NO. COA01-657

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 99 CRS 30217-30218

PAUL HASSAN CLAYTON,
Defendant

Appeal by defendant from consolidated judgment entered 19 January 2001 by Judge Jerry Cash Martin in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy Cooper, by E. Clementine Peterson, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for the defendant.

BRYANT, Judge.

Defendant was found guilty of common law robbery and second degree kidnapping following a jury trial at the 17 January 2001 criminal session of Mecklenburg County Superior Court with the Honorable Jerry Cash Martin presiding. A consolidated judgment was entered wherein defendant was sentenced to an active term of 25 - 39 months. On 19 January 2001, defendant gave notice of appeal in open court.

The State's evidence tended to show the following. Sometime prior to 14 July 1999, Anthony Thomas, a resident of the city of

Gastonia who worked in the city of Charlotte, stopped at a convenience store in Charlotte to buy cigars. Defendant approached Thomas and asked if he wanted to buy some marijuana. Thomas replied that he did not need any at that moment, but asked defendant for a number to contact him sometime in the future. Defendant gave Thomas a pager number and told him that his name was 'P.'

On 14 July 1999, Thomas paged defendant, defendant called Thomas, and the two discussed meeting so that Thomas could purchase marijuana from defendant. Defendant told Thomas to meet him at a Pizza Hut restaurant located on North Tryon Street. When Thomas arrived at the Pizza Hut parking lot, defendant flashed his car lights. Defendant was sitting in the front seat and another man was sitting in the back seat of the car that defendant was driving.

Thomas got out of his car and sat in the front seat of defendant's car. Defendant asked Thomas how much money he had and Thomas pulled out $160.00. Defendant pulled out a gun and said, "[Y]ou know what this is." Defendant pointed the gun at Thomas, took Thomas' money, patted Thomas down and asked if Thomas had a gun. Defendant told the man in the back seat to put a gun behind Thomas' head and to shoot Thomas if he tried to make a move. The man put his gun to the back of Thomas' head but said that he was "messed up" and did not want to shoot anyone that night. While holding his hands straight out, Thomas was robbed of his money, pager, and a rope necklace with a medallion pendent. Defendant had his gun pointed at Thomas' stomach. The entire incident took no

longer than a minute or two.

Defendant then told Thomas that they were going to take a little ride. Defendant drove until he stopped the car on Tom Hunter Road — which is located approximately two miles from the Pizza Hut restaurant located on North Tryon Street — and told Thomas to get out. Almost immediately, a police car drove by and Thomas motioned for the police car to stop. Thomas told the officer in the police car that he had attempted to purchase marijuana, but instead, was robbed at gunpoint during the attempted transaction. Thomas informed the officer that he had been robbed of money, a pager, and a rope necklace with a medallion pendent.

Defendant presented the following evidence at trial. Defendant testified that he first met Thomas in the summer of 1999 at the FX Club located in Charlotte. Thomas told defendant that he was from Gastonia and that he liked to frequent the clubs in Charlotte but did not know anyone with whom he could go to the clubs. Thomas and defendant exchanged pager numbers, and on 14 July 1999, Thomas paged defendant. Thomas told defendant that he was coming to Charlotte and wanted to meet him. The two agreed to meet at the Pizza Hut restaurant located on North Tryon Street.

Defendant and his cousin drove to the Pizza Hut and waited in the parking lot for Thomas to arrive. Neither of them had a gun. When Thomas arrived, defendant's cousin got in the back seat so that Thomas could get in the front seat. The three planned to go to defendant's girlfriend's home until it was time to go to a hip hop club.

On the way to the girlfriend's home, Thomas "said something about he can give me this amount of weed or this amount of cocaine and I would have to give him this amount of money back and it was a way for both of us to make money." Defendant had never heard Thomas talk about drugs before, and he immediately slowed the car down and told Thomas that he did not deal with that type of stuff. Thomas tried to persuade defendant to change his mind, but defendant again told him that he did not deal with that type of stuff. Defendant stopped his car on Tom Hunter Road and asked Thomas to get out of the car. Thomas wanted defendant to drive him back to his car at the Pizza Hut parking lot, but defendant made Thomas get out of the car immediately.

Defendant was afraid that Thomas had drugs in his pockets and wanted him to get out of the car. Thomas became angry and asked defendant why he would not take him back to his car. Defendant left Thomas on Tom Hunter Road.

I.

On appeal, defendant first argues that the trial court committed plain error in instructing the jury on common law robbery. We disagree.

Our standard of review under the plain error doctrine is whether:

> [I]t can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial

. . . .

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (alteration in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). When reviewing a jury instruction for plain error, the court must examine the entire record to determine whether the alleged error had a probable impact on the jury's finding of guilt. *State v. Larry*, 345 N.C. 497, 515, 481 S.E.2d 907, 917, *cert. denied by Larry v. North Carolina*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997).

In North Carolina, an instruction on a lesser included offense must be given when the evidence would permit a jury to rationally find the defendant guilty of the lesser included offense and acquit him of the greater offense. *Larry*, 345 N.C. at 516-17, 481 S.E.2d at 918. "'The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.'" *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994) (citation omitted), *cert. denied by* 513 U.S. 1134, 130 L. Ed. 2d 895 (1995).

> However, when the defendant denies having committed the complete offense for which he is being prosecuted, and evidence is presented by the State of every element of the offense, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, then no lesser included offense need be submitted.

State v. Shaw, 106 N.C. App. 433, 439, 417 S.E.2d 262, 266, *rev. denied by* 333 N.C. 170, 424 S.E.2d 914 (1992).

N.C.G.S. § 14-87 (a) (1999) defines robbery with a firearm as:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms . . ., whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . ., 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 [robbery with a firearm].

Mere possession of a firearm during the commission of a robbery is not sufficient to show that the victim's life was in fact threatened or in danger. *See State v. Gibbons*, 303 N.C. 484, 489, 279 S.E.2d 574, 577, (1981). It is the province of the jury to determine whether the victim's life was in fact threatened or endangered during the course of the robbery. *See State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985).

Defendant argues that the evidence indicates that defendant either committed a robbery with a firearm or that he did not commit the robbery at all. However, defendant fails to acknowledge that if evidence exists to support the charge of robbery with a firearm, then that same evidence would also support a conviction for a lesser included offense. Common law robbery is a lesser included offense of robbery with a firearm. The State presented evidence that defendant committed a robbery by use of a firearm. However, Thomas testified that the defendant did not use threatening language when he pointed his gun at Thomas' stomach. Thomas also testified that the assailant who was pointing a gun at the back of

Thomas' head said that he did not want to shoot anyone that night.

The jury had the discretion to believe or disbelieve any or all of the evidence presented. In the case at bar, the jury determined that defendant committed the act of robbery, but did not commit the act of robbery with the use of a firearm as that offense is defined pursuant to N.C.G.S. § 14-87. The trial court did not commit plain error in submitting an instruction on common law robbery. Therefore, we overrule the corresponding assignment of error.

II.

Next, defendant argues that the trial court committed plain error in instructing the jury on first degree kidnapping. Even assuming that it was error for the trial court to submit this instruction, defendant was found guilty of second degree kidnapping and not first degree kidnapping. Any error committed by submitting an instruction on first degree kidnapping is harmless in light of the fact that defendant was found guilty of the lesser included offense.

Notwithstanding his acquittal of first degree kidnapping, defendant argues that submitting a jury instruction for first degree kidnapping prejudiced his trial because "once the jury heard that defendant could be convicted of the greater offense of first degree kidnapping, they would compromise and enter a verdict of guilty of a lesser included offense . . . ." We disagree.

N.C.G.S. § 14-39 (a) (1999) provides:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16

> years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
> . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony . . . .
>
> . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). *If the person kidnapped [] was not released by the defendant in a safe place . . . the offense is kidnapping in the first degree* . . . .

(emphasis added).

In reviewing the record, the State's evidence reveals that defendant robbed Thomas of money, a pager, and a rope necklace with a medallion pendent. After taking Thomas' possessions, defendant drove Thomas a distance of approximately two miles and forced Thomas of out the car. Thomas was not from Charlotte, therefore, it may be inferred that he would be unfamiliar with the area. Moreover, it was nighttime when the incident occurred.

There existed sufficient evidence that Thomas was unlawfully removed from one place to another, without his consent, and in the furtherance of the commission of a felonious robbery. In addition, there existed sufficient evidence to submit to the jury the question of whether Thomas was left in an unsafe area. *See State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983) (stating that it is the jury's province to determine whether a kidnapping victim was released in a safe or unsafe place). The trial court did not err in submitting an instruction on first degree

kidnapping. Therefore, the corresponding assignment of error is overruled.

Conclusion

We find no error in the trial court's submission of the common law robbery and first degree kidnapping instructions to the jury.

NO ERROR.

Judges WALKER and HUNTER concur.

Report per Rule 30(e).