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NO. COA09-1686

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Cabarrus County
Nos. 08 CRS 053935 & 053941

TERRENCE LAMAR RUCKER

Appeal by Defendant from judgments entered 22 April 2009 by Judge Kevin M. Bridges in Superior Court, Cabarrus County. Heard in the Court of Appeals 25 May 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

Charlotte Gail Blake, for Defendant-appellant.

WYNN, Judge.

In a trial for armed robbery, when there is some evidence presented that the implement used was not in fact a dangerous weapon, the trial court is required to instruct the jury on the lesser included offense of common law robbery.[1] At trial in the present case, the State introduced Defendant's statements that the implement he used to commit two robberies was a cell phone. Because the trial court failed to instruct the jury on common law robbery, we must reverse and remand for a new trial.

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[1] *State v. Alston*, 305 N.C. 647, 651, 290 S.E.2d 614, 616 (1982); *State v. Frazier*, 150 N.C. App. 416, 419-20, 562 S.E.2d 910, 913-14 (2002).

At trial, the State's evidence tended to show the following: At approximately 11:15 p.m. on 13 October 2008, Derrick Upright, a taxi driver for TJ's Taxi Cab, traveled to a house on South Little Texas Road in Kannapolis, North Carolina to pick up a fare. One person got into the cab, saying he wanted to go to West Green Apartments. The passenger sat directly behind Upright but moved around when Upright looked into his rear view mirror.

When Upright got near the destination, he informed his passenger that the fare was six dollars. The passenger said something about getting somebody to bring out the money. Upon exiting the cab, the passenger turned around and lunged, wrapped the seat belt around Upright's neck, and pushed him down over the steering wheel. The passenger pushed a cold metal object that Upright believed was a gun to the side of his neck, and told Upright to give him the money or he would kill him. Upright felt threatened and believed that the passenger would kill him if he did not give him money. After Upright had produced $30, the passenger said he knew he had more than that, and Upright produced approximately $20 more. Upright did not see a gun in the passenger's hand, as the passenger kept the sleeve of his hoodie over it as he was walking away.

At approximately 1:00 a.m. on 16 October 2008, Roger Knotts, a taxi driver for TJ's Taxi Cab, traveled to an apartment complex on Green Ridge Drive to pick up a fare. Knotts arrived at the location, and a passenger got in the back seat. Knotts felt something press against his head that felt like cold steel. Knotts

thought it was a gun. The passenger told Knotts to give him the money. Knotts produced some money. The passenger then said, "that ain't all of it, give me the rest of it or I'll shoot you." The passenger took approximately one hundred dollars from Knotts and ran away toward a wooded area.

Defendant Terrence Lamar Rucker was later arrested for the robberies. Defendant gave a statement to police in which he admitted to the robbery of Upright. Defendant stated that he had put his cell phone up to Upright's neck during the robbery to make him think he had a gun. Defendant also admitted to the robbery of Knotts. Defendant stated that he had placed his cell phone against Knotts' neck and told him to give up his money. Neither a gun nor a cell phone were recovered during the investigation of the robberies.

On 19 February 2009, the State moved to join the two robberies for trial. The trial court granted the motion. Defendant was tried on two counts of armed robbery at the 20 April 2009 Criminal Session of Superior Court in Cabarrus County. At the charge conference, the trial court denied Defendant's request for an instruction on common law robbery. In addition, over Defendant's objection, the trial court granted the State's request for an instruction on flight. Defendant was convicted of two counts of armed robbery.

On appeal, Defendant alleges that the trial court erred in (I) granting the State's motion to join these offenses for trial; (II) failing to instruct the jury on the lesser included offense of

common law robbery; and (III) instructing the jury on flight.

I

Defendant first argues that the trial court erred in granting the State's motion to join the two robberies for trial because the offenses did not arise from the same act or transaction and were not so connected as to constitute parts of a common scheme or plan.

The joinder of offenses is governed by N.C. Gen. Stat. § 15A-926(a), which states that "[t]wo or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2009).

The proper standard of review involves a two step process. "In considering a motion to join, the trial judge must first determine if the statutory requirement of a transactional connection is met. Whether such a connection exists so that the offenses may be joined for trial is a fully reviewable question of law." *State v. Williams*, 355 N.C. 501, 529, 565 S.E.2d 609, 626 (2002)(citations omitted), *cert. denied*, *Williams v. North Carolina*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Once the trial judge determines that the requirement of a transactional connection is met, he must then determine whether a defendant can receive a fair trial on each charge. *Id.* The trial court's determination of whether defendant can receive a fair trial is reviewed for abuse of discretion. *Id.*

"The transactional connection required by [Section] 15A-926(a)

may be satisfied by considering various factors. Two factors frequently used in establishing the transactional connection are a common modus operandi and the time lapse between offenses." *State v. Simpson*, 159 N.C. App. 435, 437, 583 S.E.2d 714, 715 (quoting *Williams*, 355 N.C. at 530-31, 565 S.E.2d at 627), *aff'd per curiam*, 357 N.C. 652, 588 S.E.2d 466 (2003). In determining whether a defendant was deprived by the joinder of offenses of an opportunity to receive a fair trial, "[t]he question is whether the offenses are *so separate in time and place* and *so distinct in circumstances* as to render a consolidation unjust and prejudicial to defendant." *State v. Greene*, 294 N.C. 418, 423, 241 S.E.2d 662, 665 (1978) (quoting *State v. Johnson*, 280 N.C. 700, 704, 187 S.E.2d 98, 101 (1972)).

In this case, Defendant argues that the evidence did not show that the robberies were so connected as to be part of a single scheme or plan. Defendant emphasizes the differences between the crimes in terms of location and circumstances. Moreover, Defendant argues that the joinder of the charges prevented Defendant from receiving a fair trial; that the jury was more likely to assume that Defendant committed both offenses by hearing evidence on both charges; and that the jury might have confused the evidence of one robbery with that of the other.

We confronted an argument similar to Defendant's in *State v. Breeze*, 130 N.C. App. 344, 503 S.E.2d 141, *disc. review denied*, 349 N.C. 532, 526 S.E.2d 471 (1998). In *Breeze*, the trial court granted the State's motion to join defendant's twenty-three

different felony charges (including twenty counts of robbery with a dangerous weapon) for trial. *Id.* at 345, 503 S.E.2d at 143. In upholding the trial court's joinder of offenses, we noted similarities in the – victims; victims' description of their assailant; assailant's conduct toward his victims; and time of day. *Id.* at 355, 503 S.E.2d at 148. We also considered the time span over which the crimes occurred (seven weeks). *Id.* We concluded "that these offenses are not so separate in time and place nor so distinct in circumstances as to render consolidation unjust and prejudicial." *Id.*; *see also State v. Bracey*, 303 N.C. 112, 118, 277 S.E.2d 390, 395 (1981)(upholding joinder of three robbery charges over course of ten days).

In the present case, the nature of the offenses charged was likewise consistent. In each one, a taxi driver for TJ's taxi cab was robbed; the robberies took place at night; each victim had what he thought was a gun pressed against the side of his head while his passenger demanded money; when the drivers produced money, the passenger on both occasions insisted that the driver had more; and the drivers' physical descriptions of their assailant was consistent. Finally, the two robberies were committed three days apart. The evidence surrounding each offense reveals a similar modus operandi and similar circumstances in victims, location, time, and motive. Moreover, Defendant admitted his involvement in both robberies to the police.

We conclude that the trial court did not err in finding a transactional connection between the two robberies. We hold

further that the trial court did not abuse its discretion in determining that the joinder of offenses did not deprive Defendant of a fair trial.

II

Defendant next argues that the trial court erred in failing to instruct the jury on the lesser included offense of common law robbery.

"The trial court need only give a requested instruction which is supported by the evidence." *State v. Cummings*, 346 N.C. 291, 324, 488 S.E.2d 550, 569 (1997)(citing *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988)), *cert. denied*, *Cummings v. North Carolina*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). A defendant is, however, entitled to an instruction on a lesser included offense when there is evidence he is guilty of the lesser crime. *State v. Tarrant*, 70 N.C. App. 449, 451, 320 S.E.2d 291, 293 (1984). Common law robbery is a lesser included offense of armed robbery. *Id.* at 451, 320 S.E.2d at 293-94.

> The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. The use or threatened use of a dangerous weapon is not an essential element of common law robbery.

State v. Peacock, 313 N.C. 554, 562-63, 330 S.E.2d 190, 195 (1985) (citations omitted).

When a person commits a robbery with what appears to be an operable firearm, and there is no evidence presented to the contrary, the law presumes that the firearm is a dangerous weapon.

State v. Joyner, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985). In such cases, a defendant is not entitled to an instruction on common law robbery. *Id.* at 783, 324 S.E.2d at 844. On the other hand,

> [i]f there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened.

State v. Allen, 317 N.C. 119, 124, 343 S.E.2d 893, 897 (1986). Thus, North Carolina law states that when there is some evidence presented that the implement used during a robbery was not in fact a dangerous weapon, the trial court is required to instruct the jury on common law robbery. *Id.*; *Joyner*, 312 N.C. at 784, 324 S.E.2d at 845 (instruction on common law robbery must be given when there was some evidence that the rifle used during a robbery was unloaded and the firing pin was missing); *State v. Alston*, 305 N.C. 647, 651, 290 S.E.2d 614, 616 (1982) (instruction required when witness identified the gun used during a robbery as a BB gun); *State v. Frazier*, 150 N.C. App. 416, 419-20, 562 S.E.2d 910, 913-14 (2002)(instruction required when evidence was presented that gun used during the robbery was unloaded).

In the present case, Defendant gave two statements to police indicating that he placed a cell phone, not a gun, to the head of the taxi drivers. At trial, the State had a police officer read Defendant's first statement into evidence. That statement included the following:

> On Monday night, October 13, 2008, I was visiting my cousin, Eric Collins, at 563 South Little Texas Road. I called TJ's Taxi from their house around 9:30 to 10:00 p.m. and told them I needed a ride to West Green. I waited at the front door for the cab to get there. When he pulled up, I went outside and got in.
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> . . . .
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> I had my cell phone already in my hand and I put it up to his neck and he put his head down and handed me the money. I do not [sic] say anything to him. I guess he was scared and that is why he handed me the money. I had a boost mobile Nextel. I put it to his neck so he would think it was a gun to get his money. When he handed me the money, I took it out of his hand and told him not to call the police and to keep his head down.

The State also entered into evidence Defendant's subsequent statement admitting his involvement in the second robbery. That statement included the following:

> Early Thursday morning I was on my way walking to Scotty O'Neill's apartment at The Ridges off of Pine Street. I called Scotty to tell him I was on the way.
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> . . . .
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> When the cab got there, I sat in the back seat behind him. Scotty was standing on the side of the building. I put the cell phone to his neck and told him to give me the money. He gave me the money and I ran to where Scotty was at and we ran back up the hill to his apartment.

The fact that this evidence was presented by a State's witness rather than the Defendant is not determinative. The question is whether there was any evidence presented contradicting the victim's perception, which would otherwise warrant a mandatory presumption that a dangerous weapon was used. *See Alston*, 305 N.C. at 650, 290

S.E.2d at 616 ("[W]e must examine these two . . . statements *by the State's witness* to determine whether either constituted affirmative evidence that the instrument used in the robbery was not a firearm or other dangerous weapon.")(emphasis added). In the present case, Defendant's statements constituted evidence that the implement used was not a firearm or other dangerous weapon which could have endangered the life of the victim. Defendant was therefore entitled to an instruction on the lesser included offense of common law robbery. The trial court erred in failing to instruct the jury on common law robbery, and Defendant is entitled to a new trial.

III

Because we reverse Defendant's conviction on the basis of the trial court's failure properly to instruct the jury on common law robbery, we need not reach Defendant's allegation that the trial court erred in giving an instruction on flight. We note, however, that Defendant has failed to demonstrate that he was prejudiced by the flight instruction. *See State v. Holland*, 161 N.C. App. 326, 330, 588 S.E.2d 32, 36 (2003)("in light of the remaining evidence in this case, including the identification of defendant as the perpetrator of the crimes charged, the error in instructing the jury on flight was harmless.") Defendant essentially recognizes this by linking this argument to his second claim for relief.

New Trial.

Judges ROBERT C. HUNTER and CALABRIA concur.

Report per Rule 30 (e).