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NO. COA05-1020

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

Guilford County
No. 04 CRS 76149

LARRY WAYNE WEBSTER,
Defendant.

Appeal by defendant from judgment entered 20 April 2005 by Judge Judson D. Deramus, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.

Jon W. Myers for defendant-appellant.

GEER, Judge.

Defendant Larry Wayne Webster appeals his conviction for common law robbery, arguing that the trial court erred in denying his motion to dismiss based on insufficiency of the evidence to support the charge. Specifically, defendant argues that the State failed to prove that defendant's theft was by means of fear or violence, an element necessary for a common law robbery conviction. We hold that the State presented sufficient evidence of constructive force to prove this element and, therefore, uphold the judgment of the trial court.

Facts

The State's evidence tended to show the following facts. On 1 April 2004, defendant entered a Pantry convenience store in Greensboro, North Carolina and proceeded to the beer display. On more than 10 prior occasions, the store clerk on duty, Thomas Sprole, had observed defendant enter the store, remove two to three 18-packs of beer from the beer display, and walk out of the store without paying for the beer. The Pantry policy was for the store clerk to fill out an incident report in such instances and not to phone the police unless there was a robbery or the clerk was threatened. Sprole testified at trial that he did not believe the Pantry's policy was "a right rule, but that's what they got."

As he had done on the prior occasions, defendant picked up three 18-packs of beer and headed for the door. Upon observing the defendant picking up the beer, Sprole started to fill out the incident report, but he was "tired of the company not doing nothing." For that reason, when the defendant approached the door, Sprole began to walk around the counter and "asked [defendant] about it." Defendant responded, "[y]ou interfere, I'll shoot you." Sprole then walked back behind the counter to fill out the incident report and allowed defendant to leave the store with the merchandise.

Sprole testified that he did not stop defendant from leaving the store because of "what he said" and because "[i]t was against company policy and against the orders from the police." He called the police once defendant left the store. The next day, Sprole identified defendant as the perpetrator from a photographic line-

up.

Defendant was convicted of one count of common law robbery. The trial court sentenced defendant to a term of 25 to 30 months imprisonment. Defendant has timely appealed.

Discussion

In his sole argument on appeal, defendant contends the trial court erred by denying his motion to dismiss the robbery charge. In deciding a motion to dismiss, the trial court must determine whether the State presented substantial evidence of each essential element of the offense charged and of the defendant's being the perpetrator of the offense. *State v. Wardrett*, 145 N.C. App. 409, 412, 551 S.E.2d 214, 216 (2001). Substantial evidence is that relevant evidence, which a reasonable mind might accept as adequate to support a conclusion. *State v. Williams*, 133 N.C. App. 326, 328, 515 S.E.2d 80, 82 (1999). The trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences that may be drawn from the evidence. *Id.*

To obtain a conviction in North Carolina for common law robbery, the State must show that the defendant unlawfully took money or personal property from another by means of violence or fear. *State v. White*, 142 N.C. App. 201, 204, 542 S.E.2d 265, 267 (2001). The element of fear or violence distinguishes common law robbery from the lesser offense of larceny from the person. *Id.* North Carolina courts have consistently held that the crime of common law robbery includes an assault on the person, which is "an

intentional offer or attempt by force or violence to do injury to the person of another which causes a reasonable apprehension of immediate bodily harm." *Id.*, 542 S.E.2d at 268 (holding that the State offered sufficient evidence of common law robbery when the defendant handed a clerk a note stating, "[g]ive me the money or I'll blow your head off").

Here, defendant contends that the State failed to establish that his actions put Sprole in fear. Common law robbery does not, however, require the use of actual force or violence to induce fear. The requisite force may be constructive. *State v. Robertson*, 138 N.C. App. 506, 508, 531 S.E.2d 490, 492 (2000). "Constructive force exists if the defendant, by words or gesture, has placed the victim in such fear as is likely to create an apprehension of danger and thereby induce [him] to part with [his] property for the sake of [his] person." *Id.* at 510, 531 S.E.2d at 493. The acts creating this apprehension of danger "must precede or be concomitant with the taking in order for the crime of robbery to be committed." *State v. Stephenson*, 144 N.C. App. 465, 468, 551 S.E.2d 858, 861, *disc. review denied*, 354 N.C. 227, 554 S.E.2d 829 (2001).

In the present case, when Sprole confronted defendant about taking the beer, the defendant told Sprole, "[y]ou interfere, I'll shoot you." Once defendant made the threatening remark, Sprole allowed defendant to leave the store with the beer. Thus, the threat of force was concomitant with the removal of the beer from the store, and a jury could reasonably conclude that the threat of

violence created a fear of danger that induced Sprole to allow defendant to leave the store without paying for the beer. Accordingly, we conclude that the trial court properly denied defendant's motion to dismiss.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).