

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-390

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

STATE OF NORTH CAROLINA

v.

Beaufort County
No. 04 CRS 54613

JEFFERY WOODROW JACKSON, II

Appeal by defendant from judgment entered 9 August 2005 by Judge J. Richard Parker in Beaufort County Superior Court. Heard in the Court of Appeals 25 September 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Patrick S. Wooten, for the State.

Geoffrey W. Hosford, for defendant-appellant.

JACKSON, Judge.

Jeffery Woodrow Jackson, II, ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of robbery with a dangerous weapon on 9 August 2005.

On the night of 9 November 2004, Melissa Keyes ("Keyes"), a cashier, and John Cobb ("Cobb"), a night manager, were working at a Food Lion located in Chocowinity. At approximately 11:30 p.m., defendant, armed with a handgun, approached the two employees as they were leaving the store. Defendant pointed the gun at Keyes and ordered the two employees back into the store. Defendant

demanded that Cobb open the safe. After securing the money in two backpacks, defendant forced the employees into the freezer, and left the store.

Defendant met with Chocowinity police on 5 January 2005. In his statement to police, defendant admitted that he robbed the Food Lion. Defendant stated that the gun, a .380 Jennings, was not loaded at the time of the robbery and that he did not recall pointing the gun at Keyes. Defendant informed the police that he abandoned the gun in the woods off of Highway 55, but when he returned to retrieve it the next day, the gun was gone. Law enforcement officers seized .380 caliber ammunition at defendant's residence.

Defendant testified on his own behalf at trial. Defendant stated that he and Cobb had discussed robbing the Food Lion. Defendant further testified that the handgun used in the robbery was the same handgun he had received from Cobb in a trade for car stereo speakers two months before the robbery. According to defendant, the gun was not loaded during the robbery and he had "absolutely no intention of harming anybody" that evening. Defendant further testified that he gave Cobb \$1,600.00 of the money taken from the Food Lion.

The trial court denied defendant's request to instruct the jury on common law robbery and felony larceny. The jury returned a verdict of guilty as charged and the trial court sentenced defendant to sixty to eighty-one months imprisonment. Defendant appeals to this Court.

Defendant's only assignment of error is the trial court's refusal to instruct the jury on the lesser included offense of common law robbery. Defendant contends there was evidence from which a reasonable jury could conclude that defendant committed the lesser included offense and the trial court should have instructed the jury on common law robbery. We agree.

In *State v. Joyner*, 67 N.C. App. 134, 312 S.E.2d 681 (1984), *aff'd*, 312 N.C. 779, 324 S.E.2d 841 (1985), the defendant appealed his armed robbery conviction arguing that the trial court erred in denying his motion to dismiss because there was evidence that the rifle used in the robbery was unloaded and missing a firing pin. Upholding defendant's armed robbery conviction, this Court opined that the defendant's evidence that the weapon used during a robbery was unloaded or otherwise incapable of firing, "tended to prove the absence of an element of the offense charged and required the submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense of robbery with firearms or other dangerous implements." *Id.* at 136, 312 S.E.2d at 682 (citing *State v. Bailey*, 278 N.C. 80, 178 S.E.2d 809 (1971), *cert. denied*, 409 U.S. 948, 34 L. Ed. 2d 218 (1972)).

Defendant argues that, like *Joyner*, the evidence in this case tends to show that the instrument he used was not loaded during the commission of the robbery, and, therefore, the trial court was required to submit to the jury the lesser included offense of common law robbery. The State concedes that it cannot distinguish the instant case from *Joyner* and requests that this Court vacate

defendant's conviction for robbery with a dangerous weapon and remand this case to the trial court for a new trial.

Because there was evidence from which a reasonable jury could conclude that defendant committed the lesser included offense, the trial court erred in failing to instruct the jury on common law robbery. We therefore vacate defendant's conviction for armed robbery and remand this case to the trial court for a new trial.

New Trial.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).