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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-567

Filed: 17 April 2018

Alamance County, Nos. 13 CRS 50485, 2080

STATE OF NORTH CAROLINA

v.

TONYA MICHELLE LEATH

Appeal by defendant from judgment entered 24 April 2015 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Nancy Dunn Hardison, for the State.

Joseph P. Lattimore for defendant-appellant.

DAVIS, Judge.

Tonya Michelle Leath ("Defendant") appeals from her convictions for felonious breaking or entering, felonious larceny, and attaining the status of a habitual felon. On appeal, she contends that the trial court erred in failing to instruct the jury on the law of abandoned property. After a thorough review of the record and applicable law, we affirm Defendant's convictions.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: At approximately 5:00 a.m. on 24 January 2013, Margarito Montes-Cruz was asleep in his home in Burlington, North Carolina where he lived with his wife and three daughters. He was awakened by a knock at his door, and upon opening the door Montes-Cruz saw a woman whom he had never seen before. The woman asked for Jose, and Montes-Cruz informed her that no one by that name lived at the residence. He asked the woman to leave and watched her through a window until she walked away from his home. Montes-Cruz subsequently identified the woman as Defendant. Later that morning, Montes-Cruz left for work in High Point.

Alva Guzman lived across the street from Montes-Cruz. On the morning of 24 January 2013, she noticed that the side door of his home had been left open while no cars were in the driveway. Watching from her bedroom window, Guzman observed Defendant emerge from the residence through the open side door and look in both directions before reentering Montes-Cruz's home and pulling the door closed. Defendant did not have anything in her hands when Guzman saw her step out of the home.

Shortly thereafter, Guzman saw Defendant exit the residence through the side door again. Once again, she was not carrying anything when she walked out of the home. However, Guzman observed Defendant pick up a large bundle that had been

wrapped in a blanket from the top of Montes-Cruz's recycling bin and leave the property on foot. Guzman was unaware who had placed the bundle there.

Guzman called Montes-Cruz and told him what she had observed. He then called Harold James, another neighbor, and informed him that someone had broken into his home and asked James to investigate. After speaking with James, Montes-Cruz left his workplace to return home.

Following his conversation with Montes-Cruz, James went outside where he observed Guzman shouting for help and pointing in the direction that Defendant was walking. James then drove up the street with his son in the direction that Guzman had indicated until he saw Defendant carrying a bundle wrapped in a blanket. Based on his conversation with Montes-Cruz, James suspected that the bundle contained items stolen from his neighbor's home. He approached Defendant and asked her what was under the blanket. She told James she did not want any trouble and that she was carrying a television she had found on the side of the road. James took the bundle from Defendant and discovered that it contained a television and a Blu-ray player.

Defendant then attempted to walk away. James alerted a nearby police officer and explained the situation. The officer stopped Defendant and began questioning her about the incident as James and his son drove back to their home with the television and Blu-ray player in the backseat of their vehicle.

Officer Adam Snow of the Burlington Police Department arrived at the Montes-Cruz residence after dispatch received a call regarding a breaking or entering in progress at the home. James informed Officer Snow that Guzman had witnessed the incident, and Officer Snow arranged for Defendant to be driven to Guzman's residence in a police car. Guzman subsequently identified Defendant as the woman she witnessed leaving the Montes-Cruz property earlier that day. Shortly thereafter, Montes-Cruz arrived and identified the items in James' vehicle as his belongings.

Officer Snow and Montes-Cruz then walked through his home to determine if anything else was missing. Officer Snow observed that a corner of a piece of plexiglass in the side door had been pushed inward, leaving a gap large enough for a person to reach through and unlock the door. In Montes-Cruz's bedroom, he saw the outline of a dust ring on the dresser where the television and Blu-ray player found in Defendant's possession had been. Montes-Cruz testified that those items had been on his dresser when he left for work that morning.

Defendant was indicted by a grand jury on 22 April 2013 for felonious breaking or entering, felonious larceny, resisting a public officer, and for attaining the status of a habitual felon. A jury trial was held beginning on 22 April 2015 before the Honorable G. Wayne Abernathy in Alamance County Superior Court.

At trial, Defendant testified that on the date of the incident she was walking past the Montes-Cruz home when she noticed a television wrapped in a blanket lying

on the side of the road. She further stated that she placed the television on top of the recycling bin before knocking on the front and side doors of the residence in an attempt to inquire about the functionality of the television. According to Defendant, when no one answered the door, she picked up the television and began walking away with what she believed to be discarded property.

At the charge conference, counsel for Defendant requested that an instruction on abandoned property be provided for the jury. The trial court asked defense counsel if she had any specific language prepared, and she responded that she did not. The trial court then stated that it would look for a pattern jury instruction defining abandoned property. No definition of the term was included in the instructions actually given to the jury by the trial court. At no point did Defendant object to the lack of such an instruction.

The jury convicted Defendant of felonious breaking or entering and felonious larceny on 23 April 2015. She subsequently entered into a plea agreement in which she pled guilty to attaining the status of a habitual felon in exchange for the dismissal of the resisting a public officer charge. Defendant was sentenced to a term of imprisonment of 75 to 102 months. On 24 June 2016, this Court allowed Defendant's *pro se* petition for a writ of *certiorari* seeking review of her convictions.

Analysis

As an initial matter, the State contends that Defendant has not properly preserved the issue she seeks to raise on appeal. Specifically, the State notes that Defendant did not object to the trial court's failure to provide the jury with an instruction defining abandoned property. In response, Defendant argues that defense counsel's request for the instruction, coupled with the trial court's statement that it would search for a pattern jury instruction on abandoned property, served to preserve the issue.

North Carolina Rule of Appellate Procedure 10(a)(2) governs the preservation of issues related to jury instructions. Rule 10(a)(2) provides, in pertinent part, as follows:

> (2) *Jury Instructions*. 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; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2).

State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987), involved the failure of a trial court to give a requested instruction after explicitly assuring the requesting party that it would do so. *Id.* at 574, 356 S.E.2d at 327. In that case, the defense attorney requested at the charge conference that the trial court give the pattern jury instruction on prior inconsistent statements. *Id.* The court responded to the request

by stating, "If I overlook that, call it to my attention. I don't think I will." *Id.* The trial court subsequently failed to give the requested instruction, and the defendant did not object to the omission. *Id.* Nevertheless, our Supreme Court deemed the issue preserved because "defense counsel complied with the spirit of Appellate Rule [10(a)(2)]." *Id.* at 575, 319 S.E.2d at 327.

Similarly, in *State v. Ross*, 322 N.C. 261, 367 S.E.2d 889 (1988), counsel for the defendant requested the pattern jury instruction concerning the refusal of a defendant to testify. *Id.* at 264, 367 S.E.2d at 891. Although the trial court informed defense counsel that it would give the requested instruction, it never actually did so. The defendant's attorney made no objection to the trial court's oversight. *Id.* In ruling that the defendant's challenge was properly preserved on appeal, our Supreme Court held that "a request for an instruction at the charge conference is sufficient compliance with [Appellate Rule 10(a)(2)] to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention." *Id.* at 265, 367 S.E.2d at 891; *see also State v. Hayes*, 183 N.C. App. 602, 608, 644 S.E.2d 655, 659 (interpreting *Ross* and *Pakulski* as standing for the proposition that "where a defendant requests a jury instruction, the trial judge promises to give it, the instruction is not given, and the defendant fails to object at the conclusion of the jury charge, the error is preserved

for appellate review" (citation omitted)), *disc. review denied*, 361 N.C. 699, 663 S.E.2d 147 (2007).

In the present case, the following exchange occurred during the charge conference between defense counsel and the trial court:

> [DEFENSE COUNSEL]: Your Honor, may we have a definition for abandoned property included?
>
> [THE COURT]: Do you have one to hand up?
>
> [DEFENSE COUNSEL]: I do not.
>
> [THE COURT]: I don't think -- are you aware of a pattern instruction that says that?
>
> [DEFENSE COUNSEL]: I can look at it.
>
> [THE COURT]: Well, I'll look.

Thus, unlike in *Ross* and *Pakulski*, the trial court here never actually promised to give the instruction requested by Defendant. Rather, the court merely asked defense counsel if she had any proposed instructional language defining abandoned property. When she responded in the negative, the trial court stated its willingness to look for a pattern jury instruction containing the requested definition. Such an offer, however, does not rise to the level of a promise to give the requested instruction.

In the alternative, however, Defendant requests that we review this issue for plain error. *See* N.C. R. App. P. 10(a)(4) ("In 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.”).

> 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 affects 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, quotation marks, and brackets omitted).

As a general proposition, “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) (internal citation omitted), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002). This Court has held that “[f]or 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, 777 (citation omitted), *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). Where a defendant requests a jury instruction "that is correct in law and supported by the evidence . . . the trial court must relate the substance of that instruction, although it is not required to give the instruction verbatim." *State v. Dodd*, 330 N.C. 747, 753, 412 S.E.2d 46, 49 (1992) (citation omitted).

In order "[t]o support a conviction for felonious breaking [or] entering . . . there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Jones*, 188 N.C. App. 562, 564-65, 665 S.E.2d 915, 917 (2008) (citation and quotation marks omitted). With regard to the crime of larceny, "the State must prove that the defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent[;] and (4) with the intent to deprive the owner of the property permanently." *State v. McNeill*, 243 N.C. App. 762, 769, 778 S.E.2d 457, 462 (2015) (citations and quotation marks omitted), *disc. review denied*, 368 N.C. 689, 781 S.E.2d 482 (2016). Notably, "property which has been abandoned by the owner cannot be the subject of larceny." *State v. Hall*, 57 N.C. App. 544, 546, 291 S.E.2d 873, 875 (citation omitted), *disc. review denied*, 305 N.C. 761, 293 S.E.2d 593 (1982). However, "[t]he party relying on the defense of abandonment must

affirmatively show by clear, unequivocal and decisive evidence the intent of the owner to permanently terminate his ownership of the disputed property." *Id.* (citation omitted).

The State contends that the trial court's failure to give an instruction on abandoned property could not have prejudiced Defendant because the court's instructions "addressed the substance of Defendant's request." The trial court's instructions to the jury stated, in pertinent part, as follows:

> [THE COURT]: For you to find the defendant guilty of felonious breaking or entering the State must prove four things each beyond a reasonable doubt.
>
> First, there was a breaking or entering or an entry by the defendant.
>
> Second, that it was a building that was broken into or entered.
>
> Third, that the owner or tenant did not consent to the breaking or entering.
>
> And fourth, that at the time the defendant intended to commit larceny.
>
> Larceny is the taking and carrying away of the personal property of another without his consent with the intent to deprive him of possession permanently.
>
> . . . .
>
> For you to find the defendant guilty of felonious larceny, the State must prove six things.
>
> First, that the defendant took property belonging to

another person.

Second, that the defendant carried away the property.

Third, that the victim did not consent to the taking and carrying away of the property.

Fourth, that at the time of the taking the defendant intended to deprive the victim of its use permanently.

Fifth, that the defendant knew she was not entitled to take the property.

And six, either that the property was taken -- that the property was taken from a building after a breaking or entering.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant took and carried away another person's property without his consent, knowing that she was not entitled to take it and intending at that time to deprive that person of its use permanently, and either that the defendant took the property from -- sorry -- that the defendant took the property from a building after a breaking and entering, it would be your duty to return a verdict of guilty of felonious larceny.

If you do not so find or if you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of felonious larceny, but must determine whether the defendant is guilty of non-felonious larceny.

Non-felonious larceny differs from felonious larceny in that the State need not prove that the property was taken from a building after a breaking or entering.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant

> wrongfully took and carried away another person's property without his consent, knowing that she was not entitled to take it and intending at that time to deprive that person of its use permanently, it would be your duty to return a verdict of guilty of non-felonious larceny.
>
> If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty on the larceny count.

(Emphasis added.)

The State contends that — based on these instructions — the jury could only have convicted Defendant of felonious breaking or entering and felonious larceny if it found Defendant's explanation for how she obtained the property to lack credibility. Because the jury did, in fact, convict her on those charges, the State reasons, the jury necessarily did not believe Defendant's explanation.

We find instructive several cases from our appellate courts addressing — albeit in other contexts — the question of whether a defendant can show prejudice from a trial court's denial of a requested jury instruction where the jury's verdict implicitly shows that it did not believe the evidence upon which the request for the additional instruction was based. In *State v. Lyons*, 340 N.C. 646, 459 S.E.2d 770 (1995), the defendant was charged with first-degree murder and requested instructions on the lesser-included offenses of voluntary and involuntary manslaughter. *Id.* at 663, 459 S.E.2d at 779. The trial court denied the request and elected to instruct the jury on first-degree and second-degree murder. The defendant was convicted of first-degree

murder and argued on appeal that the trial court erred in failing to grant his request. *Id*. at 664, 459 S.E.2d at 779. Our Supreme Court ruled that "a trial court does not commit prejudicial error in failing to give a voluntary manslaughter instruction when a jury rejects a verdict of guilty of second-degree murder and instead finds defendant guilty of first-degree murder." *Id*. at 663, 459 S.E.2d at 779 (citation omitted). The Court reasoned that "when a jury does not find that defendant was in the grip of sufficient passion to reduce the murder from first-degree to second-degree, then ipso facto it would not have found sufficient passion to find the defendant guilty only of voluntary manslaughter." *Id*. at 663-64, 459 S.E.2d at 779 (citation and quotation marks omitted).

Similarly, *State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990), involved a defendant convicted of first-degree murder who argued that the trial court erred in failing to instruct the jury on the lesser-included offense of involuntary manslaughter. *Id*. at 654, 392 S.E.2d at 368. Our Supreme Court held that the jury "obviously rejected the theory of an unintentional killing because it found defendant guilty of the first-degree murder of [the victim] on the theory of premeditation and deliberation." *Id*. at 655, 392 S.E.2d at 369; *see also State v. Young*, 324 N.C. 489, 493, 380 S.E.2d 94, 97 (1989) ("In reaching its verdict convicting the defendant of first rather than second degree murder, the jury found beyond a reasonable doubt that he

had the specific intent to kill his wife and, necessarily, rejected the possibility that the killing was unintentional.”).

Here, the jury convicted Defendant of both felonious breaking or entering and felonious larceny. In order to convict her of felonious breaking or entering, the jury was instructed that it must find beyond a reasonable doubt that she (1) broke or entered; and (2) intended to commit a larceny at the time that she broke or entered. Similarly, in order to convict Defendant of felonious larceny, the jury necessarily had to find that the property was taken after a breaking or entering. The trial court explained to the jury that non-felonious larceny did not require the State to prove that the property was taken after a breaking or entering.

Thus, in convicting Defendant of felonious breaking or entering and felonious larceny, the jury necessarily found that she took the television and Blu-ray player from the Montes-Cruz home after having broken into the residence for the purpose of committing a larceny. In so doing, it clearly rejected Defendant’s testimony that she simply found the items lying on the side of the road and believed them to be abandoned property.

Therefore, Defendant has failed to demonstrate that the trial court’s failure to give her requested instruction had a probable impact on the jury’s verdict. As a result, she cannot show plain error.

Conclusion

For the reasons stated above, we conclude that Defendant has failed to establish plain error.

NO PLAIN ERROR.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).