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NO. COA11-485  
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v.

Edgecombe County  
Nos. 09 CRS 51886-88

ROSHUN KENT'E PITTMAN

Appeal by defendant from judgments entered 27 October 2010 by Judge Wayland J. Sermons, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 19 September 2011.

*Attorney General Roy Cooper, by Special Deputy Attorney General Anne J. Brown, for the State.*

*Sue Genrich Berry, for defendant-appellant.*

THIGPEN, Judge.

Defendant appeals from judgments entered on verdicts finding defendant guilty of felony breaking and entering, second degree kidnapping and robbery with a dangerous weapon.

Defendant's only argument on appeal relates to the judgment entered upon the verdict finding him guilty of robbery with a dangerous weapon. He argues the court should not have accepted the jury's verdict because it was ambiguous and not unanimous.

The record shows that the court provided the jury with the following verdict form upon the indictment in case number 09 CRS 51888, which charged defendant with robbery with a dangerous weapon:

We, the jury, return the unanimous verdict as follows:

1. Guilty of Robbery with a Dangerous Weapon

Answer: \_\_\_\_\_

2. Guilty of Common Law Robbery

Answer: \_\_\_\_\_

3. Not Guilty

Answer: \_\_\_\_\_

When the jury returned with its verdict, the foreman wrote in the word "Guilty" as the answers to numbers 1 and 2, and left the answer to number 3 blank.

Upon receiving the verdict sheets, the court read them and as to each count, the court asked the jurors whether it was their verdict. The jurors responded affirmatively each time.

The following transpired as the court pronounced its judgments:

THE COURT: All right, the jury has convicted the defendant of two Class D judgments pardon me, one Class D judgment of guilty of robbery with a dangerous weapon. And they also indicated guilty of common law

robbery in 09-CRS-51888.

My intention is to arrest judgment in that charge because I think it merges. Anything the defendant wants to say about that?

MR. SPERATI: Your Honor, I'd be in agreement with that.

The court followed through with its proposal to arrest judgment on the conviction of common law robbery and sentenced defendant to an active term of 61 to 83 months for robbery with a dangerous weapon.

Although defendant agreed at trial with the court's proposal to arrest judgment on the conviction of common law robbery, defendant contends on appeal that the jury's verdict was not unanimous because some of the jurors may have believed defendant committed robbery with a dangerous weapon while other jurors may have believed defendant committed common law robbery. Generally, in order to preserve an issue for appellate review, a party must have objected or otherwise called the alleged error to the attention of the trial court. N.C.R. App. P. 10(b)(1) (2010). Moreover, "[o]rdinarily one who causes (or we think joins in causing) the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial." *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971). "Where, however, the error violates defendant's right

to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). We therefore address defendant's argument.

The law with regard to the court's acceptance of a jury's verdict is summarized in *State v. Hampton*, 294 N.C. 242, 247-48, 239 S.E.2d 835, 839 (1978):

A verdict is a substantial right and is not complete until accepted by the court. The trial judge's power to accept or reject a verdict is restricted to the exercise of a limited legal discretion. In a criminal case, it is only when a verdict is not responsive to the indictment or the verdict is incomplete, insensible or repugnant that the judge may decline to accept the verdict and direct the jury to retire and bring in a proper verdict. Such action should not be taken except by reason of necessity. If the verdict as returned substantially finds the question so as to permit the court to pass judgment according to the manifest intention of the jury, it should be received and recorded. A verdict may be given significance and a proper interpretation by reference to the indictment, the evidence, and the instructions of the court.

*Id.* (Citations omitted). We conclude that the verdict in the case at bar was not so "incomplete, insensible or repugnant" as to have required the court to order the jury to retire and bring back another verdict.

"Common law robbery is a lesser included offense of armed robbery or robbery with a firearm or other dangerous weapon and an indictment for armed robbery will support a conviction of common law robbery." *State v. Tarrant*, 70 N.C. App. 449, 451, 320 S.E.2d 291, 293-94 (1984). To constitute a lesser included offense, "all of the essential elements of the lesser crime must also be essential elements included in the greater crime." *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). Thus, when a jury finds a defendant guilty of robbery with a dangerous weapon, it also finds him guilty of the lesser offense of common law robbery. Consequently, when a jury returns verdicts finding a defendant guilty of both an offense and its lesser included offense arising out of the same conduct, the court must arrest judgment on the verdict finding the defendant guilty of the lesser offense. *State v. Richardson*, 279 N.C. 621, 628, 185 S.E.2d 102, 107-08 (1971).

In the case at bar, the court received the jury's confirmation that it was the jury's verdict that defendant was guilty of the greater offense of robbery with a dangerous weapon. We hold the court acted properly in accordance with

*Richardson* by accepting the verdicts and in arresting judgment upon the conviction of common law robbery and entering judgment on the conviction of robbery with a dangerous weapon.

NO ERROR.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

Report per Rule 30(e).