IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1235

Filed: 18 October 2016

Davie County, No. 13 CRS 51357, 51359; 14 CRS 07

STATE OF NORTH CAROLINA,

v.

ALLEN WAYNE WALL, Defendant.

Appeal by Defendant from judgment entered 22 April 2015 by Judge Anna M. Wagoner in Davie County Superior Court. Heard in the Court of Appeals 31 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Christina S. Hayes, for the State.

Kimberly P. Hoppin, for Defendant-Appellant.

INMAN, Judge.

A failure to move to dismiss charges is not ineffective assistance of counsel when the evidence is sufficient to defeat the motion. When the evidence supports the primary offense, a trial court is not required to instruct the jury on a lesser-included offense.

Allen Wayne Wall ("Defendant") appeals from a final judgment finding him guilty of breaking and entering a motor vehicle, breaking or entering, and larceny.

Defendant contends that his trial counsel provided ineffective assistance of counsel by failing to move to dismiss the charges against him for insufficient evidence at the close of trial proceedings, and that the trial court committed plain error by failing to instruct the jury on a lesser-included offense. After careful review, we hold that Defendant has failed to demonstrate either ineffective assistance of counsel or error.

I. Factual and Procedural History

The evidence at trial tended to show the following:

Defendant met Deborah Oliver ("Oliver") in July of 2011, when she hired Defendant to do maintenance work at her residence. On two occasions between 2011 and 2013 Oliver allowed Defendant, his girlfriend, and his two young children to stay in her home. Oliver then revoked Defendant's permission to be on her property.

Despite losing permission to use Oliver's property, Defendant retained possession of Oliver's Ford Expedition in order to transport his children to and from school until he could get tags for his own car. On the morning of 16 September 2013, Oliver took back possession of the Expedition. Later that afternoon as Oliver was arriving home driving the Expedition, Defendant approached her vehicle on foot in her driveway. Without exiting her vehicle, she turned around in her driveway, called 9-1-1, and left.

Davie County Sheriff's Deputy Jimmy Merritt accompanied Oliver back to her property. When they arrived he observed a Datsun 280 ZX, another vehicle owned

by Oliver, with the driver's door standing open and the inside steering column, ignition switch, and wiring harness damaged. Inside the car on the passenger seat Deputy Merritt found a flashlight pointing toward the ignition switch and an electric power drill with a six-inch wire that had been spliced on both ends. The power drill had been taken from Oliver's workshop on her property. Also inside the car was a telephone taken from inside Oliver's house.

Oliver and Deputy Merritt also discovered damage to the screen of Oliver's front door, scratch marks on the front door and windows of the home, a broken lock on the workshop door, and a broken windowpane in the workshop. When Oliver left her residence earlier that morning, the doors of the Datson, Oliver's workshop, and Oliver's house had all been locked.

Deputy Merritt called for backup and began to search the property. He saw Defendant walking toward the wooded edge of the property "in an expeditious manner as if he was trying to leave . . . ." Deputy Merritt commanded Defendant to return and to lie on the ground. Defendant complied, and Deputy Merritt placed Defendant into a patrol car.

Defendant was charged with one count of breaking and entering a motor vehicle, two counts of breaking or entering (one with respect to the shop, the other with respect to the house), and two counts of larceny (one with respect to the power

drill, the other with respect to the telephone). The case came on for trial before Judge Anna M. Wagoner on 20 April 2015.

Defendant testified at trial that he found Oliver's telephone lying outside on the porch of her home and that Oliver had given the drill to him to assist in performing jobs for her and for others. Defendant denied entering into the home, but he admitted damaging the screen door of the home and breaking the shop window. Defendant admitted entering the shop to acquire the drill, and removing the hinges from the door once inside. Defendant also admitted that he had damaged the steering wheel and wiring of the car. He testified that he had intended to use the car to pick up his children from school. Defendant's attorney did not move to dismiss the charges against Defendant at either the close of the State's evidence or at the close of all the evidence.

The trial court instructed the jury on the elements of each charge. The trial court did not instruct the jury on misdemeanor breaking and entering, a lesser-included offense of each of the felony breaking and entering charges.

The jury returned a verdict finding Defendant guilty of breaking and entering a motor vehicle, one count of felony breaking or entering into Oliver's shop, and one count of larceny of the power drill. Defendant entered a plea of guilty to having attained the status of an habitual felon.

Defendant did not give oral notice of appeal. Defendant gave untimely *pro se* written notice of appeal on 15 May 2015. Defendant filed a petition for writ of certiorari on 22 December 2015, which this Court granted.

II. Analysis

A. Ineffective Assistance of Counsel

Defendant first contends that his trial attorney's failure to move to dismiss the charges against him at the close of all the evidence amounts to ineffective assistance of counsel. We disagree.

A defendant's right to the effective assistance of counsel stems from the right to a fair trial arising from the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I Sections 19 and 23 of the North Carolina Constitution. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 247-48 (1985).

When a claim for ineffective assistance of counsel is brought on direct review, it may be decided on the merits when no further investigation or evidentiary hearing is necessary and the cold record is sufficient for review. *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). "This rule is consistent with the general principle, that on direct appeal, the reviewing court ordinarily limits its review to material included in 'the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id.* at 166, 557 S.E.2d at 524-25 (citing N.C. R. App. P. 9(a)). In this

case, the record and the verbatim transcript of the proceedings below permit direct review of Defendant's claim.

In order to succeed on a claim for ineffective assistance of counsel, a defendant must prove:

> First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, . . . that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

"[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695; 80 L. Ed. 2d at 698. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

"The trial court must determine as a matter of law whether the State has offered substantial evidence of defendant's guilt on every essential element of the crime charged." *State v. Howell*, 191 N.C. App. 349, 353, 662 S.E.2d 922, 926 (2008)

(citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (citation omitted). "In ruling on a motion to dismiss at the close of the State's evidence, the trial court is required to consider the evidence in the light most favorable to the State." *Howell*, 191 N.C. App. at 353, 662 S.E.2d at 925-26 (citation omitted).

We will address the trial court's ruling with respect to each charged offense.

Breaking or Entering of a Motor Vehicle

Under N.C. Gen. Stat. § 14-56 (2015), a conviction for felony breaking or entering a motor vehicle requires that the State prove beyond a reasonable doubt that there was: "1) a breaking or entering[,] 2) without consent[,] 3) into any motor vehicle[,] 4) containing goods, freight, or anything of value[, and] 5) with the intent to commit any felony or larceny therein." *State v. Riggs*, 100 N.C. App. 149, 155, 394 S.E.2d 670, 673 (1990).

This Court has held that "even items of trivial value satisfy [the fourth] element of this offense . . . ." *State v. McDowell*, 217 N.C. App. 634, 636, 720 S.E.2d 423,424-25 (2011) (citing *State v. McLaughlin*, 321 N.C. 267, 270, 362 S.E.2d 280, 282 (1987)). However, it must be proven that such items inside the vehicle were "separate and distinct" from the vehicle itself. *State v. Jackson*, 162 N.C. App. 695, 699, 592 S.E.2d 575, 577-78 (2004). Defendant contends that there was insufficient evidence

to support the fourth element of this charge, as no items of value were inside the vehicle when it was entered by Defendant. We disagree.

Regardless of the arguments made by the Defendant as to his own intent in taking the items found inside the Datsun, we must view the evidence in the light most favorable to the State. The jury heard testimony and viewed photographs demonstrating that an array of items, including a flashlight, hand tools, and an assortment of candy bars, all possessing value, were found inside the Datsun when Defendant was arrested. All of these items are separate and distinct from the car itself, and it is unchallenged that most of them belonged to Oliver. Therefore, the record shows sufficient evidence for the fourth element of the crime such that a reasonable jury could find Defendant guilty of breaking and entering a motor vehicle.

Breaking and Entering and Larceny

To convict a defendant for felonious breaking and entering pursuant to N.C. Gen. Stat. § 14-54(a) (2015), the State must show that defendant (1) broke and entered; (2) into any building; (3) with the intent to commit any felony or larceny therein. *State v. Jones*, 188 N.C. App. 562, 564-65, 655 S.E.2d 915, 917 (2008) (citations omitted). Larceny is defined as the (1) taking; and (2) carrying away of the property of another; (3) without the owner's consent; (4) with the intent to permanently deprive the owner of the use of the property. *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (1985) (citation omitted). Larceny is chargeable

as a felony without regard to the value of the property in question where the larceny is committed in the course of breaking and entering. N.C. Gen. Stat. § 14-72(b)(2) (2015).

Among the elements of breaking and entering is defendant's intent to commit a felony or larceny inside a building at the time of the breaking and entering. N.C. Gen. Stat. § 14-54(a). "Felonious intent usually cannot be proven by direct evidence, but rather must be inferred from the defendant's acts, conduct, and inferences fairly deducible from all the circumstances[.]" *State v. Goldsmith*, 187 N.C. App. 162, 165-66, 652 S.E.2d 336, 339-40 (2007) (alteration in original) (internal quotation marks and citations omitted).

Although he admitted to breaking the window of Oliver's shop and entering thereafter, Defendant argues that the evidence was insufficient to support the charges of felonious breaking and entering because there was no evidence that he possessed the requisite intent when entering the building. Defendant argues that the evidence shows only that he had the intent to use the drill, and not that he ever intended to permanently deprive Oliver of the use of the drill. We disagree.

The jury could reasonably infer from Defendant's actions that he intended to take the drill from Oliver's shed. Defendant testified that he took the drill from the shed to facilitate his attempt to hot-wire and ultimately take the Datsun, but he was stopped by police before he finished. Taking all of the evidence in the light most

favorable to the State, as we must, Defendant's testimony that he took the drill because he believed it had been given to him and that he had no intention to steal it does not negate the reasonable inference that Defendant intended to deprive Oliver of the drill permanently and therefore that he was guilty of both breaking and entering and larceny.

Because the totality of the evidence presented by the State was sufficient for a reasonable jury to find Defendant guilty of the charges against him at the close of the State's evidence, and because Defendant's testimony provided some evidence consistent with his guilt to both charges, it is unlikely that a motion to dismiss at either juncture would have been successful. Accordingly, we hold that Defendant has not satisfied the burden of showing that his counsel's failure to move for dismissal prejudiced Defendant.

B. Jury Instructions

Defendant next contends that the trial court erred in failing to instruct the jury on the elements of the lesser-included offense of misdemeanor breaking and entering.

Standard of Review

Defendant's trial counsel did not request an instruction on the lesser-included offense of misdemeanor breaking and entering and did not object to the omission of that instruction after the trial court instructed the jury. When a timely objection is not made during the trial, this Court is barred by Rule 10(b)(2) of the North Carolina

Rules of Appellate Procedure from reviewing a challenge to jury instructions unless the trial court's actions amounted to plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (applying the plain error standard to an erroneous jury instruction where the issue was not preserved at trial); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

"In order to establish plain error, a defendant must establish that the trial court committed error and that absent this error, the jury would have probably reached a different result." *State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 477 (2002) (citation omitted).

Lesser-included Offense

Misdemeanor breaking and entering is a lesser-included offense of felony breaking and entering. *State v. Crawford*, 179 N.C. App. 613, 616, 634 S.E.2d 909, 912 (2006). "A defendant is entitled to have a lesser included offense submitted to the jury only when there is evidence to support that lesser included offense." *Id.* at 615, 634 S.E.2d at 912 (citing *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000). If, however, "the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *Smith*, 351 N.C. at 267-68, 524 S.E.2d at 40 (citation omitted).

Defendant argues that the trial court committed plain error by failing to instruct the jury as to the lesser-included offense. Specifically, Defendant contends that there was insufficient evidence to support the intent element of the felony charge. We disagree.

As discussed above, the State presented sufficient evidence for the jury to find Defendant guilty of felony breaking and entering. Defendant admitted to breaking and entering into Oliver's shed and to removing the power drill from the shed. Defendant's removal of the power drill was sufficient to support a reasonable inference by the jury that he entered the shed intending to remove the drill. Defendant's naked denial of felonious intent did not require the trial court to instruct the jury on the misdemeanor offense. Thus the trial court did not err, much less commit plain error, in omitting an instruction on the lesser-included offense.

III. Conclusion

For the reasons above, we hold that Defendant has failed to demonstrate that he received ineffective assistance of counsel. We also hold that the trial court committed no error in its instructions to the jury.

NO ERROR.

Chief Judge MCGEE and Judge TYSON concur.

Report per Rule 30(e).