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NO. COA11-146
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v.

Wake County
No. 09 CRS 213732

MARCUS DEMARIO GILLESPIE

Appeal by Defendant from judgments entered 4 June 2010 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 30 August 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Marcus Demario Gillespie ("Defendant") appeals from a jury verdicts finding him guilty of felonious breaking or entering and felonious larceny. Judge Morgan consolidated the verdicts and sentenced Defendant to six to eight months in prison, suspending the sentence and placing Defendant on probation for twenty-four months. Defendant then entered oral notice of appeal. Defendant argues that the trial court erred in denying

his motion to dismiss and that he was deprived of his right to a unanimous jury verdict. We disagree and affirm the trial court's decision. Defendant further argues he was deprived effective assistance of counsel. We dismiss this claim without prejudice to Defendant's right to file a motion for appropriate relief.

I. Factual and Procedural Background

A Wake County grand jury indicted Defendant for felonious breaking and entering and felonious larceny on 23 March 2010. Defendant pleaded not guilty and proceeded to trial. On 4 June 2010, the jury returned verdicts finding Defendant guilty on both charges.

The State's evidence tended to show the following. During December 2009, Defendant worked for Rite Way Cleaning Services ("Rite Way"). Rite Way was hired to service the Wake County Courthouse (the "Courthouse"), including to buff the floors. However, Rite Way was not hired to clean, nor did it ever do any work in the Courthouse Deli (the "Deli").

During December 2009, Capricia Conyers worked as the Deli manager, and Catherine Harrington worked as a cashier. Every day, Ms. Conyers opened the Deli for business at 7:30 a.m., and, on most days, she closed it herself at 3:30 p.m. In the event

that Ms. Conyers could not close the Deli, Ms. Harrington would. Whoever closed the Deli was required to leave \$500.00 in a till placed under a box on the bottom rack of a shelf in the kitchen. This person was then supposed to lock the kitchen door and deposit any additional cash at a nearby BB&T bank.

The hallway doors leading into the Deli were left unlocked during the Deli's normal business hours. These doors remained unlocked even after normal business hours, allowing access to the vending machines. Only in the evenings would a security guard come by and lock the hallway doors. Ms. Conyers had a key to the kitchen and hallway doors, but Ms. Harrington did not. Therefore, when Ms. Harrington would close the Deli, a security guard would lock the Deli's kitchen door upon her departure around 3:30 p.m. and would later lock the Deli's hallway doors in the evening.

On Wednesday, 23 December 2009, Ms. Harrington was the individual responsible for closing the Deli. Following the closing routine, Ms. Harrington called a security guard who came to the Deli and locked both the kitchen door and a closet containing snacks. She then left a little early, around 2:40 p.m., due to slow business and the pending holiday weekend. As usual, Ms. Harrington left the hallway doors to the Deli

unlocked.

The Deli and the Courthouse were closed from 23 December to 28 December 2009. On 28 December 2009 between 6:30 and 6:45 a.m., Ms. Conyers arrived at work. She unlocked the Deli's hallway doors but observed that the kitchen door, which had always required unlocking before, was already unlocked. Upon entering the kitchen, she discovered that the till was on top of trash bags on the shelf's second rack instead of where it was supposed to be. The till was empty, but, according to Ms. Conyers, nothing else seemed to be out of place.

Ms. Conyers first called the Deli owner and verified he had not moved the money. She then called and questioned Ms. Harrington about the missing cash. Ms. Harrington stated that she had left \$500.00 in the till, as required, before leaving on 23 December.

During trial, security footage taken the evening of 24 December was presented, and the security coordinator for Wake County, Tim Mullally, testified as to its contents. He explained that there were two cameras recording activity between 23 December and 28 December 2009. One camera faced the Deli's cash register while the other was positioned to view the Deli's hallway and kitchen doors. Mr. Mullally testified that during

the relevant time period only two persons were recorded entering the Deli: the security guard and Defendant, and only Defendant went into the kitchen where the money was kept. The recording showed Defendant entering the kitchen where he stayed for "awhile," exiting and walking to the hallway doors, and stepping out briefly before re-entering and shutting the doors behind him. He then returned to the Deli, proceeded back into the kitchen area for a second time, reemerged from the kitchen with rags in his hand, only to once again revisit the kitchen for a third time before exiting altogether. Sergeant Baker of the Wake County Sheriff's Department testified, based on the footage, that when Defendant left the kitchen for the second time he appeared to carry a towel in one hand and "something" else in the other. He also noted that it seemed Defendant was wiping off the door handles.

Defendant's evidence tended to show the following. Defendant testified he was the individual on the security footage but claimed he had not taken anything from the Deli. Defendant confirmed he had indeed been in the Deli on the night of 24 December but told Sergeant Baker that he thought his presence was lawful since both the hallway and kitchen doors were unlocked.

Defendant claims he was taking a break from buffing the floors to get food. When en route to a nearby Chick-fil-A, he passed the Deli and thought he saw a Deli hallway door cracked open. Defendant, believing the Deli to be open, decided to go in because he "wanted something [to] eat and drink." He proceeded to the counter and called out for an employee. After no one answered, he testified he went behind the counter and into the kitchen door, which he states was unlocked, looking for someone who worked there. He testified he then walked back out to the hallway because he thought someone was at the front hallway door. After finding no one, he returned through the Deli's hallway doors, which he shut behind him. Still on a mission to find someone who worked there, Defendant says he returned to the Deli's kitchen and knocked on the office door. He then reemerged with rags in his hands to clean the surfaces he touched. Defendant returned to the back kitchen area for a third and final time to find someone who worked there so that he would not have to go all the way to Chick-fil-A. With no success, Defendant finally left the Deli altogether.

According to Defendant, the reason he wiped down the Deli surfaces was because he had previously been handling chemicals and was concerned it would cause a sanitary issue. He also

testified he did not duck under the arm leading to the counter as may appear to be the case in the video but rather was attempting to wipe something off the floor.

Greg Cromartie, who also works for Rite Way, testified that shortly upon being employed he was given a master key to the Courthouse. This key could open the Deli's hallway and kitchen doors. Mr. Cromartie, however, was unaware of this fact considering he was not required to clean the Deli and never had to use his key to unlock either the Deli's hallway or kitchen doors. Defendant testified that he was also given a master key but he too was never informed that it opened the Deli's doors.

During trial, the parties entered into a stipulation that was read to the jury. The stipulation acknowledged that an investigator processed the till, several boxes, a coin tray, and other items from the Deli for fingerprints. The investigator recovered six latent fingerprints from the till and two from a cardboard box. The fingerprints were never directly compared to Defendant's fingerprints, but they were run through a local database that returned "negative results." As to his prior arrests in Wake County, Defendant testified that he previously had been fingerprinted for driving offenses. His most recent arrest in Wake County occurred August 2009.

II. Jurisdiction

As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

III. Analysis

Defendant contends (1) the trial court erred in denying his motion to dismiss the felony breaking or entering charge because the State failed to provide sufficient evidence that he entered the Deli with the requisite intent to commit a felony therein; (2) he was deprived of his right to a unanimous jury verdict when the court instructed the jury it could convict him of breaking or entering if it found he entered either through the Deli's front hallway doors or through the Deli's kitchen door; and (3) he was deprived of effective assistance of counsel when his counsel asked the court to submit to the jury an alternative theory of guilt Defendant claims is erroneous on the breaking or entering charge. After careful review, we disagree.

Defendant first argues the trial court erred in denying his motion to dismiss the felony breaking or entering charge because the State failed to show substantial evidence that he entered the Deli with the requisite intent to commit a felony therein. In considering a motion to dismiss, this Court considers all

evidence in "the light most favorable to the State[,] and the State is allowed every reasonable inference.'" *State v. Rawlinson*, 198 N.C. App. 600, 606, 679 S.E.2d 878, 882 (2009) (citation omitted). "If the record discloses substantial evidence of each essential element constituting the offense for which the accused was tried and that defendant was the perpetrator of that offense, then the trial court's denial of a motion to dismiss for evidentiary insufficiency should be affirmed.'" *State v. King*, 158 N.C. App. 60, 65, 580 S.E.2d 89, 93 (2003) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *In the Matter of S.D.R.*, 191 N.C. App. 552, 555, 664 S.E.2d 414, 417 (2008) (citation omitted). "[C]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.'" *Id.* (citation omitted).

"The elements of felonious breaking or entering . . . are: (1) breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *In re Cousin*, 93 N.C. App. 224, 226, 377 S.E.2d 275, 276 (1989). Intent, being a state of mind, is most often proved by the circumstances from which it may be inferred. *State v. Bronson*, 10 N.C. App. 638,

641, 179 S.E.2d 823, 825 (1971). The court may infer such intent based on the defendant's acts and the circumstances as they existed at the time. *Id.* Additionally, "[t]he intent with which defendant [breaks and enters], or enter[s], may be found by the jury from what he [does] within the building." *Id.* at 640, 179 S.E.2d at 825.

Here, the State presented videotape evidence showing that, upon Defendant's arrival at the Deli, he first proceeded through the Deli's hallway doors and then into the private kitchen area in the back where the Deli's money was kept. Defendant eventually exited the kitchen and returned to the hallway because he allegedly "thought he heard somebody," only to once again re-enter the Deli and close the hallway door behind him. He then continued back into the Deli's kitchen for a second time and finally reemerged after a "period of time" with a rag that he used to wipe down the surfaces in one hand and "something" in the other. Defendant proceeded once more into the back kitchen area before departing the Deli altogether. He was the only person to enter the kitchen area during the relevant time, and it was during this time that the Deli's money kept in the kitchen went missing. This evidence taken as a whole and viewed in a light most favorable to the State supports a finding that

the trial court did not err in making the reasonable inference that Defendant possessed the requisite intent to commit a larceny at the time of breaking or entering the Deli. The trial court appropriately inferred Defendant's intent based on the circumstances as they existed at the time.

Defendant argues that because he is able to offer an alternative explanation as to his presence in the Deli, any possible inference of his intent to commit larceny upon entering the Deli is defeated. Defendant improperly bases this argument on the notion that "[w]here a defendant offers no explanation for breaking into the building or a showing of the owner's consent, intent may be inferred from the circumstances." *In re Cousin*, 93 N.C. App. at 226, 337 S.E.2d at 276. Defendant reverses this rule and argues that his ability to explain his presence in the Deli, *ipso facto*, demonstrates that he did not have the requisite intent to commit a felony within the Deli. The rule, however, states that when a defendant does not offer an explanation for his actions, intent can be inferred, not vice versa. Just because a defendant offers an explanation for breaking into a building or shows he had consent does not mean the court must infer he had no requisite intent to commit a felony therein.

"[T]he issue of whether a reasonable explanation has been given must be decided by the jury." *State v. Earley*, 38 N.C. App. 361, 363, 247 S.E.2d 796, 798 (1978). "The apparent reasonableness of the explanation does not take the question from the jury nor does it necessarily lead to an acquittal." *Id.* Although Defendant is capable of producing a reason for his presence at the scene, which he claims was due to hunger, it does not automatically exclude consideration of additional evidence, nor does it somehow solely determine he lacked intent. In ruling on a motion to dismiss, Defendant's explanation does not mean the trial court should exclusively base its decision on this one detail without also taking into account the State's evidence. As previously discussed, the State presented ample competent evidence for the trial court to draw the inference that Defendant intended to commit a larceny. Therefore, the trial court was correct in denying Defendant's motion to dismiss and submitting the question of Defendant's intent to the jury.

Defendant next argues the trial court deprived him of his right to a unanimous jury when it instructed the jury it could convict him of breaking or entering if it found he entered either through the Deli's hallway doors or through the Deli's kitchen door. Article I, Section 24 of the North Carolina

Constitution states that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. "Where the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence" and "it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990).

However, "'if the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied.'" *State v. Lawrence*, 360 N.C. 368, 374, 627 S.E.2d 609, 612 (2006) (citation and italics omitted). "[W]here the statute under which the defendant is charged criminalizes 'a single wrong' that 'may be proved by evidence of the commission of any one of a number of acts . . . the particular act performed is immaterial.'" *State v. Petty*, 132 N.C. App. 453, 460, 512 S.E.2d 428, 433, *rev. denied*, 350 N.C. 598, 537 S.E.2d 490 (1999) (quoting *State v. Hartness*, 326 N.C. 561, 566-67, 391 S.E.2d 177, 180 (1990)).

Here, when asked by the jury to clarify which entry by

Defendant satisfied the offense of breaking or entering, the trial court, upon confirmation by defense counsel, explained Defendant could be convicted if he entered either through the Deli's hallway doors or through the kitchen door. Defendant claims, however, that his entry through the hallway doors was not unlawful because it was left unlocked after the Deli closed to allow access to the Deli's vending machines. Defendant argues that the trial court's instruction, therefore, allowed the jury to convict Defendant based on lawful conduct and thus deprived him of a unanimous verdict. We disagree because we find the evidence presented was sufficient to conclude Defendant's entry through either the hallway or the kitchen doors was unlawful.

When consent is given by an owner to enter a building, a conviction of felonious breaking or entering cannot be found. *In the Matter of S.D.R.*, 191 N.C. App. at 557, 664 S.E.2d at 419. Here, however, we find Defendant did not have consent to enter the Deli's hallway doors or the kitchen doors. Evidence indicates that the hallway doors to the Deli were locked every night by security and, on that particular night, the security guard is seen on the security footage doing rounds per his usual routine. The evidence also shows a security guard called by Ms.

Harrington on 23 December 2009 locking the kitchen door. Further, the record demonstrates that, between 23 and 28 December 2009, the Deli and the Courthouse were closed for the holidays. Additionally, Defendant was only authorized to clean the Courthouse, not the Deli. In fact, neither Defendant nor Rite Way had ever been asked to clean the Deli. Thus, we find Defendant's entry through both the Deli's hallway and kitchen doors unlawful. As a result, we find the trial court did not err in instructing the jury as to various alternative acts that established a single element of the offense.¹ Therefore, we hold the requirement of juror unanimity was satisfied.

Defendant lastly argues he was deprived of effective assistance of counsel when his trial counsel, on the breaking and entering charge, asked the court to submit to the jury an alternative theory of guilt Defendant claims was erroneous. "In

¹ Even if it was unreasonable for the trial court to conclude Defendant's entry through the hallway doors was without consent, we find any possible consent void *ab initio*. Under circumstances where consent exists, "there may be occasions when subsequent acts render the consent void *ab initio*, as where the scope of consent as to areas one can enter is exceeded." *In the Matter of S.D.R.*, 191 N.C. App. at 557, 664 S.E.2d at 419. Assuming Defendant had implied consent to enter the Deli's hallway doors, even though evidence indicated they were locked and closed for business, the consent became void *ab initio* when he entered the kitchen doors because he never had consent to enter this area nor was it held open to the public.

general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). This is preferable because in defending against claims of ineffective assistance of counsel, "the State must rely on information provided by defendant to trial counsel[.]'" *Id.* at 554, 557 S.E.2d at 547 (citation omitted). "[B]ecause of the nature of [ineffective assistance of counsel] claims, defendants likely will not be in a position to adequately develop many [of these] claims on direct appeal." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001). "Our Supreme Court has instructed that 'should the reviewing court determine the [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent [motion for appropriate relief] proceeding.'" *Stroud*, 147 N.C. App. at 554, 557 S.E.2d at 547 (citation omitted). In determining whether a claim of ineffective assistance of counsel has been adequately raised, this Court has held itself bound to "reviewing this assignment of error only on the record before us, without the benefit of 'information provided by defendant to trial counsel, as well as

defendant's thoughts, concerns, and demeanor[,] that could be provided in a full evidentiary hearing on a motion for appropriate relief." *Id.* (citation omitted) (alteration in original).

Here, further investigation of evidentiary matters is necessary because the record does not reveal "sufficient information regarding trial counsel's strategy." *State v. Loftis*, 185 N.C. App 190, 203, 649 S.E.2d 1, 10 (2007); *see also State v. Mohamed*, ___ N.C. App. ___, ___, 696 S.E.2d 724, 733 (2010) ("In this case, the record reveals that certain evidentiary issues need further development before [d]efendant may adequately raise and the courts may adequately consider this claim[.]"). Therefore, it is suitable to dismiss the claim of ineffective assistance of counsel without prejudice to Defendant's right to reassert it during a subsequent motion for appropriate relief proceeding.

IV. Conclusion

Because the trial court did not err in denying Defendant's motion to dismiss nor did the court deprive Defendant of a unanimous jury verdict, we find no error as to the first two issues. As to Defendant's claim of ineffective assistance of

counsel, the claim is dismissed without prejudice to Defendant's right to file a motion for appropriate relief.

No error.

Judges MCGEE and ELMORE concur. R.

Report per Rule 30(e).