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NO. COA11-216
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v. Alamance County
Nos. 08 CRS 59456
DERRICK EUGENE SMITH 10 CRS 4776

Appeal by defendant from judgment entered 2 September 2010 by Judge James E. Hardin Jr. in Alamance County Superior Court. Heard in the Court of Appeals 19 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for the State.

Guy J. Loranger, for defendant-appellant.

THIGPEN, Judge.

Derrick Eugene Smith ("defendant") appeals from judgment entered upon his convictions of common law robbery and habitual felon status. He argues on appeal that (1) the trial court erred in denying his motion to dismiss the robbery charge for lack of sufficient evidence, and (2) he received ineffective assistance of counsel for his attorney's failure to object to

the prosecutor's statements at closing regarding the credibility of witnesses. We find no error.

I. Facts

The State's evidence tends to show that in 2007, defendant hired Michael Albright to restore a vehicle for him. The work took approximately a year and a half to complete and the total amount charged to defendant was $13,691. Defendant made several payments over the course of the year and a half, each time paying in cash. He still owed $3,691 as of December 2008.

On 18 December 2008, Mr. Albright called defendant and asked him to pay the remainder of his bill and pick up the finished car or else Mr. Albright would start charging $50.00 per day for storing the car in his garage. Mr. Albright recalled defendant being angry and "hateful" on the phone. He told defendant if he brought three thousand dollars, about $700 less than was owed, that would settle the bill.

Defendant arrived later that day with his father and brother, which made Mr. Albright feel uneasy and threatened. Defendant and Mr. Albright went into Mr. Albright's office to settle the bill. Defendant handed money to Mr. Albright, who started counting the money. Defendant said, "You ain't got to count my money. It's always right." Defendant reached down,

picked up a wad of the money and put it in his pocket. Mr. Albright came from behind his desk and dead-bolted the door. The two men struggled, and defendant threw Mr. Albright across the desk and against a filing cabinet and a refrigerator. After a few minutes of the altercation, defendant got the door open, jumped in the back of his brother's truck, and they drove off in a hurry. While defendant and Mr. Albright were fighting in the office, defendant's father got in the restored car and drove away, despite attempts by Mr. Albright's employee to stop him.

Several witnesses provided alibi evidence on defendant's behalf. Further, two witnesses testified seeing defendant's restored car at defendant's home between 5 and 18 December 2008, prior to the incident in question. The State presented several witnesses in rebuttal.

At the close of the State's case-in-chief and again at the close of all the evidence, defendant moved to dismiss the robbery charge. The trial court denied the motions. The jury returned a verdict of guilty of common law robbery and habitual felon status. The trial court sentenced defendant to an active term of 105 to 135 months imprisonment. From the judgment entered, defendant appeals.

II. Motion to Dismiss

Defendant first argues the trial court erred in denying his motion to dismiss the common law robbery charge where the evidence was insufficient to establish the element of actual or constructive force. Defendant contends the evidence shows that no threatening words or gestures were used to accomplish taking the money from Mr. Albright's desk, and that the taking was completed before any use of force by defendant. He asserts that the struggle did not induce Mr. Albright to relinquish the money. We are not persuaded by these arguments.

In order to survive a motion to dismiss for insufficient evidence in a criminal trial, the State must present substantial evidence of (1) each essential element of the charged offense and (2) defendant's being the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences" that can be drawn from the evidence. *Id.* at 378-79, 526 S.E.2d at 455.

"The elements of common law robbery are the felonious, non-consensual taking of money or personal property from the person

or presence of another by means of violence or fear." *State v. Bell*, 359 N.C. 1, 37, 603 S.E.2d 93, 117 (2004) (internal quotation marks and citation omitted), *cert. denied*, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005). "Robbery has not been committed unless the victim is induced to part with the money or property as a result of such violence or fear." *State v. Parker*, 322 N.C. 559, 566, 369 S.E.2d 596, 600 (1988) (citation omitted). Thus, the actual taking of the money or property is necessarily linked with the element that the act be committed through the use of violence or fear.

We note that the word "force" has been used in place of the words "violence" and "fear" by this Court when discussing the last element of common law robbery. *See, e.g., State v. Robertson*, 138 N.C. App. 506, 508, 531 S.E.2d 490, 492 (2000) (citing *State v. Hedgecoe*, 106 N.C. App. 157, 161, 415 S.E.2d 777, 780 (1992)). In *Robertson*, this Court noted that force may be either actual or constructive. *Id.* (citing *State v. Sawyer*, 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944)). Since this Court stated that actual force means violence and constructive force means placing a victim in fear, force encompasses both violence and fear. *Id.* We therefore clarify that the word "force" may be used interchangeably for both "violence" and "fear" for

purposes of the offense of common law robbery. We note, however, that the State need not prove both violence *and* fear, nor actual *and* constructive force, since evidence of either one of the pairs of concepts will suffice. *State v. Moore*, 279 N.C. 455, 458, 183 S.E.2d 546, 547 (1971).

With regard to the temporal relationship between the taking of money or property and the use of force in common law robbery, this Court has adopted principles applied in armed robbery cases regarding the connection between the use or threatened use of a dangerous weapon and the taking of property. These principles include,

> Robbery with a dangerous weapon requires that the defendant's use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous transaction by time and circumstances as to be inseparable. The exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction. . . . For purposes of robbery, however, the taking is not over until after the thief succeeds in removing the stolen property from the victim's possession. Property is in the legal possession of a person if it is under the protection of that person. Thus, just because a thief has physically taken an item does not mean that its rightful owner no longer has possession of it.

State v. Bellamy, 159 N.C. App. 143, 148-49, 582 S.E.2d 663, 667-68 (internal quotations and citations omitted), *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003). The same reasoning was applied to the elements of common law robbery in *State v. Porter*, 198 N.C. App. 183, 679 S.E.2d 167 (2009). In *Porter*, this Court cited approvingly to several armed robbery cases, including *Bellamy*, in determining that a defendant's taking of clothing from a store and subsequent punching of a store manager in the store parking lot constituted a continuous transaction. *Id.* at 186-88, 679 S.E.2d at 170-71. Thus, with respect to common law robbery, the evidence is sufficient to prove the elements of force and taking if it shows that both are "'so joined in time and circumstances as to be inseparable.'" *Id.* at 186, 679 S.E.2d at 170 (quoting *State v. Hope*, 317 N.C. 302, 305-06, 345 S.E.2d 361, 363-64 (1986)).

Here, the defendant's use of force against Mr. Albright was concomitant with the taking of the money because both actions were part of one continuous transaction. Defendant took the cash and as he attempted to leave the office, he was confronted by Mr. Albright. A struggle ensued during which defendant threw Mr. Albright across the room and into furniture. The taking was not completed until defendant fought with Mr. Albright and made

his escape from the office. Without the assault, defendant would not have been able to leave the office with the money. Thus, the taking of the money and the force used against Mr. Albright were part of a continuous transaction, and the trial court did not err in denying defendant's motion to dismiss for lack of sufficient evidence of each element of the offense of common law robbery.

III. Ineffective Assistance of Counsel

Next, defendant contends he received ineffective assistance of counsel for his counsel's failure to object to comments made by the prosecutor during closing arguments regarding the credibility of witnesses. The passage referred to by defendant reads:

> Now, there's individuals that testified for the defendant that say they saw the car on 12/15. Unfortunately, folks, in this case, this is a case where no matter how you cut it, there are several people who got on that stand and lied. Somebody lied in this case. The car was picked up on December 5th or it was picked up on December 18th, if you can call that picked up, stealing it. Somebody lied. It's up to you to decide who.

Defense counsel did not object to these statements. Defendant argues that the prosecutor improperly injected his opinion that the witnesses were lying, and counsel's failure to object to the comments deprived defendant of a ruling from the trial court and

an opportunity to raise the issue on appeal if the ruling did not address defendant's concerns. Further, he contends the statements prejudiced the defense by misleading the jury and tainted the result of the trial. We do not agree with these contentions.

To prevail on a claim of ineffective assistance of counsel, a defendant must make two showings:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted) (emphasis in original).

For the first prong, we must determine whether defense counsel was deficient for failing to object to the prosecutor's statements, necessitating an analysis of whether the statements were improper. A lawyer may not assert his or her opinion that a witness is lying in his argument to the jury. *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967). However, "a lawyer may argue to the jury that they should not believe a

witness." *State v. Davis*, 291 N.C. 1, 12, 229 S.E.2d 285, 293 (1976).

Taken in context, the prosecutor in this case pointed out inconsistencies in the evidence, which led to the obvious conclusion that not all of the witnesses were telling the truth. The prosecutor did not single out a particular witness as being a liar, or give an opinion that any witness was lying. He specifically left the issue up to the jury to decide who was telling the truth. Where an argument asserts that inconsistent testimony means that at least one witness is not telling the truth, the argument is not improper. *State v. Avery*, 302 N.C. 517, 528, 276 S.E.2d 699, 706 (1981).

Since the statements made by the prosecutor were not improper, the failure of defense counsel to object does not constitute deficient performance. Defendant has failed to meet the first prong of the test for ineffective assistance of counsel, and his arguments on this issue are overruled.

No error.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

Report per Rule 30(e).