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Criminal Law - Submission to the Jury of Lesser Included Offenses

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INTRODUCTION

Whether or not the judge in a criminal trial is required to charge the jury on a lesser included offense is of utmost importance to a criminal defendant, his counsel and the court. Failure to instruct on lesser included offenses when required will result in a new trial for defendant. From the attorney's standpoint, failure to request such a charge may reveal inadequate representation of his client. The courts have a stake in insuring that required lesser included offenses are addressed at the trial level because failure to do so results in renewed litigation and further expense to both the state and the defendant.1

The determinative factor for charging on a lesser included offense is the presence of evidence offered at trial from which a jury could find that such a crime of a lesser degree was committed. Where a state presents evidence tending to show the crime charged and where neither party presents conflicting evidence on any of the elements, a court is not required to instruct on the lesser offense. The North Carolina Supreme Court addressed the sufficiency of conflicting evidence relating to use or threatened use of a dangerous weapon in an armed robbery charge. Without specifically defining conflicting evidence, the Court unequivocally stated what evidence is not sufficiently conflicting to require an instruction for common law robbery.2

THE CASE

Defendant, armed with a chrome pistol, and accomplice, armed with a shotgun, forced three employees into a storage room during an attempted robbery. Defendant was tried for armed robbery.3

All three victims testified for the State on direct examination

3. Id. at 286, 254 S.E.2d at 526.
that defendant used a chrome pistol and his accomplice, a shotgun. On cross-examination the first of the three testified:

As to whether it is true that I don't know whether the shotgun . . . was a real gun, a fake gun, a toy gun, or what kind of gun, whatever kind of gun it was, *it was metal and did not look like a toy*. . . . With respect to the pistol . . . *it was metal and did not look like a toy*. I do not know whether it was real or whether it was a toy. It was shiny like chrome.  

The State's second witness testified on cross-examination that he did not know whether the pistol was real or fake, but "*[i]t looked very real. It was not a cap pistol.*" The State's third witness did not modify his testimony on cross-examination.

The trial judge charged the jury on armed robbery only. The jury returned a verdict of guilty.

On appeal defendant contended the court erred in failing to instruct on common law robbery on the ground that conflicting evidence was offered at trial relating to the use or threatened use of a dangerous weapon. The North Carolina Court of Appeals, with Judge Erwin dissenting, held the trial court erred in failing to submit the common law robbery charge to the jury based on precedent established in *State v. Bailey*.

The North Carolina Supreme Court, following the reasoning of Judge Erwin's dissent, reversed and overruled *Bailey* insofar as the two decisions are inconsistent. The Court held that evidence of the witnesses' uncertainty elicited on cross-examination was not of sufficient probative value to warrant submission of the lesser included offense of common law robbery. The lack of certainty of the State's witnesses on cross-examination as to whether or not the gun was real or a toy is not conflicting evidence relating to the elements of the crime charged.

**BACKGROUND**

Common law robbery is the felonious taking of any money or goods either from a person himself or while in a person's presence

6. Id. at 287, 254 S.E.2d at 527.
10. Id. at 289, 254 S.E.2d at 529.

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or control, against his will, by fear or violence. Statutory armed robbery does not alter common law robbery except to impose a more severe punishment when firearms or other dangerous weapons are threatened or used to endanger the life of a victim.

The actual presence of a firearm as a constituent element of armed robbery in North Carolina was established in State v. Keller. The court in Keller determined that the word "use" in the armed robbery statute means:

[an] "act employing anything, or state of being employed; . . . as, the use of a pen, his machines are in use," and may signify the "method or way of using"—Webster. The words "threatened use" coupled, as they are, with the preceding words clearly indicate the threatened act of employing. Hence, construed contextually the clause "with the use or threatened use" of a weapon, requires . . . the presence of the weapon with which the act may be executed or threatened.

Common law robbery is a lesser included offense of armed robbery.

The implications of a prosecuting witness' statement standing alone on cross-examination that he could not say the object in defendant's hand absolutely was a dangerous weapon were established in State v. Bailey. In Bailey, the State's sole eyewitness testified on cross-examination that she was not certain whether defendant used a "real or toy pistol." Defendant's confession was introduced including his statement that he had used a .22 caliber pistol during the robbery; however, defendant testified that the effect of wine and heroin on him during the day of the robbery caused him to forget anything about using a weapon. The court concluded that the conflicting testimony of the State's witness

15. 214 N.C. 447, 199 S.E. 620 (1938). Defendant was convicted of armed robbery by placing his finger against the victim's head. The court granted a new trial.
16. Id. at 449, 199 S.E. at 621.
17. State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1949). In a prosecution for armed robbery, the accused may be convicted of other lesser included offenses: assault, larceny from the person or simple larceny.
19. Id. at 87, 178 S.E.2d at 813.
20. Id.
along with defendant's own testimony raised an issue as to whether or not defendant had a firearm in his possession which required a submission of common law robbery.\textsuperscript{21}

Recent decisions treat the requirement of the actual presence of a firearm in an armed robbery case more liberally. The witness need not actually have seen the weapon used in the robbery to submit the charge of armed robbery to the jury. The court in \textit{State v. Dark}\textsuperscript{22} said, "eyesight is not the only sensory mechanism by which one can experience an object."\textsuperscript{23} In \textit{Dark}, defendant was convicted of armed robbery on the basis that the victim heard a "click"\textsuperscript{24} and felt the barrel of a pistol against his head, even though the only weapon introduced at trial was a toy pistol found in defendant's room.\textsuperscript{25} Furthermore, a common law robbery charge is not required where no evidence is presented indicating that the instrument was not a gun or that it was incapable of firing. Such was the result in \textit{State v. Evans}\textsuperscript{26} where defendant had to replace the bullets in and close his gun when it unbreached as he drew it.

\textbf{ANALYSIS}

The North Carolina Supreme Court in \textit{Thompson} overruled \textit{State v. Bailey}\textsuperscript{27} and held that the lack of certainty of State witnesses on cross-examination as to whether the gun was real or not was not conflicting evidence relating to the elements of the crime charged. \textit{Thompson} held that:

'[W]hen the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what appeared to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon is not of sufficient probative value to warrant submission of the lesser

\textsuperscript{21} Id.
\textsuperscript{22} 26 N.C. App. 610, 216 S.E.2d 498 (1975).
\textsuperscript{23} Id. at 612, 216 S.E.2d at 500.
\textsuperscript{24} Id. at 611, 216 S.E.2d at 499.
\textsuperscript{25} But see \textit{State v. Jackson}, 27 N.C. App. 675, 219 S.E.2d 816 (1975). A State's witness testified that defendant had "something under a towel that looked like a pistol or sawed off shotgun." On cross-examination the witness was unable to testify with certainty whether or not it was a weapon. The court held failure to instruct for common law robbery was error.
\textsuperscript{26} 25 N.C. App. 459, 213 S.E.2d 389 (1975).
\textsuperscript{27} 278 N.C. 80, 178 S.E.2d 809, cert. denied, 409 U.S. 948 (1971).
included offense of common law robbery.\textsuperscript{28}

The Court relied heavily on Judge Erwin’s dissent in the Court of Appeals.\textsuperscript{29} Judge Erwin distinguished \textit{Bailey}, limiting it to its facts, and found that the record did not show sufficient conflict or uncertainty of testimony to require a submission of common law robbery.\textsuperscript{30} Judge Erwin felt that \textit{Bailey} was not decided improperly but that it was being applied improperly by the majority of the Court of Appeals by requiring victims of robberies “to make an inspection of the weapons used to be able to testify whether or not the weapons were in fact real.”\textsuperscript{31}

Justice Branch of the North Carolina Supreme Court noted that the instant case might be distinguished from \textit{Bailey} because in \textit{Thompson} the three witnesses gave more forceful testimony regarding the authenticity of the weapon compared to the testimony of a single witness in \textit{Bailey};\textsuperscript{32} one witness in \textit{Thompson} remained certain as to the authenticity of the weapon. Defendant’s conduct also could have served as a basis to distinguish the cases. In \textit{Bailey} defendant testified he was intoxicated on wine and heroin and could not remember anything about the incident;\textsuperscript{33} in \textit{Thompson} defendant offered no evidence on the issue of possession of a deadly weapon but only offered an alibi as a defense.\textsuperscript{34}

The \textit{Thompson} Court, by overruling \textit{Bailey}, indicated that it was affirmatively establishing what was not conflicting evidence sufficient to require the trial judge to instruct the jury as to the lesser included offense.

\textbf{Conclusion}

\textit{Thompson} focused on a narrow but important segment of the law dealing with when the judge in a criminal trial for armed robbery was required to charge the jury on the lesser included offense of common law robbery. The determinative factor was the presence

\begin{itemize}
  \item \textsuperscript{28} 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979).
  \item \textsuperscript{29} 39 N.C. App. 375, 250 S.E.2d 710 (1979). Judge Erwin argued in dissent that the conflicting testimony was not of sufficient probative value to raise an issue as to whether or not defendant had a firearm in his possession.
  \item \textsuperscript{30} \textit{Id.} at 386, 250 S.E.2d at 716.
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} State v. Thompson, 297 N.C. 285, 288, 254 S.E.2d 526, 528 (1979).
  \item \textsuperscript{33} 297 N.C. at 287, 254 S.E.2d at 527. Furthermore, defendant made a confession but could not remember if his \textit{Miranda} rights were read to him.
  \item \textsuperscript{34} \textit{Id.}
\end{itemize}
of evidence of defendant’s guilt of the crime of common law robbery.\textsuperscript{35} If such evidence existed it was reversible error for the court to fail to submit the lesser offense to the jury.\textsuperscript{36}

Although the critical difference between armed robbery and common law robbery is the actual presence of a firearm; the uncertainty as to the authenticity of the weapon of the prosecuting witness on cross-examination does not raise an issue for the jury as to whether or not defendant used or threatened to use a firearm or other dangerous weapon. Thus a charge on the lesser offense of common law robbery is not required.

Because the Court did not distinguish \textit{Bailey} on the basis of firmer testimony in \textit{Thompson} concerning the authenticity of the weapon and the lack of rebuttal evidence, the Court seemed to be searching for an opportunity to overrule \textit{Bailey}. Thus, \textit{Thompson} can be cited for the proposition that something less than absolute certainty on cross-examination is not sufficient in and of itself to require the submission of the lesser included offense to the jury. If a court hears a later case with facts identical to \textit{Bailey}, namely, where the witness on cross-examination is not positively certain whether or not the weapon is real and where defendant is uncertain of his use of a weapon, then the court should deny instruction on common law robbery. This result is mandated by the Supreme Court’s refusal to distinguish \textit{Bailey} on these facts and its overruling of \textit{Bailey} insofar as it conflicts with \textit{Thompson}.

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\textsuperscript{35} State v. Hicks, 241 N.C. 156, 84 S.E.2d 545 (1954).
\textsuperscript{36} Id.