NO. COA05-1083

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

STATE OF NORTH CAROLINA

v. Stanly County
No. 03 CRS 50974

LARRY DAVID PEMBERTON

Appeal by defendant from judgment entered 4 May 2005 by Judge Susan C. Taylor in Stanly County Superior Court. Heard in the Court of Appeals 8 March 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Amy C. Kunstling, for the State.

James M. Bell, for defendant-appellant.

JACKSON, Judge.

On 20 January 2003, at approximately 12:30 p.m., Wal-Mart security officer Jerry Dean ("Officer Dean") observed Larry Pemberton ("defendant") in a Wal-mart store putting soap, shampoo, and two toboggans inside his black leather jacket. Pursuant to Wal-Mart store policy, Officer Dean watched defendant until defendant exited the store. After defendant walked outside of Wal-Mart with the concealed items in his jacket, Officer Dean confronted defendant, identified himself, and asked defendant to accompany him back into the store. Defendant began running through the parking lot, and Officer Dean chased after defendant.

While in pursuit, defendant yelled to Officer Dean that he had a gun. Defendant pulled a silver pocketknife with the blade extended from his jacket, which defendant held up in the air while he continued to run. Officer Dean, who was about 10 feet away from defendant, slowed his pace.

Defendant continued running, and Officer Dean yelled to defendant, "Just give me back the merchandise." Defendant shed the jacket, and the merchandise scattered over the ground. Defendant continued running, and the merchandise was returned to the store.

On 14 July 2003, defendant was charged with robbery with a dangerous weapon. On 7 March 2005, a grand jury indicted defendant on robbery with a dangerous weapon. On 3 and 4 May 2005, the Honorable Susan Taylor presided over defendant's jury trial in Stanly County Superior Court. The jury found defendant not guilty of robbery with a dangerous weapon and guilty of common law robbery. The trial court sentenced defendant to twenty-nine to thirty-five months. Defendant gave notice of appeal in open court.

On appeal, defendant argues that the trial court erred by denying defendant's motion to dismiss because the State's evidence failed to prove the essential elements of robbery with a dangerous weapon.

The essential elements of robbery with a dangerous weapon are (1) the commission or attempted commission of a larceny; (2) from a person or in a person's presence; (3) by the possession, use, or threatened use of a firearm or other dangerous weapon; and (4) which endangers or threatens the life of a person. N.C. Gen. Stat.

§ 14-87 (2005); *see State v. Wiggins*, 334 N.C. 18, 431 S.E.2d 755 (1993). Pursuant to N.C. Gen. Stat. § 15A-1227, "[u]pon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "If so, the motion is properly denied." *Id.*

"[I]t is well established in North Carolina that a conviction on a lesser offense renders any error in submission of a greater offense harmless." *State v. Williams*, 100 N.C. App. 567, 573, 397 S.E.2d 364, 368 (1990), *cert. denied*, 328 N.C. 576, 403 S.E.2d 520 (1991). Common law robbery is a lesser-included offense of robbery with a dangerous weapon. *State v. Tarrant*, 70 N.C. App. 449, 451, 320 S.E.2d 291, 293-94 (1984).

Here, defendant argues that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. However, defendant was not convicted of robbery with a dangerous weapon and was only convicted of common law robbery. Therefore, the conviction of common law robbery, a lesser offense, rendered any error in submission of a greater offense harmless. Accordingly, we find the trial court did not err.

Next, defendant argues the trial court erred in submitting the verdict sheet to the jury because the verdict sheet needed a disjunctive "or" between each offense and "guilty" preceding the fourth crime charged.

This Court has stated that a verdict is sufficient if it "can be properly understood by reference to the indictment, evidence and jury instructions." *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff'd per curiam*, 319 N.C. 392, 354 S.E.2d 238 (1987). The appellate courts "presume that jurors 'pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given.'" *State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148 (2002), *cert. denied*, 537 U.S. 845, 123 S. Ct. 178, 154 L. Ed. 2d 71 (2002), citing *State v. Trull*, 549 N.C. 428, 455, 509 S.E.2d 178, 196 (1998), *cert. denied*, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

Here, Judge Taylor read the elements of robbery with a dangerous weapon to the jury. Thereafter, Judge Taylor instructed the jury that "if you do not find the defendant guilty of robbery with a dangerous weapon, you must determine whether the defendant is guilty of common law robbery." Subsequently, Judge Taylor read the elements of common law robbery to the jury. During jury deliberations, in response to a note from the jury, Judge Taylor instructed the jury again on the elements of each crime charged, including robbery with a dangerous weapon and common law robbery. The jury did not ask any questions about the verdict sheet itself, and confirmed in open court that the jury unanimously found defendant not guilty of robbery with a dangerous weapon, and guilty of common law robbery. We hold that Judge Taylor gave clear instructions to the jury on how to fill out the verdict sheet and

there was not any evidence of confusion on how to complete the verdict sheet. Accordingly, we find no error.

NO ERROR.

Judges ELMORE and STEELMAN concur.

Report per Rule 30 (e).