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NO. COA08-315

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

STATE OF NORTH CAROLINA

v.

JEROME WATSON a/k/a GERROME  
WATSON

Johnston County  
Nos. 06 CRS 53635-36,  
06 CRS 54139

# Court of Appeals

Appeal by Defendant from judgments entered 22 August 2007 by Judge Paul L. Jones in Johnston County Superior Court. Heard in the Court of Appeals 17 November 2008.

*Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State*

# Slip Opinion

*Russell J. Hollers, III, for Defendant.*

ARROWOOD, Judge.

On 5 June 2006, Jerome Watson (Defendant) was indicted for assault inflicting serious bodily injury, two counts of robbery with a dangerous weapon, possession of a stolen firearm, and possession of a firearm by a convicted felon. The case was tried at the 20 August 2007 Criminal Session of Johnston County Superior Court.

The State presented evidence at trial which tended to show the following: On 10 March 2006, Sandy Shealy was working as the manager at the Alta Mobile Home community in Clayton, North

Carolina. At around 10 a.m., the Defendant, who lived in the community with his grandmother, came into the office looking to sell DVDs. Shealy picked one out for her granddaughter and asked Defendant to return after lunch when she would have money. Defendant returned sometime after 2 p.m. Shealy only had \$5, so she checked in her office drawer and the office's bank bag for loose change, but could not find any. Shealy testified that Defendant was present when she checked the bag, but could not tell if he could see in the bag or not. Defendant took the \$5 and left, saying that it would be "fine." Approximately ten minutes later, a man wearing a black ski mask, black jacket, black pants and black shoes entered the office carrying a gun. The man pointed the gun at Shealy and told her to give him all her money. The man took the bank bag and left the office. Shealy called 911. The police arrived within a few minutes after she placed the call.

Officer Robert Lipscomb (Officer Lipscomb) of the Clayton Police Department responded to the 911 call. After speaking with Shealy, Officer Lipscomb observed Defendant standing near a trailer. Officer Lipscomb approached Defendant, who identified himself as Jerome Smith, and Defendant told him he saw an individual dressed in dark clothes run into the woods. Sergeant David MacNeal (Sergeant MacNeal), who was a canine handler for the Clayton Police Department, arrived with Nero, a police tracking dog. Officer Lipscomb relayed to Sergeant MacNeal the information he received from Defendant, and Sergeant MacNeal and Nero began to search for the perpetrator. As Nero began tracking the robber, he

made an abrupt turn toward the trailer where Defendant was standing. Defendant said "no, no" and stated that the robber had run toward the woods. Accordingly, Sergeant MacNeal directed Nero to the woods. However, Nero was unable to pick up a scent.

Detective John Coley (Detective Coley) began canvassing the community. He knocked on the door of Defendant's grandmother's trailer. Nobody answered. After a minute or two, Defendant appeared and asked Detective Coley what he was doing. Detective Coley told him he was knocking on the door and asked Defendant if anyone was home. Defendant told Detective Coley that it was his grandmother's residence, and that he thought his cousin was inside. Defendant then knocked on the door and "hollered" for his cousin to come to the door. Carlos Hernandez (Hernandez) came to the door. Detective Coley asked Hernandez if anybody else was inside, to which Hernandez responded there was not. Detective Coley then received consent to search the mobile home, but did not find anybody else inside.

Defendant and Hernandez were subsequently charged for a separate robbery and assault that occurred on 13 April 2006. On 18 April 2006, Detective Coley interviewed Hernandez at the Johnston County Jail. Hernandez confessed to robbing the office at the Alta Mobile Home community. Hernandez told Detective Coley that on the morning of the robbery, Defendant had called him and asked him to come to his house. Upon Hernandez' arrival, Defendant suggested they rob the office. Defendant explained to Hernandez that because he had an injured leg, he would stand near the office and signal

when the "coast was clear." Hernandez stated that the weapon used in the robbery was a "black bee-bee gun." Upon receiving his signal from Defendant, Hernandez entered the office, pointed the gun at Shealy, and told her to give him all the money. After Shealy produced the bank bag, Hernandez grabbed it and ran out of the office. He ran a short distance before meeting up with Defendant. Defendant told Hernandez to hide inside his grandmother's trailer until the police had left the area. Hernandez changed clothes inside the trailer and hid the bank bag in Defendant's room. The two men then split the money. Hernandez told Detective Coley that he was wearing a black ski mask, black shirt, black pants, black gloves and black boots. Hernandez then directed Detective Coley to where he could find the "bee-bee gun" used in the robbery, and Detective Coley recovered the weapon.

Hernandez pled guilty to the robbery and agreed to testify against Defendant. At trial, Hernandez testified that Defendant asked him to commit the robbery, and that Defendant could not do it himself because he had a bad foot. Hernandez further testified that he provided the "bee-bee gun" used to commit the robbery. However, Hernandez testified that another man, a "Spanish dude" actually committed the robbery. Hernandez further testified that "Jose" hid in the backroom of the trailer after the robbery, and that the police failed to thoroughly search the trailer. Hernandez claimed that he confessed to the robbery because he was in jail with Defendant and people Defendant knew, and feared reprisal from Defendant if he did not confess.

Defendant was convicted of assault inflicting serious bodily injury, robbery with a dangerous weapon, robbery with a firearm, and possession of a firearm by a convicted felon. The trial court sentenced Defendant to consecutive terms of 25 to 30, 117 to 150, 117 to 150, and 20 to 24 months imprisonment. On appeal, Defendant seeks relief from the judgment entered in case 06-CRS-54139 but not the other cases.

Defendant argues that there was evidence presented that the robbery was committed with a "BB gun" and that the trial court erred by refusing to instruct the jury on the lesser-included offense of common law robbery. We agree.

Defendant was charged with robbery with a dangerous weapon. Common law robbery is a lesser-included offense of robbery with a dangerous weapon. *State v. Frazier*, 150 N.C. App. 416, 419, 562 S.E.2d 910, 913 (2002). Both offenses involve the use or threatened use of force to take property from the person or presence of another. *Id.* Robbery with a dangerous weapon further requires that the taking be accomplished by "the use of a dangerous weapon[.]" *State v. Bartley*, 156 N.C. App. 490, 498, 577 S.E.2d 319, 324 (2003). In *State v. Fleming*, 148 N.C. App. 16, 557 S.E.2d 560 (2001), this Court determined that where evidence was presented:

that it appeared to the victims that the robbery was committed with dangerous weapons as well as evidence tending to show that the weapons in question were not dangerous weapons within the contemplation of G.S. 14-87 . . . [that] the trial court was required to submit the case to the jury on the lesser included offense of common law robbery, as well as

armed robbery, and it was for the jury to determine the nature of the weapon used.

*Id.* at 25, 557 S.E.2d at 566 (citations omitted).

Shealy testified that the weapon used to rob her was a gun, and compared it to "a police gun." "When a robbery is committed with what appeared to the victim to be a firearm . . . and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be." *State v. Allen*, 317 N.C. 119, 124, 343 S.E.2d 893, 897 (1986). However, Hernandez testified that he provided the "bee-bee gun" that was used in the robbery. Additionally, after confessing to the robbery, he directed Detective Coley to where he could find the "bee-bee gun[,] " and the "bee-bee gun" was recovered. We note that there was no evidence presented that the "bee-bee gun" recovered by Detective Coley was capable of inflicting death or great bodily injury. See *Fleming*, 148 N.C. App. at 22, 557 S.E.2d at 564. Thus, because there was evidence from which the jury could find that the firearm used in the robbery was a "bee-bee gun" and incapable of threatening or endangering the life of the victim, we conclude that the jury should have been instructed on the offense of common law robbery. See *Frazier*, 150 N.C. App. at 419-20, 562 S.E.2d at 913-14. Accordingly, we vacate the judgment entered in case number 06-CRS-54139 and remand the matter for a new trial.

New trial in case number 06-CRS-54139.

No Error as to all other cases.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).