NO. COA13-395
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA

v. Cleveland County
No. 08 CRS 55472

TERRANCE TICO TURNER

Appeal by Defendant from judgment entered 18 October 2012 by Judge Robert T. Sumner in Cleveland County Superior Court. Heard in the Court of Appeals 24 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Nancy D. Hardison, for the State.

S. Hannah Demeritt, for Defendant.

DILLON, Judge.

Terrance Tico Turner (Defendant) appeals from a judgment convicting him of robbery with a dangerous weapon. We find no error.

The evidence of record is conflicting but tends to show the following: On 10 September 2008, Defendant met Earl Coggins in Shelby, for the purpose of either viewing a truck that Mr.

Coggins was interested in purchasing, or of exchanging cash for drugs.

According to Mr. Coggins, who worked as a cab driver, he received a check from Cone Mill — a closed factory for whom he had previously worked – for $1,556.40. Mr. Coggins said he had driven Defendant in his cab on the Friday night prior to 10 September 2008, and he had asked Defendant if he knew anyone who had a pick-up truck for sale. Defendant said his uncle had a truck for sale and he would take him to see the truck on Monday. Defendant said his uncle was selling the truck for $800.00.

On the day of the robbery, Defendant picked up Mr. Coggins at 9:00 A.M. to take him to look at his uncle's truck. Defendant drove Mr. Coggins to a Cash Masters, where Mr. Coggins cashed his $1,556.40 check. Mr. Coggins took $800.00 out of the envelope and held it in his hand. Instead of driving Mr. Coggins to Shoal Creek where the truck was supposedly located, Defendant drove Mr. Coggins to a church, where Defendant said "he was waiting on a crack dealer[,] [and] [h]e was going to get $800 worth of crack." They waited for twenty minutes, but no one showed up. Then, Defendant got out of the car, opened the trunk, then walked to the passenger side of the vehicle, pointing a gun at Mr. Coggins. Defendant said, "[g]et out or

I'll burn you[,]" and "[g]ive me your money." Mr. Coggins gave Defendant the $800.00 that was in his hand, and Defendant also took money from Mr. Coggins' pocket and change purse.

Mr. Coggins called the police. At trial, he said he may have mistakenly told the police that Defendant had stolen his check instead of cash.

Defendant testified that he saw Mr. Coggins on the date of the alleged robbery, but there were no plans to purchase a truck. Rather, Defendant said Mr. Coggins arranged to purchase 28 grams of crack cocaine, which he paid for with $1,200.00 cash. Later, Mr. Coggins complained about the potency of the crack cocaine and wanted his money back.

Defendant was indicted on the charge of robbery with a dangerous weapon on 10 September 2008. The indictment alleged that Defendant stole "one (1) check made payable to Earl Coggins for an amount of $1,611.00 and United States currency of the value of $1,618.00 from . . . Earl C. Coggins . . . with the threatened use of . . . a handgun." After Defendant's trial, on 18 October 2012, the jury returned a verdict of guilty of robbery with a dangerous weapon. The trial court entered a judgment consistent with the jury's verdict, sentencing

Defendant to 130 to 165 months imprisonment. From this judgment, Defendant appeals.

I: Fatal Variance and Motion to Dismiss

In Defendant's first argument, he contends the trial court erred by denying his motion to dismiss because there was a fatal variance between the charged crime and the proof presented at trial. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d. 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"[A]n indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged."

State v. Hunt, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (citation and quotation marks omitted). An indictment is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all essential elements of the crime. *See State v. Lowe,* 295 N.C. 596, 603-04, 247 S.E.2d 878, 883 (1978).

"[T]he evidence in a criminal case must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, there is a fatal variance between the allegations and the proof requiring dismissal." *State v. Seelig*, __ N.C. App. __, __, 738 S.E.2d 427, 438, *disc. review denied*, __ N.C. __, 743 S.E.2d 182 (2013). In order to be fatal, a variance must relate to "an essential element of the offense." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997). Alternately, "[w]hen an averment in an indictment is not necessary in charging the offense, it will be deemed to be surplusage." *Id.* (citation and quotation marks omitted); *see also State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (stating that "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage") (internal citation omitted).

"[T]he essential elements of robbery with a dangerous weapon are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." *State v. Gwynn*, 362 N.C. 334, 337, 661 S.E.2d 706, 707-08 (2008) (citing N.C. Gen. Stat. § 14-87(a)) (citations and quotation marks omitted).

With regard to the offense of robbery with a dangerous weapon, our Supreme Court has stated that "[t]he gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *State v. Thompson*, 359 N.C. 77, 107, 604 S.E.2d 850, 872 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005) (citation and quotation marks omitted). "An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property." *Id.* (citations and quotation marks omitted).

"It is well-established that [i]n an indictment for armed robbery, the kind and value of the property taken is not

material." *State v. McCallum*, 187 N.C. App. 628, 635, 653 S.E.2d 915, 920 (2007) (citation and quotation marks omitted); *see also State v. Oliver*, 334 N.C. 513, 526, 434 S.E.2d 202, 208 (1993) (stating that "[w]e have previously held that an indictment describing the property as 'U.S. currency' was sufficient to support a conviction of attempted armed robbery" because "[m]oney is recognized by law as property which may be the subject of larceny, and hence of robbery") (internal citation and quotation marks omitted); *see also State v. Council*, 6 N.C. App. 397, 400-01, 169 S.E.2d 921, 923 (1969) (stating the following: "the kind and value of the property taken is not material – the gist of the offense is not the taking but a taking by force or putting in fear"; "it is not necessary or material to describe accurately or prove the particular identity or value of the property, further than to show that it was the property of the person assaulted or in his care, and had a value"; "[a]lthough value need not be averred by a specific allegation, it must appear from the indictment that the article taken had some value") (internal citations omitted).

In this case, the indictment alleged that Defendant stole "one (1) check made payable to Earl Coggins for an amount of $1,611.00 and United States currency of the value of $1,618.00

from . . . Earl C. Coggins . . . with the threatened use of . . . a handgun." According to *McCallum*, *Oliver*, and *Council*, the foregoing indictment would have been sufficient if it had merely alleged that Defendant had taken United States currency. Because the indictment did allege Defendant took United States currency, and because the evidence tended to show Defendant took United States currency, we do not believe there was a fatal variance between the evidence and the proof in this case. The allegations regarding the check and the value of the property taken were surplusage. *Westbrooks*, 345 N.C. at 57, 478 S.E.2d at 492.

II: Jury Instruction: Lesser Included Offense

In Defendant's second and final argument on appeal, he contends the trial court committed plain error by failing to instruct the jury on the lesser included offense of common law robbery. We disagree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citation

omitted). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted).

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4) (2012); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted). "Under the plain error rule, 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. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

In this case, Defendant contends that the trial court committed plain error by failing to instruct the jury on the lesser included offense of common law robbery. Defendant asserts that, although Mr. Coggins testified that a gun was used during the robbery, the gun was never introduced into evidence. Moreover, Defendant states that no evidence was introduced regarding whether Defendant owned a gun, and opines that Mr. Coggin's description of the gun was "vague and equivocal."

"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." *State v. Cummings*, 346 N.C. 291, 325, 488 S.E.2d 550, 570 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998) (citation and quotation marks omitted). "The use or threatened use of a dangerous weapon is not an essential element of common law robbery." *Id.*

"It is well-settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Porter*, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009) (citation and quotation marks omitted). "But when the State's

evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, the submission of a lesser included offense is not required." *Id.* (citation and quotation marks omitted). "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *Id.* (citation and quotation marks omitted).

In this case, the State presented evidence through the testimony of Mr. Coggins that Defendant pointed a gun at him when Defendant took his money. Defendant did not present any evidence that Defendant did not have a gun during the robbery. Rather, Defendant's testimony pertained to a transaction of drugs between Defendant and Mr. Coggins. We do not believe Defendant's testimony was "evidence from which the jury could find that defendant committed the lesser included offense" of common law robbery. *Porter*, 198 N.C. App. at 189, 679 S.E.2d at 171. Moreover, we believe the State's evidence was positive as to each element of the crime charged – robbery with a dangerous weapon. *Id.* For these reasons, we conclude the trial court did not commit plain error by failing to instruct the jury on the lesser included offense of common law robbery. *Compare State v.*

Williamson, __ N.C. App. __, __, 727 S.E.2d 358, 359-61 (2012) (holding that since evidence tended to show that the co-defendant "struck [the victim] in the head with a black semiautomatic pistol[,]" "cocked the gun in [the victim's] face and announced, 'this is a robbery[,]'" and "[s]ince [the] defendant presented no evidence at trial to rebut the presumption that the firearm used in the robbery was functioning properly, he was not entitled to either an instruction on common law robbery or dismissal of the two counts of robbery with a dangerous weapon").

For the foregoing reasons, we conclude Defendant had a fair trial, free from error.

NO ERROR.

Judge McGEE and Judge McCULLOUGH concur.

Report per Rule 30(e).