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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-847-2

Filed 2 April 2025

Davidson County, No. 17 CRS 51616

STATE OF NORTH CAROLINA

v.

KAJUAN DYSHAWN HAMILTON, Defendant.

Appeal by Defendant from judgment entered 4 May 2022 by Judge Joseph N. Crosswhite in Davidson County Superior Court. Originally heard in the Court of Appeals on 23 May 2023. Remanded in part from the North Carolina Supreme Court on 26 June 2024. Reheard in the Court of Appeals on 2 July 2024 on limited remand.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Kimberly D. Potter and Robert C. Ennis, for the State.

Wyatt Early Harris Wheeler LLP, by Stanley F. Hammer, for Defendant-Appellant.

CARPENTER, Judge.

This case comes to us on remand for the purpose of reconsidering whether the trial court's error in failing to instruct the jury on the lesser-included offense of common-law robbery constituted plain error in light of the North Carolina Supreme Court's holding in *State v. Reber*, 386 N.C. 153, 900 S.E.2d 781 (2024). After careful

review, we discern no plain error.

I. Factual & Procedural Background

On 5 March 2018, a Davidson County grand jury indicted Kajuan Dyshawn Hamilton (“Defendant”) on two counts of robbery with a dangerous weapon. Defendant’s case proceeded to trial on 3 May 2022. The evidence at trial tended to show the following.

On 13 December 2016, Defendant and Willie Thomasson approached a gaming business (the “Business”) in Davidson County. Once inside, Defendant drew his firearm and pointed it at Todd Bauguess, a manager of the Business. Defendant then demanded money from Bauguess while Thomasson approached and demanded money from patrons of the Business, including Larry McClendon, who was located five to six feet away from Bauguess. Before leaving the Business, Defendant and Thomasson took money from Bauguess, the Business, and McClendon, as well as Bauguess’ gun and driver’s license. Police arrived approximately ten minutes after Defendant and Thomasson left the Business.

During their investigation, police obtained images from the Business’ surveillance videos and issued a press release seeking help in identifying the suspects. Based on the surveillance images, a corrections officer identified Defendant as one of the suspects. Subsequently, Bauguess identified Defendant in a police lineup of potential suspects. In addition to trial testimony, the jury viewed the Business’ surveillance video from 3 December 2016.

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At trial, Defendant failed to request an instruction on the lesser-included offense of common-law robbery and did not otherwise object to the jury instructions. The jury convicted Defendant of two counts of robbery with a dangerous weapon: one count regarding Bauguess and one count for acting in concert with Thomasson regarding McClendon. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

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

III. Issue

Per the order to reconsider in light of *Reber*, the sole issue is whether the trial court plainly erred by failing to instruct the jury on the lesser-included offense of common-law robbery.

IV. Analysis

Initially, we concluded the trial court plainly erred by failing to instruct the jury on the lesser-included offense of common-law robbery as to Defendant's second count of robbery with a dangerous weapon. *State v. Hamilton*, 291 N.C. App. 368, 378, 895 S.E.2d 611, 619 (2023). Subsequently, the North Carolina Supreme Court clarified our plain-error standard of review. *Reber*, 386 N.C. at 157–60, 900 S.E.2d at 786–87. After careful review, we now discern no plain error.

Because Defendant did not request a lesser-included instruction on common-law robbery during the charge conference, or otherwise object to the trial court's jury instructions, this argument is not preserved for our review. *See 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)) (“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.”).

In criminal cases, we may nonetheless “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 in order for us to review these issues for plain error, the appellant must “specifically and distinctly” argue plain error. *See State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995); N.C. R. App. P. 10(a)(4).

Here, Defendant “specifically and distinctly” argues the trial court plainly erred by failing to instruct the jury on common-law robbery, a lesser-included offense of robbery with a dangerous weapon. *See Frye*, 341 N.C. at 496, 461 S.E.2d at 677. Accordingly, despite Defendant’s failure to preserve the issue for appeal, we will review for plain error. *See Gregory*, 342 N.C. at 584, 467 S.E.2d at 31.

A defendant must pass a three-part test to establish plain error:

First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error

seriously affects the fairness, integrity or public reputation of judicial proceedings.

Reber, 386 N.C. at 158, 900 S.E.2d at 786 (internal quotation marks and citations omitted).

Reber clarified that the second prong of the plain-error test requires a showing that, but for the trial court's error, a different verdict was "significantly more likely than not." *Id.* at 159, 900 S.E.2d at 787. In other words, the appellant must show that a different result was more than a mere possibility; they must show a different result was "almost certain[]" or "doubtless" without the error. *Id.* at 159, 900 S.E.2d at 787 (citing New Oxford American Dictionary (3d ed. 2010) and Merriam-Webster's Collegiate Dictionary (11th ed. 2007)).

Under plain-error review, we first consider whether the trial court's failure to instruct the jury on the lesser-included offense of common-law robbery amounted to error. *Id.* at 158, 900 S.E.2d at 786. "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. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "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.'" *Id.* at 562, 572 S.E.2d at 772 (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)).

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Robbery with a dangerous weapon requires: (1) the unlawful taking of another's property; (2) with the actual or threatened use of a dangerous weapon; (3) by which another person's life is threatened. *State v. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003). Common-law robbery, on the other hand, does not involve the use or threatened use of a dangerous weapon. *State v. Peacock*, 313 N.C. 554, 562–63, 330 S.E.2d 190, 195 (1985).

Here, Defendant was convicted of a second count of robbery with a dangerous weapon regarding McClendon for acting in concert with Thomasson. For this count, Defendant claims he was entitled to a jury instruction on common-law robbery. At trial, Bauguess testified that Defendant pointed a gun at him and ordered him to retrieve the money from behind the counter. At the same time, Thomasson approached McClendon and took his money while he pleaded: "Man, I've got kids." Thomasson did not have a firearm when he approached McClendon or at any time during the robbery.

A rational jury could find McClendon's statement, "Man, I've got kids," as evidence that McClendon felt threatened and feared for his life. A jury, however, may also consider the evidence showing that Thomasson did not have a firearm as proof that a dangerous weapon was not used to threaten McClendon or take his money. The jury could also consider this as evidence that McClendon did not reasonably fear for his life.

As the evidence reflects that neither Defendant or Thomasson approached McClendon with a firearm, a rational jury could have reasonably inferred that neither Defendant nor Thomasson used a dangerous weapon to threaten McClendon. *See Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667. Therefore, concerning the second count of robbery with a dangerous weapon against Defendant, a rational jury could have instead convicted him of common-law robbery because the only difference between the crimes is the use of a dangerous weapon to threaten a life. *See Peacock*, 313 N.C. at 562, 330 S.E.2d at 195; *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771. Accordingly, because a rational jury could have viewed the evidence to support common-law robbery and not robbery with a dangerous weapon, the trial court erred by not instructing the jury on the lesser-included offense of common-law robbery.

Next, we consider whether, absent this error, a different verdict was “significantly more likely than not.” *Reber*, 386 N.C. at 159, 900 S.E.2d at 787. As we explained in our initial review, failing to instruct a jury on a lesser-included offense “constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense.” *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000). But reversible error does not necessarily equal “plain error.” *See Reber*, 386 N.C. at 158–59, 900 S.E.2d at 786–87. Plain error receives a more “exacting prejudice standard.” *Id.* at 160, 900 S.E.2d at 787. Plain error occurs only if it is “almost certain[]” or “doubtless” that the jury would have reached a different conclusion absent the error. *Id.* at 159–62, 900 S.E.2d at 787–89.

Defendant failed to show the jury “almost certainly” would have found him not guilty of the second count of robbery with a dangerous weapon had they been instructed on common-law robbery. *See id.* at 159, 900 S.E.2d at 787. Here, the State presented evidence that Defendant entered the Business, drew his firearm, and pointed it at Bauguess. No evidence demonstrates that Defendant or Thomasson pointed a gun directly at McClendon. But evidence does reflect that McClendon feared for his life while Thomasson took money from him at the same time Defendant held a gun against Bauguess, who was located five to six feet from McClendon.

The second count of robbery with a dangerous weapon stems from Defendant acting in concert with Thomasson. Therefore, based on Defendant using a firearm to threaten Bauguess in close proximity to Thomasson taking money from McClendon, a rational jury could find that McClendon reasonably feared for his life as he witnessed the use of a firearm against Bauguess as Thomasson took his money.

As explained above, if instructed on common-law robbery, it is *possible* that the jury may have convicted Defendant of common-law robbery rather than robbery with a dangerous weapon. Nevertheless, based on the evidence, we cannot say that an instruction on common-law robbery would have “almost certainly” resulted in an acquittal on the second count of robbery with a dangerous weapon. *See id.* at 159, 900 S.E.2d at 787; *Bellamy*, 159 N.C. App. at 147, 582 S.E.2d at 667. Indeed, a rational jury could still find Defendant guilty of robbery with a dangerous weapon. Thus, the trial court did not plainly err by failing to instruct the jury on the lesser

included offense of common-law robbery as to Defendant's second count of robbery with a dangerous weapon.

V. Conclusion

After reconsidering the instructional issue in light of *Reber*, we conclude that the trial court did not plainly err by failing to instruct the jury on the lesser-included offense of common-law robbery as to Defendant's second count of robbery with a dangerous weapon.

NO PLAIN ERROR.

Chief Judge DILLON and Judge STROUD concur.

Report per Rule 30(e).