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NO. COA11-103
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 09 CRS 22392-93, 223295,
10 CRS 20524

TOBIAS LAMARIO McNEIL

Appeal by Defendant from judgments entered 5 August 2010 by Judge Lucy Inman in Superior Court, Mecklenburg County. Heard in the Court of Appeals 30 August 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General V. Lori Fuller, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for Defendant-Appellant.

McGEE, Judge.

Tobias Lamario McNeil (Defendant) was found guilty of felonious breaking or entering, larceny after breaking or entering, and felony conspiracy to commit breaking or entering on 4 August 2010. Defendant's convictions were in connection with an incident that occurred on 14 May 2009 at Queen City Television Service Company, Inc. (Queen City TV), a store

selling electronics and appliances in Charlotte. A manager and another employee closed Queen City TV for the day sometime after 8:00 p.m. on 13 May 2009. An electric fence, topped with barbed wire, was connected to both front corners of the building and enclosed the sides and rear of the building and a rear parking lot where Queen City TV trucks were parked. The manager noticed a wire to the electric fence was cut, but he was able to electrify at least part of the fence. All doors to the building were closed and locked, as were all doors to the trucks. The building alarm was activated, and the gates to the fence were locked before the manager and the employee departed on the evening of 13 May 2009.

At approximately 1:45 a.m. on 14 May 2009, Charlotte-Mecklenburg Police Officer Sandra Horton (Officer Horton) responded to an alarm at Queen City TV. Officer Horton walked around the outside of the fence with her flashlight. She testified that she "came around the rear of the building to the right and, as I showed my flashlight down, I saw the reflectors of shoes running out from under a gate into a wooded area." Officer Horton chased the suspect to the tree line of woods to the rear of Queen City TV, and then radioed other officers to set up a perimeter search. A K-9 unit was also dispatched to assist. The tracking canine followed a scent about fifty feet

through the woods, ending up at a road. A Chevrolet Impala automobile (the Impala) and a blue pickup truck were found parked on the side of that road. No people were located with these two vehicles.

Officer Horton and the other officers returned to Queen City TV, and Officer Horton noticed where wire to the electric fence had been cut, and a portion of the fence had been pulled back, creating an access through the fence that was about five feet wide. Officer Horton observed five Queen City TV cargo trucks inside the fence: "All the trucks have the doors -- the back doors partially opened. A couple of the trucks had some small toolboxes in them that were opened." One of the trucks had its ignition ripped out. Officer Horton also noticed "a very large hole that was knocked out or chiseled out of the side of the building." She further observed eight flat screen televisions, six still in packing boxes, propped up against some of the trucks. There was a pile of wall debris under the large hole in the building. A hat and a pair of jeans were located on top of the pile of debris.

Charlotte-Mecklenburg Police Officer Jessica Cummings (Officer Cummings) also responded to the alarm at Queen City TV. She testified: "While I was heading [around the building], I heard some bushes rustle that were near against the front of the

building, and I turned around and I saw [Defendant] coming out from the building headed towards Queen City Drive." These bushes were located immediately outside the fence, where the fence connected with the building. Officer Cummings further described Defendant's actions as follows: "[D]efendant getting up in the bushes, making his way towards Queen City [Drive.]" Defendant "was going to take off in a run, and that's when I saw him and I said -- you know, drew my duty weapon, and I said get on the ground, let me see your hands, you know, tried to get him in the prone position." Defendant was then arrested. Keys to the rented Impala were recovered from Defendant's pocket, and Defendant testified that his mother had rented the Impala for him. Defendant's arrest occurred approximately ten to fifteen minutes after Officer Cummings had arrived at the scene. Officer Cummings further testified:

> When I was handcuffing [D]efendant, I looked up, something caught my eye, and there's -- there's like a hanger, like a metal hanger with some trucks parked underneath, and I looked up and saw two legs off of the top of the vehicle, off of one of the trucks, get onto the little overhang, the little metal hanger, and get on the top of the building, and I advised over the radio that I had seen that.

All of the Queen City TV trucks were parked inside the fence. Officer Cummings further testified that "fire trucks were called to the scene so we could [use] their ladders -- or so other

officers could use their ladders to get on top of the building" to search for the person Officer Cummings had seen climb onto the roof. Charlotte-Mecklenburg Police Officer John VanHemel (Officer VanHemel) also responded to Queen City TV on 14 May 2009. Officer VanHemel testified:

> We had to request the Charlotte Fire Department to come out with the ladder truck, at which point in time they raised us to the main. We were able to walk up to a ladder truck and up to the top of the warehouse. Once I was on top of the warehouse, we were able to see down on top of the loading dock, at which point we saw Mr. Shannon[.]

Harvel Shannon (Mr. Shannon) was the second person arrested that morning.

Charlotte-Mecklenburg Police Detective Daniel Cunius (Detective Cunius) was asked at trial: "And at some point did you charge a third person and, if so, what was that person's name?" Detective Cunius replied: "Yes. The third person that got away, Crime Scene came and collected evidence, which linked to an individual named Anthony Graham [(Mr. Graham)], and basically on that information, warrants were obtained on Mr. Graham."

Defendant was indicted on 1 June 2009 for felonious breaking or entering, larceny after breaking or entering, conspiracy to commit breaking or entering, and attempted larceny

of a motor vehicle. Defendant was also indicted for having obtained habitual felon status. Defendant was tried for these charges beginning 2 August 2010. The jury returned guilty verdicts on 4 August 2010 for the charges of felonious breaking or entering, larceny after breaking or entering, and conspiracy to commit breaking or entering. Defendant was found not guilty of attempted felonious larceny of a motor vehicle. Defendant was determined to have attained habitual felon status on 5 August 2010. Defendant was sentenced on 5 August 2010 to three consecutive active terms of 93 to 121 months for the three convictions, and was given credit for 142 days spent in confinement prior to the date of judgment. Defendant appeals.

I.

In Defendant's first argument, he contends that the trial court erred in allowing certain testimony pursuant to Rules 404(b) and 403 of N.C. Gen. Stat. § 8C-1. We disagree.

In *State v. Twitty*, __ N.C. App. __, 710 S.E.2d 421 (2011), this Court, concerning Rule of Evidence 404(b), stated:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or

accident.

> Rule 404(b) is a rule of inclusion, allowing the admission of such evidence unless its "*only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." . . . . In making a determination under Rule 404(b), the trial court must consider the similarity and temporal proximity of the defendant's other acts. However, evidence admissible under Rule 404(b) can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [pursuant to Rule 403]. This decision is left to the trial court's sound discretion.

Id. at __, 710 S.E.2d at 424-25 (citations omitted).

The trial court, over Defendant's objection, allowed testimony related to a 2008 break-in at another electronics store in Charlotte. Charlotte-Mecklenburg Police Officers Nathan Crum (Officer Crum) and Jose Aguirre (Officer Aguirre) testified on *voir dire* to the following: Officer Crum responded to a reported breaking or entering of an electronics store at approximately 1:50 a.m. on 18 March 2008. He noticed that two cinder blocks comprising part of the wall structure near a rear door had been broken, though a hole had not been completely broken through into the business. Unable to contact the owner of the business, Officer Crum left the scene and began processing an incident report. He returned to the business at approximately 4:15 a.m. As Officer Crum was approaching the

business in his patrol car, he saw two men running in different directions, both heading away from the business. One of the men was wearing a red jacket and "baggie blue jeans[.]" **[T 197]** Officer Crum lost sight of the men and requested additional police assistance. He then continued to the business, where he observed "multiple tools almost in a path . . . leading to the rear of the business[.]" These tools were in a line consistent with the path taken by the man in the red jacket and jeans. The hole was now "[t]hree times as big" as when he first observed it, and "went all the way through the wall to the inside of the business." Other officers detained a blue vehicle containing persons suspected of involvement in the breaking and entering, and Officer Crum went to that location to investigate. Defendant was in that vehicle, wearing a red jacket and blue jeans. Officer Crum testified that though he had responded to other breaking or entering reports in his approximately five years as an officer, he had never seen another breaking or entering accomplished by breaking a hole through an exterior wall of a building.

Officer Aguirre testified that he responded to the call concerning the two men seen running by Officer Crum, and he helped establish a perimeter in an effort to locate the men. Officer Aguirre "observed a blue vehicle leaving the

area . . . headed outbound . . . at a high rate of speed." The blue vehicle was still relatively close to the business. Officer Aguirre "observed two subjects in the back of the vehicle slouching down[.]" Officer Aguirre stopped the blue vehicle and he and other officers removed the suspects, including Defendant. Two flat screen televisions and other electronics were recovered from the blue vehicle. Officer Aguirre noticed the wristband of a latex glove on Defendant's left wrist. He testified that, in his seven years as a police officer, this was the only breaking or entering incident he had been involved with where entry was obtained through a hole made in an exterior wall of a building.

The trial court ruled that the testimony of Officers Crum and Aguirre was admissible, concluding:

> This evidence is admissible to show, among other things, motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake.
>
> And the Court further finds that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice in, or confusion of, the issues or misleading the jury, or by considerations of undue delay, waste of time or earliest presentation.

In the present case, the State's evidence tends to show that police responded to an alarm at Queen City TV at approximately 1:45 a.m. on 14 May 2009. After officers arrived

at Queen City TV, Defendant was spotted by Officer Cummings "getting up in the bushes" near the front of Queen City TV as if he "was going to take off in a run" toward the abutting road. Defendant and two other individuals were apprehended. Two vehicles, a Chevrolet Impala and a pickup truck, were found parked about fifty feet away from the Queen City TV loading dock. The Impala was later determined to have been rented for Defendant. Eight flat screen televisions were recovered on the grounds of Queen City TV, just outside the building. Queen City TV delivery trucks had been broken into, and toolboxes in two of those trucks were found opened. Finally, a "very large hole . . . was knocked out or chiseled out of the side of the building." This was the logical point of access into Queen City TV used by the intruders.

We hold that on this evidence the trial court did not abuse its discretion in admitting the testimony of Officers Crum and Aguirre concerning the 2008 incident for the purposes of showing motive, intent, preparation, plan, knowledge, identity and absence of mistake. The facts of the 2008 incident were sufficiently similar, including unusual specific similarities, to the facts in the case before us. The time period between the two incidents is not so remote, in light of the similarities involved, to unduly diminish the probative value of this

evidence. Further, we do not find that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. *Twitty*, __ N.C. App. at __, 710 S.E.2d at 424-25. Defendant's first argument is without merit.

II.

In Defendant's second argument, he contends the trial court committed plain error by giving an instruction on acting in concert that was not supported by the evidence. We disagree.

As Defendant states in his brief:

> Before the court can instruct the jury on the doctrine of acting in concert, the State must present evidence tending to show two factors: (1) that defendant was present at the scene of the crime, and (2) that he acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Robinson, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986) (citations omitted). Defendant argues: "In [Defendant's] case, if 'the scene of the crime' be expansive enough to include area 'near the front' of the Queen City Television building, then [Defendant] was 'present at the scene of the crime.'" We hold that, on the facts before us, evidence presented at trial was clearly sufficient to place Defendant at the scene of the crime.

Defendant further argues that there was insufficient evidence presented at trial to support the second prong as stated in *Robinson*. According to Defendant's testimony, he drove the Impala that morning to help his friend, Mr. Graham, who was having trouble starting his truck. Defendant parked at the location where the Impala and the blue truck were later found by the police, and he and Mr. Graham unsuccessfully attempted to start the truck. Defendant later testified that, after he was apprehended, an officer accused him of breaking or entering, and Defendant responded:

> I said, I'm not here breaking anything. I'm here to pick up my friend. He said, how many are there. There's two. I didn't know Anthony Graham's name at the time. I just know him by King and, come to find out, that's -- King's -- that's his middle name, and I knew Harvell Shannon by his first name. So I told the officer, King and Harvell. That's all I knew. **[T 273]**

Defendant then testified that he went out that morning to pick up two people, Mr. Graham and Mr. Shannon. Detective Cunius testified that Defendant and Mr. Shannon had been arrested at the scene, but Mr. Graham had not. Detective Cunius testified: "The third person . . . got away, Crime Scene came and collected evidence, which linked to an individual named Anthony Graham, and basically on that information, warrants were obtained on Mr. Graham."

The State's evidence tended to show that Defendant was seen crouching in bushes in front of Queen City TV, then made as if to run before he was ordered to stop. Mr. Shannon was seen jumping from the roof of one of the cargo trucks onto the roof of Queen City TV, where he was later apprehended with the aid of ladder trucks. That cargo truck was parked inside a locked, electrified fence topped with barbed wire. Mr. Graham was linked to the crime scene through physical evidence. A large hole had been busted into the side of Queen City TV, multiple trucks had been broken into, and eight flat screen televisions were found at the scene with Defendant and Mr. Shannon. No other suspects were spotted or identified, despite the fact that the criminal enterprise had been interrupted. We hold that there was sufficient evidence to support submission of the acting in concert instruction. Defendant fails to show error, much less plain error.

Having held that the trial court did not err in instructing on acting in concert, we necessarily reject Defendant's fifth argument - that Defendant "received ineffective assistance of counsel when his lawyer failed to object to the court's proposal to give and giving of an instruction on acting in concert." Defendant's third and fifth arguments are without merit.

III.

In Defendant's fourth argument, he contends the trial court erred in denying his motion to dismiss at the close of the State's evidence and at the close of all the evidence. We disagree.

> When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or of a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
>
> In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both.

State v. Bullard, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984) (citations omitted).

We have recited substantial evidence from the trial, though not all the relevant evidence, favoring the State. We do not believe a lengthy analysis is required in this opinion in order to show that the evidence cited above is sufficient to support

the elements of the crimes for which Defendant was convicted. Suffice it to say that we have considered each element in conjunction with the evidence presented at trial. We hold that, when considered in the light most favorable to the State, there was sufficient evidence admitted at trial to support each element of the crimes for which Defendant was convicted. Defendant's fourth argument is without merit.

No error.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).