

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (3d) 120936-U

Order filed November 19, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 14th Judicial Circuit,
)	Rock Island County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0936
v.)	Circuit No. 05-CF-737
)	
RAPHAEL L. OWENS,)	
)	Honorable Walter D. Braud,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Carter specially concurred in the judgment.
Justice Wright dissented.

ORDER

- ¶ 1 *Held:* Defendant's postconviction petition did not make a substantial showing of ineffective assistance of counsel.
- ¶ 2 Defendant, Raphael L. Owens, appeals from the second-stage dismissal of his postconviction petition. Defendant argues the trial court erred in dismissing his petition because it made a substantial showing that he received ineffective assistance of counsel. We affirm.

¶ 3 **FACTS**

¶ 4 Defendant was charged by information with residential burglary (720 ILCS 5/19-3(a) (West 2004)). The information alleged defendant knowingly and without authority entered the dwelling place of the victim, Julie Stevens, with the intent to commit a theft therein.

The case proceeded to a jury trial.

¶ 5 Stevens testified that she lived in a two-story house at 1130 Eighth Street in Moline with her two daughters. On the morning of August 30, 2005, Stevens left the house after her two daughters had gone to school. When Stevens returned, she saw two bicycles in front of the house, an opened fence gate, and a window screen lying in the yard. Inside the house, Stevens noticed that the screen had been removed from a window in the stairwell. Upstairs, Stevens saw a shadow moving in her study and heard noises coming from the attic. Stevens ran downstairs and called the police. Stevens then walked back to the stairs and saw defendant walk down. Defendant pointed up the stairs and said Stevens' daughter was upstairs with "us." Stevens replied her daughter was at school. Defendant responded she was not at school and was upstairs. Stevens disagreed and demanded to know why defendant was in her house. Defendant pushed Stevens out of the way, ran out the front door, and rode off on a bicycle. After defendant left, Stevens noticed items in her daughter's room had been moved, her daughter's purse was opened, and Stevens' closet door and hope chest were opened. In addition, one of Stevens' bags had been tampered with, and the three dollars she had set on her bed after doing laundry was missing.

¶ 6 Police officer Mike Kinsey testified that he responded to Stevens' call and arrested Jamiele Fayson.

¶ 7 Fayson testified that he pled guilty to the residential burglary of Stevens' house and received a sentence of four years' imprisonment. On the morning of the incident, he initially went to Stevens' house by himself. When Fayson discovered that no one was home, he left and

went to a gas station where he met with defendant. Thereafter, Fayson suggested that he and defendant go to Stevens' house to see if Stevens' daughter was home. Upon returning to Stevens' house, Fayson and defendant discovered that no one was home. Fayson used a ladder to enter the house through an upstairs window and then unlocked the front door to let defendant in. Fayson was in the attic when he realized that someone had returned home. Fayson told defendant to come upstairs, and Fayson jumped out the window and fled from the scene.

¶ 8 During jury instructions, the court instructed the jury on the offense of residential burglary. After deliberations, the jury found defendant guilty of residential burglary, and the court sentenced defendant to 18 years' imprisonment.

¶ 9 Defendant filed a *pro se* postconviction petition arguing, in part, that he had received ineffective assistance of trial counsel. The court appointed counsel and advanced the petition to the second stage. Counsel filed an amended petition alleging defendant had received ineffective assistance because trial counsel did not seek a lesser-included offense instruction on criminal trespass to property. The State filed an answer to the petition and, after a hearing, the court dismissed the petition. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 Defendant argues the trial court erred in dismissing his postconviction petition at the second stage of proceedings because he made a substantial showing of ineffective assistance of trial counsel where counsel did not tender a jury instruction on the lesser-included offense of criminal trespass to property.

¶ 12 The Post-Conviction Hearing Act provides a three-stage review process for a criminal defendant to challenge the validity of his conviction based on a constitutional violation. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Domagala*, 2013 IL 113688, ¶ 32. Second-stage

petitions will be advanced to an evidentiary hearing where the allegations in the petition, as supported by the record or accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). When the petition alleges ineffective assistance of counsel, defendant must make a substantial showing that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Domagala*, 2013 IL 113688, ¶ 36; *Strickland v. Washington*, 466 U.S. 668 (1984). Failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We review the second-stage dismissal of a postconviction petition *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 13 Defendant argues trial counsel provided deficient performance when he did not tender a jury instruction on the lesser-included offense of "criminal trespass to property." Defendant does not provide a statutory citation for this offense, but the State cites to section 19-4 of the Criminal Code of 1961 (Code), criminal trespass to a residence. 720 ILCS 5/19-4 (West 2004). Defendant did not file a reply brief to contest the State's citation. Therefore, in determining whether criminal trespass is a lesser-included offense of residential burglary, we are guided by the elements provided in section 19-4 of the Code.

¶ 14 Generally, a defendant may not be convicted of an offense he has not been charged with committing. *People v. Kolton*, 219 Ill. 2d 353, 359 (2006). However, a defendant is entitled to have the jury instructed on a less serious offense if that offense is included in the charged offense. *People v. Hamilton*, 179 Ill. 2d 319, 323 (1997). A lesser-included offense instruction is justified when there is some evidence to support the giving of the instruction. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). However, if an offense is classified as lesser-included,

there will, by definition, be some evidence to support the issuance of the instruction; the lesser offense shares common elements with the greater. Therefore, the more appropriate question is whether it would be rational to offer a lesser-included offense instruction on this evidence. See *People v. Austin*, 216 Ill. App. 3d 913 (1991) (defendant convicted of residential burglary was not entitled to a lesser-included offense instruction on the offense of criminal trespass to a residence where the jury could not have rationally convicted defendant of criminal trespass to a residence and acquitted defendant of residential burglary); *People v. Moore*, 206 Ill. App. 3d 769 (1990) (lesser-included offense instruction not warranted where the evidence would only allow jury to reach one of two conclusions, defendants were guilty of residential burglary or they were not guilty).

¶ 15 To determine if an uncharged offense is a lesser-included offense, the supreme court has directed us to use the two-step charging instrument approach. *People v. Kennebrew*, 2013 IL 113998, ¶ 34. First, we must determine whether the charging instrument contains a broad foundation or main outline of the lesser offense. *Id.* Second, we must determine whether the evidence rationally supports the conviction on the lesser-included offense. *Kolton*, 219 Ill. 2d at 360. A defendant is entitled to a lesser-included offense instruction "only if an examination of the evidence reveals that it would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit the defendant of the greater offense." *Hamilton*, 179 Ill. 2d at 324. The trial court has the discretion to decide whether an instruction is to be given. *Kolton*, 219 Ill. 2d at 360.

¶ 16 Here, the information alleged defendant committed the offense of residential burglary when he "knowingly and without authority entered the dwelling place of [the victim], with the intent to commit a theft therein." The misdemeanor offense of criminal trespass to a residence

requires proof that defendant, without authority, knowingly entered a residence. 720 ILCS 5/19-4(a)(1) (West 2004). Consequently, the information contained the broad outline of the elements required for a charge of criminal trespass to a residence.

¶ 17 Next, we must determine whether the evidence rationally supports a conviction on the lesser-included offense. "A lesser included offense instruction is proper only where the charged greater offense requires the jury to find a disputed factual element that is not required for conviction of the lesser included offense." *Hamilton*, 179 Ill. 2d at 328. Unlike criminal trespass to a residence, residential burglary requires proof that defendant entered the victim's dwelling with the intent to commit a theft or felony therein. 720 ILCS 5/19-3(a) (West 2004). Therefore, our analysis turns on whether the evidence of defendant's intent to commit a theft or felony at the time of entry was subject to dispute and rationally supported the issuance of a lesser-included offense instruction.

¶ 18 In *Hamilton*, defendant was charged with residential burglary after he entered the victim's house, announced "she owes me money," and left with the victim's purse. *Hamilton*, 179 Ill. 2d at 321. At trial, defense counsel tendered a jury instruction on the lesser offense of theft. However, the trial court refused to issue the theft instruction. On appeal, the supreme court held that defendant was entitled to a lesser-included offense instruction on theft because the evidence presented could lead a jury to rationally conclude that defendant came to the residence to collect a debt and while searching for the woman who owed him the money found a purse and decided to take it. The State presented no direct evidence that defendant possessed the intent to commit a theft at the time he entered the dwelling place. Because the element of defendant's intent was subject to dispute, the supreme court held that the jury could have rationally concluded that defendant did not formulate the intent to commit a theft until after he was inside the house and

the evidence could have rationally sustained a conviction for theft. *Id.* at 328.

¶ 19 Here, in contrast to *Hamilton*, the evidence of defendant's intent to commit a theft at the time of entry is clear. Fayson's testimony established that he and defendant knew no one was home at Stevens' house when Fayson entered through an upstairs window and let defendant in through the front door. Stevens' confrontation with defendant in the stairway, and defendant's flight from the house indicated that this was not a social visit as defendant had told Stevens. Stevens' discovery of disheveled and opened items, and missing money further evinced defendant's intent to commit a theft at the time of entry and there was no indication that defendant's intent had changed after he was inside of the house. The evidence established beyond all doubt that defendant entered the home with the intent to steal. As a result, defendant was not entitled to an instruction of the lesser-included offense. Given this record, no reasonable defense attorney would think a judge would give a lesser-included offense instruction on criminal trespass to a residence and, therefore, defense counsel's performance was not deficient for failing to tender a lesser-included offense instruction.

¶ 20 Alternatively, if the trial court had issued a lesser-included offense instruction, the outcome of the proceeding would not have changed. As discussed *supra*, defendant's intent to commit a theft at the time of entry was readily established by the evidence in this case. Had the jury been instructed on the lesser-included offense of criminal trespass to a residence, the evidence of defendant's intent to commit a theft would have led to a conviction of the greater offense.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Rock Island County is affirmed.

¶ 23 Affirmed.

¶ 24 JUSTICE CARTER, specially concurring.

¶ 25 I agree with the majority's order in the present case, except for paragraph 20. I do not join in that portion of the order.

¶ 26 For the reason stated, I specially concur with the majority's order.

¶ 27 JUSTICE WRIGHT, dissenting.

¶ 28 I respectfully dissent. Unlike my respected colleagues, I conclude counsel was ineffective for failing to tender a jury instruction on the lesser-included offense of "criminal trespass to property."

¶ 29 In this case, defendant was charged with residential burglary because he "knowingly and without authority entered the dwelling place of [the victim], with the intent to commit a theft therein." The misdemeanor offense of criminal trespass to a residence also requires proof that defendant, without authority, knowingly entered a residence, but does not require simultaneous intent to commit a theft at the time of entry. 720 ILCS 5/19-4(a)(1) (West 2004).

¶ 30 I respectfully assert the unique facts of this case would have rationally supported a conviction of the lesser-included offense of criminal trespass to residence. Here, the jury could have easily concluded that since defendant waited for the front door to open before entering—defendant may have believed he had authority to enter and/or lacked the requisite intent to commit a theft when he passed the threshold. Therefore, I would remand the cause to the trial court for further postconviction proceedings to explore the issue of the ineffective assistance of counsel.