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NO. COA10-55

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v.

Granville County
No. 07CRS53394

JUSTIN T. HOBGOOD

Appeal by Defendant from judgment entered 11 March 2009 by Judge Michael R. Morgan in Granville County Superior Court. Heard in the Court of Appeals 10 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

Dickerson Law Firm, P.A., by Donald R. Dickerson and Russell J. Hollers, III, for Defendant.

BEASLEY, Judge.

On appeal, Defendant argues that the trial court erred by failing to give the jury an instruction on common law robbery as it is a lesser included offense of robbery with a dangerous weapon. We agree and order a new trial.

On 25 October 2007, Defendant, Justin Tyree Hobgood, walked into Providence Grocery with the intention of committing a robbery to repay a debt that he owed his drug dealer. Defendant entered the store, walked over to a cashier, and demanded money while brandishing a firearm in his left hand. The cashier opened the

register and gave Defendant approximately \$120 in cash. Thereafter, Defendant fled to a friend's house, where he watched television for several hours and took some Percocet. Sometime later, after taking the Percocet and "feeling bad" about the robbery, Defendant decided to return to the store and apologize for his earlier actions. Surprisingly, Defendant's show of remorse was met with hostility and he was chased from the store by a knife-wielding employee. After Defendant fled in his car, he was stopped and arrested by law enforcement officials patrolling the area. During a search of Defendant's vehicle, officers recovered a "black beretta handgun" from inside.

On 11 February 2008, Defendant was indicted with the offense of robbery with a dangerous weapon. Following a trial, Defendant was found guilty of the offense on 11 March 2009. As a result of his conviction, Defendant received a sentence for a minimum of 45 and a maximum of 63 months of confinement. On 2 October 2009, Defendant filed a "Petition for Writ of Certiorari," requesting that this Court review his earlier conviction. Defendant's petition was granted on 19 October 2009.

In his sole argument on appeal, Defendant contends that the trial court erred by denying his request that jurors receive an instruction on the lesser included offense of common law robbery. We agree.

As a preliminary matter, the State first argues that Defendant failed to adequately preserve his argument for appellate review

because Defendant's trial counsel failed to specifically detail his reasoning for raising objection to the trial court's ruling denying Defendant's request to instruct the jury on the lesser included offense of common law robbery. "When any evidence presented at trial would permit the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding that lesser included offense." *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986) (emphasis added). A defendant's right to receive a jury instruction on a lesser included offense is waived "when there was no specific prayer for such instructions or objection to the instructions given[.]" *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993) (citations omitted). Because Defendant's counsel requested an instruction on the lesser included offense of common law robbery, the issue is properly preserved for review.

When considering whether to submit to the jury a lesser included offense, the trial court must determine whether (1) "the lesser offense is, as a matter of law, an included offense for the crime for which the defendant is indicted" and (2) "there is evidence in the case which will support a conviction of the lesser included offense."

State v. Smith, 186 N.C. App. 57, 65, 650 S.E.2d 29, 35 (2007) (quoting *State v. Drew*, 162 N.C. App. 682, 685, 592 S.E.2d 27, 29 (2004)). However, the trial court is not required to give an instruction on a lesser included offense if "the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included

offense[.]” *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). Robbery with a dangerous weapon is defined by our legislature and occurs when:

[a]ny 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, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night[.]

N.C. Gen. Stat. § 14-87(a) (2009).

In contrast, the offense of common law robbery is defined as “the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.” *State v. Harris*, 360 N.C. 145, 154, 622 S.E.2d 615, 620 (2005) (quoting *State v. Stewart*, 255 N.C. 571, 572, 122 S.E.2d 355, 356 (1961)). Comparing the two offenses, “[t]he 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,” whereas it is not an essential element for the offense of common law robbery. *Peacock*, 313 N.C. at 562, 330 S.E.2d at 195. Accordingly, our Court has held that “[c]ommon law robbery is a lesser included offense of armed robbery.” *State v. Curtis*, 18 N.C. App. 116, 122, 196 S.E.2d 278, 282 (1973).

Here, there is evidence in the record that could support a conviction of common law robbery; therefore, the trial court’s failure to provide a jury instruction on the lesser included

offense was erroneous. "An object incapable of endangering or threatening life cannot be considered a dangerous weapon." *State v. Frazier*, 150 N.C. App. 416, 419, 562 S.E.2d 910, 913 (2002) (citation omitted). To qualify as a dangerous weapon under the armed robbery statutes, there must be evidence "to support a jury finding that a person's life was in fact endangered or threatened.'" *Id.* (quoting *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982)). When a person commits a robbery while brandishing a firearm, there is a presumption that the firearm was a "dangerous weapon," absent evidence to the contrary. *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). However, when a defendant in an armed robbery case presents evidence that the firearm used was not loaded, the lesser included offense of common law robbery must be submitted to the jury. *State v. Joyner*, 67 N.C. App. 134, 136, 312 S.E.2d 681, 682 (1984), *aff'd*, 312 N.C. 779, 324 S.E.2d 841 (1985).

In *Frazier*, our Court addressed a set of factual circumstances similar to those here. In that case, the defendant was convicted of robbing a convenience store while threatening the clerk with a firearm. *Frazier*, 150 N.C. App. at 417, 562 S.E.2d at 912. The defendant appealed his conviction, arguing that because the gun was not loaded, jurors should have received an instruction as to the lesser included offense of common law robbery. *Id.* at 418, 562 S.E.2d at 912. At his trial, the defendant testified that he unloaded the weapon before entering the convenience store. *Id.* at 420, 562 S.E.2d at 913. Moreover, the weapon was not loaded when

seized by law enforcement officials several days after the robbery. *Id.* In light of the evidence presented at trial, our Court concluded that "because there was evidence from which the jury could find that the firearm was inoperable and thus incapable of threatening or endangering the life of the victim, the jury should have been instructed on the offense of common law robbery[.]" *Id.* at 420, 562 S.E.2d at 914.

In this case, Defendant presented evidence at trial that the firearm used in the commission of the robbery was unloaded, thereby warranting an instruction on the offense of common law robbery. At trial, Defendant explained how he obtained the gun used in the robbery from a cabinet in his brother's room and removed the gun's ammunition before leaving to commit the robbery. Additionally, officers testified at trial that they discovered a "black baretta handgun" in Defendant's vehicle. The officers at the scene failed to determine whether the firearm was loaded after it was recovered. However, the custodian of evidence explained how he obtained the gun from the officers at the scene of Defendant's arrest and that the gun was not loaded when he checked it.

Based on the testimony presented at trial, there was sufficient evidence to rebut the presumption that the firearm used in the robbery was loaded. Therefore, jurors should have received an instruction as to the offense of common law robbery. In its brief, the State argues that because the handgun could have been used as a bludgeoning instrument, it was still a dangerous weapon. While arguably an unloaded gun could be considered a dangerous

weapon, there is still evidence in the record which could support the lesser included offense of common law robbery; therefore, an instruction on the lesser included offense was required.

As in *Frazier*, we vacate Defendant's conviction for armed robbery and remand his case to the trial court for a new trial. 150 N.C. App. at 420, 562 S.E.2d at 914.

New Trial.

Judges GEER and JACKSON concur.

Report per Rule 30(e).