NO. COA10-340

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Moore County
No. 08 CRS 55858

CHRISTOPHER TILLMAN

Appeal by Defendant from judgments entered 13 August 2009 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Scott T. Slusser, for the State.

Faith S. Bushnaq, for Defendant.

BEASLEY, Judge.

Christopher Tillman (Defendant) appeals from judgments entered on his convictions of two counts of attempted robbery with a firearm. For the following reasons, we conclude there is no error.

Defendant was arrested on 27 January 2009 and indicted on 2 February 2009 for two counts of attempted robbery with a dangerous weapon. Defendant was tried before a Moore County jury at the 10 August 2009 Criminal Session of Superior Court. At approximately 7:00 p.m. on 15 December 2008, Defendant first attempted to rob the Microtel Inn in Southern Pines, North Carolina, and then the Quality Mart convenience store located about one mile from the

Microtel Inn. The victims of the attempted robberies, Microtel Inn's front desk clerk Priscilla Hannans and Quality Mart's clerk Noreen Lyston, both testified at trial and identified Defendant as the perpetrator. Surveillance videos of both attempted robberies were shown to the jury. Defendant offered no evidence, and on 13 August 2009, the jury found Defendant guilty of both counts of attempted robbery with a dangerous weapon. The trial court imposed two consecutive sentences of 94 to 122 months' imprisonment, and Defendant gave oral notice of appeal in open court.

I.

Defendant argues that the trial court erred in denying defense counsel's request to have the lesser included charge of attempted common law robbery included in the jury instructions. We disagree.

Our Supreme Court has held that "a lesser included offense instruction is required if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (internal quotation marks and citations omitted). The question becomes "whether there 'is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.'" *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)). It is well established that "[w]here the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no

instruction on a lesser included offense is required." *Id.* (citing *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985)).

The offense of robbery with firearms or other dangerous weapons is set forth in N.C. Gen. Stat. § 14-87. In pertinent part, the statute states:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business . . . shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2009). The essential elements of the offense 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. Fleming*, 148 N.C. App. 16, 20, 557 S.E.2d 560, 563 (2001) (internal quotation marks and citations omitted). "The primary distinction 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, however, is not an essential element of common law robbery." *State v. Frazier*, 150 N.C. App. 416, 419, 562 S.E.2d 910, 913 (2002) (internal quotation marks and citations omitted).

Defendant argues that the jury should have been given an instruction on common law robbery because one of the prosecuting

witnesses testified on cross-examination that the gun used in the attempted robbery looked like it might be plastic, and that she did not see any sight on the barrel of the gun. This witness also testified that she was familiar with guns, having owned and fired handguns herself. Defendant contends that this testimony constitutes affirmative evidence that the object Defendant brandished was not in fact a gun, but instead an instrument incapable of threatening or endangering life. We disagree.

"When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be — a firearm or other dangerous weapon." *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). Moreover, the fact that a witness cannot testify for certain that the instrument used in the robbery or attempted robbery was a firearm does not constitute evidence that the weapon was not a firearm:

> [W]hen the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what *appeared* to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery.

Id. Both of the victims in this case testified on direct examination that Defendant used a gun during the attempted robbery. It was only during cross-examination that one victim testified that

she did not see the sight on the barrel or the gun and "that the gun looked like it might be plastic." This statement alone is not sufficiently probative to require a jury instruction on the lesser included offense of common law robbery.

Defendant contends that testimony from a witness who "knows handguns" that a weapon looked like it could have been made of plastic constitutes more than a witness's lack of certainty on cross-examination, as was the case in *Thompson*. For this proposition, Defendant erroneously relies on *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982), where our Supreme Court held that the fact that the accomplice, a witness for the State, testified on cross-examination that the instrument he held was a "BB rifle" constituted affirmative evidence showing that the rifle in question was not a dangerous weapon as contemplated by N.C. Gen. Stat. § 14-87. *Alston*, 305 N.C. at 650, 290 S.E.2d at 616. *Alston* is clearly distinguishable from the instant case because, there, the witness was not exhibiting "a mere failure to testify positively that the instrument used was in fact a firearm or dangerous weapon. Quite the contrary, the witness positively identified the instrument he held in his hand during the commission of the robbery." *Id.*

In contrast, the witness in the instant case never held the instrument in question and thus had no ability to positively testify that the instrument was a firearm. It is hard to perceive how the witness could positively determine the firearm was real where Defendant did not fire a shot. *See Thompson*, 297 N.C. at

288, 254 S.E.2d at 528 ("Whether an instrument is a dangerous weapon or a firearm can only be judged by the victim of a robbery from its appearance and the manner of its use. We cannot perceive how the victims in the instant case could have determined with certainty that the firearm was real unless defendant had actually fired a shot."). However, a victim of an attempted robbery should not be required to "force the issue merely to determine the true character of the weapon," and "when a witness testifies that he was robbed by use of a firearm or other dangerous weapon, his admission on cross-examination that he could not positively say it was a gun or dangerous weapon is without probative value." *Id.* at 288-89, 254 S.E.2d at 528. Accordingly, the trial court did not err in failing to instruct the jury on common law robbery, and this assignment of error is overruled.

II.

Defendant argues that the trial court committed plain error by allowing Noreen Lyston, the victim of the attempted robbery at Quality Mart, to identify him in court as the perpetrator. We disagree.

Defendant did not object to the in-court identification at trial; therefore the inclusion of the testimony is reviewed under the plain error standard.

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). "To prevail [under the plain error rule], the defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003) (internal quotation marks and citation omitted).

"The rules relating to the admissibility of in-court identification testimony are well-settled. Generally, a witness may make an in-court identification of a defendant and any uncertainty in that identification goes to the weight and not the admissibility of the testimony." *State v. Miller*, 69 N.C. App. 392, 396, 317 S.E.2d 84, 87-88 (1984). However, these rules of admissibility are subject to the exception that "[i]dentification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). Outside of the exception for impermissibly suggestive pretrial identification procedures, "[t]he credibility of a witness's identification testimony is a matter for the jury's determination, and only in rare instances will credibility be a matter for the court's determination." *State v. Green*, 296 N.C. 183, 188, 250 S.E.2d 197, 201 (1978) (internal citations omitted). Such rare circumstances exist "where the only evidence identifying the defendant as the perpetrator of the

offense is inherently incredible." *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967).

Defendant argues that the testimony of victim Noreen Lyston was insufficiently reliable to be presented to the jury, and as such, its admission constitutes plain error. In an attempt to establish that Ms. Lyston's testimony was unreliable, Defendant asks this Court to consider the factors recognized by both North Carolina and federal courts as determinative of reliability. *See Neil v. Biggers*, 409 U.S. 188, 199, 34 L. Ed. 2d 401, 411 (1972); *State v. Turner*, 305 N.C. 356, 365, 289 S.E.2d 368, 373 (1982). Defendant's reliance on these factors is misguided. The analysis of a witness's identification under these factors was "intended to apply to those cases where there has been a showing that a pretrial identification procedure . . . is in some manner impermissibly suggestive." *Green*, 296 N.C. at 187, 250 S.E.2d at 200. Where there is such a showing, the factors are used to determine "whether the witness's identification of the defendant at trial will be reliable and of an origin independent of the suggestive pretrial procedure." *Id.* However, in cases such as the instant case, where "no contention was made that pre-trial procedures were unlawfully conducted or tainted the in-court identification, findings of fact and conclusions of law regarding the independence of the identification were not required." *State v. Paige*, 316 N.C. 630, 653, 343 S.E.2d 848, 862 (1986). Thus, the reliability of the witness's in-court identification will remain a question for the jury absent a showing that the identification was inherently

incredible. "[T]he test to be employed to determine whether the identification evidence is inherently incredible is whether 'there is a reasonable possibility of observation sufficient to permit subsequent identification.'" *Turner*, 305 N.C. at 363, 289 S.E.2d at 372 (quoting *Miller*, 270 N.C. at 732, 154 S.E.2d at 906).

Here, Ms. Lyston testified that, in her estimation, Defendant was in the store for approximately one minute, and that her conversation with him lasted somewhere between fifteen to thirty seconds. While Defendant suggests this was not enough time for her to subsequently make an accurate identification, our Supreme Court has held that where a witness "observed defendant for only a few to sixty seconds, this limited opportunity for observation goes to the weight the jury might place upon [his] identification rather than its admissibility." *State v. Parker*, 350 N.C. 411, 433, 516 S.E.2d 106, 121 (1999) (internal quotation marks and citation omitted). Thus, the minute that Defendant was in the store was enough time to establish a reasonable possibility of observation sufficient to permit Ms. Lyston to identify him in court. Moreover, Ms. Lyston testified that her conversation with Defendant took place while she was behind the counter and he was in front of it. There is no indication that Defendant was more than a few feet away from Ms. Lyston at the time or that he wore a mask or other face covering. Ms. Lyston's ability to observe Defendant from this short distance further establishes that she had a reasonable opportunity to observe Defendant sufficiently to render her in-court identification admissible. The instant case is easily

distinguishable from a case like *Miller*, where our Supreme Court held that a witness's identification was inherently incredible because the witness was never closer than 286 feet to the man he identified as the perpetrator. *Miller*, 270 N.C. at 732, 154 S.E.2d at 905.

Defendant had every opportunity to cross-examine the witness to establish the length of time for which she was able to observe Defendant and the fact that she may have spent a portion of that time focusing on the gun he held instead of on his face. Defendant was likewise able to elicit testimony from Ms. Lyston indicating that when shown a photo array the day after the robbery, she was unable to positively identify Defendant as the perpetrator, as she selected two pictures as possible suspects. The jury was shown the surveillance video of the attempted robbery and was able to compare Ms. Lyston's description of the perpetrator with the video image. Thus, we conclude that the credibility of Ms. Lyston's testimony was properly left to the purview of the jury.

Defendant has failed to establish the trial court erred by allowing Ms. Lyston's in-court identification of Defendant as the perpetrator. Being that there was no showing of error, we need not reach the issue of whether the jury would have reached a different result absent this in-court identification. The trial court did not commit plain error by admitting this in-court identification. Accordingly, this assignment of error is overruled.

No Error.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).