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NO. COA11-175
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA,

v.

Wake County
No. 09CRS210668

JACQUES CRAIG FLOYD

Appeal by defendant from judgment entered on or about 27 October 2010 by Judge R. Allen Baddour, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 29 August 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Anne Goco Kirby, for the State.

Mercedes O. Chut, for defendant-appellant.

STROUD, Judge.

On 27 October 2010, a jury found Jacques Craig Floyd ("defendant") guilty of robbery with a dangerous weapon. The trial court entered judgment pursuant to the verdict and sentenced defendant to a term of 108 to 139 months imprisonment. Defendant gave notice of appeal in open court.

We first address defendant's argument that the trial court erred in denying his motion to dismiss the charge of robbery

with a dangerous weapon. Defendant contends the State failed to present sufficient evidence that he was the perpetrator of the robbery, or that the robbery was committed using a firearm. We disagree.

The law in North Carolina regarding motions to dismiss is well established:

[W]hen a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. . . . Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. . . . The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.

State v. McNeil, 359 N.C. 800, 803-04, 617 S.E.2d 271, 273-74 (2005) (citations and quotation marks omitted). To obtain a conviction for robbery with a dangerous weapon, the State must show: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon,

(3) whereby the life of a person is endangered or threatened." *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (citations and quotation marks omitted), *cert. denied*, 540 U.S. 988, 157 L.Ed. 2d 382 (2003); *see also* N.C. Gen. Stat. § 14-87(a) (2009).

Here, the State's evidence tends to show that at approximately 10:00 p.m. on 8 November 2009, two men entered the McDonald's restaurant located at 1805 North Harrison Avenue in Cary, North Carolina. One of the men approached the counter and asked a cashier for some water. The cashier gave the man a cup of water, and the man asked to see the manager. The manager came to the counter and spoke to the man, who told the manager that he had a gun and wanted money. The gunman demanded the manager take him to the office and open the safe. While in the office, the gunman observed a third employee with a cell phone. The gunman pulled out a silver semi-automatic handgun, pointed it at the employee, and told the employee to throw the phone away. The gunman then pointed the handgun at the manager's head and told the manager to open the safe and fill a bag with money. The manager complied with the gunman's request, and the gunman fled with approximately two to three thousand dollars. During

the robbery, the second man stayed in the front of the restaurant, watching the door.

Investigating officers examined several items in the store for fingerprints. Defendant's fingerprints were found to be on the water cup, and his palm print was found on the counter. A detective interviewed defendant on 30 November 2009. Defendant told the detective he had been in the McDonald's restaurant two or three weeks previously and had applied for a job. Defendant initially told the detective he had not asked for anything to drink while at the McDonald's. However, when confronted with the information that his fingerprints had been found on a cup of water just after the robbery, defendant stated he may have asked for a cup of water while he was waiting for a job application. Defendant denied committing the robbery but told the detective that even if he did commit the robbery, he would not admit to it, and he was going to make the detective work at the case to keep him in jail.

We hold this evidence is sufficient to establish that a robbery was committed with the use of a firearm, wherein the lives of the McDonald's employees were endangered or threatened. Further, while no witness identified defendant at trial, defendant's fingerprints on the water cup are sufficient

evidence to establish that he was the perpetrator of the robbery. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

Defendant also argues the trial court erred in denying his request for a jury instruction on the lesser-included offense of common law robbery. Again, we disagree.

"Common law robbery is the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (citation omitted), *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982).

A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. The trial court may refrain from submitting the lesser offense to the jury only where the evidence is clear and positive as to each element of the offense charged and no evidence supports a lesser-included offense.

State v. Tillery, 186 N.C. App. 447, 450, 651 S.E.2d 291, 294 (2007) (citations and quotation marks omitted).

Here, the evidence at trial clearly established that the robbery was committed using a firearm, and no evidence supports defendant's contention that the robbery was not committed with

the use of a firearm. Further, defendant's argument that he could have been the second suspect involved in the robbery is without merit. The State's evidence established that only the gunman touched the water cup that was left on the counter, and defendant's fingerprints were found on the cup. No evidence supports defendant's theory that he was the second suspect and not the actual gunman. Thus, the State's evidence establishes that defendant committed the robbery only by using a firearm and threatening or endangering the lives of the McDonald's employees. Accordingly, we hold the trial court did not err in denying defendant's request for a jury instruction on the lesser-included offense of common law robbery.

NO ERROR.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).