NO. COA02-218

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v. Iredell County
No. 99CRS20978

MICHAEL LEE PERRY

Appeal by defendant from judgments entered 8 November 2001 by Judge Marcus L. Johnson in Superior Court, Iredell County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen S. Edwards, for the State.

Allen W. Boyer for defendant-appellant.

McGEE, Judge.

Defendant Michael Lee Perry was charged with felonious breaking and entering and larceny. The State's evidence tends to show that on or about 23 October 1999, a security alarm was activated at the home of Margaret Marks located at 1510 Winston Avenue, Statesville, North Carolina. Deputy Johnnie Sutphin of the Iredell County Sheriff's Department was dispatched to the home, where he noticed that the door jamb, around the lock on the front door, had been damaged. Marks arrived at her home shortly after Deputy Sutphin arrived, and noticed that her Orion VCR had been taken and the figurines that had been sitting on top of the VCR had

been broken.

Gary Leonard Scott, Marks' nephew, subsequently observed the VCR at the home of defendant. When Scott inquired of defendant's wife as to how the VCR came to be at her residence, she stated that defendant had brought the VCR into the home. She acknowledged that the VCR did not belong to her. When Scott told defendant's wife that he thought the VCR was his aunt's, she gave Scott the VCR. Scott returned the VCR to Marks, at which time she checked its serial number and determined that the VCR was the one that had been stolen from her home on 23 October 1999.

During his investigation into the 23 October 1999 break-in at Marks' residence, Detective R.W. Lambert interviewed and obtained a statement from Julie Gardner. Julie Gardner told Detective Lambert that sometime in October 1999, she drove defendant to Marks' home. Defendant told her to pull into the driveway and turn the van around so that the front of the van was facing the street. Defendant exited the van and walked in the direction of the residence. Gardner did not specifically see defendant enter the residence, but after about five minutes, defendant returned from the direction of the house, carrying a VCR. Gardner and defendant then traveled to defendant's house. Marks never gave defendant permission to enter her home, or to remove property from her residence.

Defendant did not present any evidence. The jury found defendant guilty as charged. After finding one aggravating factor and no mitigating factors, the trial court sentenced defendant to

two consecutive aggravated terms of 18-22 months imprisonment. Defendant appeals.

On appeal, defendant argues that the trial court erred in denying his motion to dismiss. Defendant contends that there was not sufficient evidence from which the jury could find that he committed the offenses charged. We disagree.

A motion to dismiss for insufficiency of the evidence is properly denied if the State has presented substantial evidence of the defendant's guilt as to each element of the offense charged. *State v. Roberts*, 135 N.C. App. 690, 695-96, 522 S.E.2d 130, 134 (1999) (citing *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981), *disc. review denied*, 351 N.C. 367, 543 S.E.2d 142 (2000). "Substantial evidence is that amount of relevant evidence which a reasonable mind would find sufficient to support a conclusion." *State v. Smith*, 121 N.C. App. 41, 44, 464 S.E.2d 471, 473 (1995)(citation omitted). In ruling upon the defendant's motion to dismiss, the trial court must view the evidence, whether direct or circumstantial, in the light most favorable to the State, giving the State every reasonable inference arising therefrom. As this Court stated in *State v. Everhardt*, "'If there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court's duty to submit the case to the jury.'" 96 N.C. App. 1, 11, 384 S.E.2d 562, 568 (1989)(quoting *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958)), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990).

In the case before us, defendant was convicted of felonious

breaking and entering and larceny. To obtain a conviction of felony breaking and entering, the State must show (1) a breaking or entering (2) into a building (3) with an intent to commit a felony therein. N.C. Gen. Stat. § 14-54(a) (2001). "The requisite intent for felony breaking and entering need not be directly proved it may be inferred from the circumstances." *Roberts*, 135 N.C. App. at 696, 522 S.E.2d at 134 (citing *State v. Myrick*, 306 N.C. 110, 115, 291 S.E.2d 577, 580 (1982)). To support a conviction of larceny, the State must present substantial evidence that 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 his property permanently." *State v. Sluka*, 107 N.C. App. 200, 204, 419 S.E.2d 200, 203 (1992) (citing *State v Reeves*, 62 N.C. App. 219, 302 S.E.2d 658 (1983)). "[T]he intent to commit larceny may be inferred from the fact that the defendant committed larceny." *State v. Thompkins*, 83 N.C. App. 42, 43, 348 S.E.2d 605, 606 (1986) (citation omitted). Larceny by breaking and entering a building is a felony without regard to the value of the stolen property. N.C. Gen. Stat. § 14-72(b)(2)(2001). The doctrine of recent possession permits a presumption that a defendant is guilty of larceny and breaking and entering "when there is sufficient evidence that a building has been broken into and entered and . . . the property in question has been stolen," and the defendant is found to be in possession of that stolen property recently after the larceny. *State v. Maines*, 301 N.C. 669, 673-74, 273 S.E.2d 289, 293 (1981) (citations omitted); *see State v. Carter*, 122 N.C.

App. 332, 337, 470 S.E.2d 74, 78 (1996)(citing *Maines*, 301 N.C. at 674, 273 S.E.2d at 293).

In the light most favorable to the State, the evidence tends to show that the home of Margaret Marks was broken into and a Orion VCR was stolen on the afternoon of 23 October 1999. Julie Gardner testified that sometime during October 1999, she drove defendant to Marks' residence, at which time defendant ordered her to back into the driveway, preventing the license tag of her vehicle from being seen from the street. Defendant left the vehicle and walked in the direction of the residence. A few minutes later, defendant returned to the vehicle and directed Gardner to quickly drive away. Gardner drove defendant to his residence. Two or three days after the 23 October 1999 break-in at Marks' residence, Marks' nephew, Gary Scott, saw the VCR in defendant's home while visiting defendant's wife. Defendant's wife told Scott that defendant had brought the VCR home. Defendant's wife gave the VCR to Scott, who then took it to his aunt. Marks thereafter confirmed that the VCR, found in defendant's residence, was the VCR stolen from her home on 23 October 1999.

We conclude that this evidence was sufficient to show that defendant committed the crimes as charged. While Gardner was unable to state the exact date that she drove defendant to Marks' residence and did not see defendant break and/or enter the residence, there was plenary evidence from which a reasonable fact finder could infer that defendant broke and entered into Marks' residence and removed her VCR. *See Maines*, 301 N.C. at 674, 273

S.E.2d at 293. As to Gardner's credibility, it is well settled that such issues are for the jury. *See State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001)(stating that issue "of any witness' credibility is for the jury"). Moreover, it is uncontroverted that Marks did not give defendant consent to enter her residence. Finally, the facts and circumstances tend to show that defendant possessed the requisite intent to commit the offenses charged. The trial court did not err in denying defendant's motion to dismiss.

No error.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).