NO. COA14-354
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Durham County
No. 12 CRS 062652

TRAVIS MARKEE LENNON

Appeal by defendant from judgment entered 13 September 2013 by Judge William Pittman in Durham County Superior Court. Heard in the Court of Appeals 10 September 2014.

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

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

HUNTER, Robert C., Judge.

Travis Markee Lennon ("defendant") appeals from judgment entered after a jury found him guilty of armed robbery, second degree kidnapping, and felony breaking or entering. On appeal, defendant argues that the trial court erred by failing to instruct the jury on the lesser included offenses of larceny from the person and misdemeanor larceny.

After careful review, we hold that the trial court reversibly erred. Accordingly, defendant is entitled to a new trial on the charge of armed robbery.

Background

The evidence presented by the State at trial tended to show the following: On 16 December 2012, Jessica Porter ("Ms. Porter") pulled her vehicle into the parking lot of her apartment complex and was approached by defendant. As he walked toward her, he pulled out a black handgun from his pocket, showed it to her, and told her to "stay calm." Defendant made Ms. Porter hand him her iPhone and wallet, from which he took a debit card and a Harris Teeter card. He told Ms. Porter that he wanted cash, but she said she had none. He then forced her to take him into her apartment to retrieve the charger for the iPhone.

Once inside the apartment, defendant made Ms. Porter look for valuables in her jewelry box in order to find anything that might be worth taking. Defendant took an MP3 player and the charger for the iPhone, then asked Ms. Porter for the PIN number to her debit card, which she wrote onto a post-it note. Defendant then made Ms. Porter escort him out of the apartment. He told her to sit in her vehicle until she saw him leave. As

he was driving away, Ms. Porter tried to write down the license plate number of defendant's vehicle. She then ran to a neighbor's house and called 911.

A few minutes later, Officer Justin Harris ("Officer Harris") of the Durham Police Department arrived at the scene. Ms. Porter gave him the piece of paper with the license plate number and described the events that took place, as well as defendant's appearance. After learning that the iPhone defendant had taken could not turn off, Officer Harris used a GPS-based "find my phone" feature to track its location. The iPhone stopped moving at a nearby apartment complex, to which Officer Harris drove Ms. Porter. Once there, Ms. Porter identified a black Jeep leaving the parking lot, which she claimed was the vehicle defendant was driving. Its license plate number was one digit off from the number written down by Ms. Porter. Another officer stopped the vehicle, but Ms. Porter told Officer Harris that the man driving was not the same one who had robbed her earlier.

Officer Harris drove Ms. Porter back to her apartment, where she called her bank after noticing a number of unauthorized withdrawals from her debit account. Meanwhile, officers interviewed the driver of the black Jeep, who told them

that they could find defendant in apartment A6 of the complex. Officer Harris knocked on the door, which defendant opened, and Officer Harris immediately put him into custody. Officer Harris then walked around the building and found Ms. Porter's iPhone in the bushes underneath the bedroom window of the apartment where defendant had been located. After searching the area, officers also found an iPhone cord, the screen of a broken iPhone, an MP3 player, and a pistol-style BB gun.

Ms. Porter told the police that her debit card had been used in four ATM transactions at a BP gas station. Officer Jonathan Fredrick ("Officer Fredrick") reviewed the security footage taken at the BP. The video showed that a black Jeep pulled in. The driver of the Jeep went into the store, entered a PIN number into the ATM to retrieve cash, and then went to the cash register.

Defendant was charged with robbery with a dangerous weapon, second degree kidnapping, and felony breaking or entering. At trial, defendant took the stand in his own defense and refuted Ms. Porter's characterization of the events on 16 December 2012. Defendant testified that he saw Ms. Porter struggling to carry all of her belongings into her apartment, so he asked if she needed help. She handed him a bag and allowed defendant to help

carry it to her apartment, where she invited him in. Once inside, defendant saw a number of valuable items sitting on a table. He took an iPhone with a white box containing some tools, an MP3 player, and Ms. Porter's car keys. Defendant left the apartment and returned to his car, where he found a debit card and a Harris Teeter card inside the MP3 player case. Defendant claimed that the Harris Teeter card had a note on it with a four-digit PIN number, which he later used in the ATM transactions. Defendant denied using a firearm or forcing Ms. Porter to go from one location to another.

At the close of all evidence, defendant requested that the jury be instructed on larceny from the person and misdemeanor larceny as lesser included offenses of armed robbery, but the trial court refused the request. However, the trial court did instruct the jury on the lesser included offense of common law robbery. The jury found defendant guilty of armed robbery, second degree kidnapping, and felony breaking or entering. Defendant was sentenced to 72 to 99 months of active imprisonment for armed robbery and felony breaking or entering, and 24 to 38 months for kidnapping, which was suspended. Defendant gave notice of appeal in open court.

Discussion

I. Instruction on Lesser-Included Offenses

Defendant's sole argument on appeal is that the trial court erred by failing to instruct the jury on the lesser included offenses of larceny from the person and misdemeanor larceny. We agree.

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 defendant is indicted" and (2) "there is evidence in the case which will support a conviction of the lesser included offense." *State v. Drew*, 162 N.C. App. 682, 685, 592 S.E.2d 27, 29 (2004). If there is "any evidence presented at trial" that would permit the jury to convict the defendant of the lesser included offense, failure to instruct on that offense "constitutes reversible error not cured by a verdict of guilty of the offense charged." *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). "Error in failing to submit the question of a defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been

correctly presented in the charge." *State v. Thacker*, 281 N.C. 447, 456, 189 S.E.2d 145, 151 (1972).

Here, the trial court based its decision to deny defendant's request to instruct on larceny from the person and misdemeanor larceny not on a lack of evidence supporting the instructions, but rather on the mistaken belief that these crimes were not lesser included offenses of armed robbery. However, our appellate courts have made clear that, as a matter of law, both misdemeanor larceny and larceny from the person are lesser included offenses of armed robbery. *See State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988) (holding explicitly that "larceny is a lesser included offense of armed robbery"); *see also State v. Allen*, 47 N.C. App. 482, 484, 267 S.E.2d 514, 515 (1980) ("The lesser included offenses of armed robbery include . . . larceny from the person[.]"). As our Supreme Court has "repeatedly held," *White*, 322 N.C. at 512, 369 S.E.2d at 816:

> in a prosecution for robbery with a firearm, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial.

Id. (quoting *State v. Black*, 286 N.C. 191, 194, 209 S.E.2d 458, 460-61 (1974)). Thus, because it is undisputed that defendant's evidence supported a jury instruction on misdemeanor larceny and larceny from the person, the trial court erred in its failure to instruct on these charges.

However, the State contends that because the jury declined to convict defendant of common law robbery, for which it was instructed, it must have rejected defendant's evidence supporting the charges of misdemeanor larceny and larceny from the person. Thus, the State argues that any error in the trial court's failure to instruct on misdemeanor larceny or larceny from the person was harmless. In support of this contention, the State cites *State v. Lyons*, 340 N.C. 646, 664, 459 S.E.2d 770, 779 (1995), where our Supreme Court held that the trial court's failure to instruct on voluntary manslaughter was harmless error where the jury was instructed on second degree murder and convicted the defendant for first degree murder. In so holding, the Court reasoned that "when a jury does 'not find that defendant was in the grip of sufficient passion to reduce the murder from first-degree to second-degree, then ipso facto it would not have found sufficient passion to find the defendant guilty only of voluntary manslaughter.'" *Id.* at 663-64, 459

S.E.2d at 779 (quoting *State v. Tidwell*, 323 N.C. 668, 675, 374 S.E.2d 577, 581 (1989)).

The State's reliance on *Lyons* and similar cases is misplaced. The jury's rejection of common law robbery in favor of armed robbery is not "ipso facto" a rejection of misdemeanor larceny or larceny from the person. "The difference between common law robbery and robbery with a dangerous weapon is the use of a dangerous weapon in the commission of the robbery." *State v. Flaugher*, 214 N.C. App. 370, 386, 713 S.E.2d 576, 589 (2011). In contrast, the difference between common law robbery and misdemeanor larceny or larceny from the person "is that common law robbery has the additional requirement that the victim be put in fear by the perpetrator." *State v. White*, 142 N.C. App. 201, 204, 542 S.E.2d 265, 267 (2001). Thus, unlike in *Lyons*, the crimes for which defendant requested an instruction had an elemental distinction in addition to the difference between the principal crime and the lesser included offense for which the trial court did instruct the jury. The distinction between first degree murder, second degree murder, and involuntary manslaughter in *Lyons* was the defendant's mental state; thus, the jury implicitly considered the difference between first degree murder and involuntary manslaughter even

though it was not instructed on involuntary manslaughter. *See Lyons*, 340 N.C. at 664, 459 S.E.2d at 779 ("Since the jury rejected second-degree murder, it would also have rejected the lesser offense of voluntary manslaughter."). Here, armed robbery and misdemeanor larceny/larceny from the person are distinguished by two elements: putting the victim in fear and the use of a dangerous weapon. In choosing to convict defendant for armed robbery rather than common law robbery, the jury only considered whether or not defendant used a dangerous weapon in the commission of the crime. The jury was not given the option of convicting defendant of a crime that did not include the element of putting Ms. Porter in fear. Therefore, contrary to the State's argument that rejection of common law robbery is inherently a rejection of larceny, the jury could have rejected both armed and common law robbery and convicted defendant for larceny had it been properly instructed. Here, unlike in *Lyons*, "it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the charge." *Thacker*, 281 N.C. at 456, 189 S.E.2d at 151.

Thus, the trial court's error in failing to instruct on the charges of misdemeanor larceny and larceny from the person was

not harmless. Accordingly, defendant is entitled to a new trial. *See State v. Alston*, 305 N.C. 647, 651, 290 S.E.2d 614, 616 (1982).

Conclusion

After careful review, we hold that the trial court reversibly erred by failing to instruct on the lesser included offenses of misdemeanor larceny and larceny from the person. Therefore, defendant is entitled to a new trial on the charge of robbery with a dangerous weapon. Because the trial court consolidated the conviction for armed robbery with the conviction for felony breaking or entering for judgment, we vacate that judgment and remand for resentencing.

JUDGMENT FOR OFFENSES 51 AND 53 VACATED; REMANDED.

NEW TRIAL ON ROBBERY WITH A DANGEROUS WEAPON.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).