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NO. COA14-425
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v.

ANTHONY LAMOUR JONES,
Defendant.

Mecklenburg County
Nos. 12 CRS 42714
12 CRS 222317

Appeal by defendant from judgment entered 4 December 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Associate Attorney General Adrian Dellinger, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jason Christopher Yoder, for defendant-appellant.

GEER, Judge.

Defendant Anthony Lamour Jones appeals from a judgment entered on his convictions of breaking or entering a motor vehicle and being a habitual felon. On appeal, defendant primarily argues that the trial court committed plain error by failing to instruct the jury on the lesser included offense of first degree trespass, which, unlike the greater offense of

breaking or entering a motor vehicle, does not include the element of felonious intent. The State, however, presented evidence from which the jury could reasonably infer that defendant broke and entered the motor vehicle with the intent to commit a larceny, and there is no evidence suggesting that defendant had any other intent or explanation for his presence on the premises. Therefore, we hold that the trial court did not err in refusing to instruct the jury on the lesser offense of trespass.

Facts

The State's evidence tended to show the following facts. Around 2:40 a.m. on 22 May 2012, Gregory Stevenson, Jr. drove onto the premises of Comfort Systems, U.S.A., a heating and air conditioning business in Charlotte, North Carolina. Mr. Stevenson noticed that there was glass on the ground underneath one of the vans parked in the lot and that the van had its door open and the interior light on. Mr. Stevenson saw a man, whom he later identified as defendant, inside the van. Mr. Stevenson asked defendant if he worked there, and defendant replied that he did. Mr. Stevenson drove out of the parking lot and called the police. As he left the lot, Mr. Stevenson witnessed defendant walk across the property to a pink-colored moped with "VIP" written on the side and drive away. Mr. Stevenson tried

to follow the moped but lost sight of it when he had to stop at a traffic light. He stopped and waited for the police to arrive.

Sergeant Stephen Christenbery of the Charlotte-Mecklenburg Police Department testified that he heard a dispatch around 2:40 a.m. on 22 May 2012 concerning a break-in of a van. The dispatch related that the suspect was traveling in the vicinity of Beam and Yorkmont Roads on a moped pink in color and having the letters VIP written on its side. As the officer drove toward Yorkmont Road, he encountered a single headlight coming toward him. The officer stopped his vehicle and allowed the approaching vehicle, a moped, to pass by him. Sergeant Christenbery saw the letters VIP on the side of the moped on the back right panel. Sergeant Christenbery executed a u-turn, activated his blue lights and siren, and followed the moped. The rider of the moped made a u-turn. Sergeant Christenbery yelled at the rider to stop, but the rider accelerated and took off. Sergeant Christenbery attempted multiple times to cause the rider to stop the moped. The rider drove the moped down a gravel drive. Sergeant Christenbery ultimately apprehended the rider when the rider rode the moped into a ditch.

The police took Mr. Stevenson to the location where the police had apprehended the rider. Mr. Stevenson identified this

person as the man he saw at Comfort Systems. The police also showed him a moped that looked like the one he had seen leaving Comfort Systems.

Daniel Graham, a manager in charge of HVAC projects in North and South Carolina for Comfort Systems, testified that the police called him out to his business in Charlotte the morning of 22 May 2012. He arrived and observed that the window to a van was broken out, and the inside of the van "looked like it had been rifled through" with items having been moved around. The window was intact, and the van was locked when Mr. Graham left the business at 6:00 p.m. the previous day. He did not give permission to anyone to go inside the van, break the window, or take anything. He was not aware of any person by defendant's name working at Comfort Systems on 22 May 2012.

On 11 June 2012, defendant was indicted for felony breaking and entering a motor vehicle and for being a habitual felon. At trial, defendant testified in his own defense that on the evening he was arrested, he had borrowed his roommate's moped to go to the store to buy some cigarettes. On his way home from the store, the police pulled up behind him. Defendant panicked and did not stop because he had a warrant for a probation violation, and he wanted to get home because he had not told his roommate that he had his moped, and it was his roommate's only

transportation to get to work the following day. Defendant denied going "anywhere near Comfort Systems" during the early morning hours of 22 May 2012, stating "[i]t wasn't me" and "I had nothing to do with it."

The jury returned a verdict of guilty of the offense of breaking or entering a motor vehicle. Defendant then pled guilty to being a habitual felon. The prosecution and defense counsel stipulated that defendant had eight prior record points, giving him a prior record level of III. The trial court sentenced defendant to a presumptive-range term of 33 to 52 months imprisonment.

Grounds for Appellate Review

Rule 4(a) of the Rules of Appellate Procedure provides for two modes of appeal in criminal cases. "The Rule permits oral notice of appeal, but only if given at the time of trial or . . . of the pretrial hearing. Otherwise, notice of appeal must be in writing and filed with the clerk of court." *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) (internal citation omitted). In this case, shortly before the trial court rendered its judgment in open court, defense counsel stated that "we would respectfully enter notice of appeal at the appropriate time." The trial court then sentenced defendant and directed the clerk to "[e]nter notice of appeal, appoint the appellate

defender." The written judgment indicates that "[t]he defendant gives notice of appeal from the judgment of the trial court to the appellate division," and both the judgment and appellate entries were filed on 4 December 2013. At a hearing on 6 December 2013, the trial court, in the presence of the State, confirmed that "the Court did in fact authorize [defendant's] appeal and appoint the appellate defender."

We need not address whether defendant's notice of appeal complied with the Appellate Rules because defendant additionally filed a petition for writ of certiorari. Even assuming that defendant's oral notice of appeal was ineffective, the trial court accepted -- and the State had actual notice of -- defendant's appeal. Thus, in our discretion, we allow the petition for writ of certiorari and consider the merits of defendant's appeal.

<u>Discussion</u>

On appeal, defendant contends the trial court committed plain error by failing to instruct the jury on the lesser offense of first degree trespass.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

> Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

"The sole factor determining the judge's obligation to give [a lesser included offense instruction] 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. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). "'[T]he trial court need not submit lesser included degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime*.'" *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (quoting *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989)). Moreover, the "[m]ere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice" to require the submission of a lesser included offense. *State v. Hicks*, 241 N.C. 156, 160, 84 S.E.2d 545, 547 (1954).

A person is guilty of the Class I felony of breaking or entering a motor vehicle if he, with the intent to commit any

felony or larceny therein, breaks or enters a motor vehicle. N.C. Gen. Stat. § 14-56 (2013). First degree trespass is a lesser included offense of breaking or entering a motor vehicle. N.C. Gen. Stat. § 14-159.14 (2013); *State v. Owens*, 205 N.C. App. 260, 266, 695 S.E.2d 823, 828 (2010). Unlike breaking or entering a motor vehicle, first degree trespass does not include the element of felonious intent but rather only requires evidence that the defendant entered or remained on the premises or in a building without authorization. N.C. Gen. Stat. § 14-159.12(a) (2013).

With respect to the element of felonious intent, our Supreme Court, in the context of breaking or entering a building, has explained:

> ". . . The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent."

State v. Sweezy, 291 N.C. 366, 384, 230 S.E.2d 524, 535 (1976) (quoting *State v. McBryde*, 97 N.C. 393, 396, 1 S.E. 925, 927 (1887)). The same reasoning applies in this case.

Here, the State presented evidence as to each element of the charged offense, including intent to commit a larceny. Mr. Stevenson testified that he witnessed defendant inside a van belonging to Comfort Systems around 2:40 a.m. on 22 May 2012. There was glass on the ground by the van, the front door was open, and the interior light was on. When Mr. Stevenson confronted defendant, defendant claimed that he worked there but then fled on his moped. A short time later, police officers attempted to stop defendant, but he refused to pull over and did not stop until his moped became stuck in a ditch.

Mr. Graham, the manager at Comfort Systems, testified that items in the van had been moved around, that defendant did not work at Comfort Systems and was not authorized to be in the van. Defendant did not offer any alternative explanation for his presence in the van, but rather simply denied that he was the person seen by Mr. Stevenson.

Under *Sweezy*, a jury could reasonably infer from this evidence that defendant broke and entered the van with intent to commit a larceny. Consequently, the trial court, in the absence of any evidence of an alternative reason for defendant's

presence, did not err in refusing to instruct the jury on the lesser included offense of trespass. *See State v. Lucas*, ___ N.C. App. ___, ___, 758 S.E.2d 672, 679 (2014) (on appeal from conviction for breaking and entering, holding trial court did not err in refusing to instruct jury on lesser offense of trespass where no evidence presented to support an alternative explanation for defendant's presence at premises).

Defendant next contends the trial court erred by determining that he had eight prior record level points. Defendant argues the calculation is incorrect because the court improperly added one point to the prior record level on the basis that the offense was committed while defendant was on probation. He asserts the addition of the point was improper because the State did not provide him with written notice of its intent to prove defendant committed the offense while on probation as required by N.C. Gen. Stat. § 15A-1340.16(a6) (2013).

Defendant fails to recognize that "[a] defendant may waive the right to receive such notice." *Id.* Here, the prosecutor and defendant's counsel signed a prior record level worksheet in which they stipulated to defendant's prior record level points, including a point added pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) (2013) for commission of the offense while on

probation for another offense. At the sentencing hearing, counsel stated that defendant was on probation and that his probation was likely to be revoked. Counsel also stipulated in open court that defendant had a prior record level of III and eight prior record level points. We conclude that by stipulating to the prior record level, defendant waived objection to any lack of notice.

In any event, defendant concedes that he would have a prior record level III regardless whether he was found to have eight prior record points or seven. Therefore, the trial court correctly determined that defendant had a prior record level of III, and any error with respect to the prior record points was harmless.

No error.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).