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NO. COA13-295
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 10 CRS 220290-93

MOORI EL

Appeal by defendant from judgments entered 13 September 2012 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 14 October 2013.

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

Bryan Gates, for defendant-appellant.

CALABRIA, Judge.

Moori El ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of one count of robbery with a dangerous weapon ("RWDW") and three counts of second-degree kidnapping. We find no error.

At 8:29 p.m. on 21 August 2010, defendant entered the Dollar General store on Rock Quarry Road in Raleigh, North Carolina as employees Tiffany Baker ("Baker"), Gidget Addison

("Addison"), and Kimberly Seagroves (collectively, "the employees") were preparing to close. Defendant requested a restroom key, and remained in the restroom until closing. At 9:00 p.m., defendant exited the restroom wearing a mask and went to the store office, where Baker was counting money. Baker heard a knock and opened the office door to find defendant pointing a gun at her. Baker locked herself within her office, but after watching the situation unfold on the security monitors, she emerged from the office because she did not want anyone "to get hurt."

After locating all three employees, defendant demanded that Baker unlock the store safe, but Baker told defendant there was no money in the safe. Defendant then moved the employees to the office in the rear of the store at gunpoint, and demanded Baker put money in a bag. While Baker put cash in a deposit bag, defendant unsuccessfully attempted to deactivate the store's surveillance system. He took the bag of cash and Baker's store keys and left. The three employees waited until they heard defendant exit the store before calling law enforcement. The incident was recorded by the store's surveillance system, and store manager Travis Davis later identified defendant as the individual on the surveillance tape.

Defendant was subsequently arrested and charged with one count of RWDW and three counts of second-degree kidnapping. At trial in Wake County Superior Court, defendant requested that the jury be instructed that "actual possession of a firearm is required to constitute the offense of robbery with a firearm[.]" The court declined the request and elected to submit the pattern jury instruction. The jury returned verdicts finding defendant guilty of all offenses. The trial court sentenced defendant to a minimum of 84 months and a maximum of 110 months imprisonment for RWDW and three sentences of a minimum of 30 months and maximum of 45 months for the three counts of second-degree kidnapping. All sentences were ordered to be served consecutively in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

Defendant argues that the trial court erred by denying his request for a special jury instruction, and instead using the pattern jury instructions. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of

extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). "[R]equested instructions need only be given in substance if correct in law and supported by the evidence." *State v. Bivens*, 204 N.C. App. 350, 352, 693 S.E.2d 378, 380 (2010) (citation omitted).

To establish robbery with a dangerous weapon, the State must prove beyond a reasonable doubt that the defendant possessed or used or threatened to use a firearm or other dangerous weapon at the time of the robbery and that the victim's life was in danger or threatened. N.C. Gen. Stat. § 14-87 (2011); *State v. Williams*, 335 N.C. 518, 520, 438 S.E.2d 727, 728 (1994). "Proof of armed robbery requires that the victim reasonably believed that the defendant possessed, or used or threatened to use a firearm in the perpetration of the crime." *State v. Bartley*, 156 N.C. App. 490, 496, 577 S.E.2d 319, 323 (2003) (citation omitted).

In *State v. Jarrett*, 167 N.C. App. 336, 340, 607 S.E.2d 661, 663 (2004), we rejected the defendant's argument that the court erred by instructing the jury that defendant could be found guilty without finding he actually possessed a firearm. There, the trial court instructed the jury that for a conviction

of robbery with a dangerous weapon, the jury had to find that "the defendant had a dangerous weapon in his possession . . . or that it reasonably appeared to the victim that a dangerous weapon was being used, in which case you may infer, but you are not required to infer, that said instrument was what the defendant's conduct represented it to be." *Id.* at 340, 607 S.E.2d at 663.

In the instant case, defendant requested the jury be instructed that "actual possession of a firearm is required to constitute the offense of robbery with a firearm[.]" The trial court instead elected to submit the pattern jury instruction, including an instruction defining "firearm" as well as an instruction on common law robbery. The court specifically charged that in order to find defendant guilty of robbery with a dangerous weapon, the jury had to find, *inter alia*,

Sixth, that the defendant had a firearm in his possession at the time he obtained the property, or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer, but you're not required to, that that said instrument was what the defendant's conduct represented it to be.

Defendant argues that the trial court's omission of the word "actual" from the jury instructions constitutes error, and that the term was necessary to clarify the instruction on RWDW.

However, the language of the statute indicates that while possession of a firearm is one manner by which a defendant could be convicted of RWDW, a conviction could also be sustained by the use *or threatened use* of a firearm. *Jarrett*, 167 N.C. App. at 338, 607 S.E.2d at 662; N.C. Gen. Stat. § 14-87 (2011). An instruction *requiring* "actual" possession of a firearm would be a misstatement of the law. Therefore, the trial court's denial of defendant's requested instruction does not constitute error.

Defendant relies on *State v. Fleming*, 148 N.C. App. 16, 557 S.E.2d 560 (2001) and *State v. Faulkner*, 5 N.C. App. 113, 168 S.E.2d 9 (1969) to argue the instruction should have included the element of actual possession of a firearm. In *Fleming*, the weapon involved was a BB gun and there was no evidence to indicate it constituted a dangerous weapon. 148 N.C. App. at 25-26, 557 S.E.2d at 566. The trial court gave instructions on robbery with a dangerous weapon but did not define "dangerous weapon" and this Court held the instruction constituted plain error. *Id.*

In the instant case, there was some evidence presented that Addison and Baker may have believed the gun was a paintball gun. However, in contrast to *Fleming*, there was also evidence indicating that the instrument was a dangerous weapon.

Furthermore, the trial court instructed the jury as to what constituted a "firearm," thus "it was for the jury to determine the nature of the weapon used." *Id.* (citing *State v. Summey*, 109 N.C. App. 518, 529, 428 S.E.2d 245, 251 (1993) (holding that jury instructions were sufficient when there was conflicting evidence regarding whether the weapons were dangerous and the trial court instructed on common law robbery, armed robbery and the definition of a dangerous weapon)).

In *Faulkner*, this Court found that where there was conflicting testimony from the same witness regarding the nature of the weapon, the defendant was entitled to an instruction on the lesser charge of common law robbery, as "the jury should determine [the] conflict in the State's evidence." 5 N.C. App. at 119, 168 S.E.2d at 13. In the instant case, the trial court instructed the jury on common law robbery and RWDW. If jurors were not convinced that defendant's instrument was a firearm meeting the definition given, they could have found the defendant guilty of the lesser included offense of common law robbery or not guilty as instructed by the court.

The disputed instruction given by the court in the instant case is correct in law, supported by the evidence, and virtually identical to the court's instruction given in *Jarrett*. Any

conflict in the evidence was to be determined by the jury. We conclude the court correctly instructed the jury in accordance with the law.

No error.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).