IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1142

Filed: 21 April 2015

Guilford County, No. 13 CRS 79149

STATE OF NORTH CAROLINA

v.

BRIAN PHILIP HOLE

Appeal by defendant from judgment entered 29 May 2014 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 4 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.

Amanda S. Zimmer, for defendant.

TYSON, Judge.

Brian Philip Hole ("Defendant") appeals from judgment entered, following his conviction of larceny of a motor vehicle. We hold the trial court did not commit plain error. We dismiss Defendant's ineffective assistance of counsel claim, without prejudice.

I. Background

Defendant began drinking beer at 7:00 a.m. on 12 May 2013. He arrived at the Double K Bar between 7:00 p.m. and 8:00 p.m. and continued to consume beer.

A patron of the bar, John Staten, played a game of pool with defendant. Staten testified that Defendant appeared to be very intoxicated. By 8:45 p.m., Mr. Staten noticed Defendant was having difficulty standing and he leaned against a drink machine.

Emily Story was also a patron in the Double K Bar that evening. She drove her 1986 Chevrolet Blazer to the bar, left the keys in the ignition, and went inside. Story testified her Blazer had large, thirty-eight inch tires, and was raised two feet from the ground. She had to grasp the steering wheel or seat belt to pull herself into the vehicle.

Story had been inside the bar about thirty minutes when she heard her vehicle crank. She went to the door and saw Defendant drive away in her Blazer. Story's boyfriend, Joe Graves, and : Graves'friend, Samuel Turner, immediately got into : Graves'truck and followed Defendant.

Defendant attempted to turn and drove into a ditch. He was able to drive the Blazer out of the ditch and continued driving down the road, with Graves and Turner following behind. As Defendant came to a sharp curve, he drove off the road, traveled about 500 yards through a field, and crashed into a barn. Hayes and Turner left their truck and walked through the field to the barn. Defendant was unconscious and lying in the floorboard of Story's vehicle.

Defendant was transported by ambulance to Moses Cone Memorial Hospital in Greensboro and arrived in the emergency room at 11:40 p.m. Defendant called

Dr. Brian Opitz, the emergency room physician who treated him, to testify at trial. Dr. Opitz testified that Defendant registered a blood alcohol level of .334 at 11:51 p.m. Defendant was offered beer at the hospital to prevent symptoms of alcohol withdrawal, but refused.

Dr. Opitz evaluated Defendant using the Glasgow Coma Scale ("GCS") as part of his medical treatment. The GCS is a scale used by emergency medicine practitioners to determine how trauma may have affected the patient's mental function. The GCS ranges from 3 to 15 and a score of 15 is normal. Dr. Opitz explained that the first component of the test involves the patient's eyes. Four points are assessed if the patient opens his eyes normally when he is approached and spoken to. The patient is assessed one point, if he cannot respond by opening his eyes.

The second component involves verbal communication. Five points are assessed if the patient is able to speak normally and coherently. One point is assessed if the patient cannot speak at all. The final component tests the patient's fine motor skills. Six points are assessed if the patient is able to follow commands to perform fine motor movements. He will be assessed one point if he cannot do anything at all.

The EMS team evaluated defendant using the GCS and determined he scored 11 out of the 15 possible points. When Dr. Opitz evaluated him, defendant scored 13 points. Dr. Opitz testified he assessed 3 points for the eye component of the test

and 4 points for the verbal component. Dr. Opitz scored Defendant with 6 points, a perfect score, on the fine motor skills portion of the test.

Defendant was indicted on the charge of felonious larceny of a motor vehicle. He was tried before a jury and convicted on 29 May 2014. The trial court sentenced Defendant to an active prison term of fifteen to twenty-seven months. Defendant appeals.

II. Issues

Defendant argues: (1) the trial court committed plain error by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle; and, (2) his trial counsel was ineffective by failing to request a jury instruction on the lesser-included offense of unauthorized use of a motor vehicle.

III. Jury Instruction

Defendant argues the trial court committed plain error by failing to instruct the jury on the offense of unauthorized use of a motor vehicle. He contends unauthorized use of a motor vehicle is a lesser-included offense of larceny. Defendant also contends the evidence showed he was too intoxicated to form the requisite intent to support a conviction of felonious larceny. We disagree.

a. Standard of Review

Defendant failed to object to the jury instructions provided at trial. We review unpreserved error in criminal cases under a plain error standard. N.C.R. App. P. 10(a)(4); *State v. Black*, 308 N.C. 736, 739-41, 303 S.E.2d 804, 805-07 (1983). Under

the plain error standard, the defendant must establish "the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted). "[B]ecause 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[.]" *Id.* (citation and quotation marks omitted). In reviewing for plain error, appellate courts are to "examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E. 2d 375, 379 (1983).

b. Unauthorized Use of a Motor Vehicle

A person is guilty of unauthorized use of a motor vehicle, a Class 1 misdemeanor, if he takes or operates a motor vehicle without the express or implied consent of the owner or person in lawful possession. N.C. Gen. Stat. § 14-72.2(a) and (b) (2013). "The essential elements of larceny are that defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300, *cert. denied*, 314 N.C. 118, 332 S.E.2d 492 (1985) (citing *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982)). When the value of the property stolen exceeds $1,000, the larceny in question is classified as a Class H felony. N.C. Gen. Stat. § 14-72(a) (2013). The offense of larceny requires the State to prove the defendant possessed the intent to permanently deprive the

owner of the property, while the offense of unauthorized use of a motor vehicle does not.

A trial court must instruct the jury on a lesser-included offense, if there is evidence the defendant might be guilty of the lesser-included offense. *State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 190-91 (1993). "If the State's evidence is clear and positive as to each element of the charged offense, and if there is no evidence of the lesser-included offense, there is no error in refusing to instruct on the lesser offense." *State v. Howie*, 116 N.C. App. 609, 613, 448 S.E.2d 867, 869 (1994) (citing *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985)).

Our Court has held unauthorized use of a motor vehicle "may be a lesser-included offense of larceny where there is evidence to support the charge." *State v. Ross*, 46 N.C. App. 338, 339, 264 S.E.2d 742, 743 (1980); *State v. McRae*, 58 N.C. App. 225, 229, 292 S.E.2d 778, 780 (1982). *But see State v. Nickerson*, 365 N.C. 279, 282, 715 S.E.2d 845, 847 (2011) (holding unauthorized use of a motor vehicle is not a lesser-included offense of possession of stolen goods because unauthorized use of motor vehicle requires the State to prove the property in question is a "motor-propelled conveyance," an element not found in the definition of possession of stolen goods).

c. Voluntary Intoxication and Specific Intent

"Voluntary intoxication may negate the existence of specific intent as an essential element of a crime." *Howie*, 116 N.C. App at 613, 448 S.E.2d at 869.

Evidence of defendant's intoxication at the time of the crime may support an instruction on the lesser-included offense, which requires no specific intent, in addition to an instruction on larceny. *Id.* at 613, 448 S.E.2d at 869-70 (citing *Peacock*, 313 N.C. at 560, 330 S.E.2d at 194).

"In order for intoxication to negate the existence of specific intent, the evidence must show the defendant was 'utterly incapable' of forming the requisite intent." *Id.* at 613, 448 S.E.2d at 869-70 (citation omitted). "Evidence of mere intoxication is insufficient to meet this burden." *Id.* If the evidence showed defendant was "utterly incapable" to form the intent to commit larceny, the trial court should instruct the jury on the lesser-included offense. *Id.*

Defendant asserted he was too intoxicated to form the requisite intent to commit larceny. The court instructed the jury on voluntary intoxication, as follows:

> You may find that there is evidence which tends to show that the defendant was intoxicated at the time of the acts alleged in this case. Generally, voluntary intoxication is not a legal excuse for a crime. However, if you find that the defendant was intoxicated, you should consider whether this condition affected the defendant's ability to formulate the specific intent which is required for conviction of felonious larceny.
>
> In order for you to find the defendant guilty of felonious larceny, you must find beyond a reasonable doubt that the defendant had the specific intent required to commit this crime, as I have previously instructed you. If, as a result of intoxication, the defendant did not have the required specific intent, you must find the defendant not guilty of felonious larceny.

> Therefore, I charge that if, upon considering the evidence with respect to the defendant's intoxication, you have a reasonable doubt as to whether the defendant formulated a specific intent required for conviction of felonious larceny, you will not return a verdict of guilty of felonious larceny and must find the defendant not guilty.

The trial court properly instructed the jury on the issue of voluntary intoxication. Under plain error review and in light of this instruction, defendant has not shown the absence of an instruction on unauthorized use of a motor vehicle impacted the jury's larceny verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Whether defendant possessed the intent to permanently deprive the owner of the vehicle was a question of fact to be found by the jury. The jury heard Dr. Opitz's testimony and had EMS and Dr. Opitz's evaluations of Defendant's mental functioning and intoxication at the hospital shortly after the wreck. After receiving the proper instruction, the jury found the element of defendant's intent to commit larceny beyond a reasonable doubt. Defendant has not shown the jury probably would have reached a different result, if the trial court had given an additional instruction on unauthorized use of a motor vehicle. The trial court did not commit plain error in failing to instruct the jury on unauthorized use of a motor vehicle. Defendant's argument is overruled.

IV. Ineffective Assistance of Counsel

Defendant argues he received ineffective assistance of counsel because his attorney failed to request an instruction on the lesser-included offense of

unauthorized use of a motor vehicle. He asserts there is a reasonable probability the jury would have acquitted him of larceny, if the jury had been instructed on the lesser-included offense of unauthorized use of a motor vehicle.

The defendant must demonstrate his "counsel's conduct fell below an objective standard of reasonableness" to obtain relief for ineffective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984)). Precedents require defendant to show: (1) "counsel's performance was deficient;" and, (2) "that the deficient performance prejudiced his defense." *Id.* at 562, 324 S.E.2d at 248. Judicial scrutiny of trial counsel's performance is highly deferential.

Trial counsel is given wide latitude in discretionary matters of trial strategy. *State v. Milano*, 297 N.C. 485, 495-96, 256 S.E.2d 154, 160 (1979) (citation and quotation omitted), *overruled on other grounds* by *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). An appellate court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Mason*, 337 N.C. 165, 178, 446 S.E.2d 58, 65 (1994) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

In a recent decision, this Court thoroughly discussed the preference for litigating ineffective assistance of counsel claims before the trial court, as opposed to the appellate courts:

> The preference for the assertion of ineffective assistance of counsel claims in postconviction proceedings rather than on direct appeal inherent in numerous decisions by this Court and the Supreme Court stems from the fact that evidence concerning the nature and extent of the information available to the defendant's trial counsel at the time that certain decisions were made and the fact that information concerning any discussions that took place between the defendant and his or her trial counsel, while needed in evaluating the validity of the ineffective assistance of counsel claim under consideration, are generally not contained in the record presented to a reviewing court on direct appeal.

State v. Pemberton, __ N.C. App. __, __, 743 S.E.2d 719, 725 (2013).

On the record before us, this Court can only speculate to whether defense counsel's failure to request a jury instruction on unauthorized use of a motor vehicle constituted a reasonable trial strategy. *Id.* at __, 743 S.E.2d at 727. In cases such as this, "ineffective assistance of counsel claim[s] should be asserted through the filing and litigation of a motion for appropriate relief, during the course of which an adequate factual record can be developed, rather than during the course of a direct appeal." *Id.* at __, 743 S.E.2d at 725. We dismiss Defendant's ineffective assistance of counsel claim, without prejudice to Defendant's right to assert the claim in the trial court.

V. Conclusion

Defendant has failed to show the trial court committed plain error in failing to instruct the jury on the offense of unauthorized use of a motor vehicle, a lesser-

included offense of larceny. The jury was instructed on voluntary intoxication, heard all the evidence, and found Defendant to be guilty of larceny.

Defendant's ineffective assistance of counsel claim is dismissed, without prejudice to Defendant's right to assert the claim in the trial court.

NO ERROR IN PART, DISMISSED IN PART.

Judges STEPHENS and HUNTER, Jr. concur.