NO. COA02-402

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v. Forsyth County
No. 00 CRS 58997

ELROY JONES,
Defendant.

Appeal by defendant from judgment entered 6 November 2001 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Susan R. Lundberg, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

HUDSON, Judge.

Defendant appeals his conviction for robbery with a dangerous weapon. Because we conclude that the trial court erred by refusing to instruct the jury on the lesser offense of common law robbery, we remand for a new trial.

The State adduced evidence tending to show that defendant robbed an optometrist's office on Fourth Street in Winston-Salem on 1 November 2000. The office secretary, Jean Behm, testified that defendant entered the office at 3:30 p.m., grabbed her by the hair, displayed "[a] black serrated knife[,]" and ordered her to show him

where the money was. Behm led defendant to her desk and produced the office's bank deposit bag. Defendant took three one-dollar bills and approximately $5 in coins from the bag. After releasing Behm, defendant stole $10 from a change purse in her pocketbook. He then fled the office and drove off in a red car.

During the charge conference at the conclusion of the evidence, defendant requested an instruction on the lesser included offense of common law robbery. The trial court declined to instruct the jury on the lesser offense, stating "that if the jury finds that the defendant committed the crime, it could only be the crime of armed robbery . . . . It is either armed robbery or not." The court thus presented the jury with two possible verdicts: guilty of robbery with a dangerous weapon or not guilty. However, in instructing the jury on the elements of the charged offense, the trial court defined "dangerous weapon" as "a weapon which is likely to cause death or serious bodily injury." It did not instruct the jury that the knife allegedly brandished by defendant was a dangerous weapon as a matter of law but left it to the jury to decide.

Defendant argues on appeal that the trial court erred in refusing to instruct the jury on common law robbery at the same time that it submitted the question of the use of a dangerous weapon to the jury. Because the knife was not described in any detail or offered into evidence at trial, and was not used to injure Behm during the robbery, defendant asserts—and the trial court recognized—that the knife's status as a dangerous weapon was

a question of fact for the jury. Thus, defendant maintains that common law robbery was an alternative the jury should have been given. We agree.

As an initial matter, we address the State's claim that defendant has not preserved this issue for appeal because he failed to object (1) to the court's denial of his request for an instruction on common law robbery or (2) to the jury instructions as given. Our Rules of Appellate Procedure require a party to "have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling" in order to preserve an issue for appeal. N.C. R. App. P. 10(b)(1). The party must also obtain a ruling from the trial court on the request, objection or motion. *Id.* The Rules further provide that "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection[.]" N.C. R. App. P. 10(b)(2). Defendant made a timely request during the charge conference for an instruction on common law robbery and obtained an adverse ruling from the trial judge. Therefore, defendant properly preserved this question for appeal under Rule 10(b)(2). *See Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995).

A defendant is "'entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *State v. Leazer*, 353 N.C. 234, 237, 539 S.E .2d 922,

924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). Common law robbery is a lesser included offense of robbery with a dangerous weapon. *State v. Frazier*, __ N.C. App. __, __, 562 S.E.2d 910, 912-13 (2002). The distinction between the two offenses is that robbery with a dangerous weapon is "'accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened.'" *Id.* (quoting *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985)). Even where the evidence establishes the use of a weapon to commit a robbery, "[i]t is error to refuse to submit common law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used is a dangerous weapon as a matter of law." *State v. Smallwood*, 78 N.C. App. 365, 367, 337 S.E.2d 143, 144 (1985).

"In deciding whether a particular instrument is a dangerous weapon . . ., 'the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened.'" *Frazier*, __ N.C. App. at __, 562 S.E.2d at 913 (quoting *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982)). "[T]he evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 726 (1981). "In cases where the knife has not been produced or described in detail, and the victim has not suffered

injury or death, the question of whether a knife is a dangerous weapon is generally for the jury." *Smallwood*, 78 N.C. App. at 369, 337 S.E.2d at 145; *see also State v. Ross*, 268 N.C. 282, 150 S.E.2d 421 (1966); *State v. Norris*, 264 N.C. 470, 141 S.E.2d 869 (1965) (per curiam)).

In *Smallwood*, the knife used in the robbery was not introduced at trial. 78 N.C. App. at 371, 337 S.E.2d at 146. It was described by a witness as "approximately that long[.]" *Id.* The victim testified that the defendant put the knife to his throat, but another witness claimed that the defendant had kept the knife "down at [the defendant's] side." *Id.* Based on this evidence, this Court held that the trial court "erred in defining the knife as a dangerous weapon and in refusing to submit common law robbery to the jury." *Id.*; *see also Norris*, 264 N.C. at 473, 141 S.E.2d at 872 (1965) (pocket knife, not otherwise described, that was pointed at the victim supported a jury charge on both robbery with a dangerous weapon and common law robbery).

Here, the prosecution's only evidence regarding the nature and use of the knife was the following testimony from Behm:

> Q. Did [defendant] have anything with him at that point in time?
>
> A. He had a knife. A black serrated knife.
>
> Q. Where did he have that knife?
>
> A. In his right hand.
>
> Q. Where was the knife in relation to you?
>
> A. Well I don't remember at that time where the knife was in relation to me but later on I saw it more when I opened the door. Leaned

> down and opened the drawer he had the knife in his hand.

Behm confirmed that defendant was carrying the knife when he first demanded the money. She further described leading defendant to the money while he grabbed her by the hair.

> A. Well I walked. He had my hair and I walked.
>
> Q. Were you able to see the knife at that point?
>
> A. Yes. It was in his right hand.
>
> Q. Where was it in relation to you?
>
> A. It wasn't close to me. It was, you know, down there.
>
> Q. Was he holding it out?
>
> A. Yes.
>
> Q. He didn't have it up against your skin?
>
> A. No.

Behm also gave the following account of defendant's theft of her change purse:

> Q. And he was how far away from you at that point in time?
>
> A. Oh, close. About here.
>
> Q. Would that be about two feet?
>
> A. Yes.
>
> Q. Did he have the knife on you during this entire time?
>
> A. No.
>
> Q. Did he have the knife out the entire time?
>
> A. I don't remember.

> . . .
>
> Q. Why didn't you try and stop him?
>
> A. Because he was bigger than me. I thought he would, you know, hurt me or punch me or something.

In light of this evidence, the trial court properly submitted to the jury the determination of whether defendant used or threatened to use a dangerous weapon. The trial court properly recognized that the State's evidence was insufficient to resolve as a matter of law whether defendant used a dangerous weapon. Here, as in *Smallwood*, the prosecution did not produce the knife allegedly used by defendant. *But see State v. Wiggins*, 78 N.C. App. 405, 407, 337 S.E.2d 198, 199 (1985) (where, inter alia, weapon itself was offered into evidence, no error to declare weapon deadly as a matter of law); *State v. Parker*, 7 N.C. App. 191, 195, 171 S.E.2d 665, 667 (1970) (same). Furthermore, Behm described the knife only as "black" and "serrated[.]" There was no evidence of the size, strength or sharpness of the blade, as there was in *State v. Stevens*, 94 N.C. App. 194, 195, 379 S.E.2d 863, 864 (ten-inch butcher knife a dangerous weapon per se), *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989), and *Wiggins*, 78 N.C. App. at 407, 337 S.E.2d at 199 (boxcutter with an "exposed, sharply pointed razor blade" declared deadly per se). Nor was Behm cut with the knife. *Cf. State v. Young*, 317 N.C. 396, 417, 346 S.E.2d 626, 638 (1986) (in reaching conclusion that knife was dangerous per se, court considered fact that the victim was cut with it); *State v. Sanders*, 81 N.C. App. 438, 439, 344 S.E.2d 592, 593 (same), *disc.*

review denied, 318 N.C. 419, 349 S.E.2d 604 (1986). To the contrary, Behm testified that the knife, although visible in defendant's right hand, was kept "down there" and "wasn't close to me." *Cf. State v. Tarrant*, 70 N.C. App. 449, 452, 320 S.E.2d 291, 294 (1984) (deadly weapon where, inter alia, the knife was held at victim's throat); *Wiggins*, 78 N.C. App. at 407, 337 S.E.2d at 199 (same, where boxcutter held "a couple of inches from [victim's] side"). Finally, in explaining the fear evoked by defendant, Behm did not refer to the knife but alluded to defendant's size and to her concern that he might "hurt me or punch me or something." Given this evidence, we conclude that the knife's status as a dangerous weapon was properly a question of fact for the jury.

Here the trial court defined "dangerous weapon" for the jury but left it to determine whether the knife at issue here met the standard. Since the jury could have answered the question in the negative, it should have been given the option of finding the defendant guilty of common law robbery, which is distinguished from the greater offense (robbery with a dangerous weapon) only by the absence of this element. "Accordingly, defendant was prejudiced by the court's failure to instruct on the lesser included offense of common law robbery entitling him to a new trial on the charge of . . . robbery with a dangerous weapon." *State v. Brandon*, 120 N.C. App. 815, 820, 463 S.E.2d 798, 802 (1995); *accord Smallwood*, 78 N.C. App. at 372, 337 S.E.2d at 147.

In light of our ruling above, we do not reach defendant's second claim regarding the re-opening of the jury voir dire by the

trial court after the original jury had been impaneled. This procedure is unlikely to recur on remand and, therefore, need not be reviewed now. *See State v. Ward*, 354 N.C. 231, 267, 555 S.E.2d 251, 273 (2001).

Defendant's remaining assignments of error are not discussed in his brief to this Court and are deemed abandoned under N.C. R. App. P. 28(b)(6).

Judgment vacated; remanded for a new trial.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).