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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-69

Filed: 19 December 2017

Mecklenburg County, Nos. 15 CRS 218348-50

STATE OF NORTH CAROLINA

v.

CEDRICK SHIHEED SHIELDS

Appeal by defendant from judgment entered 21 September 2016 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah Greene, for the State.

Allegra Collins Law, by Allegra Collins, for defendant-appellant.

CALABRIA, Judge.

Cedrick Shiheed Shields¹ (“defendant”) appeals from the trial court’s judgment entered upon jury verdicts finding him guilty of felonious breaking or entering;

¹ The record and transcript contain several different spellings of defendant’s first and middle names. We presume the spelling in the trial court’s judgment to be correct.

larceny after breaking or entering; and felonious possession of stolen goods. After careful review, we conclude that the trial court committed prejudicial error by denying defendant's requests for jury instructions on (1) duress as a defense to larceny after breaking or entering and possession of stolen goods, and (2) misdemeanor breaking or entering as a lesser-included offense to felonious breaking or entering. Therefore, we vacate the trial court's judgment and remand for a new trial on all charges.

I. Background

On the evening of 24 May 2015, defendant was walking home from the bus stop in Charlotte, North Carolina, when he passed a group of six or seven men standing outside a house that belonged to a man named "Damian." One of the men was Travis Jermaine West ("Travis"), an individual whom defendant had known "for a very long time." As defendant walked by, Travis asked him which gang he represented. When defendant did not respond, Travis, Damian, and a third man with dreadlocks whom defendant did not know began following him. Although defendant walked faster, the men continued to follow and harass him.

Defendant was nearly home when the three men caught up to him. Placing a gun to the back of defendant's head, Travis threatened to kill him if he screamed, snitched, or yelled. Travis ordered defendant to "walk to the house," and the men led him to the front door of a residence on Fairstone Avenue. Damian gave defendant

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burglary tools, and the men instructed him to break into the house. When defendant was unsuccessful, Travis approached with his gun pointed and told defendant to stomp the door in with his foot. After he opened the door, defendant entered the house with Damian and the third man, while Travis remained outside keeping lookout. Damian and the third man ordered defendant to “get anything expensive” and began removing electronics and other items throughout the house.

Defendant was standing in the living room, holding a laptop, when the men left and instructed defendant to “stay put” until they returned to the house. Soon after, defendant saw a flashlight shine through the curtains on the back door, and he believed that the men had returned. However, when defendant exited through the back door, he was confronted by Officer Aaron Deroba of the Charlotte-Mecklenburg Police Department (“Officer Deroba”). Defendant was wearing black gloves and holding a laptop bag, and there was a computer cable and a flat screwdriver in his pocket. With his pistol drawn and flashlight pointed at defendant, Officer Deroba commanded, “Don’t run, do not run. Get down. Drop everything. Get down on the ground. Get down on the ground.” Defendant cooperated, lay face down on his stomach, and submitted his arms. While Officer Deroba restrained him with handcuffs, defendant explained that his friends told him “to go into the home and steal all the electronic[s] out of the home”; therefore, breaking in was not his idea. When Officer Deroba asked defendant whether he would join his friends if they

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jumped off a bridge, defendant, an 18-year-old with various mental disabilities, replied that he “didn’t have a lot of friends” and “just want[ed] to be part of the in crowd.”

On 14 September 2015, defendant was indicted for felonious breaking or entering, larceny after breaking and entering, and felonious possession of stolen goods. Prior to trial, defendant filed notice of intent to assert the affirmative defenses of duress, mental infirmity, and diminished capacity, pursuant to N.C. Gen. Stat. § 15A-905(c) (2015). On 19 September 2016, a jury trial commenced in Mecklenburg County Criminal Superior Court. Following the State’s presentation of evidence, defendant testified that he would not have broken into the house if Travis had not threatened him with a gun. Defendant believed that Travis was involved in a gang, and based on previous violent encounters with him, defendant feared for his life that night. Defendant testified that he initially told Officer Deroba that he “wanted to fit in” because he “knew [the men] would come hunt [him] down and hurt [him]” if he “snitch[ed] on them.”

At the jury charge conference, defendant requested an instruction on the defense of duress. After considering arguments from defendant and the State, the trial court agreed to provide the instruction for the charge of felonious breaking or entering. However, the court declined to instruct the jury on duress as a defense to the remaining offenses.

On 21 September 2016, the jury returned verdicts finding defendant guilty of all charges. After consolidating the offenses for judgment, the trial court imposed a 5-15 month suspended sentence and placed defendant on 24 months of supervised probation. In addition, the court ordered defendant to complete 1,000 hours of community service and pay restitution to the victim. Defendant appeals.

II. Analysis

A. Duress Defense

Defendant first contends that the trial court erred by partially denying his request for a jury instruction on the defense of duress. We agree.

“[T]he question of whether a defendant is entitled to an instruction on the defense of duress . . . presents a question of law, and is reviewed *de novo*.” *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015). “Generally, the trial court must give an instruction on any substantial feature of a case, regardless of whether either party has specifically requested an instruction. Any defense raised by the evidence is a substantial feature of the case, and as such an instruction is required.” *State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 887-88 (2001) (citations omitted), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002). “For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when viewing the evidence in a light most favorable to the defendant.” *State v. Brown*, 182 N.C. App. 115, 118, 646 S.E.2d 775,

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777, *disc. review denied*, 361 N.C. 431, 648 S.E.2d 848, *cert. denied*, 552 U.S. 1010, 169 L. Ed. 2d 373 (2007). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citation and quotation marks omitted).

In North Carolina, the affirmative defense of duress serves as a complete defense to criminal charges other than murder. *State v. Cheek*, 351 N.C. 48, 61, 520 S.E.2d 545, 553 (1999). In order to successfully invoke the defense, a defendant must “show that his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act.” *Id.* at 62, 520 S.E.2d at 553 (citation omitted). However, a duress defense “cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm.” *Smarr*, 146 N.C. App. at 55, 551 S.E.2d at 888 (citation and quotation marks omitted). The defendant must present evidence of each of these elements in order to receive a jury instruction on duress. *Id.*

In the instant case, defendant testified that although he did not want to break into the victim’s house, he “was scared for [his] life” when Travis approached him with the gun and ordered him to stomp in the door. Defendant’s fear did not subside after defendant entered the residence, even though Travis remained outside keeping a lookout. On cross-examination, defendant testified that he “wanted to go back out” while Damian and the third man “went around in the house . . . but [he] knew Travis

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was out there” with the gun. Defendant’s continued fear of Travis was reasonable, particularly in light of the pair’s violent history:

[DEFENSE COUNSEL:] Well, was there any experiences that you had with Travis in the past that would make you more likely to believe that he would hurt you?

[DEFENDANT:] Yes.

Q. What are those experiences?

. . .

A. Travis has abused me, drugged my drink, he has raped me, and he’s molested me too.

Q. What, if any, other physical violence has Travis done to you in the past?

A. He’s brutally beat me ’cause he wanted his way. He wanted my money that my mother has gave to me through my SSI.

Q. So when you – when he threatened you, you believed him?

A. Yes.

At the charge conference, defendant requested N.C.P.I.--Crim. 310.10, which applies to compulsion, duress, or coercion. While acknowledging that “having a gun to your head is a reasonable fear,” the State nevertheless contended that defendant was not entitled to the instruction, because he “had a reasonable opportunity to escape the duress.” The trial court initially denied defendant’s request in its entirety, based on the court’s findings that the “danger was not continuous throughout the

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time of the crime” and that defendant “did have means to withdraw safely.” Upon defendant’s motion, however, the trial court reconsidered its ruling and agreed to provide a duress instruction for the charge of felonious breaking or entering, but not the remaining charges. The court delivered the following instruction²:

There is evidence in this case tending to show that the Defendant acted only because of compulsion, duress or coercion in breaking or entering a home. The burden of proving compulsion, duress, or coercion is upon the Defendant. It need not be proved beyond a reasonable doubt but only to your satisfaction.

The Defendant would not be guilty of breaking or entering only if his actions were caused by the reasonable fear that he would suffer immediate death or serious bodily injury if he did not commit the crime. The danger must be continuous throughout the time when the act is being committed and must be one from which the Defendant cannot withdraw in safety.

His assertion of compulsion, duress, or coercion is a denial that he committed any crime. The burden remains on the State to prove the Defendant’s guilt beyond a reasonable doubt.

On appeal, the State contends that the instant case is analogous to *State v. Smarr*, 146 N.C. App. 44, 551 S.E.2d 881 (2001). In *Smarr*, the sixteen-year-old defendant testified that in the early morning of 14 July 1998, he was riding bikes with his friend, McNeil, when their acquaintance, Lipscomb, arrived in a van. 146 N.C. App. at 47, 551 S.E.2d at 884. Lipscomb offered the pair a ride home but

² The underlined portions of the instruction are alterations to N.C.P.I.--Crim. 310.10, which were requested by the State.

indicated that he needed money for gas. *Id.* Looking for his wallet, the defendant removed a gun from his pocket, and Lipscomb grabbed it. *Id.* Lipscomb said that he wanted to rob someone, and McNeil offered to help and showed his own gun; however, the defendant felt scared and said “no.” *Id.*

When they arrived at the filling station, the defendant pumped gas while Lipscomb went inside to pay. *Id.* Afterwards, the group drove around until they spotted two men and a woman walking, and they exited the van to follow on foot. *Id.* at 48, 551 S.E.2d at 884. The defendant stopped to tie his shoes, but when he looked up, Lipscomb and McNeil were gone. *Id.* Nevertheless, the defendant continued down the road, where he witnessed Lipscomb shoot both men and McNeil fire his gun once. *Id.* One of the men whom Lipscomb shot subsequently died. *Id.* at 46, 551 S.E.2d at 883.

On appeal to this Court, the defendant argued that the trial court committed reversible error by denying his request for a duress instruction on all charges except murder. *Id.* at 54, 551 S.E.2d at 887-88. We disagreed, concluding that “[e]ven under [his] version of the facts,” the defendant had two reasonable opportunities to avoid committing the crimes without undue exposure to risk of death or serious bodily harm:

When defendant, Lipscomb, and McNeil reached the gas station, defendant was alone outside pumping the gas. This gave him the opportunity to run away or call for help, but he chose to get back in the van. In addition, when

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McNeil and Lipscomb left the van to attack the Hammonds and Long, defendant got out with them but stopped to tie his shoes. At this point, McNeil and Lipscomb had gotten so far away they were out of defendant's eyesight, thus giving defendant another opportunity to run away and avoid being part of the armed robbery. Defendant's fear that McNeil and Lipscomb might later hurt him if they thought he told the police about their plan is not the kind of immediate threat of harm that would negate his opportunity to escape.

Id. at 55, 551 S.E.2d at 888.

The instant case is distinguishable. Unlike the *Smarr* defendant, who had two reasonable opportunities to flee his accomplices *while outside*, here, defendant was unarmed and outnumbered by his captors *inside an unfamiliar house*. In denying defendant's request for a duress instruction on the larceny and possession of stolen goods charges, the trial court noted that

the evidence tends to indicate that Travis remained outside at all times. The evidence also tends to indicate that they arrived through the front door, that Travis hid in the bushes out of the front door, and that there was a back door that the Defendant could have retreated from.

Notwithstanding the available exit, however, defendant presented evidence that he remained afraid of Travis even after he entered the home with the other men, and that his continued fear precluded any reasonable opportunity to retreat. Defendant testified that he "wanted to go back out but [he] knew Travis was out there" with the gun. When the men left the house and instructed defendant to "stay put" until they

returned, defendant reasonably obeyed, due to Travis's prior threats and actual violence against him.

The State failed to present any evidence to refute defendant's version of events. *Contra id.* at 48, 551 S.E.2d at 884 (providing that "[i]n rebuttal, the State presented the testimony of Montrell McNeil[,] who testified that "he and defendant had been riding around . . . looking for someone to rob" and that "Lipscomb and defendant argued over who would use defendant's gun, but defendant eventually agreed to allow Lipscomb to use it"). Instead, the State contended that defendant's testimony was "not credible," because "once he was in the living room with no one else around for 60 seconds, . . . if he were truly under duress and he truly did not intend to commit this crime, he would have dropped the laptop and run out of the house screaming and yelling for help." However, since defendant was confined inside the unfamiliar house, he had no way of knowing whether the men had truly left the vicinity, or whether they remained nearby. Moreover, considering his violent history with Travis, it is wholly unreasonable to expect that defendant—who has diagnosed mental disabilities, including autism and post-traumatic stress disorder, among others—would have "run out of the house screaming and yelling for help" immediately after the men exited the residence when *that very night*, Travis threatened to kill defendant if he "screamed, snitched, or yelled."

Viewed in the light most favorable to defendant, *Brown*, 182 N.C. App. at 118, 646 S.E.2d at 777, defendant presented substantial evidence from which the jury could find that “his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act.” *Cheek*, 351 N.C. at 62, 520 S.E.2d at 553. Furthermore, unlike in *Smarr*, defendant did not “have an opportunity to leave the scene without undue exposure to risk of death or serious bodily injury.” 146 N.C. App. at 55, 551 S.E.2d at 888. Accordingly, defendant was entitled to a jury instruction on duress as a defense to each of the charged offenses, not only felonious breaking or entering. The trial court erred by partially denying defendant’s request for a duress instruction, and the court’s error entitles him to a new trial on the charges of larceny after breaking or entering and possession of stolen goods.

B. Misdemeanor Breaking or Entering

Defendant next challenges the trial court’s denial of his request for a jury instruction on misdemeanor breaking or entering as a lesser-included offense of felonious breaking or entering.

1. Appellate Waiver

Before reaching the merits, we must first address the State’s argument that defendant waived appellate review by failing to object to the trial court’s omission of the jury instruction on the lesser-included offense. *See* N.C.R. App. P. 10(a)(2)

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(providing, *inter alia*, that “[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection”). “For the purposes of Rule 10(a)(2), a request for instructions constitutes an objection.” *State v. Rowe*, 231 N.C. App. 462, 469, 752 S.E.2d 223, 227 (2013) (citing *State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 192 (1993)); *see also id.* at 469-70, 752 S.E.2d at 228 (holding that the issue was properly preserved where the transcript established that the defendant “specifically requested the trial court to include a jury instruction on [a lesser-included offense] and argued that point before the court”).

Here, the transcript demonstrates that defense counsel requested instructions on misdemeanor breaking or entering at the charge conference:

THE COURT: . . . All right, Counsel. I’ve highlighted a few other options within the instructions beginning on page four. Let me hear first from the State as to misdemeanor B&E.

[THE STATE]: I’m not sure that there’s been any evidence of misdemeanor B&E. It was misdemeanor B&E without the intent to commit a larceny.

Generally we see that when someone’s going into a house to sleep, to consume drugs, to watch TV. I don’t know that there’s been any evidence whatsoever of a lack of intent to steal in the B&E, so I would ask that it be nonfelonious or not guilty.

THE COURT: All right. For the Defendant?

[DEFENDANT]: Well, with regard to my client's testimony, I think that it is possible that a jury could determine that he had no intent to commit a larceny upon the breaking or entering. Of course, that's part and parcel with the defense of duress.

If they believe that he – if for some reason they were to find that he were not under duress, they could also believe that he committed the breaking or entering, but at the time, did not have an intent to commit a larceny therein, given that he was instructed to take an item after he was inside the home. So I'd ask that the instruction remain.

THE COURT: All right. If the jury believes the Defendant was under duress, regardless (inaudible) not necessary for felony B&E or misdemeanor B&E and so I'm going to decline to give misdemeanor B&E.

As in *Rowe*, the transcript clearly establishes that defense counsel submitted an oral request for instructions on the lesser-included offense, which the court denied. “The fact that counsel did not say the words ‘I object’ is not reason to deny appellate review in this case.” *Id.* at 470, 752 S.E.2d at 228. Therefore, the State's preliminary argument is overruled, and we proceed to the merits of defendant's second issue.

2. Breaking or Entering Instructions

A defendant is entitled to a jury instruction on a lesser-included offense “if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citations and quotation marks omitted). However, the trial court is not obligated to instruct the jury on a lesser-included offense based on “[t]he mere

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possibility that a jury might reject part of the prosecution's evidence" *State v. Hamilton*, 132 N.C. App. 316, 321, 512 S.E.2d 80, 84 (1999). Rather, due process requires that the jury be instructed on a lesser-included offense "*only* when the evidence warrants such instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence." *Leazer*, 353 N.C. at 237, 539 S.E.2d at 924 (citation and quotation marks omitted).

Misdemeanor breaking or entering is a lesser-included offense of felonious breaking or entering. *Hamilton*, 132 N.C. App. at 321, 512 S.E.2d at 84; N.C. Gen. Stat. § 14-54(a), (b). Intent is the distinguishing element: a "person who breaks or enters any building *with intent to commit any felony or larceny therein*" commits a Class H felony, N.C. Gen. Stat. § 14-54(a) (emphasis added), whereas a "person who *wrongfully* breaks or enters any building" commits a Class 1 misdemeanor. N.C. Gen. Stat. § 14-54(b) (emphasis added). In order for the offense to be a felony, the defendant must possess "the specific intent to steal . . . at the time of the breaking or entering." *State v. Costigan*, 51 N.C. App. 442, 444, 276 S.E.2d 467, 468 (1981). However, the commission of a felony inside the building "is not positive proof that the defendant had the intent to commit the felony at the time of [the] breaking and entering." *State v. Little*, 163 N.C. App. 235, 240, 593 S.E.2d 113, 116, *disc. review denied*, 358 N.C. 736, 602 S.E.2d 366 (2004), *appeal dismissed as moot*, 359 N.C. 855, 619 S.E.2d 857 (2005). Rather, "[t]he presence of any evidence of guilt in the lesser

degree is the determinative factor.” *Id.* (holding that the defendant’s testimony explaining that “although he purposefully brought the bat into the apartment, and that he intended to assault [the occupants] therein, he did not intend to use the bat unless his life was threatened” was not sufficient to require a jury instruction on the lesser-included offense of misdemeanor breaking or entering).

The undisputed evidence in this case is that prior to defendant’s involvement in the offenses on 24 May 2015, he was walking home alone from the bus stop. Before defendant arrived home, three men followed him, and Travis threatened him by placing a gun at the back of his head. Defendant testified that he was unsure where to go when Travis commanded him to “walk to the house”:

[DEFENDANT:] He told me, Walk to the house. I said, What house? I didn’t know what house he was talking about. And he said, Walk with me, with the gun still pointed to the back of my head.

[DEFENSE COUNSEL:] And where did he have you walk?

A. To [the victim’s] house

When they arrived, Damian gave defendant burglary tools, and the men instructed him to break in to the house. However, “[t]he tools didn’t work[,]” and defendant was uncertain how to proceed:

[DEFENSE COUNSEL:] And then after Damian gave you tools, what happened next?

[DEFENDANT:] They told me to break inside of the house. And they went behind a bush and waited until I got into

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the house. And I didn't have any tools so I turned around and (gesturing) that was my gesture. And Travis came toward me with the gun pointing towards me. He said, Use your foot to break inside of the house.

I was scared for my life.

Q. And what did you do when he told you to do that?

A. I turned around, went back to the house. I turned my back to the door and I stomped the door in.

Q. Did you want to break into the house?

A. No, I did not.

Q. And so when the door came open, where did you go?

A. I went into the living room and I remember them saying to me, Get anything expensive. And all I saw was the TV and I couldn't carry it by myself. It's a two-man TV. And these guys kept coming in and out. They had their shirts with stuff in the middle of it going in and outside the house (gesturing). And the dread man had the Xbox. I remember that.

During cross-examination, defendant testified that he was unsure what to do after he entered the house with Damian and the third man:

[THE STATE:] Okay. So the two guys inside and the three of you were going through the house?

[DEFENDANT:] Uh-huh.

Q. That's when the two other guys tell you to stay put and they leave; correct?

A. No. They came in with me and I stood in, like, the middle because I didn't know what to do.

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Q. Okay.

A. They went around in the house. I wanted to go back out but I knew Travis was out there.

Q. Okay. So they were going into other rooms of the house and they left you in the living room?

A. Uh-huh.

Defendant's testimony is competent "evidence of guilt in the lesser degree" and entitles him to a jury instruction on misdemeanor breaking or entering. *Id.* Unlike in *Hamilton*, where the defendant "did not testify or present any evidence that he broke or entered for any non-felonious purpose[.]" 132 N.C. App. at 321, 512 S.E.2d at 85, here, defendant testified that he neither wanted nor knew how to break in to the victim's house. Indeed, defendant testified that he "didn't know what to do" *even after he entered the house*—once they were in the living room, Damian and the third man instructed defendant to "get anything expensive." This evidence is sufficient to permit the jury to find that defendant did not possess "the specific intent to steal existing at the time of the breaking or entering" that is necessary for a felony conviction under N.C. Gen. Stat. § 14-54. *Costigan*, 51 N.C. App. at 444, 276 S.E.2d at 468. Therefore, defendant was entitled to a jury instruction on the lesser-included offense of misdemeanor breaking or entering, *Leazer*, 353 N.C. at 237, 539 S.E.2d at 924, and the trial court's denial of his request for an instruction entitles him to a new trial on the charge of felonious breaking or entering.

III. Conclusion

We conclude that defendant is entitled to a new trial on all charges as a result of the trial court's denial of his requests for jury instructions on (1) duress as a defense to the charges of larceny after breaking or entering and possession of stolen goods; and (2) misdemeanor breaking or entering as a lesser-included offense of felonious breaking or entering. Accordingly, we need not address defendant's remaining arguments on appeal. We vacate the trial court's judgment and remand for a new trial on all charges.

NEW TRIAL.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).