IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-985

Filed: 16 May 2017

Henderson County, No. 15 CRS 52360

STATE OF NORTH CAROLINA

v.

LAYTON ALLEN WATERS, Defendant.

Appeal by Defendant from judgment entered 7 January 2016 by Judge Bradley B. Letts in Henderson County Superior Court. Heard in the Court of Appeals 3 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Office of the Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jonathan H. Hunt and Assistant Appellate Defender Jillian C. Katz for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Layton Allen Waters ("Defendant") appeals his conviction for robbery with a dangerous weapon. Defendant contends the trial court erred by denying his motion to dismiss when the State failed to prove Defendant possessed a dangerous weapon. We find no error.

I. Factual and Procedural History

On 25 June 2015, Detective S. Galloway arrested Defendant for robbery with a dangerous weapon. On 27 July 2015, a Henderson County Grand Jury indicted Defendant for robbery with a dangerous weapon. On 5 January 2016, the trial court called Defendant's case for trial. The State's evidence tended to show the following.

The State first called Melanie McCall, a teller at the First Citizens Bank of Etowah ("the Bank"). On the afternoon of 25 June 2015, Defendant approached McCall's teller window. Defendant wore a baseball hat and red sunglasses. He did not speak to McCall and did not respond when she greeted him. When he reached her teller window, Defendant set a piece of folded paper in front of her. McCall opened it. The paper read, "This is not a joke. Give me all your money. I have a bomb outside." McCall indicated, at trial, for a "split second" she wondered if she would ever see her children again. Defendant then handed McCall a wadded up plastic bag. McCall placed $13,327[1] in the bag, and Defendant left.

The State next called Matthew Clark. At the relevant time, Clark rented a basement apartment from Defendant's mother. On 25 June 2015, Defendant asked Clark for a ride to the Bank. Clark drove Defendant towards the Bank, but Defendant asked Clark to pull into a gas station near the Bank. Defendant entered the gas station. Clark did not see Defendant carrying anything with him into the gas station.

[1] At trial, McCall testified she put "$13,326 or something like that. It was over $13,000" in the bag. The indictment alleges Defendant took $13,327 from the Bank.

Defendant exited the gas station and walked around the back of the gas station, towards the Bank. Clark did not wait "long" before Defendant exited the Bank. Clark did not see Defendant carry anything with him out of the Bank. Clark drove Defendant back to Clark's residence. Clark noticed Defendant seemed "a little more upbeat" on the drive home. Defendant gave Clark $100.

The State next called Detective Richard Olsen of the Hendersonville Police Department. On 25 June 2015, Detective Olsen heard a radio transmission announcing the presence of a suspected bank robber near a local camping store.[2] Detective Olsen arrived at the store, and an employee motioned him towards the middle of the store. There, Detective Olsen saw Defendant in one of the aisles. Detective Olsen approached Defendant, arrested him, and seized his backpack. Fearing the presence of explosives, Detective Olsen moved Defendant's backpack "kind of away from everybody else." He opened up the bag and discovered sets of $100 and $20 bills, banded together in paper wrappers. Detective Olsen found no evidence of a bomb or other explosive device either on Defendant's person or in his backpack. Officers also did not find a bomb at the Bank. Detective Darrin Whitaker inspected Defendant's home. He did not find a bomb, evidence of a bomb, or bomb making materials.

[2] There is no indication who radioed Detective Olsen.

The State rested. Defendant then moved to dismiss the case. Defendant argued the State failed to prove the "use or threatened use of any firearms or other dangerous weapon," element for N.C. Gen. Stat. § 14-87. The trial court denied Defendant's motion to dismiss.

Defendant testified on his own behalf. According to Defendant, a dream from the previous night inspired him to commit the bank robbery. Defendant admitted to walking into the Bank and stealing the money by using the note. However, Defendant denied the presence of a bomb or any intention to hurt anyone. Defendant believed it was protocol for bank tellers to hand over money if a note indicated the presence of a weapon.

Defendant rested and renewed his motion to dismiss. The trial court denied the motion.

On 6 January 2016, the trial court held a charge conference. The trial court altered the pattern jury instruction for robbery with a dangerous weapon other than a firearm. For the element "use or threatened use of any firearms or other dangerous weapon," the trial court removed the presumptive language that would have allowed the jury to assume where a dangerous weapon was threatened, one was present. Additionally, the trial court included a definition for an explosive device. The instructions included the lesser included offense of common law robbery.

The next morning, on 7 January 2016, the State argued the presumptive language should not be removed from the pattern jury instruction because Defendant failed to prove he was not carrying a bomb. Defendant argued there was sufficient evidence to rebut the presumption. The trial court, relying on Defendant's testimony as some evidence of the lack of a bomb, denied the State's request and left the presumptive language out of the instruction. The trial court then instructed the jury on both common law robbery and robbery with a dangerous weapon. Before closing arguments, Defendant admitted he was guilty of common law robbery.

The jury found Defendant guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to 64 to 89 months imprisonment. Defendant moved for Judgment Notwithstanding the Verdict. The trial court denied Defendant's motion. Also on 7 January 2016, Defendant filed a *pro se* purported written notice of appeal.

On 11 January 2017, Defendant filed a petition for a writ of certiorari. In his petition, Defendant admits his written notice of appeal failed to comply with Rule 4 of the North Carolina Rules of Appellate Procedure. On 19 January 2017, the State filed its response to Defendant's petition and a motion to dismiss Defendant's appeal.

II. Jurisdiction

Under Rule 4 of the North Carolina Rules of Appellate Procedure:

> Any party entitled by law to appeal from a judgment or order of a superior or district court . . . may take appeal

> by: . . . filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order . . . .

N.C. R. App. P. 4 (2017).

Here, although Defendant filed a purported notice of appeal on the same day as the judgment, there is no evidence Defendant served the State. In fact, Defendant fully admits failure to adhere to Rule 4, and the record suggests the appeal did not include a certificate of service. Because Defendant failed to comply with Rule 4, we allow the State's motion to dismiss. However, we exercise our discretion and grant Defendant's petition for writ of certiorari and review the merits of his appeal.

III. Standard of Review

The standard of review for a motion to dismiss for insufficient evidence is *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted).

IV. Analysis

Defendant contends the trial court erred in denying his motion to dismiss because the State failed to provide sufficient evidence Defendant had a dangerous weapon at the time of the robbery. We disagree.

Under N.C. Gen. Stat. § 14-87,

> Any person or persons who, having in possession or with the *use or threatened use of any firearms or other dangerous weapon*, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87 (2016) (emphasis added).[3]

In construing this statute:

> This Court has explicitly held: "Proof of armed robbery requires that the victim reasonably believed that the

[3] Common law robbery is a lesser included offense, which does not require proof that the defendant had a dangerous weapon. *State v. Ford*, 194 N.C. App. 468, 475, 669 S.E.2d 832, 837 (2008).

> defendant possessed, or used or threatened to use a firearm [or other dangerous weapon] in the perpetration of the crime. *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). The State need only prove that the defendant represented that he had a firearm [or other dangerous weapon] and that circumstances led the victim reasonably to believe that defendant had a firearm [or other dangerous weapon] and might use it. *State v. Williams*, 335 N.C. 518, 522, 438 S.E.2d 727, 729 (1994)."

State v. Jarrett, 167 N.C. App. 336, 339-40, 607 S.E.2d 661, 663 (2004) (quoting *State v. Lee*, 128 N.C. App. 506, 510, 495 S.E.2d 373, 376 (1998)). *See also State v. Williams*, 335 N.C. 518, 521, 438 S.E.2d 727, 728-29 (1994); *State v. Bartley*, 156 N.C. App. 490, 496, 577 S.E.2d 319, 323 (2003).

As stated by our Court:

> We agree with the State that a firearm or other dangerous weapon need not be displayed, and our Courts have upheld convictions for robbery with a dangerous weapon when, as in the case *sub judice*, the evidence showed that the defendant did not possess a firearm or dangerous weapon but merely pretended to possess a firearm or dangerous weapon.

State v. Marshall, 188 N.C. App. 744, 750, 656 S.E.2d 709, 714 (2008) (citations omitted).

When a defendant pretends to possess a dangerous weapon, there is "a presumption that the defendant, in fact, possessed a dangerous weapon." *Id.* at 750-51, 656 S.E.2d at 714 (citing *State v. Joyner*, 312 N.C. 799, 782-83, 324 S.E.2d 841, 844 (1985)). However, when a defendant introduces evidence to show he did not, in

fact, possess a weapon, the mandatory presumption disappears. *Id.* at 751, 656 S.E.2d at 714 (citation omitted). Then, a "permissive inference" survives and permits, but does not require, the jury to infer the element. *Id.* at 751, 656 S.E.2d at 714 (citation omitted). The permissive inference is enough to survive a motion to dismiss. *Id.* at 751, 656 S.E.2d at 714 (citation omitted).

Defendant cites to *State v. Keller*, 214 N.C. 447, 199 S.E. 620 (1938)[4] in support of his argument that N.C. Gen. Stat. § 14-87 requires Defendant to actually possess a dangerous weapon during the commission of the robbery.[5] However, more recent case law articulated in *Lee*, *Jarrett*, and *Bartley* and N.C. Gen. Stat § 14-87 "make clear threatened use of a [dangerous weapon] is sufficient to sustain a conviction under the statute." *Jarrett*, 167 N.C. App. at 339, 607 S.E.2d at 663.[6]

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[4] Moreover, we note *Keller* is distinguishable from the case before us today. In *Keller*, the court instructed the jury only on robbery with a dangerous weapon, not robbery with a dangerous weapon and the lesser included offense of common law robbery. Here, the trial court instructed the jury both on robbery with a dangerous weapon and common law robbery.

[5] Defendant also cites to *State v. Hinton*, 361 N.C. 207, 639 S.E.2d 437 (2007) in support of his argument. However, *Hinton* concerned whether or not a defendant's hands could be considered a deadly weapon for purposes of N.C. Gen. Stat. § 14-87. *Id.* at 210-12, 639 S.E.2d at 439-40. The case did not involve the issue at hand, whether threatening the use of a dangerous weapon is sufficient for N.C. Gen. Stat. § 14-87. Defendant also cites *State v. Smallwood*, 78 N.C. App. 365, 337 S.E.2d 143 (1985) and *State v. Reid*, 151 N.C. App. 379, 565 S.E.2d 747 (2002). Defendant asserts since *Smallwood* predates *Lee* and *Reid* predates *Jarrett* and *Bartley*, we are bound by *Smallwood* and *Reid*. First, *Reid* does not involve the threatened use of a dangerous weapon under N.C. Gen. Stat. § 14-87. Second, in *Smallwood*, this Court awarded defendant a new trial when the trial court failed to instruct the jury on common law robbery, and only instructed on robbery with a dangerous weapon. *Smallwood*, 78 N.C. App. at 370-72, 337 S.E.2d at 145-47. Here, however, the trial court instructed the jury on both common law robbery and robbery with a dangerous weapon. Defendant's backflips through our case law are unavailing.

[6] In his reply brief, Defendant asserts *Jarrett* and *Lee* were "wrongly decided." However, we are bound by our precedent. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

Defendant contends the State failed to present sufficient evidence to survive a motion to dismiss. Defendant's argument centers on the amount of evidence indicating a bomb was not present. Specifically, Defendant notes officers searched the Bank, the getaway car, and Defendant's home. However, officers failed to discover a bomb, evidence of a bomb, or any bomb-making materials.

Here, the victim of the robbery testified Defendant passed her a note saying "This is not a joke. Give me all your money. I have a bomb outside." Additionally, McCall testified she gave Defendant the money "[b]ecause he said he had a bomb." In fact, McCall stated she would not have given Defendant the money, but for the note indicating he had a bomb outside. Viewing the evidence in the light most favorable to the State, we conclude Defendant's statement and behavior were sufficient evidence leading the victim to reasonably believe he possessed a bomb, a dangerous weapon, and would use it to perpetuate the robbery.

We note Defendant presented evidence he did not actually possess a dangerous weapon. Thus, there was no mandatory presumption of possession. *Marshall*, 188 N.C. App. at 751, 656 S.E.2d at 714 (citation omitted). However, what remained was a "mere permissive inference" of the element being met. *Id.* at 751, 656 S.E.2d at 714 (citation omitted). This is sufficient to overcome Defendant's motion to dismiss. *Id.* at 750-51, 656 S.E.2d at 714 (citation omitted).

We hold the evidence was sufficient to submit to the jury the charge of robbery with a dangerous weapon and overrule this assignment of error.[7]

V. Conclusion

For the reasons stated above, the trial court properly denied Defendant's motion to dismiss.

NO ERROR.

Chief Judge McGEE and Judge ZACHARY concur.

Report per Rule 30(e).

[7] Defendant also seems to argue the trial court erred in the jury instructions. First, as stated *supra*, we hold there was enough evidence to present this charge to the jury. Second, Defendant fails to properly present any argument regarding the jury instructions. Thus, we need not address that issue on appeal. N.C. R. App. P. 28 (2017).