NO. COA05-1045

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 04 CRS 91128, 91131

DA'NOLLEN JAWAUNN HINSON

Appeal by defendant from judgment entered 7 January 2005 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

Charlotte Gail Blake for defendant-appellant.

ELMORE, Judge.

Da'Nollen Jawaunn Hinson (defendant) appeals the judgment entered on his convictions for attempted common law robbery and simple assault. Defendant was charged with robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. Defendant's sole assignment of error on appeal concerns the trial court's instruction to the jury on the offenses of attempted robbery with a dangerous weapon and attempted common law robbery and submitting verdict sheets on these charges.

The State's evidence tended to show that defendant met Brandon Neal (Neal) on the evening of 28 August 2004, and the two men went

to the house of defendant's father, Sharman White (Mr. White). Mr. White was outside the house when they arrived. Defendant and Mr. White went into the house and, soon thereafter, Neal heard a commotion and entered the house. Neal observed defendant hit Mr. White on the head with a lamp. Defendant then retrieved a small box from the back of the house.

Mr. White testified that he was in his yard when defendant and Neal stopped by that evening. Mr. White followed defendant into the house. Mr. White testified that defendant put on a mask and stated that he wanted to rob him. Mr. White and defendant then had an altercation, during which defendant hit Mr. White with a bottle. The struggle continued, and defendant struck Mr. White on the head several times with a lamp. Defendant went into Mr. White's brother's room and tried to take an electronic device but could not get it unhooked. Defendant then went into Mr. White's room and retrieved a silver box containing coins from a cabinet.

Defendant presented no evidence. At the charge conference, defendant objected to the charge on attempted robbery with a dangerous weapon and attempted common law robbery. With respect to the robbery charges, the verdict sheet submitted to the jury contained the following offenses: robbery with a dangerous weapon; attempted robbery with a dangerous weapon; common law robbery; and attempted common law robbery. On appeal, defendant contends that the instruction on the attempted robbery charges was in error because there was no evidence to support them.

Defendant first argues that the submission of the lesser included offense of attempted robbery with a dangerous weapon constituted prejudicial error. But the jury did not convict defendant of this charge; the jury returned a guilty verdict on the charge of attempted common law robbery. Therefore, the jury rejected the charge of attempted robbery with a dangerous weapon. Defendant has not shown how the jury instruction on attempted robbery with a dangerous weapon has prejudiced him. *See State v. Williamson*, 122 N.C. App. 229, 235, 468 S.E.2d 840, 845 (any error in jury instruction on the defendant's specific intent to kill rendered harmless where jury convicted the defendant of assault with a deadly weapon inflicting serious injury, a charge that did not require finding of specific intent to kill) *disc. review denied*, 344 N.C. 637, 477 S.E.2d 54 (1996); *State v. Berkley*, 56 N.C. App. 163, 165-66, 287 S.E.2d 445, 448-49 (1982) (defendant's convictions of lesser included crimes rendered instruction on armed robbery and first degree sexual offense harmless where defendant could not show how verdicts on lesser crimes were affected by this instruction on the greater crimes).

Defendant next contends that the trial court's instruction on attempted common law robbery was prejudicial error. The offense of common law robbery is defined as the "(1) felonious, non-consensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force." *State v. Staten*, ___ N.C. App. ___, ___, 616 S.E.2d 650, 660 (2005). The essential elements of attempted common law robbery are (1) the defendant's

specific intent to commit the substantive crime, and (2) a direct act that is beyond mere preparation but does not complete the offense. *See State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982).

As noted *supra*, an essential element of common law robbery is that the assailant take property from the victim's *person or presence*. In interpreting the term "presence" in an armed robbery statute, this Court has stated the following:

> The word "presence" must be interpreted broadly and with due consideration to the main element of the crime -- intimidation or force by the use or threatened use of firearms. "Presence" here means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property.

State v. Clemmons, 35 N.C. App. 192, 196, 241 S.E.2d 116, 118-19, *disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978). Thus, the State must show that the taking was effectuated through the defendant's violence or threats of violence. *See id.; see also State v. Styles*, 93 N.C. App. 596, 604-05, 379 S.E.2d 255, 261 (1989) (evidence that the defendant took money from a chair near the victim's bed after forcing her to have intercourse and threatening death and bodily injury was sufficient to show a taking from the victim's presence through violence or intimidation).

"Where there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence*." *State v. Jones*, 304 N.C. 323, 331, 283 S.E.2d 483, 488 (1981) (emphasis in original). Thus, where any version of

the State's evidence in the case *sub judice* supports a theory that defendant did not take from the victim's person or presence, the trial court properly instructed on the lesser included offense of attempted common law robbery. We find the admonition of the Court in *State v. Hicks* particularly informative to the instant case:

> [T]he State may contend solely for conviction of robbery and the defendant may contend solely for complete acquittal, but the trial judge, when there is evidence tending to support a verdict of guilty of an included crime of lesser degree than that charged must instruct the jury that it is permissible for them to reach such a verdict if it accords with their findings.

241 N.C. 156, 160, 84 S.E.2d 545, 548 (1954).

Here, the State's evidence established that defendant struck Mr. White on the head with a bottle and a lamp. Defendant then went to Mr. White's brother's room and attempted to unhook a DVD player. Subsequently, defendant walked into another room and retrieved a coin box from inside a cabinet. Mr. White did not testify to any threats of force by defendant, aside from defendant's statement that he was going to rob Mr. White. The hitting of Mr. White with a lamp occurred during the struggle between defendant and Mr. White in the living room. Mr. White testified that the two "wrestled" up the hallway and into the living room. The jury could reasonably infer that defendant did not take from the victim's person or presence when he took the coin box, thus negating an essential element of common law robbery.

Moreover, the State established sufficient evidence of the elements of attempted common law robbery. The State presented

evidence of defendant's specific intent to take Mr. White's property by force, specifically that defendant told Mr. White he was going to rob him. The evidence also established that defendant went beyond mere preparation, as he assaulted Mr. White with a lamp and a bottle. Accordingly, we hold that the trial court did not err in submitting the instruction and verdict sheets on the lesser included offense of attempted common law robbery.

No error.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).