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NO. COA01-780

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v.

Iredell County
No. 99 CRS 2507

JEREMY LYNN BENFIELD

Appeal by defendant from judgment entered 5 January 2001 by Judge Sanford L. Steelman, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 18 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Judy Dalton for defendant-appellant.

EAGLES, Chief Judge.

Defendant Jeremy Lynn Benfield appeals from a judgment sentencing him to imprisonment for a minimum term of 117 months and a maximum term of 150 months for a conviction by a jury of robbery with a dangerous weapon.

The State presented evidence tending to show that on 10 February 1999, Douglas Nichols (Nichols) gave defendant's two daughters and their mother, Shannon Anderson (Anderson), a ride to Anderson's residence in his pickup truck. Nichols, Anderson, and the two girls walked into Anderson's residence, and Anderson prepared to give her daughters a bath. At trial, the accounts of

Nichols and Anderson as to what transpired after this point conflict.

Anderson testified that as she was preparing to bathe her daughters, she saw defendant standing in the living room and holding a gun by his side but not pointing it. Defendant asked her why she was keeping him away from his children. He told her that he wanted her and the children to spend some time with him that day. Anderson finished bathing the girls, and asked defendant to dress the youngest. At Anderson's request, defendant handed her the gun. Defendant asked Nichols for the use of his truck so he could spend time with Anderson and his children. Defendant told Nichols that he would return the truck that afternoon. Defendant, Anderson, and the two girls departed in the truck. They stayed overnight in a motel room, and they traveled to Myrtle Beach, South Carolina the next day. At no time did Anderson see defendant point a gun at anyone while he was in the residence.

Conversely, Nichols testified that Anderson was giving the girls a bath when defendant entered the residence and pointed a gun at him. Defendant uttered a profanity and ordered Nichols to get on the floor. Defendant entered the bathroom and argued angrily with Anderson. During the course of the argument, defendant pointed the gun at Anderson. Defendant subsequently asked to use Nichols' truck. Nichols indicated that he was going with defendant in his truck. Defendant responded, "No, I ain't that stupid. . . . Either you let me take it or I'll force you to let me take it." While making this statement, defendant had the gun stuck in his

waistband. Defendant, Anderson, and the two girls departed in Nichols' truck. At no time did defendant relinquish possession of the gun to Anderson.

At trial, defendant testified on his own behalf. Defendant testified that he picked up the gun after entering the residence, removed the clip, and put the clip in his pocket. He did not point the gun at Nichols or anyone else. He handed the gun to Anderson after she asked him to dress the youngest child. Nichols allowed him to take his truck. Anderson and the two girls rode with him. After staying in a motel overnight, they rode to Murrill's Inlet, South Carolina, where he subsequently surrendered to law enforcement officers on 12 February 1999.

On appeal, defendant contends that the court erred by denying his motions to dismiss the charge of robbery with a dangerous weapon for insufficient evidence. A motion to dismiss requires the trial court to determine whether there is substantial evidence to establish every element of the offense charged and the defendant's perpetration of the offense. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is that which 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). In deciding the motion, the court must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn, and resolving all conflicts and discrepancies in its favor. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982).

The essential elements of armed robbery are (1) the unlawful taking or 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. Faison*, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991). The taking or attempted taking must be with felonious intent, i.e., the intent to permanently deprive the owner of his property. *State v. Wheeler*, 122 N.C. App. 653, 656, 471 S.E.2d 636, 639 (1996). As long as there is a continuous transaction, the temporal order of the use or threatened use of a deadly weapon is immaterial. *State v. Barnes*, 125 N.C. App. 75, 78, 479 S.E.2d 236, 238 (1997).

Defendant argues that the State's evidence fails to show a taking of Nichols' truck with felonious intent or by the use or threatened use of a deadly weapon. We disagree.

Felonious intent may be proved by evidence demonstrating the taker's total indifference to the owner's rights, such as when the taker keeps the property as his own until he is apprehended. *State v. Smith*, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966). The uncontradicted evidence shows that the truck was not returned to Nichols by defendant, but instead, the truck was taken from defendant by law enforcement authorities at the time of his apprehension.

With respect to the element of use or threatened use of a deadly weapon, the evidence, considered in the light most favorable to the State and disregarding contradictions and discrepancies,

shows that defendant pointed the gun at Nichols and kept it on his person at all times. Additionally, Nichols testified that he was afraid defendant would shoot him or beat him to death with the gun if he did not allow defendant to have the truck. Thus, we conclude that the State presented substantial evidence to establish every element of the offense charged and defendant's perpetration of the offense sufficient to warrant submission of the charge to the jury.

Alternatively, defendant contends that the court erred by failing to submit the lesser offense of common law robbery to the jury. Submission of a lesser offense is required only when there is evidence from which it could be found that the defendant committed the lesser offense. *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547 (1954). The presence of such evidence is the determinative factor, and the mere contention that the jury might accept the evidence in part and reject it in part is insufficient to mandate submission of the instruction. *Id.* at 159-60, 84 S.E.2d at 547. Common law robbery is the felonious taking of another's money or goods from his person or in his presence without his consent or against his will by violence or intimidation. *State v. Moore*, 279 N.C. 455, 457, 183 S.E.2d 546, 547 (1971). The difference between common law robbery and robbery with a dangerous weapon is that the latter "is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened." *State v. Lee*, 282 N.C. 566, 569, 193 S.E.2d 705, 707 (1973).

The testimony of both Anderson and defendant was to the effect that defendant borrowed Nichols' truck with Nichols' consent and without force or the use or threatened use of a gun or weapon. Nichols' testimony was that the truck was taken against his will by the threatened use of a gun. The evidence therefore shows that defendant either committed the offense of robbery with a dangerous weapon or no offense at all. Thus, we conclude that the court did not err by failing to submit common law robbery to the jury. See, e.g., *State v. Lee*, 282 N.C. 566, 193 S.E.2d 705 (common law robbery properly not submitted where defendant denied robbing or holding gun to victim); *State v. Stevenson*, 3 N.C. App. 46, 164 S.E.2d 24 (1968) (common law robbery properly not submitted where defendant's evidence did not show a robbery but a loan).

By failing to argue his remaining assignments of error, defendant has abandoned them. N.C. R. App. P. 28(a).

In sum, we hold defendant received a fair trial, free of prejudicial error.

No error.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).