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2012 IL App (3d) 100909-U

Order filed April 23, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit Court
	)	of the 14h Judicial Circuit,
	)	Rock Island County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0909
v.	)	Circuit No. 09-CF-971
	)	
	)	
CONNIE BLAIR,	)	Honorable
	)	F. Michael Meersman,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices McDade and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) Defendant's conviction for the uncharged offense of armed robbery committed with a dangerous weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2008)) vacated where the charged offense was not a lesser included offense of armed robbery committed with a firearm (720 ILCS 5/18-2(a)(2) (West 2008)); and (2) The defendant's conviction vacated and judgment of conviction on the lesser included offense of robbery is entered with remand for sentencing on the conviction.

¶ 2 The defendant, Connie Blair, was convicted, following a bench trial, of armed robbery (720 ILCS 5/18-2(a)(1) (West 2008)) and sentenced to a term of imprisonment of 15 years. On appeal, the defendant contends that the trial court erred in finding her guilty of the offense of armed robbery with a dangerous weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2008)) when she had been charged with the offense of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2008)). At issue is whether the offense of robbery while armed with a dangerous weapon other than a firearm is a lesser included offense of the offense of robbery while armed with a firearm. We hold that it is not and vacate the conviction. Pursuant to Supreme Court Rule 615(b)(3) (Ill. S. Ct. R. 615(b)(3)), we reduce the defendant's conviction to robbery and remand the cause to the trial court for sentencing.

¶ 3 **FACTS**

¶ 4 Tracey Wilden, the manager of the Check-N-Go in Rock Island, testified that on July 25, 2009, at approximately 10:13 a.m., a woman with black netting covering her face walked into the store and held a gun to Wilden's face. Wilden further testified that the gun was black and looked like what police carry. She testified that the assailant pointed the gun directly at her and she was looking directly into the barrel of the gun. Wilden was forced by the assailant into a back room where she was restrained. The assailant then returned to the front of the store, where Wilden heard the individual opening and ransacking drawers. Approximately \$1,400 was taken from the store.

¶ 5 Wilden testified that she was familiar with rifles and shotguns, but she had never handled or shot a handgun. She did not know the difference between a revolver and a semi-automatic handgun. She had seen BB guns and pellet guns that looked like rifles but never ones that looked

like handguns. She testified that the defendant never made any actions with the gun such as cocking the gun or moving a slide.

¶ 6 During argument, the prosecutor maintained that the State had proven that the weapon used by the defendant was a handgun. Defense counsel argued that the evidence was insufficient to prove that the object Wilden saw was a firearm and, thus, the State had failed to prove beyond a reasonable doubt that the defendant was guilty of armed robbery. The trial judge took the matter under advisement and subsequently ruled that the State had failed to establish beyond a reasonable doubt that Wilden had identified a "firearm." The trial judge found, however, that the State proved beyond a reasonable doubt that the defendant was armed with a dangerous weapon other than a firearm and entered a judgment of conviction on that offense. The defendant appealed.

¶ 7 ANALYSIS

¶ 8 The defendant's only argument on appeal is that her conviction for armed robbery must be reduced to simple robbery. She contends that her conviction for robbery while armed with a dangerous weapon other than a firearm was not a lesser included offense of robbery while armed with a firearm, the offense for which she was charged. We agree.

¶ 9 This court recently held that a charge of robbery while armed with a dangerous weapon other than a firearm (720 ILCS 5/18-2(a)(1) (West 2008)) was not a lesser included offense of robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2008)). *People v. Barnett*, 2011 IL App (3d) 090721. In *Barnett*, we held that robbery while armed with a dangerous weapon "other than a firearm" and robbery while "armed with a firearm" are mutually exclusive, do not contain the same elements and, thus, the offense of robbery while armed with dangerous

weapon "other than a firearm" cannot be a lesser included offense of robbery while armed "with a firearm." *Barnett*, 2011 IL App (3d) 090721, ¶ 38.

¶ 10 We note here, as we did in *Barnett*, that, had the State elected to charge the defendant with two counts, one alleging a violation of section 18-2(a)(1) (dangerous weapon other than a firearm) and another separately alleging a violation of section 18-2(a)(2) (while armed with a firearm), the defendant's conviction for armed robbery would have been affirmed. *Barnett*, 2011 IL App (3d) 090721, ¶ 34.

¶ 11 Having found that the defendant's conviction cannot stand, both the defendant and the State ask this court to exercise its authority under Supreme Court Rule 615(b)(3) (Ill. S. Ct. R. 615(b)(3)) to reduce the defendant's conviction to the lesser included offense of robbery (720 ILCS 5/18-1 (West 2008)) and remand the cause to the trial court for sentencing. Rule 615(b)(3) allows the appellate court to reduce the offense of which a defendant is convicted to a lesser offense where the reduced offense is a lesser included offense of the charged offense. Robbery is a lesser included offense to armed robbery. *People v. Barry*, 207 Ill. App. 3d 67, 70 (1990). Both the State and the defendant acknowledge that the evidence established that the elements of simple robbery were proven beyond a reasonable doubt. We therefore exercise our authority to reduce the conviction from armed robbery to robbery and remand the matter for sentencing on that conviction.

¶ 12

#### CONCLUSION

¶ 13 For the foregoing reasons, the judgment of the circuit court of Rock Island County, finding the defendant guilty of armed robbery, is vacated and judgment of conviction on the

charge of robbery (720 ILCS 5/18-1 (West 2008)) is entered. The cause is remanded to the circuit court for sentencing on the robbery conviction.

¶ 14 Conviction vacated, new conviction entered, and remanded for sentencing.