NO. COA01-1554

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 00 CRS 143443
00 CRS 027236

REGINALD WRIGHT

Appeal by defendant from judgment entered 27 June 2001 by Judge Kimberly S. Taylor in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Richard H. Bradford, for the State.

William D. Auman for defendant-appellant.

THOMAS, Judge.

Defendant, Reginald Wright, appeals a conviction of felonious breaking or entering a motor vehicle. Following his guilty plea to habitual felon status, he was sentenced to a minimum term of 80 months and a maximum term of 105 months. For the reasons discussed herein, we find no error.

The State presented evidence tending to show that at approximately 1:30 a.m. on 28 June 2000, a 2000 Nissan Frontier crew cab truck was parked at Smokey Joe's, a Charlotte nightclub, when the security alarm of the vehicle sounded. Robert Kevin Quan, Jr., who was employed as a security guard by the nightclub,

responded to the alarm and found a man, whom Quan identified as defendant, rummaging inside the truck. The rear window of the truck had been broken out. Quan asked defendant whether the truck belonged to him and defendant responded in the negative. Defendant jumped out of the truck and lunged at Quan. Quan then sprayed defendant with red pepper spray.

Joseph Anthony Pullano, a manager of the nightclub, then arrived to assist Quan. Defendant fled. Approximately two hours later, Quan and Pullano received a report that a person who had been pepper sprayed was seeking treatment at a local hospital. The two men went to the hospital and identified defendant as the man they found inside the truck.

The owner of the vehicle testified that he kept pocket change in a dashboard console and some compact discs in the vehicle. Some of the pocket change had been strewn on the floorboard, the driver's seat and the ground. Approximately $5.00 was missing. He did not know defendant and did not give him permission to enter his truck or to take anything.

Defendant testified that he was making a telephone call at the First Stop store when a white girl came out of the nightclub and asked him where she could purchase some cocaine. As he spoke to her, "about five white dudes" sprayed him with Mace and struck him with a pipe. The white girl assisted him to his sister's house. His sister brought him to the hospital.

By defendant's first assignment of error, he argues the trial court erred by refusing to submit an instruction indicating that

the "mere presence" of defendant in the vicinity of the parking lot would not make him guilty of the crime charged. We disagree.

A trial judge must give a requested jury instruction at least in substance if the instruction is a correct statement of law and is supported by evidence in the record. *State v. Corn,* 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982). The "mere presence" doctrine posits that the mere fact the defendant is present at the scene of a crime does not make him guilty of the offense. *State v. Cheek*, 351 N.C. 48, 74, 520 S.E.2d 545, 560 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000). Therefore, the court was required to give the instruction in the present case if there is evidence that defendant was "merely present" as a bystander at the scene of the breaking and entering of the truck. *State v. Ligon*, 332 N.C. 224, 242, 420 S.E.2d 136, 146 (1992). Here, the State's evidence positively shows that defendant actively participated in the commission of the offense. Defendant's evidence, on the other hand, did not place him at the scene of the breaking and entering but at the First Stop store. Because there is no evidence that defendant was "merely present" at the scene, the court did not err in refusing to submit the instruction. We reject defendant's argument.

By defendant's second assignment of error, he argues the trial court committed plain error by failing to submit the issue of misdemeanor breaking or entering to the jury. We disagree.

Plain error may be found only in the rare and exceptional case in which "it can be said the claimed error is a '*fundamental* error,

something so basic, so prejudicial, so lacking in its elements that justice cannot have been done' . . . or it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'" *State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513(1982)). When the State's evidence is clear and positive as to each element of the charged offense and there is no evidence to show commission of the lesser offense, the refusal to submit the lesser offense to the jury is not error. *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

Breaking into a motor vehicle with the intent to commit larceny in violation of N.C. Gen. Stat. § 14-56 is a felony regardless of whether the intended larceny would be a felony or misdemeanor. *State v. Kirkpatrick,* 34 N.C. App. 452, 456, 238 S.E.2d 615, 618 (1977). This is true even if the items contained in the vehicle are of trivial value. *State v. McLaughlin*, 321 N.C. 267, 270, 362 S.E.2d 280, 282 (1987). Here, the evidence is uncontradicted that the vehicle contained items of value. There is no evidence that defendant broke into the vehicle with any intent other than to commit larceny or a felony. Under these circumstances, the court did not commit error, plain or otherwise. We thus reject defendant's argument.

By defendant's third assignment of error, he argues the trial court erred by denying his motion to dismiss for insufficient evidence. We disagree.

A motion to dismiss requires the court to determine whether there is substantial evidence (1) of each essential element of the charged offense and (2) of perpetration of the offense by the defendant. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The evidence must be viewed in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The court is to determine only whether the evidence is sufficient to allow the jury to draw a reasonable inference of the defendant's guilt of the crime charged. *State v. Earnhardt,* 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

The crime of breaking or entering a motor vehicle in violation of N.C. Gen. Stat. § 14-56 is proved by evidence establishing the defendant (1) broke or entered (2) without the owner's consent (3) a motor vehicle (4) containing goods, freight, or anything of value (5) with the intent to commit any felony or larceny therein. *State v. Riggs*, 100 N.C. App. 149, 155, 394 S.E.2d 670, 673 (1990). The evidence in this case is sufficient to establish all of the above elements. This assignment of error is therefore rejected.

Finally, as a "preservation issue," defendant argues that the Habitual Felon Act violates the equal protection clauses of the North Carolina and United States Constitutions. It does not appear that defendant raised this constitutional issue in the trial court. An appellate court is not required to pass upon a constitutional issue unless it affirmatively appears in the record that the issue was presented to and decided by the trial court. *State v. Creason*,

313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985). Moreover, our Supreme Court has previously rejected a prior challenge made on due process and equal protection grounds to the constitutionality of the habitual felon statute. *State v. Todd*, 313 N.C. 110, 117-118, 326 S.E.2d 249, 253 (1985). Accordingly, this assignment of error is dismissed.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).