going to charge on under larceny as a lesser offense. I think if you're going to be admitting that you committed the assault, that if the jury decides you took the phone, they wouldn't be finding you guilty of the lesser included. So I'm just going to charge on the felony charge and not give a lesser included.

[DEFENDANT]: Okay.

The jury returned a verdict finding Defendant guilty of common law robbery, interference with an emergency communication, and assault on a female. Defendant then entered a guilty plea for attaining habitual felon status. The trial court entered judgment accordingly, imposing an active sentence of 116 to 152 months' imprisonment. Defendant gave no oral notice of appeal at trial but submitted a hand-written "motion for appeal."

## **II. Discussion**

### **A. Writ of Certiorari**

Defendant concedes that he lost his right to appeal because his pro se notice of appeal did not specify the court to which appeal was taken and there is no evidence that it was served upon the State as required by the North Carolina Rules of

Appellate Procedure. *See* N.C. R. App. P. 4. Defendant filed a petition for writ of certiorari with his principal brief asking this Court to reach the merits of his appeal. In our discretion, we allow Defendant’s petition and reach the merits of his appeal. *See* N.C. R. App. P. 21(a)(1).

### **B. Waiver of Counsel**

Defendant argues that the trial court erred by allowing him to proceed pro se without ensuring that his waiver of counsel was knowing and intelligent.

“[W]e review de novo a trial court’s determination that a defendant has either waived or forfeited the right to counsel.” *State v. Simpkins*, 373 N.C. 530, 533, 838 S.E.2d 439, 444 (2020) (italics and citations omitted). “Under a de novo review, the 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) (quotation marks, italics, and citation omitted).

“The Sixth Amendment of the Constitution of the United States as applied to the states through the Fourteenth Amendment guarantees an accused in a criminal case the right to the assistance of counsel for his defense.” *State v. White*, 78 N.C. App. 741, 744, 338 S.E.2d 614, 616 (1986) (citing *Gideon v. Wainwright*, 472 U.S. 335 (1963)). “Implicit in this right to counsel is the right of a defendant to refuse the assistance of counsel and conduct his own defense.” *Id.* at 744-45, 338 S.E.2d at 616 (citation omitted). However, “[b]efore allowing a defendant to proceed pro se, the trial court must establish both that the defendant clearly and unequivocally expressed a

desire to proceed without counsel, and that the defendant knowingly, intelligently, and voluntarily waived the right to counsel.” *State v. Lindsey*, 271 N.C. App. 118, 126, 843 S.E.2d 322, 328 (2020) (citations omitted).

Additionally, in North Carolina:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2022).

“When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise.” *State v. Anderson*, 215 N.C. App. 169, 171, 721 S.E.2d 233, 235 (2011) (citation omitted). However, even when the defendant has executed a written waiver, the record must still “reflect that the trial court is satisfied regarding each of the three inquiries listed in the statute.” *State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230 (2000) (citation omitted).

Here, Defendant executed a written waiver of counsel in 21CRS050247 on 28



January 2021 and another waiver of counsel in both 21CRS050247 and 22CRS000643 on 14 November 2022, which was certified by the trial court on that date. Moreover, the trial court conducted an adequate inquiry when Defendant expressed his wish to proceed pro se. The trial court clearly advised Defendant of his right to counsel, including his right to court-appointed counsel, which Defendant emphatically waived. The trial court also advised Defendant of the charges against him, the standards expected of him at trial, the range of permissible punishments, and the nature of subsequent procedures for his trial. The trial court therefore complied with all requirements necessary to determine that Defendant knowingly and intelligently waived his right to counsel.

### **C. Misdemeanor Larceny**

Defendant also argues that the trial court erred by denying Defendant's request for an instruction on misdemeanor larceny, a lesser-included offense of common law robbery.

We review de novo the trial court's denial of a request for an instruction on a lesser-included offense. *State v. Laurean*, 220 N.C. App. 342, 345, 724 S.E.2d 657, 660 (2012) (citations omitted). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Brichikov*, 383 N.C. 543, 554, 881 S.E.2d 103, 112 (2022) (citation omitted). "[T]he trial court need not submit lesser degrees of a crime to the jury when the State's evidence is positive as to each

and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.” *Id.* (emphasis and citation omitted).

“Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.” *State v. Porter*, 198 N.C. App. 183, 186, 679 S.E.2d 167, 169-70 (2009) (citation omitted). Common law robbery “is an aggravated form of larceny, and absent the element of violence or intimidation, the offense becomes larceny.” *Id.* at 189, 679 S.E.2d at 171 (citation omitted).

Here, the State presented positive evidence that Defendant intentionally took Johnson’s phone from her person or presence without her consent by means of violence or fear: Johnson testified that Defendant took her phone while he was beating her, and that Defendant had both taken and broken her cell phones in the past. She further testified that during this time, Defendant grabbed her by the hair and began beating her and that she ran into the street because she feared for her life. Responding officers also documented Johnson’s injuries. Thus, the State presented positive evidence of each essential element of common law robbery.

Defendant argues that there was conflicting evidence about whether he intended to take Johnson’s phone during the assault because Johnson stated both that Defendant took her phone, and that after the assault she told responding officers that she did not know where it was. However, this evidence is not conflicting. The jury may have believed that Defendant took Johnson’s phone during the assault and

that Johnson did not know where her phone was after the assault. Moreover, “[t]he mere contention that the jury might accept the State’s evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense.” *Id.* (citation omitted).

Because the State presented positive evidence as to each and every element of common law robbery, and there was no conflicting evidence relating to any of these elements, the evidence would not permit the jury rationally to find Defendant guilty of misdemeanor larceny and to acquit him of common law robbery. Thus, the trial court did not err by denying Defendant’s request for an instruction on the lesser-included offense of misdemeanor larceny. *See Brichikov*, 383 N.C. at 554, 881 S.E.2d at 112.

### **III. Conclusion**

For the foregoing reasons, the trial court ensured Defendant knowingly and intelligently waived his right to counsel and properly denied an instruction on misdemeanor larceny.

NO ERROR.

Judges ZACHARY and FLOOD concur.

Report per Rule 30(e).