

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-45
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 11 CRS 252097

TERENCE J. MALACHI

Appeal by defendant from judgment entered 17 August 2012 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Daniel F. Read for defendant-appellant.

DILLON, Judge.

Terence J. Malachi (Defendant) appeals from the judgment entered after a jury found him guilty of attempted common law robbery. Defendant contends that the trial court erred by refusing to instruct the jury on the lesser-included offense of misdemeanor larceny. We find no error.

On 22 November 2011, Defendant put two beers in his pockets and attempted to leave a convenience store without paying for

them. One of the store employees locked the door through which Defendant was attempting to exit and told him he needed to return the items in his pockets or pay for them. When Defendant attempted to exit through another door, the employee blocked his path. At that point, Defendant pushed the employee and threw punches at him. Another employee intervened, but Defendant fled the store and was arrested a short time later. At trial, the jury found Defendant guilty of attempted common law robbery. The trial court sentenced Defendant to 20 to 24 months imprisonment. Defendant appeals.

On appeal, Defendant contends the trial court erred by refusing to instruct the jury on lesser-included offenses, including larceny. Defendant argues the evidence supports a finding that the violence was part of his effort to escape rather than to take property. We disagree.

"Common law robbery is 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. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). The element of violence must precede or be concomitant with the taking in order for the crime of robbery to be committed. The taking is not complete until the thief

removes the property from the victim's possession. *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986).

"Property is in the legal possession of a person if it is under the protection of that person." *State v. Bellamy*, 159 N.C. App. 143, 149, 582 S.E.2d 663, 668, *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003) (citation omitted). "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. Barnes*, 125 N.C. App. 75, 79, 479 S.E.2d 236, 238, *aff'd per curiam*, 347 N.C. 350, 492 S.E.2d 355 (1997). As a result, this Court has held that a robbery occurs when the taking of property and violent acts are part of a "continuous transaction," even if the violence occurs after the defendant has physically taken the property. *State v. Porter*, 198 N.C. App. 183, 188, 679 S.E.2d 167, 170 (2009).

"The law 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. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984). "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." *State v. Hurley*, 180 N.C. App. 680, 683, 637 S.E.2d 919, 922 (2006) (citation omitted), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 394 (2007).

In this case, the State presented uncontroverted evidence that Defendant's violent acts and his taking of property constituted a continuous transaction. Defendant pushed and punched an employee as he attempted to take items from the store. Although Defendant already had the items in his pockets at the time of his violent acts, he had not removed the items from the victim's care and completed a robbery. *Bellamy*, 159 N.C. App. at 149, 582 S.E.2d at 668. Therefore, because Defendant's acts of violence in this case occurred in the course of a continuous transaction involving his attempt to take items from the store, we find no error in the jury instructions.

NO ERROR.

Judges GEER and ERVIN concur.

Report per Rule 30(e).