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NO. COA02-86

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v.

Rowan County
No. 01 CRS 51707

ROLANDO WALKER,
Defendant

Appeal by defendant from judgment entered 26 September 2001 by Judge Michael E. Beale in Rowan County Superior Court. Heard in the Court of Appeals 15 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.

Michael E. Casterline for defendant.

BRYANT, Judge.

Sometime between the late night hours of 12 March 2001 and the early morning hours of 13 March 2001, defendant Rolando Walker robbed the Circle K store on Innes Street in Salisbury, North Carolina. Cathy Highley was the store clerk on the date and at the time of the robbery. Defendant told Highley that he had a gun, to give him all the money, and not to make a scene. Highley gave defendant approximately \$68.53 in money from the register.

Defendant was arrested and subsequently indicted for robbery with a dangerous weapon. This matter came for jury trial at the 24 September 2001 criminal session of Rowan County Superior Court with

the Honorable Michael E. Beale presiding. At trial, defendant admitted to having committed the robbery, but denied having a gun in his possession when the robbery occurred. On 26 September 2001, defendant was found guilty as indicted, and was sentenced to 96-125 months, active imprisonment. Defendant gave notice of appeal on 27 September 2001.

I.

First, defendant argues that his conviction must be vacated because there is insufficient evidence that he actually possessed a weapon or that the victim believed defendant possessed a weapon, and that the victim's life was endangered or threatened. We disagree.

A person is guilty of robbery with a dangerous weapon if that person, *having in his possession or with the use or threatened use of any dangerous weapon or firearm*, unlawfully takes personal property from another, whereby the life of the other person is endangered or threatened. N.C.G.S. § 14-87(a) (2001). The State has the burden of proving the existence of each element of the offense, either through the use of direct or circumstantial evidence. See *State v. Tisdale*, ___ N.C. App. ___, 569 S.E.2d 680 (2002). In addition, this Court has previously stated:

To obtain a conviction for armed robbery, it is not necessary for the State to prove that the defendant displayed the firearm to the victim. Proof of armed robbery requires that the victim reasonably believed that the defendant possessed, or used or threatened to use a firearm in the perpetration of the crime. The State need only prove that the defendant represented that he had a firearm

and that circumstances led the victim reasonably to believe that the defendant had a firearm and might use it.

State v. Lee, 128 N.C. App. 506, 510, 495 S.E.2d 373, 376 (1998) (citation omitted); see *State v. Williams*, 335 N.C. 518, 521, 438 S.E.2d 727, 728-29 (1994) (concluding that defendant's verbal representations that he had a firearm and that he would shoot the victims entitled the State to a presumption that the defendant used a firearm).

This Court held in *State v. Wiggins* that when a defendant uses a dangerous weapon in the commission of a robbery, absent evidence to the contrary, there attaches the presumption that the victim's life was in fact endangered or threatened. *State v. Wiggins*, 78 N.C. App. 405, 408, 337 S.E.2d 198, 199-200 (1985). When there is evidence tending to show that the weapon used was not a dangerous weapon, however, the mandatory presumption disappears and the jury may infer that the weapon used was in fact dangerous. *State v. Wilson*, 121 N.C. App. 720, 725, 468 S.E.2d 475, 479 (1996).

On numerous occasions our Supreme Court has held, in regard to a robbery with a deadly weapon charge, the determinative question to be answered by the jury is whether the victim's life was in fact endangered or threatened; and not whether the victim subjectively believed his life was endangered or threatened. See *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982); *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978); *State v. Moore*, 279 N.C. 455, 459, 183 S.E.2d 546, 548 (1971).

The State's evidence in the instant case tended to show the

following: Defendant walked around inside the store for some unspecified amount of time. There were several customers in line in front of defendant. Defendant lingered around the back of the store until the other customers left. After asking for and receiving some change from a customer standing in line in front of him, defendant asked Highley what was the cheapest pack of cigarettes the store carried. After Highley answered, defendant took some change out of his pocket, held the change up, and said he did not think he had enough change for the cigarettes.

Highley suggested that maybe she could help, and proceeded to take change from the "penny cup." Defendant stated that he did not think he would have enough change and asked Highley to show him the cigarette package. Highley laid a cigarette package on the counter and continued to count change from the penny cup. Sometime immediately thereafter, defendant put his hand in his pocket, told Highley that he had a gun, told her not to make a scene, and told her to give him all the money.

Highley testified that she asked defendant if he was joking. She testified that nothing like that had ever happened to her before, and that defendant again told her to not make a scene. Highley testified that defendant's hand was in his pocket during the above mentioned exchange, and that defendant "kinda pulled up because he leaned up over the counter, and it actually looked like he had something in his pocket, but I never actually seen it." Highley illustrated for the trial court the manner in which defendant held his hand up while it was in his pocket. Further,

Highley testified that when defendant pointed at her, she was scared.

There existed sufficient evidence from which the jury could infer both that defendant possessed a gun or that the victim reasonably believed that defendant possessed a gun, and that the victim's life was endangered or threatened. Therefore, this assignment of error is overruled.

II.

Second, defendant argues that the trial court committed prejudicial error by providing jury instructions that allowed the jury to convict defendant without finding that he actually possessed a weapon. Specifically, defendant argues that the evidence did not establish that defendant actually possessed a gun during the commission of the robbery. Defendant argues that the trial court, moreover, erred in instructing the jury that it may consider whether the victim reasonably believed that defendant possessed a gun. Therefore, defendant argues that the trial court's instructions concerning the elements of robbery with a dangerous weapon were prejudicial and his conviction should be vacated.

N.C. R. App. P. 10 (b) (1), provides that to preserve an issue for appellate review, a party must have presented a timely objection or motion to the trial court, and must have received a ruling on that objection or motion. Defendant never objected to the trial court's instructions regarding the elements of the offense charged, nor did he assign as prejudicial or plain error

the trial court's instructions as to the elements of the offense charged. The failure to properly preserve this issue via assignments of error subjects the issue to dismissal. N.C. R. App. P. 10(a). Therefore, this issue is dismissed as not properly being preserved for appellate review.

We do note that defendant assigned as error the trial court's failure to accept defendant's proposed instruction regarding the State's alleged burden of proving beyond a reasonable doubt that defendant actually possessed a gun during the commission of the offense. However, even this issue is not properly before this Court, because defendant failed to object to the trial court's decision to reject the proposed instruction, and because defendant failed to assign this rejection as an act of plain error.

Even if we were to consider defendant's contention that the jury should have been instructed that they had to find defendant actually possessed a gun, that contention is unsupported by case law. See *Lee*, 128 N.C. App. at 510, 495 S.E.2d at 376. Therefore, this assignment of error is overruled.

NO ERROR.

Judges GREENE and MARTIN concur.

Report per Rule 30(e).