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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1004

Filed: 15 December 2020

Cleveland County, Nos. 19CRS000988; 050406

STATE OF NORTH CAROLINA

v.

DEMETRIUS LEQUAISE ALLEN, Defendant.

Appeal by defendant from judgment entered on or about 24 July 2019 by Judge Forrest D. Bridges in Superior Court, Cleveland County. Heard in the Court of Appeals 11 August 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Gwenda L. Laws, for the State.*

*Richard Croutharmel, for defendant-appellant.*

STROUD, Judge.

Defendant appeals a judgment convicting him of breaking or entering a motor vehicle and attaining the status of habitual felon. Because the trial court erred in not instructing the jury on a lesser-included offense, defendant must receive a new trial.

I. Background

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*Opinion of the Court*

The State's evidence tended to show that in January of 2019 Mr. and Ms. Rathbone were in bed at home when they heard a noise outside in the heavy rain. Mr. Rathbone opened the door and saw defendant in his father's vehicle going through the console. Ms. Rathbone called 911, and defendant was indicted for breaking or entering a motor vehicle and attaining the status of habitual felon.

Defendant presented no evidence at trial, but the parties stipulated that on the day of the incident the "temperate forecast . . . was a high of 54 degrees and a low of 42 degrees[.]" On direct by the State, both Mr. Rathbone and one of the officers who responded to the incident testified defendant told them he was homeless. The officer also testified defendant told her he was just wanting to get out of the rain.

Defendant requested a jury instruction on the lesser included offense of first-degree trespass because "through the State's evidence in this case Officer Parker indicated that Defendant stated to her that he was homeless and getting out of the rain." The trial court denied defendant's request, and the jury found him guilty of both charges. The trial court entered judgment. Defendant appeals.

II. Lesser Included Offense

Defendant contends

in a jury trial for breaking or entering a motor vehicle, the trial court reversibly erred in failing to instruct the jury on the lesser-included offense of first-degree trespass because evidence had been presented that the defendant was homeless and had entered the vehicle to get out of a cold rain.

“The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*.” *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014). “To determine whether the evidence supports the submission of a lesser-included offense, courts must consider the evidence in the light most favorable to the defendant.” *State v. Matsoake*, 243 N.C. App. 651, 658, 777 S.E.2d 810, 815 (2015) (citation, quotation marks, and brackets omitted). *State v. Covington* provides,

It is well settled that a defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State’s evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

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.

The elements of breaking or entering into a motor vehicle are (1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein. First-degree trespass is a lesser-included offense of felonious breaking or entering. Unlike felonious breaking or entering, first-degree trespass does not include the element of felonious intent but rather merely requires

evidence that the defendant entered or remained on the premises or in a building of another without authorization.

248 N.C. App. 698, 702, 788 S.E.2d 671, 675 (2016) (emphasis added) (citations and quotation marks omitted). Thus, the only elemental difference is intent.<sup>1</sup> *See id.*

Here, viewing the evidence in the light most favorable to defendant, *see Matsoake*, 243 N.C. App. at 658, 777 S.E.2d at 815, there was evidence that defendant was homeless and entered the car to get out of the rain, and it was within the purview of the jury to determine if defendant had an intent to commit a felony or larceny or was simply taking shelter from the wet and cold night. *See generally id.* The State notes that there was evidence defendant was going through the console of the vehicle and that negates his innocent intent, but on an issue as subjective as intent, the jury was entitled to determine what intent the evidence pointed to as the evidence was “conflicting” on this element. *Id.* As such, the trial court erred in denying defendant’s instruction for the lesser-included offense of first-degree trespass, and defendant must receive a new trial.

### III. Conclusion

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<sup>1</sup> The trial court and counsel engaged in a discussion regarding the possible lesser-included offense instruction. At one point, it appears the trial court may have denied the instruction based upon the theory that a motor vehicle is not a “premise” for purposes of first-degree trespass despite the plain language of *Covington*, which determines that (1) first-degree trespass *was* a lesser-included offense of breaking or entering into a motor vehicle and (2) the only elemental difference was intent. *See generally* 248 N.C. App. at 702, 788 S.E.2d at 675. But regardless of the trial court’s reasoning, the question before us is simply whether the jury should have been instructed on the lesser-included offense and to answer that we must consider “whether the State’s evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.” *Id.*

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For the foregoing reasons, defendant must receive a new trial.

NEW TRIAL.

Judges BRYANT and BROOK concur.

Report per Rule 30(e).