NO. COA13-187
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v. Duplin County
No. 11 CRS 51902

MICHAEL ANTHONY PEACOCK

Appeal by defendant from judgment entered 12 September 2012 by Judge John E. Nobles, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 9 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Assistant Public Defender Brendan O'Donnell for defendant appellant.

McCULLOUGH, Judge.

Defendant Michael Anthony Peacock appeals from the judgment entered after a jury found him guilty of breaking or entering a motor vehicle and he pled guilty to having attained habitual felon status. Defendant contends the trial court committed plain error by failing to instruct the jury on first-degree trespass as a lesser-included offense, that trial counsel

rendered ineffective assistance by failing to request such an instruction, and that the trial court committed plain error by instructing the jury that opening a car door constituted "entering" a motor vehicle. We find no error.

Shortly after midnight on 14 August 2011, North Carolina Highway Patrol Sergeant Bryan Smith responded to a call in Duplin County. Sergeant Smith noticed a car parked on the shoulder of Interstate 40 with its hazard lights flashing. Sergeant Smith stopped to investigate, and as he approached the car, he saw defendant near the passenger side. He also noticed that the passenger door was open and there was glass from the broken passenger window on the ground. Defendant looked "stunned, kind of like a deer in the headlights[.]" After detaining defendant, Sergeant Smith examined the car and the surrounding area more closely and saw a tire iron and some blue containers on the ground next to the car, glass from the passenger window on the passenger seat and floorboard, and blood on the door trim, seat, and middle console. There were also several of the blue containers still in the car. The items left in the vehicle, including a cell phone, appeared to have been "disturbed." Defendant's hands were cut and bleeding, and the partial DNA profile from blood collected from the passenger-side

door matched the partial DNA profile from blood collected from defendant.

A jury found defendant guilty of breaking and/or entering a motor vehicle and defendant pled guilty to having attained habitual felon status. The trial court sentenced defendant to 139 to 176 months' imprisonment. Defendant appeals.

In his first two arguments on appeal, defendant asserts that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of first-degree trespass, and that his trial counsel rendered ineffective assistance of counsel by failing to request such an instruction. We disagree.

When a defendant fails to object to the omission of a lesser-included offense jury instruction at trial, or to request such an instruction, we must review the instructions under the plain error standard. *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 315 (2002). Plain error is "a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted). Under plain error analysis, a defendant is entitled to reversal "only if the error

was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

"[A] lesser included offense instruction is required if the evidence 'would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater.'" *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations omitted). "Where the State's 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).

To obtain a conviction for breaking or entering a motor vehicle, the State's evidence must establish: "(1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein." *State v. Jackson*, 162 N.C. App. 695, 698, 592 S.E.2d 575, 577 (2004) (emphasis deleted); *see also* N.C. Gen. Stat. § 14-56 (2011). First-degree trespass is a lesser-included offense of breaking or entering a motor vehicle. N.C.

Gen. Stat. § 14-159.14 (2011). "[A] person is guilty of first-degree trespass when 'without authorization, he enters or remains . . . [o]n premises of another . . . or [i]n a building of another.'" *State v. Hamilton*, 132 N.C. App. 316, 321, 512 S.E.2d 80, 84 (1999) (alterations in original); *see also* N.C. Gen. Stat. § 14-159.12 (2011).

Here, defendant cannot demonstrate that the trial court erred, much less committed plain error, because the State's evidence of each element of breaking or entering a motor vehicle was clear and there was no evidence to support submission of the lesser offense. Defendant asserts that there is a conflict in the evidence as to whether he intended to commit a larceny or other felony when he entered the car. Officers, however, discovered defendant alone with the car, standing near a tire iron. The car's passenger window had been smashed, and containers had been removed from the car and were on the ground near defendant. The items left in the car also appeared to be disturbed, and defendant had cut his hands and left his blood on the interior of the car, including on the center console. Defendant presented no evidence to undermine any of the State's evidence of his intent to commit a larceny, and has not identified any deficiencies in the State's evidence that support

his position. Consequently, we hold that the trial court was not required to submit the lesser offense to the jury in this case.

Defendant's claim of ineffective assistance of counsel, based on counsel's failure to request such an instruction, also fails. To establish a claim of ineffective assistance of counsel, a defendant must first show that counsel rendered deficient performance. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

Here, as we have discussed, the evidence supported only the submission of breaking or entering a motor vehicle, and not the lesser offense of first-degree trespass. Thus, we decline to find that counsel rendered deficient performance by failing to request an instruction on the lesser offense. In sum, defendant's first two arguments lack merit.

Finally, we address defendant's argument that the trial court committed plain error by instructing the jury that opening a door would constitute an entry. We do not agree.

In relevant part, the trial court instructed the jury:

> The defendant has been charged with breaking or entering into a motor vehicle. For you to find the defendant guilty of this offense, the State must prove five things beyond a reasonable doubt: First, that there was a breaking or entering by the defendant. Breaking a window would be a breaking. *Opening a door would be an entry*.

(Emphasis added.)

Even assuming *arguendo*, that the trial court's instruction was erroneous, defendant cannot demonstrate that the result of his trial would have been different in light of the overwhelming evidence of his guilt. In addition to evidence that the car's passenger door was open, the State also presented evidence that the window had been smashed and that defendant had suffered cuts on his hands and left blood inside the car. Some of the blue containers had been removed from the car, and other items left in the car had been disturbed. Defendant has failed to demonstrate how different instructions would have affected the result of the trial under these circumstances, and thus cannot demonstrate the sufficient prejudice to establish plain error. Accordingly, we find no error.

No error.

Judges HUNTER (Robert C.) and BRYANT concur.

Report per Rule 30(e).