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NO. COA07-853

NORTH CAROLINA COURT OF APPEALS

Filed: 16 September 2008

STATE OF NORTH CAROLINA

v.

Forsyth County  
No. 05 CRS 57750

MICHAEL WAYNE MOSES,  
Defendant.

Appeal by defendant from judgment entered 4 April 2007 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 12 December 2007.

*Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.*

*Duncan B. McCormick for defendant-appellant.*

GEER, Judge.

Defendant Michael Wayne Moses appeals from his conviction of robbery with a dangerous weapon. The indictment in this case did not identify what kind of weapon was used or in what way it was dangerous, but rather only alleged that it was "an unknown type of weapon." Because of this omission, the indictment was fatally defective, and we must arrest the judgment of the trial court.

#### Facts

The State's evidence tended to show the following. On 13 June 2005, Bryan Dale Carter went to a grocery store to cash his paycheck from Domino's Pizza. While Carter was in the store, he

noticed defendant. Carter made a few purchases, left the store, and got into his car. He was then approached by defendant, who told Carter to "[g]ive me a ride to my boys" or "[l]et me get a ride to my boys." Defendant climbed into the front passenger seat of Carter's car, and Carter, because he was nervous, drove off with defendant in the car.

Defendant gave Carter instructions as to where to drive. When they reached a dead end street, defendant directed Carter to turn around and let defendant out of the car. Defendant then stretched his left arm across Carter's body to hold him in his seat and brought his right arm holding a brown paper bag up next to Carter's head and demanded that Carter give him everything in his pockets. Carter did not see what was inside the paper bag, but he described the bag as "look[ing] stiff." Carter testified that there "had to be something in [the bag] for it to be so stiff," but he "couldn't feel exactly what it was or how big it was or anything." Carter gave defendant all of his money because he was scared. Although defendant tried to give Carter some of the money back, Carter refused it. Defendant got out of Carter's car and walked away.

When defendant was arrested on 26 July 2005, he responded: "I know what this is about before we get started. It's about the little guy that works for the pizza place." Defendant added: "It says on the warrant that it was \$120. It was a lot more than that."

On 26 September 2005, defendant was indicted for robbery with a dangerous weapon. Defendant did not present any evidence at

trial, and the jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant to a presumptive-range sentence of 114 to 146 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant contends the trial court erred by denying his motion to quash the indictment. The allegations of defendant's indictment state:

The jurors of the State upon their oath present that on or about the date of offense shown and in Forsyth County the defendant named above unlawfully, willfully and feloniously did steal, take and carry away another's personal property, US Currency of the value of \$220.00, from the person and presence of Bryan Dale Carter. The defendant committed this act by means of an assault consisting of having in possession and threatening the use of a dangerous weapon to wit: an unknown type of weapon, whereby the life of Bryan Dale Carter was threatened and endangered.

Defendant argues that the indictment was insufficient to charge him with robbery with a dangerous weapon because it failed to name the weapon.

"A criminal pleading must contain: . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof . . . ." N.C. Gen. Stat. § 15A-924(a)(5) (2007). An indictment is fatally defective "'when the indictment fails on the face of the record to charge an essential element of the offense.'" *State v. McGee*, 175 N.C. App. 586, 588, 623 S.E.2d 782, 784 (quoting *State v. Bartley*,

156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003)), *disc. review denied*, 360 N.C. 489, 632 S.E.2d 768 (2006).

The elements of the crime of robbery with a dangerous weapon as set out in N.C. Gen. Stat. § 14-87 (2007) are "(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means'; and (3) danger or threat to the life of the victim." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (quoting N.C. Gen. Stat. § 14-87). The question presented by this appeal is the sufficiency of the indictment as to the second element regarding threatened use of a firearm or other dangerous weapon, implement, or means.

With respect to this question, our Supreme Court has held "that it is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon." *State v. Palmer*, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1977). This principle was applied in *State v. Moses*, 154 N.C. App. 332, 572 S.E.2d 223 (2002), in which the defendant was charged with assault with a deadly weapon inflicting serious injury. The indictment did not specifically name the deadly weapon, but rather simply alleged that "the defendant named above unlawfully, willfully and feloniously did assault Mateo Mendez Jimenez with a deadly weapon." *Id.* at 335, 572 S.E.2d at 226. This Court held

that that indictment "clearly does not name the deadly weapon allegedly used by defendant in his assault on [the victim]" and, therefore, violated the requirement set out in *Palmer* and its progeny. *Id.* at 336, 572 S.E.2d at 226.

In this case, the indictment is even less specific than that in *Moses*, alleging only that defendant threatened "the use of a dangerous weapon to wit: an unknown type of weapon." The State argues, however, that *Moses* is distinguishable as it involved assault with a deadly weapon rather than, as here, robbery with a dangerous weapon. Contrary to this contention, the Supreme Court's holding in *Palmer* expressly encompassed any "crime in which one of the elements is the use of a deadly weapon." 293 N.C. at 639, 239 S.E.2d at 411. Similarly, *Moses* discussed "[t]he requirements for an indictment charging a crime in which one of the elements is the use of a deadly weapon . . . ." 154 N.C. App. at 335, 572 S.E.2d at 226. While robbery with a dangerous weapon involves use of a "firearm[] or other dangerous weapon," rather than a "deadly weapon," we see no meaningful basis upon which to conclude that *Palmer* and *Moses* should not equally apply to robbery with a weapon. See *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982) ("In determining whether evidence of the use of a particular instrument constitutes evidence of use of 'any firearms or other dangerous weapon, implement or means' within the prohibition of G.S. 14-87, the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened.").

Indeed, in *State v. Hinton*, 361 N.C. 207, 210, 639 S.E.2d 437, 439 (2007), our Supreme Court held that "assault with a deadly weapon is a lesser included offense of robbery with a dangerous weapon." As a lesser included offense, "'all of the essential elements of the lesser crime must also be essential elements included in the greater crime.'" *Id.*, 639 S.E.2d at 439 (quoting *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). Consequently, there is no basis for distinguishing the charges with respect to the element requiring use of a weapon.

*Moses*, therefore, controls, and we hold that the indictment in this case was insufficient to charge the crime of robbery with a dangerous weapon. Accordingly, the judgment of the trial court on defendant's conviction of robbery with a dangerous weapon must be arrested. See *State v. Locklear*, 361 N.C. 688, 654 S.E.2d 704 (2007) (determining that judgment must be arrested for flaw in indictment; vacating portion of Court of Appeals opinion that remanded for resentencing on lesser included offense); *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990) ("When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the state must seek a new indictment if it elects to proceed again against the defendant."). Because of this determination, we need not address defendant's remaining arguments.

Judgment arrested.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).