NO. COA05-1467

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 04 CRS 8843
ANTONIO MARQUEZ WITHERSPOON 04 CRS 51939

Appeal by defendant from judgment entered 24 May 2005 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 19 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

Daniel F. Read for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgment entered after a jury verdict of guilty of common law robbery charges. Upon his admission to habitual felon status, the trial court sentenced him to a presumptive prison term of 168 to 211 months. We find no error.

FACTS

The State's evidence tended to show the following: On the afternoon of 2 February 2004, defendant and Lee Smith entered a Best Buy store in Winston-Salem, North Carolina. They walked into the store's electronics section, where defendant picked up a Sony PlayStation 2 console and two or three video games before returning

to the check-out area at the front of the store. Defendant ran out of the store without paying for the merchandise, followed by Smith. The store's loss prevention officer, Van Getter, chased after the men as they ran toward Smith's silver Mitsubishi Gallant, which was parked in the fire lane in front of the store. Defendant placed the merchandise inside Smith's car and sat down in the front passenger seat. Smith reached into the car for a gun, which he pointed at Getter from a distance of fifteen feet while saying, "[S]top [m.f.]." Feeling "threatened" by the gun, Getter stopped. Smith and defendant then "drove out of the parking lot and left." They were stopped for speeding in Smith's Gallant the next day, 3 February 2004, by North Carolina Highway Patrol Trooper B.D. Stalvey. Defendant was driving the car, and Smith was seated beside him. In the backseat of the car, Stalvey found "[a] Sony Playstation 2 box which was sealed" and a video game. He also found a Crossman BB gun "underneath the passenger seat."

Smith testified that he offered defendant a ride while driving his car around High Point, North Carolina, on 2 February 2004. As the two men talked in Smith's car, they "just both agreed that [they] were kind of in need of money at the time." Deciding they could obtain money by selling "a PlayStation or something like that[,]" Smith and defendant drove to a Best Buy in Winston-Salem. Smith had a BB gun in the car and showed it to defendant, explaining "how it looked real but it wasn't real and it didn't work or anything." After parking his car at "the curb next to the front of the store" so that they "could get out quicker[,]" Smith

walked with defendant to the store's electronics department. Defendant carried the PlayStation and the games to the front of the store and "walked out" without paying for them. A store employee who was chasing defendant exited the store ahead of Smith. As the employee tried to wrest the merchandise away from defendant, Smith "got the BB gun out of the car and . . . pointed it at the guy and told him to back away from [defendant]." When the employee backed away, Smith and defendant "got in the car and left" for High Point. They were stopped by a state trooper the next day while defendant was driving Smith's car. The PlayStation, a video game, and Smith's BB gun were still in the vehicle. Smith gave a written statement to a Winston-Salem police officer on 6 February 2004, detailing the robbery.

Defendant offered no evidence. The trial court denied defendant's request for a jury instruction on misdemeanor larceny as a lesser included offense of common law robbery. Defendant declined the court's offer for an instruction on larceny from the person. Defendant now appeals.

ANALYSIS

I.

Defendant first contends on appeal that the trial court erred in refusing to instruct the jury on the lesser included offense of misdemeanor larceny. Defendant now claims that the evidence created issues of fact for the jury as to whether he (1) intended to act in concert with Smith, and (2) reasonably could have foreseen Smith's use of force to accomplish the planned theft.

Because the jury could have resolved these factual questions in his favor, defendant contends the evidence supported a misdemeanor larceny instruction. We disagree.

The trial court must instruct the jury on any lesser included offense which is supported by affirmative evidence introduced at trial. *State v. Kyle*, 333 N.C. 687, 703, 430 S.E.2d 412, 421 (1993). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). However, the mere possibility that the jury might accept some, but not all, of the State's proffer is insufficient to warrant an instruction on a lesser offense, absent affirmative evidence which tends to negate an element of the greater offense. *State v. Franks*, 74 N.C. App. 661, 662, 329 S.E.2d 717, 718, *disc. review denied*, 314 N.C. 333, 333 S.E.2d 493 (1985).

"Common law robbery is defined as 'the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.'" *State v. Jones*, 339 N.C. 114, 164, 451 S.E.2d 826, 854 (1994) (quoting *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982)), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). Misdemeanor larceny is a lesser included offense of common law robbery. *See State v. White*, 142 N.C. App.

201, 204, 542 S.E.2d 265, 267 (2001). The distinction between the greater and lesser offenses is that robbery requires the taking to be accomplished by means of violence or fear, while misdemeanor larceny does not. *Id.*

The taking of merchandise from a store over the resistance of a store employee or security officer is a taking "from the person or presence of another" as contemplated by the term "robbery." *See State v. Gaither*, 161 N.C. App. 96, 100, 587 S.E.2d 505, 508 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004); *State v. Barnes*, 125 N.C. App. 75, 79, 479 S.E.2d 236, 238, *aff'd per curiam*, 347 N.C. 350, 492 S.E.2d 355 (1997). Here, the evidence showed that Getter broke off his pursuit of defendant only when threatened by Smith with a gun. Taken together, the acts of defendant and Smith thus constituted a taking from the presence of another by fear, and thus comprised all the elements of a common law robbery. *See Barnes*, 125 N.C. App. at 79, 479 S.E.2d at 238. Because defendant did not make a show of force toward Getter, the issue before this Court is whether the evidence adduced at trial would have allowed a jury to find defendant not criminally liable for Smith's actions.

The trial court instructed the jury, without objection, that it could find defendant guilty upon a finding that he acted in concert with Smith to commit the robbery. Under the doctrine of concerted action, if "'"two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular

crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."'" *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (citations omitted). A defendant need not intend or subjectively foresee the specific criminal acts committed by his accomplice in furtherance of their joint enterprise. "[R]ather it is sufficient if the crime charged is a natural occurrence of, or flows from a common criminal purpose." *State v. Herring*, ___ N.C. App. ___, ___, 626 S.E.2d 742, ___ (2006).

We find no evidence that would have allowed a rational juror to find defendant guilty of the lesser offense of misdemeanor larceny, rather than common robbery. No witness' account of the incident tended to show that defendant acted alone, rather than in concert with Smith, in stealing the PlayStation and video games. Smith testified that, prior to their arrival at the Best Buy, he and defendant discussed obtaining a PlayStation so that they could sell it for money. In addition to threatening Getter with a gun to thwart his pursuit of defendant, Smith drove defendant to the store in Smith's car, parked in the fire lane next to the store's entrance, accompanied defendant to the electronics section, and served as his getaway driver. Rather than fleeing on foot with the stolen goods, defendant placed them in Smith's car and made his escape therein. Moreover, we find that the threatened use of non-deadly force in order to elude capture by a retail store's security officer was a natural occurrence directly flowing from defendant

and Smith's joint criminal purpose of stealing merchandise from a store. Accordingly, Smith's act of brandishing the BB gun at Getter was attributable to defendant as the product of their concerted action. *See, e.g., State v. Bellamy*, ___ N.C. App. ___, ___, 617 S.E.2d 81, 94 (2005). Finally, there was no evidence that the theft was accomplished without threatening Getter with the gun. *Cf. State v. McCullers*, 77 N.C. App. 433, 435, 335 S.E.2d 348, 349 (1985) ("All of the evidence tends to show that the taking of the money was 'occasioned by the violent acts of the defendant,' namely striking the victim over the head with a soft drink bottle.").

II.

Defendant next contends that his sentence is so disproportionate to his crime as to violate the constitutional prohibition against cruel and unusual punishment. While we note defendant did not raise his constitutional claim in the trial court, *see State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), we also find that it is without merit.

"Our Supreme Court has found that as long as the judge sentences within the limits established by the legislature, the Eighth Amendment is not offended." *State v. Streeter*, 146 N.C. App. 594, 599, 553 S.E.2d 240, 243 (2001), *cert. denied*, 356 N.C. 312, 571 S.E.2d 211 (2002), *cert. denied*, 537 U.S. 1217, 154 L. Ed. 2d 1071 (2003). Moreover, "both this Court and our Supreme Court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment." *State v. McIlwaine*, 169 N.C. App. 397, 403, 610 S.E.2d 399, 403 (2005);

accord State v. Clifton, 158 N.C. App. 88, 95-96, 580 S.E.2d 40, 45-46, *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003); *State v. Hodge*, 112 N.C. App. 462, 468, 436 S.E.2d 251, 255 (1993) (holding that a thirty-year sentence for possession of stolen goods as an habitual felon was not cruel and unusual punishment). As a recidivist, defendant was subject to enhanced punishment for his crime, as prescribed by our legislature. *See, e.g., State v. Mason*, 126 N.C. App. 318, 321, 484 S.E.2d 818, 820 (1997), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001).

Accordingly, the trial court did not err in refusing to instruct the jury on the lesser included offense of misdemeanor larceny and based on defendant's conviction and habitual felon status, properly sentenced defendant. In the instant case, therefore, these assignments of error are overruled.

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. By rule, we deem them abandoned. N.C.R. App. P. 28(b)(6).

No error.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).