NO. COA06-51

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Moore County
Nos. 02 CRS 53283
03 CRS 785

ROBERT LEE HOLMES,
Defendant.

Appeal by defendant from a judgment entered 10 August 2005 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 16 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Allison S. Corum, for the State.

Russell J. Hollers, III, for defendant-appellant.

BRYANT, Judge.

Robert Lee Holmes (defendant), charged with common law robbery and, in a separate bill of indictment, having attained habitual felon status, appeals from a judgment entered 10 August 2005.

The State's evidence tended to show that on the afternoon of 10 July 2002, Rachel Robertson (Robertson) was working as a cashier at a Piggly-Wiggly located in Vass, North Carolina. A male customer, later identified as Mr. Hill, approached Robertson's register to purchase a bottle of rubbing alcohol with a handful of change. Robertson completed the sales transaction and closed her cash register drawer. Mr. Hill then told Robertson that he would

like to exchange his remaining change for cash. Robertson consented and opened the cash register. As Mr. Hill handed over the change, "he dropped all of it on the floor." Mr. Hill told Robertson that he had arthritis and asked for her assistance in picking up the change. Leaving the cash register open, Robertson bent over to help Mr. Hill. She then heard a loud "click", which sounded as if one of the bill clips in her cash register had snapped back down after being lifted. Robertson quickly turned around and saw defendant "standing pretty close to the register." Robertson had not seen defendant prior to the clicking noise. Robertson stood up, closed the register drawer, and asked defendant if he had taken any money. Before defendant could answer, Mr. Hill said, "No. I saw him. He didn't take any money out of the drawer."

Although Robertson believed Mr. Hill, she had a "bad feeling[.]" Robertson noticed that defendant had a Piggly-Wiggly sales paper in his hand. Robertson thought defendant took the sales paper from the stack of sales papers behind her register to hide money defendant may have taken from her cash register. Robertson followed defendant as he left the store and again asked him if he had taken any cash. After defendant denied taking any money, Robertson "placed [her] hands on the edge of the paper and tried to tug on it, but he wouldn't let go of it." Robertson saw defendant drive off in a vehicle occupied by another man. When Robertson turned around she saw that Mr. Hill had left the store without picking up his change. Robertson wrote down the vehicle's license plate number and reported the incident to her

supervisor, who called the police.

Police took a statement from Robertson upon arriving at the store. In the meantime, Officer Marvin Scott McKinnis stopped a vehicle matching Robertson's description and arrested defendant, who was the driver, and Mr. Hill, the passenger. At the arrest scene, Robertson identified defendant and Mr. Hill. Upon a search of defendant, Officer McKinnis found $736.47 on defendant's person. The Piggly-Wiggly later determined that $700.00 was missing from Robertson's cash register drawer.

A jury found defendant guilty of larceny from the person. Defendant subsequently admitted his habitual felon status. The trial court sentenced defendant to 90 to 117 months imprisonment. Defendant appeals.

Defendant raises two issues on appeal: (I) whether the trial court committed error by denying his motion to dismiss; and (II) whether the trial court committed plain error by not instructing the jury on the lesser included offense of misdemeanor larceny.

I

Defendant first contends the trial court erred in denying his motion to dismiss. A motion to dismiss for insufficiency of the evidence should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade

a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

"Common law robbery is 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. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982). "At common law, larceny from the person differs from robbery in that larceny from the person lacks the requirement that the victim be put in fear." *State v. Pickard*, 143 N.C. App. 485, 491 547 S.E.2d 102, 106 (2001). Defendant argues that the State failed to present substantial evidence of a taking "from the person." To support his contention, defendant relies on *State v. Barnes*, 345 N.C. 146, 478 S.E.2d 188 (1996) and *State v. Lee*, 88 N.C. App. 478, 363 S.E.2d 656 (1988). In *Barnes*, our Supreme Court held that the evidence did not support a conviction of larceny from the person where the defendant removed a bank bag containing money from below the cash register in a kiosk at a shopping mall while the victim was twenty-five to thirty feet from the kiosk, in another store. *Barnes* at 151, 478 S.E.2d at 191. In *Lee*, this Court held that the evidence did not support a

conviction for larceny from the person where the defendant secretly removed the victim's purse from her unattended grocery cart while she was four to five steps away, looking for an item in the grocery store. *Lee* at 479, 363 S.E.2d at 656. Like the grocery store customer and the kiosk merchant, defendant asserts that "the cash in the register's drawer was not in Ms. Robertson's immediate presence, nor under her protection or control when Mr. Holmes secretly took it" and, therefore, his conviction larceny from the person is not supported by the evidence.

The facts of this case are distinguishable from *Barnes* and *Lee*. They are more closely aligned with those of *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991). In *Buckom*, the clerk was making change for the defendant when he reached into the drawer and grabbed the money. *Id.* "Such evidence was sufficient to support the defendant's conviction for larceny from the person." *Id.* at 318, 410 S.E.2d at 365.

Here, defendant took money from the cash register while Robertson, at her cash register, bent down to help a customer who was later identified as defendant's accomplice, pick up change he had dropped on the floor. Robertson was physically at her cash register when defendant took the money and, unlike the victims in *Barnes* and *Lee*, had not left her cash register unattended. Defendant's removal of the money while Robertson was at her cash register constituted an invasion of Robertson's person or immediate presence. We conclude that the evidence was sufficient to support a finding that the money was in the immediate presence of and under

the protection or control of Robertson at the time of the taking, and the money was taken "from the person" of Robertson. Accordingly, the trial court properly denied defendant's motion to dismiss. Because we conclude that there was sufficient evidence to satisfy the "from the person" element of the larceny from the person charge, we reject defendant's contention that he was entitled to an instruction on the lesser included offense of misdemeanor larceny. This assignment of error is overruled.

II

Defendant admits he failed to ask the trial court for the instruction and, therefore, asks this Court for plain error review. Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). 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) (citations and internal quotation marks omitted). However, "a lesser offense should not be submitted to the jury if the evidence is sufficient to support a finding of all the elements of the greater offense, and there is no evidence to support a finding of the lesser offense." *State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995). "The essential elements of larceny are: (1) the taking of

the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 127 (2002) (citation omitted).

Here, the State presented substantial evidence that the money was taken "from the person" of Robertson and there is no evidence to support a finding of the lesser included offense of misdemeanor larceny. Accordingly, the trial court did not commit plain error in failing to instruct on the lesser included offense. This assignment of error is overruled.

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).