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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-929

Filed 20 August 2024

New Hanover County, No. 15 CRS 58657

STATE OF NORTH CAROLINA

v.

RICHARD A. McLAUGHLIN, Defendant.

Appeal by Defendant from judgment entered 7 October 2022 by Judge Lisa C. Bell in New Hanover County Superior Court. Heard in the Court of Appeals 14 May 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Laura H. McHenry, for the State.*

*Hynson Law, PLLC, by Warren D. Hynson, for Defendant-Appellant.*

CARPENTER, Judge.

Richard A. McLaughlin (“Defendant”) appeals after a jury convicted him of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. On appeal, Defendant argues that the trial court erred by: (1) denying his motion to dismiss the charge of robbery with a dangerous weapon; and (2) improperly instructing the jury on the offense of robbery with a dangerous weapon. After careful

review, we conclude the trial court did not err by denying Defendant's motion to dismiss, and Defendant failed to preserve the jury-instruction issue for review. Accordingly, we discern no error.

### **I. Factual & Procedural Background**

On 13 February 2017, a New Hanover County grand jury indicted Defendant for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The grand jury issued a superseding indictment on 4 June 2018. On 3 October 2022, the State began trying Defendant in New Hanover County Superior Court before the Honorable Lisa C. Bell. Trial evidence tended to show the following.

On the morning of 16 October 2015, Defendant asked his girlfriend and shift manager at McDonald's, Iasia Black,<sup>1</sup> to help him with his "money situation" that night at closing by granting him back-door access to the restaurant. Black, who assumed Defendant was planning a robbery, agreed to leave the door open for him. Later that night, Defendant asked Michelle Weatherly, a former girlfriend, to give him and Leroy Johnson, a coworker of Weatherly, a ride. Defendant did not specify where until they were all on the road. Weatherly, who did not know of their plans,

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<sup>1</sup> We note that Iasia Black's name was spelled "T'Asia Black" in the motion and order for joinder.

ultimately dropped Defendant and Johnson off on a road behind the McDonald's where Black worked.

After closing, Defendant and Johnson entered the restaurant through the back door, which Black had left slightly ajar, and triggered the alarm. Upon entering the restaurant, Defendant encountered a McDonald's employee, Dion Carter, and pushed him into the office with Black, who was already there counting the money as part of her normal nightly duties. Defendant demanded Black and Carter put the money, totaling more than \$4,000, into his bookbag.

At the same time, Matthew Wood, another McDonald's employee, was cleaning at the front cash register. Wood heard the alarm go off and immediately tried to escape. As Wood attempted to flee, he saw Johnson point a silver handgun at him and pull the trigger. Wood said he "was ready to die." Then Wood heard the gun click, and "nothing came out" of the barrel. Assuming no bullets were inside the gun, Wood chased Johnson away.

Wood, who was a former 911 dispatcher and probation officer, with relatives in the military, immediately called 911. Wood advised the dispatcher about his encounter with Johnson, including a description of the gun, that Johnson "pulled [the] trigger but nothing came out," and the license plate number of Weatherly's car.

After being chased away, Johnson jumped into Weatherly's waiting car. As Johnson approached her car, Weatherly observed Johnson holding what "looked like" a gun. With Johnson in the car, Weatherly drove away, but, as she paused at a

stoplight a few blocks away from the McDonald's, Johnson jumped out of the car and fled on foot. In response to the dispatch notification of the license-plate number, Peter Schwarz of the Wilmington Police Department stopped Weatherly and searched the car. Police later found BB-gun ammunition in the trunk but never recovered the gun.

At trial, Wood, who had received training in guns but was “not too familiar with the extent of guns,” described the gun as silver and automatic, “not a revolver.” He also admitted that he did not know whether the gun jammed or was empty. Kevin Tully, a police sergeant in major crimes with extensive training and experience with firearms, viewed the surveillance video from McDonald's and testified that Johnson appeared to be holding a semiautomatic handgun while approaching Wood.

At the close of State's evidence and again at the close of all evidence, Defendant moved to dismiss both charges for insufficient evidence that the weapon used was operable or loaded and capable of causing death or serious injury. The trial court denied Defendant's motions to dismiss.

The trial court, after granting Defendant's request for a special jury instruction, initially instructed the jury that “a firearm is a dangerous weapon, [but] whether the weapon at issue was loaded or capable of firing at the time of the robbery is a factor you may consider because an object incapable of endangering or threatening life cannot be considered a dangerous weapon.” During deliberation, the jury wrote to the judge that this instruction was “contradictory.” The trial court then clarified that “if . . . you have a question in your mind that is a reasonable doubt that

the gun was functioning, operable, loaded, then you’ve got reasonable doubt as to that element of it being a dangerous weapon.” Recognizing that some of the jurors still seemed confused, the trial court sent the jury back to deliberate. Defendant did not object to any of the trial court’s instructions.

On 7 October 2022, the jury convicted Defendant of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. For a third time, Defendant moved to dismiss and also moved for judgment notwithstanding the verdict, which the trial court also denied. The trial court sentenced Defendant to a minimum of 156 months and a maximum of 200 months of imprisonment for robbery with a dangerous weapon and a consecutive term of a minimum of 60 months and maximum of 84 months of imprisonment for conspiracy to commit robbery with a dangerous weapon, with credit for prior confinement. The trial court also imposed \$4,000 in restitution and \$3,345.50 in costs. Defendant gave notice of appeal in open court.

## **II. Jurisdiction**

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(1), 15A-1444(a) (2023).

## **III. Issues**

The issues on appeal are whether the trial court erred by: (1) denying Defendant’s motion to dismiss the charge of robbery with a dangerous weapon; and (2) improperly instructing the jury on the charge of robbery with a dangerous weapon.

#### **IV. Analysis**

##### **A. Motion to Dismiss**

Defendant asserts that the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon. Specifically, Defendant argues that because the gun was not loaded, as a matter of law, it was not a dangerous weapon, and therefore the State could not establish all the elements of robbery with a dangerous weapon. We disagree.

##### **1. Standard of Review**

We review a denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). 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)).

“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). “Substantial evidence is such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

In evaluating the sufficiency of the evidence concerning a motion to dismiss, the evidence must be considered “in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . .” *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed at trial contains “substantial evidence, whether direct or circumstantial, or a combination, ‘to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.’” *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). “Contradictions and discrepancies do not warrant dismissal . . . but are for the jury to resolve.” *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)).

## **2. Robbery with a Dangerous Weapon**

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, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business . . . .” N.C. Gen. Stat. § 14-87(a) (2023). This crime

contains three elements: “(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. Clevinger*, 249 N.C. App 383, 392, 791 S.E.2d 248, 255 (2016) (citing N.C. Gen. Stat. § 14-87(a)). A defendant can be vicariously liable for robbery with a dangerous weapon by a co-conspirator. *See State v. Allen*, 57 N.C. App. 256, 258, 291 S.E.2d 341, 343 (1982) (citing *State v. Tilley*, 292 N.C. 132, 138, 232 S.E.2d 433, 438 (1977)).

A dangerous weapon is “any article, instrument or substance which is likely to produce death or great bodily harm.” *State v. Fleming*, 148 N.C. App. 16, 20, 557 S.E.2d 560, 563 (2001) (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)). For a weapon to be dangerous, “the determinative question is whether the evidence was sufficient to support a finding that a person’s life was in fact endangered or threatened.” *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982) (citing *State v. Moore*, 279 N.C. 455, 183 S.E.2d 546 (1971)). Thus, an object “incapable of endangering or threatening life cannot be considered a dangerous weapon.” *State v. Frazier*, 150 N.C. App. 416, 419, 562 S.E.2d 910, 913 (2002).

To resolve “the sufficiency of evidence question in armed robbery cases where the instrument used appears to be, but may not in fact be, a firearm or other dangerous weapon capable of endangering or threatening the life of another,” the North Carolina Supreme Court set out the following rules:



- (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and *there is no evidence to the contrary*, there is a mandatory presumption that the weapon was as it appeared to the victim to be.
- (2) If there is *some* evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened.
- (3) If *all* the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

*State v. Allen*, 317 N.C. 119, 124–25, 343 S.E.2d 893, 897 (1986) (emphasis added).

In other words, with some evidence showing the weapon was dangerous and some evidence showing the opposite, the inference to be drawn concerning the danger of the weapon is permissive. *State v. Joyner*, 312 N.C. 779, 783, 324 S.E.2d 841, 844; *see also Allen*, 317 N.C. at 125–26, 343 S.E.2d at 897 (“It was thus for the jury to determine the nature of the weapon.”).

When there is conflicting evidence regarding the operability of a gun, “the defendant has the burden of demonstrating to the court the invalidity of the permissive inference as applied in his case.” *Joyner*, 312 N.C. at 783–84, 324 S.E.2d 844–45 (citing *Ulster Cnty. Court v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 2225, 60

L. Ed. 2d 777, 792 (1979)). If the defendant “fails to show conclusively that the weapon was not operational,” the permissive inference that the weapon was dangerous remains. *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000).

Absent conclusive evidence of the weapon’s inoperability, the State has met its burden of presenting substantial evidence “to support a finding that the offense charged has been committed and that the defendant committed it.” *Winkler*, 368 N.C. at 575, 780 S.E.2d at 826. Thus, “the case is for the jury and the motion to dismiss should be denied.” *Id.* at 575, 780 S.E.2d at 826.

### **3. Application**

Here, Defendant does not contest the sufficiency of the evidence concerning the element of the unlawful taking or an attempt to take personal property from the person or in the presence of another. Accordingly, the State has provided substantial evidence of the first element of robbery with a dangerous weapon. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

Rather, Defendant contests the second and third elements requiring that the gun be a dangerous weapon, arguing that the gun was incapable of endangering or threatening Wood’s life. Therefore, we will review whether the State provided substantial evidence, *see id.* at 378, 526 S.E.2d at 455, that: (1) Defendant used or threatened to use a firearm or other dangerous weapon, and (2) Wood’s life was endangered or threatened, *see Clevinger*, 249 N.C. App. at 392, 791 S.E.2d at 255.

In short, the State met its burden. The State’s evidence concerning the robbery is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” *see Smith*, 300 N.C. at 78–79, 265 S.E.2d at 168, that the gun endangered Wood’s life, *see Clevinger*, 249 N.C. App. at 392, 791 S.E.2d at 255.

In the light most favorable to the State, the evidence tends to show the following. First, Johnson’s gun was a dangerous weapon. As Wood fled the restaurant to escape Johnson, Wood turned around and saw Johnson point the gun at Wood. In the moment, the gun appeared dangerous and did not indicate any issue with operability. Indeed, Wood “was ready to die.” Wood, who had received firearm training, classified the gun as a silver handgun. Sergeant Tully, who viewed the surveillance video from McDonald’s, also determined Johnson was brandishing a weapon.

Second, Johnson’s conduct “represent[ed] it to be” a dangerous weapon. *See State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). Sergeant Tully saw Johnson “scaling the counter [of McDonald’s] with a firearm in his hand and . . . attempting to grab a hold of Mr. Wood.” As Wood fled, Johnson raised the silver handgun, aimed at Wood, and pulled the trigger. When “nothing came out” of the gun, Johnson fled.

Accordingly, the State’s evidence tended to show that (1) Johnson’s gun was dangerous and (2) Johnson represented the gun as operable. This evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion” that the gun was a dangerous weapon, *see Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169, that endangered Wood’s life, *see Clevinger*, 249 N.C. App. at 392, 791 S.E.2d at 255.

There was some testimony that the gun was incapable of threatening or endangering life. Wood heard the gun click, and he guessed that sound meant the gun was unloaded. But the gun also could have been jammed. Wood’s subjective belief, or rather hope, as to the operability of the gun is not dispositive. *See Barnes*, 334 N.C. at 75, 430 S.E.2d at 918. Accordingly, Defendant did not conclusively prove the gun’s incapability of endangering or threatening Wood’s life.

Thus, the permissive inference was not rebutted, and “[t]he credibility of this evidence was ultimately for the jury.” *See Allen*, 317 N.C. at 126, 343 S.E.2d at 898. Therefore, the State presented substantial evidence that Defendant committed robbery with a dangerous weapon. *See Fritsch*, 351 N.C. at 75, 430 S.E.2d at 918. Accordingly, the case was for the jury, and the trial court properly denied Defendant’s motion to dismiss.

### **B. Jury Instructions**

Defendant also asserts that the trial court erred by instructing the jury on the charge of robbery with a dangerous weapon due to insufficient evidence that there was a dangerous weapon. We disagree.

“In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that

issue.” *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)).

Here, Defendant failed to object to the trial court’s jury instructions. Indeed, Defendant now challenges, at least in part, the very special instruction he requested. Therefore, Defendant failed to preserve any arguments concerning the jury instructions. *See id.* at 298–99, 697 S.E.2d at 421.

In criminal cases, however, we “review unpreserved issues for plain error when they involve either (1) errors in the judge’s instructions to the jury, or (2) rulings on the admissibility of evidence.” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citing *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)). But on appeal, a defendant must “specifically and distinctly” argue plain error for us to apply plain-error review. *See State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995); N.C. R. App. P. 10(a)(4) (allowing review of certain unpreserved arguments in criminal appeals only “when the judicial action questioned is specifically and distinctly contended to amount to plain error”).

Here, Defendant did not request plain error review. In the absence of a request for plain error review, we lack a legal basis to review this issue. *See Frye*, 341 N.C. at 496, 461 S.E.2d at 677.

## **V. Conclusion**

We conclude that the trial court did not err by denying Defendant’s motion to dismiss.

STATE V. McLAUGHLIN

*Opinion of the Court*

NO ERROR.

Judges STROUD and THOMPSON concur.

Report per Rule 30(e).