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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-288

Filed: 15 December 2020

Cumberland County, No. 18 CRS 53917

STATE OF NORTH CAROLINA

v.

DEVON JUAMALL GILMORE.

Appeal by defendant from judgment entered 31 October 2019 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 3 November 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Dylan Sugar, for the State.

Epstein Law Firm, by Drew Nelson, for Defendant-Appellant.

ARROWOOD, Judge.

Devon Juamall Gilmore ("defendant") appeals from judgment entered upon his conviction for common law robbery and of having reached the status of being a habitual felon. Defendant contends that the trial court erred in denying his motion to dismiss the charge of common law robbery, and in failing to instruct the jury on

the lesser-included offense of larceny. We hold that the trial court did not err in denying defendant's motion to dismiss and find no other error at trial.

Defendant also appeals by *writ of certiorari* from the trial court's civil judgment issued on 2 January 2020. Defendant argues that the trial court erred by failing to inform defendant of his right to be heard concerning the trial counsel's fees included in the civil judgment. We issue a *writ of certiorari* and vacate the civil judgment without prejudice to the State to seek a new hearing on this issue.

I. Background

Defendant was indicted on 5 November 2018 by a Cumberland County grand jury for one count of common law robbery and for having reached the status of being a habitual felon. The matter came on for trial on 30 September 2019 in Cumberland County Superior Court. The State's evidence tended to show the following facts.

On 25 March 2018, Zjondelle Patrick ("Patrick") left his sister's house to go to the store. As Patrick walked to the store, he saw defendant walk out of a nearby residence and get into a car. Defendant pulled up next to Patrick and asked if he could make a call on Patrick's cell phone. Patrick agreed and dialed two numbers for defendant. There was no response to the first phone call, and when someone answered the second call, Patrick handed the phone to defendant. Defendant spoke on the phone for about two minutes, then hung up and said to Patrick, "thanks for the phone." Defendant placed the phone beside his thigh on the driver's seat, and

tried to drive away from Patrick. Patrick grabbed onto the side of the car with one arm through the open driver's side window as the car was moving, and defendant said "let go of my car before I run you over." Patrick grabbed a different cell phone that was laying on the passenger's seat, and let go of the car. Defendant stopped the car, got out, and walked towards Patrick. Defendant told Patrick to give him the phone back, and Patrick responded that "I'll give you your phone whenever you give me mine back." Defendant began hitting Patrick, who retreated and eventually escaped from defendant. Patrick ran to the store and called the police. Defendant was arrested later that day, and was in possession of a phone that matched the description Patrick gave of the phone that was stolen from him by defendant.

After jury selection on 30 September 2019, defendant removed his tracking bracelet, left the courthouse, and did not return. The trial continued without defendant being present. At the close of the State's case, defendant's trial counsel made a motion to dismiss the robbery charge. The trial court denied the motion. During the charge conference, defendant's counsel requested that the trial court instruct the jury on larceny, the lesser-included offense of common law robbery. The trial court denied the request, and the jury was solely instructed on the charge of common law robbery.

On 1 October 2019, the jury found defendant guilty of common law robbery and subsequently guilty of having achieved the status of being a habitual felon. On

31 October 2019, defendant was brought back in front of the trial court and was sentenced to an active term of 88 to 118 months in prison. After sentencing, the trial court ordered defendant to pay court costs in the following exchange:

> THE COURT: [Defendant], as a result of receiving the benefit of a court-appointed counsel, you're required to reimburse the State for his services. That amount will be $2798.30 for the fee that was prior to sentencing and then $187.50 for [trial counsel]'s services after the trial. Do you understand?
>
> [DEFENDANT]: Yes, ma'am.
>
> THE COURT: All right. That amount is also to be lodged as a civil judgment.

Defendant gave oral notice of appeal in open court on 31 October 2019. The trial court issued the civil judgment against defendant on 2 January 2020. On 3 June 2020, defendant filed a petition for *writ of certiorari* to request review of the civil judgment.

II. Discussion

A. Motion to Dismiss

Defendant contends that the trial court erred in denying his motion to dismiss the charge of common law robbery "as the theft of . . . Patrick's phone was completed prior to the use of force by [defendant]." We disagree.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 842

(2011) (quotation marks and citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citation omitted).

"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. Porter*, 198 N.C. App. 183, 186, 679 S.E.2d 167, 169-70 (2009) (quotation marks omitted) (citing *State v. Smith,* 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982)). The element of violence must precede or be concurrent with the taking in order for the crime of robbery to be committed. *State v. Sumpter,* 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986). The element of taking is not complete until the thief successfully removes the stolen property from the possession of the victim. *Id.*

It is well-settled that in robbery cases, "the exact time relationship . . . between the violence and the actual taking is unimportant as long as there is one continuing transaction amounting to . . . robbery with the elements of violence and of taking so joined in time and circumstances as to be inseparable." *State v. Hope,* 317 N.C. 302, 305-306, 345 S.E.2d 361, 363-64 (1986) (quotation marks omitted). "[J]ust because a thief has physically taken an item does not mean that its rightful owner no longer

has possession of it." *State v. Barnes*, 125 N.C. App. 75, 79, 479 S.E.2d 236, 238, *aff'd*, 347 N.C. 350, 492 S.E.2d 355 (1997). In *Barnes*, this Court held that the taking was not complete because "the store employees were actively attempting to retain possession of the property when defendant suddenly pulled out a handgun." *Id.*

In this case, it is clear that defendant took Patrick's phone without consent and did so by means of violence and fear. Patrick was actively attempting to retain possession of his cell phone by holding on to the side of defendant's car, and defendant threatened that he would run Patrick over with his car if he did not let go. After Patrick did let go of the car, defendant proceeded to physically attack Patrick in an attempt to recover the phone that Patrick removed from defendant's car. The taking and dispossession of Patrick's phone was completed only when Patrick fled from defendant, and after defendant threatened and attacked Patrick. Accordingly, there is substantial evidence to persuade a rational juror to conclude that defendant committed common law robbery. We hold that the trial court did not err in denying defendant's motion to dismiss.

B. Lesser-Included Instruction

Defendant next contends that the trial court erred by failing to instruct the jury on the lesser-included offense of larceny from the person. We disagree.

"This Court reviews a defendant's challenge to a trial court's decision to instruct the jury on the issue of the defendant's guilt of a lesser included

offense . . . on a *de novo* basis." *State v. Debiase*, 211 N.C. App. 497, 503-504, 711 S.E.2d 436, 441 (2011) (citations omitted). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted). "[W]hen the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser[-]included offense[,]" and the determining factor is whether evidence has been presented to support a conviction of the lesser[-]included offense. *State v. Rhinehart*, 322 N.C. 53, 59-60, 366 S.E.2d 429, 432-33 (1988).

Larceny from the person is a lesser[-]included offense of common law robbery. *State v. White*, 142 N.C. App. 201, 204, 542 S.E.2d 265, 267 (2001) (citing *State v. Young,* 305 N.C. 391, 393, 289 S.E.2d 374, 376 (1982)). The only difference between the two crimes is that common law robbery has the additional requirement that the victim be put in fear by the perpetrator. *Id.* (citing *State v. Buckom,* 328 N.C. 313, 317, 401 S.E.2d 362, 365 (1991)). "Robbery is an aggravated form of larceny, and absent the element of violence or intimidation, the offense becomes larceny." *Porter*, 198 N.C. App. at 189, 679 S.E.2d at 171 (citation omitted).

Defendant argues that the trial court should have included an instruction for larceny from the person because a rational juror could conclude that the taking was complete prior to acts of violence committed by defendant. This argument is without merit, and ignores the fact that defendant threatened to run over Patrick with his car during the struggle for the phone. As previously discussed, there was substantial evidence positive to every element of the common law robbery charge, with no conflicting evidence regarding defendant's use of fear or violence. Accordingly, we hold that the trial court was not required to submit and instruct the jury on any lesser-included offense, and did not err in its instructions to the jury.

C. Petition for *Writ of Certiorari*

Defendant finally contends that the trial court erred in issuing a civil judgment without first informing defendant of his right to be heard on the issue of court costs. Defendant did not file a written notice of appeal from the civil judgment, and now petitions this Court for *writ of certiorari*.

In order for the Court of Appeals to have jurisdiction to review a civil judgment for attorney's fees, a criminal defendant must file written notice of appeal in compliance with Rule 3 of the North Carolina Rules of Appellate Procedure. *State v. Smith*, 188 N.C. App. 842, 845-46, 656 S.E.2d 695, 697 (2008). Although this Court routinely allows a petition for a *writ of certiorari* to review a criminal judgment where the defendant failed to timely appeal, it is less common to allow a petition for a *writ*

of certiorari where a litigant failed to timely appeal a civil judgment. *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018) (citations omitted). Because it appears that there was error in the entry of the civil attorney fee judgment, in our discretion we allow the petition and reach the merits of defendant's claim.

In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorneys' fees incurred by their court-appointed counsel. *See* N.C. Gen. Stat. § 7A-455 (2019). By statute, counsel's fees are calculated using rules adopted by the Office of Indigent Defense Services, but trial courts awarding counsel fees must take into account factors such as "the nature of the case, the time, effort, and responsibility involved, and the fee usually charged in similar cases." N.C. Gen. Stat. § 7A-455(b). Before imposing a judgment for these attorneys' fees, the trial court must afford the defendant notice and an opportunity to be heard. *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005); *State v. Crews*, 284 N.C. 427, 442, 201 S.E.2d 840, 849 (1974).

This Court recently reaffirmed the importance of providing defendants with sufficient opportunity to be heard. *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 906-907 (discussing two unpublished cases where civil judgments were vacated "because the trial court did not ask the defendants if they wished to be heard."); *see also State v. Farabee*, 247 N.C. App. 399, 786 S.E.2d 432 (2016) (unpublished), *State v. Hurley*, 256 N.C. App. 164, 805 S.E.2d 563 (2017) (unpublished). In both cases

discussed in *Friend*, the trial court "stated that it was taking up the issue, questioned the defendants' counsel about the amount of fees to be awarded, and then announced that it was entering a judgment in the amount of those fees[,]" and in both cases, this Court held that these discussions with counsel did not provide the defendant with sufficient opportunity to be heard. *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 907 (citations omitted). Due to the concern that attributing counsel's silence to the defendant on a civil judgment for attorney's fees could lead to injustice, this Court held that trial courts should ask defendants personally, not through counsel, whether they wish to be heard on the issue, and that "the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* at 523, 809 S.E.2d at 907.

In the present case, defendant was provided with notice of the civil judgment, but the trial court failed to ensure that defendant was aware of the opportunity to be heard. According to the transcript, the trial court informed defendant of the amount of attorney's fees and asked if he understood, but conducted no further questioning or discussion of whether defendant was aware of the opportunity to be heard on the issue. We hold that while defendant had notice of the civil judgment he was not made aware of the opportunity to be heard. Therefore, we vacate the civil judgment without prejudice to the State to seek a new hearing on this issue.

III. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying the motion to dismiss and in declining to instruct the jury on the lesser-included offense of larceny. We vacate the civil judgment for attorney's fees without prejudice to the State's right to seek a new hearing on this issue.

NO ERROR IN PART, VACATED IN PART.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).