IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-953

Filed: 17 April 2018

Guilford County, No. 13 CRS 76500

STATE OF NORTH CAROLINA

v.

BARBARA LYNNE HENRICKSEN

Appeal by defendant from judgment entered 25 August 2015 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 12 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Whitney Hendrix Belich, for the State.

Meghan Adelle Jones for defendant-appellant.

ZACHARY, Judge.

Barbara Lynne Henricksen ("defendant") appeals from judgment entered upon her conviction for non-felonious breaking or entering. Defendant argues the trial court 1) committed plain error by failing to instruct the jury on the lesser-included offense of first-degree trespass, and 2) erred by ordering the payment of attorney's

fees without affording her notice and the opportunity to be heard. After careful review, we find no plain error in part, vacate in part, and remand.

On the morning of 15 April 2013, Monica Riess was returning to her home after completing some errands when she noticed a car parked in her driveway. Riess went to the side door of her home and found the door to be slightly ajar. She entered her home and proceeded to call out to see if anybody was in the house. Riess walked through her house to the landing of her stairs, and came upon defendant walking toward her down the hallway. Riess did not know the defendant. Defendant was wearing a scarf, sandals and glasses that defendant had taken from bedrooms in Riess's home. Defendant was also holding a folder and a book that she had taken from the bedroom of Riess's son, a picture of Riess's son that had been on a coffee table in the home, and a small picture of Riess's nephew that she had removed from the mud room.

Riess asked defendant what she was doing in Riess's home. Defendant responded that "God sent me here . . . to get my son." Defendant then alternately told Riess that her own son had passed away, and that Riess's son was her son. Riess told defendant that "this is my son" and demanded that defendant put everything down that she was holding. Riess retrieved her glasses, scarf, and sandals from defendant. Defendant left Riess's home and Riess called the police. Riess was able to record the license plate number of defendant's car and gave the information to the

police. Later the same day, defendant was located by police, and Riess identified her as the person she saw in her home.

On 1 December 2014, defendant was indicted for felonious breaking or entering. On 13 August 2015, defendant was convicted by a jury of non-felonious breaking or entering. The trial court sentenced defendant to a suspended term of 45 days of imprisonment and placed her on supervised probation for 18 months. Defendant was also ordered to pay $1992.00 for attorney's fees. Defendant gave written notice of appeal.

On 2 October 2017, defendant filed a petition for writ of certiorari. Defendant notes that her notice of appeal was deficient in that it did not designate the court to which appeal was taken and there is no certificate of service indicating that it was served upon the State. *See* N.C.R. App. P. 4(b) (2017). In our discretion pursuant to N.C.R. App. P. 21(a), we allow defendant's petition for writ of certiorari in order to review the trial court's judgment.

Defendant's sole argument on appeal is that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of first-degree trespass. We are not persuaded.

To preserve an issue for review on appeal, a defendant "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds

for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1)(2017). However,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4) (2017). Here, defendant neither objected to the trial court's instructions on breaking or entering nor requested instructions on trespass. Therefore, she did not preserve any such error, and this Court's review is limited to whether the trial court's failure to instruct the jury on trespass constituted plain error. *Id*.

Our Supreme Court has stated:

> 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) (alteration in original) (citations and quotation marks omitted).

Defendant contends that because the evidence was not clear and positive that she intended to commit a larceny, the trial court should have instructed the jury on the lesser-included offense of first-degree trespass. "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted). "The trial court is not, however, obligated to give a lesser included instruction if there is 'no evidence giving rise to a reasonable inference to dispute the State's contention.' " *State v. Hamilton*, 132 N.C. App. 316, 321, 512 S.E.2d 80, 84 (1999) (quoting *State v. McKinnon*, 306 N.C. 288, 301, 293 S.E.2d 118, 127 (1982)); *see also State v. Lucas*, 234 N.C. App. 247, 256, 758 S.E.2d 672, 679 (2014) (citation, quotation marks, and ellipsis omitted) ("The trial court is not obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention."). "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation and quotation marks omitted).

"The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. G.S. 14-54(a)." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577

(1986). Misdemeanor breaking or entering is a lesser-included offense of felonious breaking or entering. *State v. Dickens*, 272 N.C. 515, 516-17, 158 S.E.2d 614, 614-15 (1968). The only distinction between the two offenses is that misdemeanor breaking or entering does not include the element of intent to commit a felony or larceny therein. *Id.* As defendant notes, trespass is a related offense. "[A] person is guilty of first-degree trespass when 'without authorization, he enters or remains on premises of another or in a building of another.' " *Hamilton*, 132 N.C. App. at 321, 512 S.E.2d at 84 (quoting N.C. Gen. Stat. § 14-159.12) (brackets and ellipses omitted). This Court has held that first-degree trespass is a lesser-included offense of felony breaking or entering, because the essential elements of first-degree trespass are present in the charge of felony breaking or entering. *Id.*

Here, the State presented positive evidence of every element of the offense of felonious breaking or entering. Riess testified that the side door to her house was open, and she found defendant inside her home in possession of items belonging to her and her family. Because there was evidence presented concerning defendant's mental status, and whether she could form the specific intent to commit larceny, the trial court instructed the jury on non-felonious breaking or entering. There was no evidence, however, that defendant did not wrongfully break or enter Riess's home, and defendant has presented no argument that the elements of non-felonious

breaking or entering were not met. Consequently, we conclude the trial court did not commit plain error by failing to instruct the jury on trespass.

Defendant next argues that the trial court erred by ordering the payment of attorney's fees without affording her notice and the opportunity to be heard. The State concedes error, and we agree.

N.C. Gen. Stat. § 7A-455 (2017) authorizes a trial court to order a criminal defendant, upon conviction, to pay for the services of his or her court-appointed counsel. However, a defendant must first be given notice and the opportunity to be heard. *State v. Jacobs*, 172 N.C. App. 220, 616 S.E.2d 306 (2005). In *Jacobs*, after the defendant was sentenced, the trial court asked whether defendant's counsel had been appointed. Defendant's trial counsel informed the trial court that he was appointed, but "he had not yet calculated his hours of work related to [the] defendant's representation." *Id.* at 235, 616 S.E.2d at 316. The trial court instructed defense counsel to calculate his hours and submit them to the court. The trial court then informed defendant that counsel was going to submit an hourly bill, that the court would multiply the number of hours by $65, and that the trial court would enter a judgment which would require defendant to reimburse the State that amount of money. This Court vacated the trial court's order after determining that there was "no indication in the record that defendant was notified of and given an opportunity

to be heard regarding the appointed attorney's total hours or the total amount of fees imposed." *Id.* at 236, 616 S.E.2d at 317.

Similarly, here, the trial court asked counsel if he was appointed. Counsel replied that he was appointed, and that it would take him some time to estimate the amount of time he had spent working on defendant's case. The trial court asked counsel to submit his hours to the court, and then informed defendant that "attorney's fees will be part of what you'll need to pay while you're on probation. Set that up with a schedule with your probation officer." We find *Jacobs* to be indistinguishable, and conclude that defendant was not given notice or the opportunity to be heard regarding her appointed counsel's hours or the total amount of fees imposed. Accordingly, we vacate the civil judgment entered against defendant for her court-appointed attorney's fees and remand without prejudice to the State's right to seek the imposition of attorney's fees and an appointment fee, provided that defendant is given notice and an opportunity to be heard.

NO PLAIN ERROR IN PART, VACATED IN PART AND REMANDED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).