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NO. COA01-673

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v.

JARROD DAMIEN STROUD,
Defendant

Rutherford County
Nos. 99 CRS 6412
99 CRS 7367

Appeal by defendant from judgments entered 15 November 2000 and 16 November 2000 by Judge J. Marlene Hyatt in Rutherford County Superior Court. Heard in the Court of Appeals 15 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jill B. Hickey, for the State.

Belser & Parke, by David Belser for the defendant.

BRYANT, Judge.

Defendant Jarrod Damien Stroud was indicted for first degree (felony) murder and common law robbery on 13 September 1999. On 15 November 2000, following a trial by jury, defendant was found guilty of both charges and sentenced to life imprisonment without parole for the charge of first degree murder. Defendant was sentenced to 15 - 18 months for the charge of common law robbery; however, this judgment was arrested. Defendant gave notice of appeal in open court.

The State's evidence tends to show the following. The victim was an employee of the Service Distributing Inc. Store #2 in Forest

City, North Carolina. The victim worked the 2:00 p.m. - 10:00 p.m. shift, and was responsible for restocking the shelves as part of his work duties. In order to restock the shelves, the victim had to retrieve merchandise from the oil shed, a separate outbuilding directly behind and within several feet of the store.

On 14 March 1999 at approximately 10:30 p.m., the victim was in the process of restocking the shelves. Defendant and a second person named Jamar Gordon hid behind the oil shed, then attacked the victim from behind as the victim approached the oil shed. They forced the victim to the ground, taped his legs and arms together, and stuck a gag, secured with tape, in his mouth.

While Gordon remained outside with the victim, defendant went inside the store and took money from the cash register. Evidence introduced at trial showed that \$1235.44 was taken from the cash drawer. When defendant came out of the store, he and Gordon moved the victim from the ground between the store and the shed to the inside of the oil shed. When they left the scene, the victim was still breathing. Defendant's confession concerning his involvement in this matter was introduced at trial.

The following morning, a police officer found the victim's dead body lying face down in the oil shed. An autopsy showed that the victim died from suffocation. Hemorrhages found on the victim's neck indicated possible strangulation. There were several rib fractures and chest injuries, as well as a contusion on the right side and center of his forehead. He had internal head bleeding, abrasions on his lower abdomen, knees and elbows.

Additional hemorrhages, contusions, and abrasions were also found at various locations on the victim's body.

I.

Defendant first argues that the trial court erred in failing to dismiss the charges of common law robbery and first degree (felony) murder due to insufficiency of the evidence. We disagree.

"In reviewing a motion to dismiss, 'the trial court is to determine 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[] being the perpetrator of the offense.'" *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *aff'd as modified by* 355 N.C. 266, 559 S.E.2d 788 (2002) (citation omitted). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied by Fritsch v. North Carolina*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

a. Common Law Robbery

"Common law robbery requires proof of four elements: (1) felonious, non-consensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force." *State v. Robertson*, 138 N.C. App. 506, 508, 531 S.E.2d 490, 492 (2000). Here, defendant disputes the "presence" element. Specifically, defendant argues that the evidence does not show that the money was taken from the presence of the victim. We disagree.

Common law robbery "necessarily carries with it the concept that the offense can only be committed in the presence of the victim." *State v. Jacobs*, 25 N.C. App. 500, 503, 214 S.E.2d 254, 256 (1975). Prior case law discussing the elements of common law robbery does not specifically address the element of "presence." However, our courts have discussed the element of "presence" in the context of a charge of armed robbery. See *State v. Clemmons*, 35 N.C. App. 192, 241 S.E.2d 116 (1978); see also *State v. Powell*, 299 N.C. 95, 102, 261 S.E.2d 114, 119 (1980). We note that armed robbery includes all of the elements of common law robbery, in addition to the element of the use of a firearm or dangerous weapon during the commission of the offense. See *State v. Norris*, 264 N.C. 470, 473, 141 S.E.2d 869, 871-72 (1965).

Our Supreme Court and this Court have both construed the element of "presence" broadly. See *State v. Clemmons*, 35 N.C. App. 192, 241 S.E.2d 116; see also *State v. Powell*, 299 N.C. 95, 102, 261 S.E.2d 114, 119. "'Presence' here means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property." *Clemmons*, 35 N.C. App. at 196, 241 S.E.2d at 118-19. "'A thing is in the presence of a person, with respect to robbery, which is so within his reach, inspection, observation, or control that he could, if not overcome by violence or prevented by fear, retain his possession of it.'" *State v. Thompson*, 37 N.C. App. 651, 661, 247 S.E.2d 235, 241 (1978) (quoting 77 C.J.S. Robbery s 9, p. 455).

Here, the victim, as a store employee, had the responsibility

of maintaining the store premises. Even at times when the victim would temporarily leave the store building to retrieve merchandise from the oil shed, which we again note was within feet of the store, the victim was still in the presence of the store property and was still on the store premises. The victim did not abandon the premises, he did not leave the premises unattended, nor was he removed from the premises. Rather, the victim temporarily left the store building for the purpose of retrieving merchandise from the adjacent oil shed to restock the store shelves.

By attacking the victim and incapacitating him between the store and the shed, defendant was able to accomplish the act of robbing the store. Even though the victim was not physically inside the store at the time of the attack and robbery, we hold that the store and its contents, including the money taken from the cash register, were in the victim's immediate presence and under his protection such that force or intimidation was essential in accomplishing the robbery. See *Clemmons*, 35 N.C. App. at 196, 241 S.E.2d at 118-19. Viewing the evidence in the light most favorable to the State, there was substantial evidence of each essential element of common law robbery and that defendant was the perpetrator of the offense. Therefore, we conclude that the trial court did not err in failing to dismiss the charge of common law robbery.

b. Felony Murder

As to the charge of first degree (felony) murder, defendant argues that the charge should have been dismissed because there

exists insufficient evidence of the underlying felony. Specifically, defendant argues that there does not exist sufficient evidence that the money was taken from the presence of the victim. As we have discussed *supra*, that argument is without merit.

II.

Next, defendant argues that as to the common law robbery charge, the trial court committed plain error in failing to instruct the jury on the lesser included offense of larceny. We disagree.

Our standard of review under the plain error doctrine is whether:

[I]t 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," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alteration in original) (citation omitted).

In North Carolina, an instruction on a lesser included offense must be given when the evidence would permit a jury to rationally find the defendant guilty of the lesser included offense and acquit him of the greater offense. *State v. Larry*, 345 N.C. 497, 516-17, 481 S.E.2d 907, 918, *cert. denied*, *Larry v. North Carolina*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997). "'The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the

lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.'" *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994) (citation omitted).

Defendant argues that there is no evidence to show that property was taken from the victim's presence; therefore the trial court should have given an instruction on larceny. For the reasons stated in part I, we disagree. The State produced sufficient evidence of each element of the crime charged. Therefore, we conclude that the trial court did not err and this assignment of error fails.

Conclusion

We hold that the trial court did not err in failing to dismiss the charges and that the trial court did not err in failing to give an instruction on the lesser included offense of larceny.

NO ERROR.

Chief Judge EAGLES and Judge HUDSON concur.

Report per Rule 30(e).