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NO. COA11-1389
NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2012

STATE OF NORTH CAROLINA

v.

Durham County
No. 10 CRS 58673

DENNIS ROYSTER

Appeal by Defendant from judgments dated 23 May 2011 by Judge Michael R. Morgan in Durham County Superior Court. Heard in the Court of Appeals 6 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Parish & Cooke, by James R. Parish, for Defendant.

STEPHENS, Judge.

Defendant Dennis Royster was indicted on one count each of robbery with a dangerous weapon and assault with a deadly weapon with intent to kill, inflicting serious injury. Royster pled not guilty to the charges and was tried before a jury in Durham County Superior Court, the Honorable Michael R. Morgan presiding. The evidence presented at trial tended to show that on 8 August 2009, Ulisses Gurgel and Tanya Lake were approached

in the street by a man later identified as Royster. Royster brandished a firearm, instructed Gurgel and Lake to put their hands in the air, and took Gurgel's wallet and keys. As Royster turned away from Gurgel and Lake, Gurgel attempted to take Royster's gun. During a struggle with Royster, Gurgel was shot in the abdomen. Thereafter, Royster "limped away" with his gun. When police arrived at the scene, they obtained a hat identified as the assailant's and which contained Royster's DNA. At trial, Royster was identified by Lake as her and Gurgel's assailant.

Following presentation of the evidence, the jury was instructed on potential verdicts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury. The jury returned verdicts finding Royster guilty of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. The trial court sentenced Royster to 133 to 169 months imprisonment for the robbery charge and 47 to 66 months imprisonment for the assault charge. Royster appeals.

On appeal, Royster first argues that the trial court erroneously denied his motion to dismiss the charge of assault with a deadly weapon because there was insufficient evidence

that Royster used a deadly weapon. This argument is frivolous. The following uncontradicted evidence presented by the State showed that Royster committed the assault with a gun: both Gurgel and Lake testified that Royster brandished a gun; Gurgel testified that he was injured by a projectile fired from the gun; Gurgel had surgery and spent more than a week in the hospital; and bullet fragments were found in Gurgel's torso. This evidence, taken in the light most favorable to the State, is clearly sufficient to show that Royster used a deadly weapon. This is so despite testimony by Gurgel and Lake, who professed to having very limited experience with firearms, indicating that the firearm was smaller than the two victims expected a gun to be. We conclude that the trial court did not err by denying Royster's motion to dismiss.¹ See *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (stating that a motion to dismiss on the basis of sufficiency of evidence should be denied if the State's evidence, taken in the light most favorable to the State, constitutes substantial evidence in support of each

¹We note that Royster's appellate counsel raised a nearly identical argument regarding the sufficiency of the evidence to support the robbery with a dangerous weapon charge, but conceded that issue in the reply brief once he reviewed the State's trial evidence "in its entirety," which he had not done at the time he filed his principal brief. For the same reasons he conceded that issue, Royster's counsel should have conceded the three other arguments on appeal.

element of the charged offense and that the defendant is the perpetrator).

For his final two arguments, Royster contends that the trial court plainly erred by failing to instruct the jury on the lesser included offenses of common law robbery and assault inflicting serious injury. We disagree. A trial court is not required to instruct the jury on common law robbery when the defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery was perpetrated by the use of a dangerous weapon. *State v. Porter*, 303 N.C. 680, 686-87, 281 S.E.2d 377, 382 (1981). Likewise, when a defendant is charged with assault with a deadly weapon, a trial court need not instruct the jury on the lesser included offense of assault inflicting serious injury where there is uncontradicted evidence that the assault was perpetrated by the use of a deadly weapon. *See State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) ("Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." (quoting *State v. Thomas*, 353 N.C. 583, 594, 386 S.E.2d 555, 561 (1989))). As discussed *supra*, there is uncontradicted evidence that Royster perpetrated

the crimes by use of a firearm. Accordingly, it was proper for the trial court not to instruct the jury on the lesser included offenses urged by Royster. Royster's argument is overruled.

Based on the foregoing, we conclude that Royster received a fair trial, free of error.

NO ERROR.

Chief Judge MARTIN and Judge HUNTER, ROBERT C. concur.

Report per Rule 30(e).