NO. COA11-157
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 09 CRS 99155;
09 CRS 99161 and
10 CRS 24191

MICHAEL REED HARGRAVES, Jr.

Appeal by Defendant from judgments entered 25 August 2010 by Judge Shannon R. Joseph in Superior Court, Guilford County. Heard in the Court of Appeals 30 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General M. A. Kelly Chambers, for the State.

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

McGEE, Judge.

Michael Reed Hargraves, Jr. (Defendant) was convicted of breaking or entering and larceny after breaking or entering. Defendant also pleaded guilty to having habitual felon status. Defendant was sentenced to 150 to 189 months in prison. Defendant appeals.

On the afternoon of 18 November 2009, Lora Gayle (Ms. Gayle) saw a door open to a garage attached to a house located across the street from her residence on Vance Street in Greensboro. Knowing that the house was unoccupied, Ms. Gayle called the police.

Greensboro Police Officer Betsy Strader (Officer Strader) testified that, following the call to the police, she was dispatched to investigate. Officer Strader contacted Ms. Gayle who said she had seen two black men enter the garage. Officer Strader waited for assistance from other police officers, and then approached the garage. Officer Strader heard sounds "[l]ike something was being moved, like they were moving stuff around, items inside the garage [were] being moved." Officer Strader ordered anyone inside the garage to come out. When no one came out of the garage, Officer Strader opened the door and she saw a person hiding behind an object in the garage.

Officer Strader identified herself as a police officer and ordered the person hiding to come out with his hands up. Two men came forward, one man was identified as Lee Thompson (Mr. Thompson), and the other was identified as Defendant. Officer Strader testified that Defendant said, "Man, I just went into the garage because I was curious. I don't deal with that copper s---." Officer Strader searched Mr. Thompson and found two

screwdrivers, a wrench, and "drug paraphernalia." Officer Strader also searched Defendant and recovered drug paraphernalia from Defendant in the form of a "push rod [used] to put the filter in [a pipe]" for smoking narcotics, and a "Chore Boy pad[,]" which she also identified as drug paraphernalia.

While searching the garage for other people possibly hiding there, Officer Strader found a wet burgundy duffel bag containing several lengths of copper pipe. Officer Strader testified that the plumbing in the garage was made of copper pipe and that the pipe had been cut and was dripping water. Defendant was arrested and charged with breaking or entering, larceny after breaking or entering, and possession of stolen goods.

At trial, Defendant testified that he was riding his bike down Vance Street to his sister's house, located three houses away from the garage. Mr. Thompson approached Defendant and said he had something he wanted to show Defendant. Defendant followed Mr. Thompson and, while Defendant was locking up his bike, Mr. Thompson approached the garage. Defendant followed Mr. Thompson, and they "just walked in the garage." Defendant testified that he was aware no one lived in the house because it had been empty for almost two months. When Defendant and Mr. Thompson entered the garage, Mr. Thompson showed Defendant a

piece of copper pipe. Defendant testified that he did not know Mr. Thompson intended to take any copper, though he did know that Mr. Thompson "stole copper on a regular basis." Defendant also testified that Officer Strader lied when she testified that he hid in the garage when police arrived; Defendant testified that he was not hiding.

I. Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss all of the charges based on insufficient evidence. We review a trial court's denial of a motion to dismiss based on sufficiency of the evidence *de novo*. *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008). We review the evidence presented at trial to determine whether, in the light most favorable to the State, there was substantial evidence of each element of the offense charged. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "This Court [has] stated . . . , '[i]n "borderline" or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals.'" *State v. Manning*, 184 N.C. App. 130, 137, 646 S.E.2d 573, 577 (2007) (citation omitted).

A. Breaking or Entering

This Court held in *State v. Sluka*, 107 N.C. App. 200, 204, 419 S.E.2d 200, 202 (1992): "To support a conviction for felonious breaking or entering . . ., there must be substantial evidence of each of the following elements of the offense: (1) the breaking or entering; (2) of any building; (3) with the intent to commit a felony or larceny therein." "An essential element of the crime is the specific intent to steal existing at the time of the breaking or entering." *State v. Costigan*, 51 N.C. App. 442, 444, 276 S.E.2d 467, 468 (1981). Defendant admits that he entered the garage, but contends there was insufficient evidence that he entered the garage with the intent to commit a larceny therein.

"'Intent is a mental attitude and can seldom be proved by direct evidence and is most often proved by circumstances from which it can be inferred.'" *Id.* (citation omitted). "'The jury may infer the requisite specific intent to commit larceny at the time of the breaking or entering from the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged.'" *State v. Garcia*, 174 N.C. App. 498, 503, 621 S.E.2d 292, 296 (2005) (citation omitted). "Further, under the acting in concert theory, if a defendant joins another person 'in a purpose to commit a crime, each of them, if actually or constructively

present, is . . . guilty as a principal if the other commits that particular crime[.]'" *Id.* (citation omitted). In his argument, Defendant stresses his own testimony at trial, which tended to show that he did not know why Mr. Thompson brought him into the garage. Defendant's testimony does present a version of events which would have supported the jury's finding him not guilty. However, we review the evidence in the light most favorable to the State. *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

The State presented evidence that Defendant and Mr. Thompson entered the garage without the consent of the owner. A duffel bag with copper pipe still dripping water was found near the garage door, and copper pipe was missing from the garage plumbing. Defendant and Mr. Thompson hid from police officers who arrived on the scene. Mr. Thompson was in possession of tools, including a screwdriver and a wrench. Thus, the State presented sufficient circumstantial evidence of a theory of guilt involving Defendant's acting in concert with Mr. Thompson to enter the garage and take copper pipe. Despite Defendant's testimony to the contrary, the State's evidence was sufficient to survive Defendant's motion to dismiss and to submit the charges to the jury. *See, e.g., Garcia*, 174 N.C. App. at 503, 621 S.E.2d at 296.

B. Possession of Stolen Goods

The elements of felony possession of stolen goods are: "(1) possession of personal property; (2) having a value in excess of $[1,000.00]; (3) which has been stolen; (4) the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) the possessor acting with a dishonest purpose." *State v. Martin*, 97 N.C. App. 19, 25, 387 S.E.2d 211, 214 (1990). "[I]f a defendant is guilty of possession of stolen goods and also knows or has 'reasonable grounds to believe' that the goods were stolen pursuant to a breaking or entering, the defendant is guilty of felonious possession of stolen goods." *State v. Tanner*, 364 N.C. 229, 233, 695 S.E.2d 97, 100 (2010). Defendant contends that the State failed to show that he was ever in possession of the duffel bag containing the copper pipe. However, in *State v. Bartlett*, 77 N.C. App. 747, 749, 336 S.E.2d 100, 101-02 (1985), this Court noted that "[t]here may be joint possession of stolen goods by two or more persons if they are shown to have acted in concert." We find the evidence sufficient to withstand a motion to dismiss as to the issue of whether Defendant and Mr. Thompson were, either severally or jointly, in possession of the duffel bag containing the copper pipe.

C. Larceny

Defendant contends there was insufficient evidence of his having taken the copper pipe and of his having carried it anywhere. "'Larceny is the wrongful taking and carrying away of the personal property of another without his consent and with the intent to permanently deprive the owner thereof.'" *State v. Hager*, ___ N.C. App. ___, ___, 692 S.E.2d 404, 407 (2010) (citation omitted). "Larceny in consequence of a felonious breaking and entering is a felony regardless of the value of the property stolen from the building." *State v. Raynes*, 272 N.C. 488, 490, 158 S.E.2d 351, 353 (1968).

In *State v. Carswell*, 296 N.C. 101, 249 S.E.2d 427 (1978), our Supreme Court addressed the issues of removal and asportation of an air conditioning unit. The Court held that "[t]he movement of the air conditioner in this case off its window base and four to six inches toward the door clearly is 'a bare removal from the place in which the thief found [it].'" *Id.* at 103, 249 S.E.2d at 429. The Court held that the "defendant picked the air conditioner up from its stand and laid it on the floor. This act was sufficient to put the object briefly under the control of the defendant, severed from the owner's possession." *Id.* at 104, 249 S.E.2d at 429. Our Supreme Court concluded that there was sufficient evidence to submit the larceny charge to the jury. *Id.*

In this case, the State presented circumstantial evidence that suggested the copper pipe had been cut and removed from where it was affixed to the wall in the garage, was carried to a duffel bag, and was placed in the duffel bag. As discussed above, there was sufficient circumstantial evidence that it was either Mr. Thompson or Defendant who actually carried out this action, plus evidence that Mr. Thompson and Defendant acted in concert. Thus, there was sufficient evidence to submit the charge of larceny to the jury. For the foregoing reasons, we hold that the trial court did not err in denying Defendant's motion to dismiss the charges for insufficient evidence.

II. Closing Argument

Defendant next argues that the trial court erred by failing to intervene during the State's closing argument to correct certain statements made by the State. Defendant contends the trial court erred by failing to intervene *ex mero motu* during the following portions of the State's closing argument:

> [I]f you look at [Defendant's] prior record, he would know, there's no mistake he is committing a crime. He's been convicted of B and E and a felony B and E before, so he can't say, "I didn't know I was doing something wrong," because he's already been convicted of doing something wrong like that in the past. So he's aware of what he's doing. He knows he's committing a crime, but yet and still he goes into the house.
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> . . . .

> knowing that it's wrong, which [Defendant] should know, based on [his] prior history with the court system.
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> . . . .
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> Of course, as I stated previously, Defendant's been convicted of multiple larcenies, B and E's, misdemeanors and felonies, but he wants you to believe this was all a mistake. And you have to use your reason and common sense and decide whether or not this person, his history, (1) this was a mistake and he didn't know what was going on, and also you can look at those cases or look at those convictions and you can decide whether or not that would affect whether or not you would believe his testimony or not.

Defendant argues that, when the State "argue[d] that evidence of . . . [D]efendant's previous convictions may be used by the jury as substantive evidence of . . . [D]efendant's knowledge or absence of mistake and the trial court fail[ed] to intervene on its own motion, it [was] reversible error." Defendant contends his criminal record was admitted into evidence solely for credibility and impeachment purposes pursuant to N.C. Gen. Stat. § 8C-1, Rule 609. However, Defendant did not object during the State's closing argument, but now argues on appeal that the State's argument was "so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error."

When a defendant fails to object at trial to portions of the State's closing argument, our standard of review is "whether the prosecutor's arguments were so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002). Assuming *arguendo* the State's closing argument was improper, we do not find it to be so grossly improper as to warrant a new trial.

In support of his argument, Defendant cites *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986). In *Tucker*, our Supreme Court addressed the State's remarks during closing argument regarding the defendant's criminal record, which had been admitted solely for impeachment purposes. The Court held that, "[a]lthough it was proper to cross-examine defendant concerning his prior convictions on the question of his credibility, these convictions were not admissible as substantive evidence tending to prove his guilt. It was error for the trial court to permit the prosecutor to argue as if they were." *Id.* at 544-45, 346 S.E.2d at 424.

We note that, assuming the State's comments on Defendant's criminal record were improper in the way Defendant challenges, the State also made several references to Defendant's criminal record to which Defendant does not except. The State's

commentary concerning Defendant's knowledge was commingled with comments that the jury could consider Defendant's criminal record in assessing his credibility. After reciting Defendant's criminal record, the State concluded: "Of course . . . you can look at this when you're trying to assess [Defendant], who was on the stand telling you, believe me over these officers." The State also commented: "You can evaluate whether or not he's credible when he's on that stand telling you that he went in that house not to . . . commit a larceny therein." The State further argued:

> Of course, the judge will tell you it's for a limited purpose that you can use these. Of course, [Defendant is] on the stand testifying and you have a chance to look at him, and you can decide, using your everyday common sense whether or not you believe him. Is he the person you believe is trustworthy or you believe what he says[?]

Viewing the State's closing argument in its entirety, it appears that, though the State referred to Defendant's prior convictions with respect to Defendant's lack of mistake and knowledge of illegality, the actual point of the argument was that the jury should not find Defendant credible. Any impropriety in the State's argument occurred in passing, and was not the overall point of the argument. Further, we note that the trial court provided the following instruction to the jury concerning the evidence of Defendant's criminal record:

> When evidence has been received that at an earlier time . . . [D]efendant was convicted of criminal charges, you may consider this evidence for one purpose only. If, considering the nature of the crimes, you believe that this bears on truthfulness, then you may consider it together with all other facts and circumstances bearing on . . . [D]efendant's truthfulness, in deciding whether you will believe or disbelieve . . . [D]efendant's testimony at this trial. It is not evidence of . . . [D]efendant's guilt in this case. You may not convict . . . [D]efendant on the present charge because of something that . . . [D]efendant may have done in the past.

In light of the full context of the State's closing argument, we do not find any statements made by the State to have been "so grossly improper that the trial court erred in failing to intervene *ex mero motu*[.]" *Barden*, 356 N.C. at 358, 572 S.E.2d at 135. Considering also the trial court's proper instruction to the jury on the purpose for which it could consider Defendant's prior convictions, we find the trial court did not err in failing to intervene *ex mero motu*.

No error.

Judges ELMORE and HUNTER, Jr. concur.

Report per Rule 30(e).