NO. COA09-1648

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Forsyth County
No. 08 CRS 62664
08 CRS 62666
08 CRS 62889

MICHAEL WAYNE MABE

Appeal by defendant from judgments entered 2 July 2009 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 27 May 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Richard H. Bradford, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

JACKSON, Judge.

Michael Wayne Mabe ("defendant") appeals from his 2 July 2009 convictions of first-degree burglary, two counts of assault on a female, larceny of a motor vehicle, communicating threats, and interfering with emergency communications. For the following reasons, we hold no error.

Defendant's former girlfriend Laura Willard ("Willard") testified that on 18 November 2008, she drove defendant to work as she usually did, because defendant did not have a car. At around

lunchtime, Willard broke up with defendant over the phone. Defendant was upset and concerned about how he would get home from work. Later that evening at around 11:00 p.m., defendant arrived at Willard's mother's home where Willard was watching TV. Defendant kicked in the bottom portion of the kitchen door and crawled into the home. Willard ran into her mother's room, where defendant kicked in the door, followed Willard into the adjoining bathroom, and proceeded to beat Willard. Defendant also struck Willard's mother and then left the bathroom and went into the kitchen. Willard heard defendant rummaging through the kitchen and left the bathroom to see what defendant was doing. As she left the bathroom, Willard saw the contents of her purse dumped out on the kitchen table and floor. When Willard arrived in the kitchen, defendant screamed at her asking where her car keys were, to which Willard replied that she did not know. Willard then saw defendant crawl outside through the bottom part of the kitchen door and heard her car start and pull out of the driveway.

Early the next morning, at around 3:00 a.m., defendant was pulled over in Willard's car by Deputy D. H. Tubbs. Defendant smelled of alcohol and was acting belligerently. The front end of Willard's car was smashed in, the bumper was damaged, there were puncture marks in the back seat, and defendant had carved "Free bird" into the dashboard. Willard was able to drive the car home, but only at a very slow speed because of a bent rim.

Defendant was charged with larceny of a motor vehicle, communicating threats, first-degree burglary, larceny after

breaking and entering, interference with emergency communication, two counts of assault on a female, and two counts of habitual misdemeanor assault. At the 30 June 2009 trial, Willard testified on *voir dire* regarding prior incidents of assault by defendant. Defendant interrupted Willard's testimony twice. During both interruptions, defendant expressed his desire to call witnesses, specifically his brother and his brother's niece, whom Willard had identified during her *voir dire* testimony. During the second interruption, defendant stated, "I would like my counsel to withdraw from this case. I would like to continue to call my witnesses." Defendant's request was denied.

On 1 July 2009, a jury convicted defendant of first-degree burglary, larceny of a motor vehicle, communicating threats, interfering with emergency communications, and two counts of assault on a female. Defendant pled guilty to two convictions for habitual misdemeanor assault. The trial court arrested judgment on the two charges of habitual assault. Defendant was sentenced within the presumptive range for the offenses of first-degree burglary, larceny of a motor vehicle, communicating threats, interfering with emergency communication, and two counts of assault on a female. Defendant appeals.

First, defendant contends that the trial court erred in denying his request to represent himself *pro se*. We disagree.

"'It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated.'" *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554

S.E.2d 331, 332 (2001) (quoting *Piedmont Triad Reg'l Water Auth. v. Summer Mills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002) (emphasis added). In order to waive his right to counsel, a defendant must make a clear and unequivocal expression of his desire to do so. *State v. Thomas*, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475-76 (1992) (citing *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173, *cert. denied*, 444 U.S. 943, 62 L. Ed. 2d 310 (1979)). It is only after defendant "clearly and unequivocally" states that he wishes to proceed *pro se* that the trial court must conduct an inquiry, pursuant to North Carolina General Statutes, section 15A-1242, to determine whether defendant "knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Id.* at 674, 417 S.E.2d at 476 (citing *Faretta v. California*, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 581-82 (1975); *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108 (1986)). North Carolina General Statutes, section 15A-1242 provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2007).

"'Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intent[ion] to represent oneself.'" *State v. White*, 349 N.C. 535, 562, 508 S.E.2d 253, 270 (1998) (quoting *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981)). "A mere disagreement between the defendant and his court-appointed counsel as to trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney." *State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976).

In the case *sub judice*, defendant interrupted Willard's *voir dire* testimony regarding prior incidents of assault:

> [The State]: Where did he strike you?
>
> DEFENDANT: My brother's niece - -
>
> BAILIFF: Sir - -
>
> THE COURT: That's the second time. I've warned you now. The third time is going to be more stringent methods used to keep you quiet. Do you understand?
>
> DEFENDANT: I apologize, sir. I would like my counsel to withdraw from this case. I would like to continue to call my witnesses. These things that do not exist in this case are permitted to be brought up, the assault on my niece that she done to being drunk, knocking her clocks off the wall, unable to drive her call, all this stuff, if we're going to fight that case, she needs to go take a charge out for that case, and we need to do that in another thing. That's just my opinion, Your Honor. I apologize for inconveniencing the Court, I really do.
>
> THE COURT: Very well, your motion is denied. Move along.

Defendant's statements do not clearly and unequivocally express a desire to proceed *pro se*. Defendant's statement — "I would like my counsel to withdraw" — evinces only the "desire not to be represented by [his] counsel," not the "intent[ion] to represent [him]self." *White*, 349 N.C. at 562, 508 S.E.2d at 270 (concluding that the defendant's statement that he "would like for [his] counsel to be released from [his] case" did not amount to an expression of intent to proceed *pro se*). Defendant's statement that he "would like to continue to call [his] witnesses" was based upon his mistaken understanding that Willard's *voir dire* testimony would be admitted as evidence. The court-appointed counsel whom defendant contends he wished to dismiss shortly thereafter convinced the trial court to exclude Willard's *voir dire* regarding the prior assaults. Defendant continued the rest of the trial with court-appointed counsel and never again raised a request to dismiss his counsel or represent himself. Based upon the colloquy set forth above, defendant's statements do not unequivocally express a desire to proceed *pro se*. Therefore, the trial court was not required to conduct an inquiry pursuant to North Carolina General Statutes, section 15A-1242. This assignment of error is overruled.

Second, defendant contends that the trial court erred in charging the jury on larceny of a motor vehicle and denying defendant's request to instruct the jury on the lesser included offense of unauthorized use of a conveyance. We disagree.

Whether the trial court should have instructed the jury on a lesser included offense is a question of law. "We review questions

of law *de novo*." *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999) (citing *Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 433, 470 S.E.2d 552, 554 (1996)).

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) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). A lesser included offense instruction is required "'*only* when the evidence warrants such an instruction.'" *Id.* (quoting *Hopper v. Evans*, 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982)) (emphasis in original). If "the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime[,]" then "the court is not required to submit to the jury the question of defendant's guilt of a lesser degree of the crime charged . . . ." *State v. Green*, 305 N.C. 463, 477-78, 290 S.E.2d 625, 634 (1982) (citing *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972)).

"[Unauthorized use of a motor vehicle] may be a lesser included offense of larceny where there is evidence to support the charge." *State v. Ross*, 46 N.C. App. 338, 339, 264 S.E.2d 742, 743 (1980) (citing *State v. Reese*, 31 N.C. App. 575, 578, 230 S.E.2d 213, 215 (1976)). "Where all the evidence tends to show that defendant intended to permanently deprive the victim of her car, it would be improper for the court to instruct on unauthorized use of

a conveyance." *State v. McRae*, 58 N.C. App. 225, 229, 292 S.E.2d 778, 781 (1982) (citing *Green*, *supra*). "Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 160, 84 S.E.2d 545, 547 (1954).

"To convict a defendant of larceny, it must be shown that he (1) took the property of another; (2) carried it away; (3) without the owner's consent, and (4) with the intent to deprive the owner of the property permanently." *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983) (citations omitted). To convict a defendant of unauthorized use of a motor vehicle, it must be shown that "without the express or implied consent of the owner or person in lawful possession, he takes or operates a[] . . . motor vehicle . . . of another." N.C. Gen. Stat. § 14-72.2(a) (2007).

Initially we note that even when, as here, a defendant does not present evidence, a lesser included instruction still may be warranted. *See State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (Conflicts in evidence relating to an element of the charged crime "'may arise when only the State has introduced evidence.'") (quoting *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989)). However, "[t]o determine whether this evidence is sufficient for submission of the lesser offense to the jury, we must view the evidence in the light most favorable to defendant." *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994).

In the case *sub judice*, defendant presented no evidence. The State's evidence showed that defendant forcibly entered Willard's mother's residence, that defendant screamed at Willard demanding her keys, that Willard's purse had been emptied onto the kitchen table and floor, that defendant took Willard's keys without her permission, that defendant threatened to kill Willard if she called the police, that Willard had never before shared her car keys with defendant, and that defendant had damaged the car to the point where it could only be driven at a slow speed. This evidence, if accepted by a jury, was sufficient to show that defendant intended to deprive Willard of her car permanently.

Defendant contends in his brief that he did not intend to deprive Willard of her car permanently based upon the following evidence: (1) that defendant usually received rides from Willard to and from work in her vehicle; (2) that defendant was worried about how he would get home from work on the day Willard broke up with him; and (3) that defendant carved "Free bird" on top of the dashboard, indicating that he would return the car in order to convey that "message" to Willard. Contrary to defendant's argument, this evidence does not conflict with the element of intent to deprive the owner of the property permanently.

In *State v. Watson*, this Court held that an instruction as to the lesser included offense of unauthorized use of a motor vehicle was not required. 179 N.C. App. 228, 634 S.E.2d 231 (2006). In that case, the defendant told an investigator that "a person named 'Mike' showed him $300 and asked him to move the vehicle." *Id.* at

246, 634 S.E.2d at 242. Defendant here has presented even less evidence as to the issue of intent than the defendant did in *Watson*. Even when viewed in the light most favorable to defendant, there is no evidence tending to show that "it was [defendant's] intent only to temporarily, and not permanently, deprive [Willard] of . . . her motor vehicle." *Id.* Therefore, the trial court was not required to instruct the jury as to unauthorized use of a motor vehicle. This assignment of error is overruled.

We hold that the trial court did not err as to either its denial of defendant's request to represent himself or its decision not to instruct the jury as to unauthorized use of a motor vehicle.

No error.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).