

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-385

Filed: 17 December 2019

Mecklenburg County, No. 16CRS212439

STATE OF NORTH CAROLINA

v.

JERVARE MOQUAN WISE, Defendant.

Appeal by Defendant from judgment entered 11 October 2018 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.*

*Cooley Law Office, by Craig M. Cooley, for the Defendant.*

DILLON, Judge.

Defendant Jervare Moquan Wise appeals from a judgment finding him guilty of attempted robbery with a dangerous weapon. After careful review, we conclude that the trial court committed reversible error by not instructing the jury on the lesser included offenses of common law robbery.

I. Background

Defendant was arrested and tried by a jury for attempted robbery with a firearm based on events that occurred at a convenience store.

The evidence introduced by the State at trial tended to show as follows:

On 30 March 2016, Defendant and another man entered a convenience store shortly before midnight. Defendant jumped over the counter, pointed what appeared to be a gun at the store clerk and demanded money. When the store clerk replied that he had already put the register's money in the safe, both men fled the scene.

The detective testified at trial that during the investigation Defendant admitted to the attempted robbery but claimed that the gun was actually a BB gun painted black. No gun or BB gun was ever recovered.

During the charge conference, Defendant requested jury instructions on attempted common law robbery and simple assault, lesser included offenses of attempted robbery with a dangerous weapon. The trial court denied Defendant's request and instructed the jury on the charge of attempted robbery with a firearm.

Defendant was found guilty of attempted robbery with a firearm. Defendant timely appealed to our Court.

## II. Analysis

Defendant argues that the trial court erred in refusing to give jury instructions concerning simple assault and attempted common law robbery. We review this argument *de novo*. See, e.g., *State v. Ligon*, 332 N.C. 224, 241-42, 420 S.E.2d 136, 146-47 (1992).

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Defendant, here, was convicted of armed robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87. The crime of “common law robbery” is a lesser included offense of armed robbery with a dangerous weapon, the difference being that common law robbery does not require proof that the defendant used a firearm or dangerous weapon. *State v. Langley*, 371 N.C. 389, 396, 817 S.E.2d 191, 197 (2018).

Our Supreme Court has held that a trial court is required to instruct the jury on lesser included offenses “whenever there is *some* evidence to support it,” *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981) (emphasis in original) (citations omitted), and that “[t]he test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.” *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (internal marks omitted) (citation omitted).

Our Supreme Court has further held that “the failure to [instruct the jury on a lesser included offense] constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense.” *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000).

With regard to robbery, our Supreme Court has instructed that when the implement used appears to be a firearm, the law presumes, in the absence of any evidence to the contrary, that the implement is, in fact, a firearm, whereupon no instruction for common law robbery need be given. *See, e.g., State v. Joyner*, 312 N.C.

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779, 782, 324 S.E.2d 841, 844 (1985). However, if there is *any evidence* – whether offered by the State or by the defendant – that the implement used was *not* a deadly weapon, then the trial court *must* also instruct the jury on common law robbery:

The mandatory presumption [that the implement was, in fact, a deadly weapon], however, is of the type which merely requires the defendant to come forward with some evidence (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts. Therefore, when any evidence is introduced tending to show that the life of the victim was not endangered or threatened, the mandatory presumption disappears, leaving only a mere permissive inference. . . . Such evidence . . . require[s] the trial court to permit the jury also to consider a possible verdict of guilty of the lesser included offense of common law robbery.

*Id.* at 783-84, 324 S.E.2d at 844-45 (emphasis in the original).

In this case, Defendant argued that he was entitled to an instruction on the lesser included offense of common law robbery because the State put forth *some* evidence that the weapon used was a BB gun and a BB gun is not a dangerous weapon.

The resolution of this case is controlled by our Supreme Court’s holding in *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982). In that case, the State put forth evidence that the weapon used was a .22 rifle. *Id.* at 649, 290 S.E.2d at 615. But the State also put on evidence from another witness that the weapon used was a BB gun. *Id.* at 650, 290 S.E.2d at 616. Our Supreme Court held that the latter testimony “that the rifle was a BB rifle constituted affirmative evidence . . . [and] that the victims’

lives were not endangered . . . required the submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense of robbery with firearms or other dangerous weapons.” *Id.* at 651, 290 S.E.2d at 616. *See also State v. Allen*, 317 N.C. 119, 123, 343 S.E.2d 893, 896 (1986) (recognizing that a BB rifle is not a firearm or dangerous weapon within the meaning of the robbery statute).

Based on our Supreme Court precedent, had that State’s witness not testified that Defendant had claimed the weapon he used was a BB gun, then an instruction on the crime of common law robbery would not have been required. But since the witness *did* so testify, the trial court was required to instruct on common law robbery. Defendant’s hearsay statement that the gun was a BB gun made to the detective is substantive evidence on this issue, though offered by the State. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d) (out-of-court statement by party-opponent is an exception to hearsay); *see also Joyner*, 312 N.C. at 782, 324 S.E.2d at 844 (a defendant is entitled to instruction on lesser included offense of common law robbery where either the State or the defendant offers evidence that the weapon used was not a firearm).

### III. Conclusion

The trial court was required to instruct the jury on the lesser included offense of common law robbery. Since the trial court failed to do so, we are compelled by

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Supreme Court precedent to vacate the judgment against him for armed robbery with a firearm and remand for a new trial.

NEW TRIAL.

Judges DIETZ and ARROWOOD concur.