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NO. COA14-581
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Buncombe County
No. 13CRS050747-48

MICHAEL DEVON GASH

Appeal by Defendant from judgments entered 21 November 2013 by Judge Bill Coward in Buncombe County Superior Court. Heard in the Court of Appeals 7 October 2014.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Larissa S. Williamson, for the State.*

*Kathryn L. VandenBerg, for the Defendant.*

DILLON, Judge.

Michael Devon Gash ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon.

## I. Background

The evidence tended to show the following: Four friends, Angel Gonzalez, Alex Garren, Kelly Childress, and Leilani

Anderson hatched a plan to stage a heist at a convenience store in Asheville. Ms. Anderson worked at the store and knew the combination to the store's safe. The plan was for Ms. Anderson to report for work one morning, place a phone call to Mr. Gonzalez once the alarm was deactivated, whereupon Mr. Gonzalez would then direct Defendant to hold up the store.

Days later the four individuals drove together and dropped Defendant off at a church near the store and then dropped Ms. Anderson off at the store. When Ms. Anderson arrived at the store, she discovered that a co-worker had already reported for work and had deactivated the store alarm. After Ms. Anderson arrived, the co-worker walked to the store's back room to flip the breakers and turn on the lights.

As the co-worker returned from the back room, she observed Defendant enter the store. Defendant aimed a gun at her, cocked it, and demanded money "in a violent tone." The co-worker began to comply, grabbing a bag to put the money in and filling it first with rolled change, in hopes that it would break as Defendant attempted to escape, and then with money from the cash register. When Defendant demanded the contents of the safe, the co-worker replied that she did not know the combination, whereupon Ms. Anderson, who had been standing next to the safe,

turned around and opened it. Once Ms. Anderson and the co-worker had finished filling the bag with money, Defendant took it and fled.

As he was running away from the store, the bag of money broke, and Defendant dropped the gun. The gun went off. Defendant scooped up the money and the gun and ran for the car, jumping in and speeding off.

When he was eventually apprehended by law enforcement, Defendant voluntarily confessed to certain aspects of his involvement in the robbery, but denied planning it. During his police interview, Defendant told officers that Mr. Gonzalez and Mr. Garren had recruited him; that Mr. Gonzalez gave him the gun used in the robbery; and that the gun was not supposed to be loaded. Ms. Anderson had also told officers that the gun was not supposed to be loaded. She testified that the gun belonged to Mr. Gonzalez.

A Buncombe County grand jury indicted Defendant with robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The matter came on for a jury trial in superior court. The jury found Defendant guilty of the charges. The trial court entered a judgment sentencing Defendant to prison for forty to sixty months on the robbery with a dangerous

weapon conviction. The trial court entered a separate judgment sentencing Defendant to prison for thirty-six months on the conspiracy to commit robbery with a dangerous weapon conviction; however, the trial court suspended this second sentence and placed Defendant on supervised probation for a period of thirty-six months to commence upon his release from prison for the first conviction. Defendant entered written notice of appeal.

## II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

### A. Common Law Robbery Instruction

Defendant first argues that the trial court erred in refusing to instruct the jury on common law robbery where some evidence existed suggesting that he believed *at the time he committed the robbery* that the gun he was using was not loaded. Specifically, he contends that his and Ms. Anderson's statements to police that the gun was not *supposed* to be loaded and that Mr. Gonzalez had emptied the magazine prior to the robbery,[1] if credited by the jury, would allow the jury to find that he committed common law robbery, not robbery with a dangerous

[1] This evidence was introduced through the testimony of the police detective who responded to the report of the robbery and led the investigation resulting in Defendant's arrest. Defendant did not take the stand in his own defense.

weapon, and he therefore was entitled to an instruction on the lesser offense. We disagree.

Robbery with a dangerous weapon is codified in N.C. Gen. Stat. § 14-87 (2013), which makes it a felony to take or attempt to take personal property belonging to another through the use or threatened use of a firearm or other dangerous weapon. Conviction of the crime requires proof of "(1) an unlawful taking or an attempt to take the personal property from the person or presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of another is either endangered or threatened." *State v. Gainey*, 355 N.C. 73, 89, 558 S.E.2d 463, 474 (2002), *cert. denied sub nom*, *Gainey v. North Carolina*, 537 U.S. 896, 123 S. Ct. 182, 154 L. Ed.2d 165 (2002). We have previously observed that "[e]xhibition of a pistol while demanding money conveys the message loud and clear that the victim's life is being threatened." *State v. Green*, 2 N.C. App. 170, 173, 162 S.E.2d 641, 643 (1968).

Where the "evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense." *State*

*v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). In *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986), our Supreme Court articulated three rules that govern whether evidence is sufficiently "clear and positive" to establish that an instrument used in a robbery qualifies as a firearm or other dangerous weapon within the meaning of N.C. Gen. Stat. § 14-87. *Id.* at 124-25, 343 S.E.2d at 897. The first of those rules is that use during a robbery of what "appear[s] *to the victim* to be a firearm or other dangerous weapon . . . [creates] a mandatory presumption that the weapon was as it appeared to the victim to be." *Id.* at 124, 343 S.E.2d at 897 (emphasis added). The second and third rules can be viewed as exceptions to the first, which apply (1) where "there is *some* evidence that the implement used was *not* a firearm *or* other dangerous weapon," or (2) where "*all* the evidence shows the instrument could *not* have been a firearm *or* other dangerous weapon[.]" *Id.* (emphasis added). If the first exception applies, the mandatory presumption transforms into a permissive inference, creating a jury question and entitling the defendant to an instruction on the lesser-included offense of common law robbery. *See State v. Frazier*, 150 N.C. App. 416, 419, 562 S.E.2d 910, 913 (2002). If the second exception applies, a jury instruction on robbery with a

dangerous weapon is inappropriate. *Allen*, 317 N.C. at 124-25, 343 S.E.2d at 897.

Defendant argues that the first exception applies in the present case. However, the evidence was uncontradicted that the gun Defendant used in the robbery was an operable, loaded firearm. Specifically, the evidence was uncontradicted that the gun was in Defendant's possession throughout the commission of the offense and his subsequent flight and that the gun discharged when Defendant dropped it. We hold that the evidence in the present case was sufficient to create a mandatory presumption that the gun was capable of endangering life at the time of the robbery and therefore qualified as a dangerous weapon as a matter of law.

Defendant and Ms. Anderson's statements that the weapon was not *supposed* to be loaded and that Defendant observed Mr. Gonzalez empty the magazine before giving him the gun may have suggested to the jury that Defendant believed *at the time of the crime* that the gun was not loaded, but this evidence did not contradict the evidence that the gun was, in fact, loaded and operable because it did not "tend[] to show that the life of the victim was not endangered or threatened[.]" *State v. Joyner*, 312 N.C. 779, 783, 324 S.E.2d 841, 844 (1985). The intentions

or beliefs of a defendant about whether a gun used to commit a robbery is loaded and operable do not determine whether it qualifies as a firearm or dangerous weapon within the meaning of N.C. Gen. Stat. § 14-87. *See State v. Harris*, 115 N.C. App. 560, 563, 445 S.E.2d 626, 629 (1994). Instead, "the determinative question is whether . . . a person's *life was in fact endangered or threatened*." *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982) (emphasis added). As our Supreme Court explained over fifty years ago in *State v. Hare*, 243 N.C. 262, 90 S.E.2d 550 (1955), "the purpose and intent of the Legislature in enacting [N.C. Gen. Stat. § 14-87] was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threatened use of any firearm[] or other dangerous weapon, or implement[,] or means[.]" *Id.* at 263-64, 90 S.E.2d at 551 (internal marks omitted). It makes no difference that the perpetrator *knew* at the time of the crime that the weapon used was, in fact, dangerous. Rather, the specific intent requirement of the offense is the intent to steal, not the intent to use a dangerous weapon in doing the stealing. *See State v. Norris*, 264 N.C. 470, 472-73, 141 S.E.2d 869, 871-72 (1965).

Since there was evidence that the gun used by Defendant was an operable firearm and there was no evidence to the contrary, a mandatory presumption existed "that the weapon was as it appeared to the victim to be." *Allen*, 317 N.C. at 124, 343 S.E.2d at 897. Therefore, no jury question of whether the gun qualified as a dangerous weapon within the meaning of N.C. Gen. Stat. § 14-87 existed, and the trial court correctly denied Defendant's request for an instruction on common law robbery. Accordingly, this argument is overruled.

B. Dangerous Weapon and Conspiracy Instructions

Defendant's second argument consists of two subparts. First, he contends that the trial court committed plain error by failing to instruct the jury on the definition of dangerous weapon. However, assuming without deciding that the trial court erred in failing to define "dangerous weapon," we believe that the error did not rise to the level of plain error. We do not believe that it is reasonably probable that the jury would have come to a different conclusion regarding whether the weapon was dangerous when the evidence was uncontradicted that the weapon was a gun which was loaded at the time of the robbery. *See State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006). Accordingly, this contention is overruled.

Second, Defendant contends that the trial court committed plain error by not instructing the jury on conspiracy to commit common law robbery since there was evidence that there was no agreement to use a *loaded* gun. We believe, however, that our holding in *State v. Johnson*, 164 N.C. App. 1, 595 S.E.2d 176 (2004), *disc. review denied*, 359 N.C. 194, 607 S.E.2d 659 (2004), compels us to conclude that the trial court did not commit plain error in not instructing on the offense of conspiracy to commit common law robbery. As we held in *Johnson*, the trial court is not required to instruct on conspiracy to commit common law robbery when there is uncontradicted evidence that the defendant used a dangerous weapon. *Id.* at 18, 595 S.E.2d at 186. As we said in *Johnson*, a conviction for conspiracy to commit robbery with a dangerous weapon does not require that each of the conspirators expressly agree that a dangerous weapon be used. *Id.* at 17, 595 S.E.2d at 185. Accordingly, this contention is overruled.

III. Conclusion

For the reasons stated herein, we uphold the challenged convictions.

NO ERROR.

Judge HUNTER, Robert C. and Judge DAVIS concur.

Report per Rule 30(e).