NO. COA11-275
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v. Lincoln County
Nos. 09 CRS 2932, 51777-78

TYSON JAVON LASALLE

Appeal by Defendant from judgment entered 14 September 2010 by Judge F. Lane Williamson in Superior Court, Lincoln County. Heard in the Court of Appeals 13 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth N. Strickland, for the State.

Mary March Exum for Defendant-Appellant.

McGEE, Judge.

In the early morning hours of 21 May 2009, **[T 57]** Jason Elliott (Mr. Elliott) entered a detached garage belonging to Linda Campbell (Ms. Campbell), removed a four-wheeled vehicle (the four-wheeler), and gave possession of the four-wheeler to Tyson LaSalle (Defendant) in exchange for crack cocaine. At the time, Mr. Elliott was living in an outbuilding – not the garage – on Ms. Campbell's property. Ms. Campbell had hired Mr.

Elliott to help maintain her property, including doing yard work and other chores. As part of Mr. Elliott's work for Ms. Campbell, he regularly used the four-wheeler, and was often permitted to borrow Ms. Campbell's Chevrolet Suburban (the Suburban). Earlier that evening, Mr. Elliott had already "rented" Ms. Campbell's Suburban to Defendant for crack cocaine. According to Mr. Elliott's testimony, he called Defendant later on the evening of 20 May 2009 to obtain more crack cocaine. Mr. Elliott proposed that he exchange the four-wheeler for crack cocaine, and Defendant agreed. Mr. Elliott's testimony was equivocal concerning whether he intended for Defendant to keep the four-wheeler, whether he was "renting" it to Defendant for some period of time, or whether he was "pawning" it to Defendant with the intent of paying Defendant later and recovering the four-wheeler. Mr. Elliott testified that he was planning to "[p]awn it or sell it [to Defendant], I don't – I can't really remember exactly what I said, but pawn it or sell it." Mr. Elliott further testified that he told Defendant the four-wheeler belonged to his "boss lady[.]" Defendant drove Mr. Elliott to Ms. Campbell's property that evening, or early on the morning of 21 May 2009, so Mr. Elliott could remove the four-wheeler. Mr. Elliott entered the garage and rolled the four-wheeler down Ms. Campbell's drive. Mr. Elliot testified that he

"cranked it up. Then I went up to that walking trail. I drove it up the walking trail, hit the train tracks and drove it back across town on the other side of town" to the house where Mr. Elliott had been smoking crack cocaine earlier on 20 May 2009. That is where Mr. Elliott and Defendant made the deal. Defendant then called someone who arrived with a truck, and the four-wheeler was loaded onto that truck and taken away. Defendant drove away in Ms. Campbell's Suburban.

Detective Dennis Harris (Detective Harris) of the Lincolnton Police Department testified that he received a call on 21 May 2009 saying that a stolen four-wheeler had been traded for crack cocaine. Detective Harris knocked on doors in the area where the caller had reported the four-wheeler had been stolen, and knocked on Ms. Campbell's door. He asked Ms. Campbell if she had a four-wheeler, and when she indicated that she did, he asked to see it. When Ms. Campbell opened her garage, she saw that her four-wheeler was gone. When Detective Harris asked who had access to the garage, Ms. Campbell told him that Mr. Elliott had access. A warrant was issued for Mr. Elliott, but he was not immediately located.

Sergeant William Vaughn (Sergeant Vaughn), of the Lincolnton Police Department, testified that on 30 May 2009, he pulled Defendant over for riding a four-wheeler on a public

street. Sergeant Vaughn later identified a photograph of Ms. Campbell's four-wheeler as being the same one Defendant was driving that day. At the time Sergeant Vaughn stopped Defendant, he did not know that the four-wheeler was stolen. Mr. Elliott finally went to Ms. Campbell and confessed that he had taken the four-wheeler. They called the police, and Mr. Elliott was arrested on 1 June 2009. Mr. Elliot told the police about the circumstances surrounding the taking of the four-wheeler, and warrants were issued for Defendant. Defendant was indicted on 13 July 2009 for felonious breaking or entering, felonious larceny, and felonious possession of stolen goods, all under a theory of acting in concert with Mr. Elliott. Defendant was also indicted for felonious conspiracy and felonious delivery of cocaine.

When these charges came on for trial on 13 September 2010, Defendant's counsel had just finished representing Defendant in another trial. Before jury selection Defendant's attorney moved for a continuance, stating that he had only heard the night before of witnesses Defendant wanted subpoenaed. The continuance motion was denied. A jury was empaneled, including one juror whom Defendant had sought unsuccessfully to have removed for cause, and Defendant was tried on 13 and 14 September 2010. Defendant was found guilty of all charges.

Defendant and the State then reached an agreement whereby Defendant agreed to plead guilty to habitual felon status in return for other outstanding charges against him being dismissed, and the consolidation of the five felony convictions for an active sentence of 168 to 210 months. Defendant appeals.

I.

In Defendant's first argument, he contends the trial court erred in denying his motion for a continuance. We disagree.

> It is, of course, axiomatic that a motion for a continuance is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent a gross abuse. It is equally well established, however, that, when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case. Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced thereby.

State v. Searles, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981) (citations omitted).

> Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality

> of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

State v. Barlowe, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003) (citations omitted).

> The constitutional guarantees of due process, assistance of counsel and confrontation of witnesses unquestionably include the right of a defendant to have a reasonable time to investigate and prepare his case. No precise time limits are fixed, however, and what constitutes a reasonable length of time for the preparation of a defense must be determined upon the facts of each case.
>
> In making our review and reaching our determination upon the facts of a particular case, we can judicially know only what appears of record on appeal and will not speculate as to matters outside the record. The record on appeal in the present case fails to reveal that the defendant informed the trial court of the name of a single witness the defendant allegedly sought to bring before the court. The record is also absolutely devoid of any indication as to what the defendant expected to attempt to prove through these witnesses or the likelihood that they could ever be located or be available for trial if they existed. As Justice Huskins, speaking for this Court in a similar case, indicated:
>
> > The oral motion for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial and affords little basis to conclude that absent witnesses, if they existed, would ever be available. . . . .

> 'Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds.'
>
> We encourage counsel in criminal cases to offer such affidavits or other evidence when making motions to continue pursuant to G.S. 15A-952.
>
> . . . . Given the state of the record before us on appeal, we are unable to say that the action of the trial court in denying the defendant's motion to continue was either an abuse of the trial court's discretion or prejudicial to the defendant.

State v. Branch, 306 N.C. 101, 104-06, 291 S.E.2d 653, 656-57 (1982) (citations omitted); *see also State v. Bethea*, 173 N.C. App. 43, 46-49, 617 S.E.2d 687, 690-92 (2005).

In the case before us, Defendant failed to identify the witnesses he wished to subpoena, or indicate how any of these unidentified witnesses would help his defense. Nor did Defendant indicate where any of these unidentified witnesses could be located, or whether they would appear at trial if subpoenaed. Defendant's counsel simply requested: "If I could have any number of – any number of days or weeks to speak with [Defendant] to subpoena whatever witnesses he would like for me to subpoena[.]" Defendant did not request a continuance for any other reason. As in *Branch*, "we are unable to say that the

action of the trial court in denying [Defendant's] motion to continue was either an abuse of the trial court's discretion or prejudicial to the defendant." *Branch*, 306 N.C. at 106, 291 S.E.2d at 657. Defendant's first argument is without merit.

II.

In Defendant's second argument, he contends the trial court erred in denying his motion to strike a juror for cause. We disagree.

Defendant argues juror William Vandresser should have been excused for cause based upon a relationship between juror Vandresser and Micah Sanderson (Mr. Sanderson), the Assistant District Attorney prosecuting Defendant's case. There is no transcript from the jury selection so the only evidence of record concerning this juror is the trial transcript from when Defendant renewed his motion before opening arguments were heard.

> MR. BLACK [Defendant's counsel]: I want to renew my motion for cause. I think the Statute for Cause allows a juror to be removed for any other reason that may render a fair and impartial judgment and a fair and impartial verdict, something that is unattainable. And I would say that, even though his answers to our questions were – that he could have a fair and impartial verdict, I think that that is not a dispositive proof that it could be. And I think it's up in – up to the Judge, in your discretion, to strike him for cause, and I would ask that you do that now.

> THE COURT: Well, I think the operative word is discretion. And my impression of Mr. Vandresser and the relationship that he had with Mr. Sanderson was that, while at one point they had been good friends in high school, they had not seen much of each other in recent years, and that I was satisfied from the answers given by Mr. Vandresser that that was - that he could put that aside and that that would not be a factor in his deliberations in this case. And then, of course, as we noted in our bench conference, there - you had no further peremptories available to you. So again, it was my judgment that the relationship with Mr. Sanderson did not give rise sufficiently to cause - for me to grant your motion; therefore, I deny it.
>
> Mr. Sanderson, do you want to put anything on the record about that?
>
> MR. SANDERSON: No, Your Honor. My recollection from the - Mr. Vandresser's answer was that we hadn't seen each other but one - a couple of times in the last seven or eight years, as I think Your Honor is correct in your interpretations of his answers.

N.C. Gen. Stat. § 15A-1212 establishes the grounds pursuant to which a prospective juror may be excused for cause. None of the specific provisions of N.C. Gen. Stat. § 15A-1212 apply in this case. However, N.C. Gen. Stat. § 15A-1212(9) (2009) allows the trial court to excuse a prospective juror who "[f]or any other cause is unable to render a fair and impartial verdict." "A judge who observes the prospective juror's demeanor as he or she responds to questions and efforts at rehabilitation is best

able to determine whether the juror should be excused for cause." *State v. Rogers*, 355 N.C. 420, 430, 562 S.E.2d 859, 867 (2002) (citation omitted); *see also State v. Kemmerlin*, 356 N.C. 446, 461-62, 573 S.E.2d 870, 883 (2002) ("[W]e ordinarily 'defer to the trial court's judgment as to whether the prospective juror could impartially follow the law.'").

> We review a trial court's ruling on a challenge for cause for abuse of discretion. A trial court abuses its discretion if its determination is "manifestly unsupported by reason" and is "so arbitrary that it could not have been the result of a reasoned decision." In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record. The question that the trial court must answer in determining whether to excuse a prospective juror for cause is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

State v. Cummings, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citations omitted).

In *State v. Simmons*, __ N.C. App. __, 698 S.E.2d 95 (2010), this Court held, in a driving while impaired case, that the trial court did not abuse its discretion in denying the defendant's motion to exclude a police officer as a juror for cause, even though the officer "worked closely with the [Pitt County] District Attorney's office in the prosecution

of . . . traffic cases, including driving while impaired cases, and had never testified on behalf of a defendant." *Id.* at __, 698 S.E.2d at 103. The holding in *Simmons* was based in part on the officer's testimony that "despite his law enforcement experience, he could be fair and impartial." *Id.* In *Simmons*, our Court also cited *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977), for the proposition that "a juror's close relationship with a police officer, standing alone, is not grounds for a challenge for cause." *Id.* at 625, 234 S.E.2d at 579; *see also State v. Lasiter*, 361 N.C. 299, 301, 643 S.E.2d 909, 911 (2007) (no abuse of discretion in allowing juror with ties to law-enforcement officers and other courthouse personnel based on facts of case); *State v. Bates*, 172 N.C. App. 27, 33-35, 616 S.E.2d 280, 285-86 (2005) (no abuse of discretion in denying the defendant's motion to exclude juror who knew one of the State's witnesses because the juror stated that she could be fair and impartial).

In the present case, Defendant can point to no facts beyond juror Vandresser's close friendship with Mr. Sanderson in high school, a friendship that had not retained its closeness in the years leading up to the trial in this matter. Further, juror Vandresser was questioned concerning any bias, and answered that his relationship with Mr. Sanderson would not impair his ability

to consider Defendant's case impartially. We hold that Defendant has not shown that the trial court abused its discretion in denying his motion to exclude juror Vandresser for cause. Defendant's second argument is without merit.

III.

In Defendant's final argument, he contends that the "trial court's denial of [his] motion to dismiss and instructing the jury on the charges of felonious breaking and entering and felonious larceny unfairly prejudiced [him]." We disagree.

Defendant's argument concerning the jury instructions is based entirely upon his argument that there was insufficient evidence produced at trial to submit to the jury the charges of breaking or entering and felonious larceny. Therefore, we only address Defendant's argument that the trial court erred in denying his motion to dismiss.

> "To survive a motion to dismiss, the State must present substantial evidence of each element of the charged offenses sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt." "The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence." "[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." The issue of felonious breaking or entering is addressed by N.C. Gen. Stat. § 14-54(a) [2009]. That statute

> provides that "[a]ny person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." "'[B]uilding' shall be construed to include any . . . structure designed to house or secure within it any activity or property." "To support a conviction for felonious breaking and entering under [N.C. Gen. Stat.] § 14-54(a), there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein."

In re S.D.R., 191 N.C. App. 552, 556-57, 664 S.E.2d 414, 418-19 (2008) (citations omitted). "[A]n entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under G.S. 14-54(a)." *Id.* at 557, 664 S.E.2d at 419 (citations omitted). However, "there may be occasions when subsequent acts render the consent void *ab initio*, as where . . . the defendant conceals himself in a building until a time he is not authorized to be there in order to facilitate a theft[.]" *State v. Boone*, 297 N.C. 652, 659, n3, 256 S.E.2d 683, 687, n3 (1979).

At trial the following colloquy transpired between the State and Ms. Campbell:

> Q. All right. Did [Mr. Elliott] have permission to be in the garage?
>
> A. Not after working hours.

Q. Okay. Did you specifically tell him not to be in there after working hours?

A. He knew where he was supposed to be and not supposed to be because he was living on our property.

Q. Okay. I understand. But did you tell him he couldn't be in there after he was in there during the day?

A. Herbie was not in the habit of just taking liberties like that. If he wanted something from the garage, he would come to me and say so.

Q. Okay. I'm sorry.

A. I don't know how else to answer you.

Q. I think -- let me ask it one more time and, if you could, say yes or no. And I think that might be a fair answer.

A. If I can.

Q. Did you ever tell him that he could not be in the garage?

A. That he could not be in the garage?

Q. Yes, ma'am.

A. No---

Q. Okay.

A. ---because he was in there all the time.

According to Mr. Elliott's testimony, Defendant drove Mr. Elliott to Ms. Campbell's property sometime after midnight to get the four-wheeler. Mr. Elliott opened the garage, pushed the four-wheeler down the drive, started it, and drove across town.

Though Mr. Elliott had consent to enter the garage during working hours, we hold there was sufficient evidence, when viewed in the light most favorable to the State, that Mr. Elliott did not have consent to enter the garage after working hours, and certainly not after midnight. Because there was evidence presented that Mr. Elliott did not have consent to enter the garage at the time he took the four-wheeler, his entry into the garage could constitute an "entry" as required by N.C. Gen. Stat. § 14-54(a). Because sufficient evidence was presented to submit this issue to the jury, the trial court did not err in denying Defendant's motion to dismiss the charge of felonious breaking or entering.

Defendant further argues that the trial court erred in denying his motion to dismiss the charge of felonious larceny at the close of all the evidence. He contends that there was not sufficient evidence that the value of the four-wheeler was more than $1,000.00 as required for felonious larceny pursuant to N.C. Gen. Stat. § 14-72(a).

First, a purchase receipt for the four-wheeler was entered into evidence showing that the four-wheeler was purchased for $3,513.43 on 20 December 2001, as well as photographs of the four-wheeler made shortly after it was taken by Mr. Elliott. Though the four-wheeler was nearly nine years old at the time

Mr. Elliott took it, we believe the evidence presented was sufficient for the jury to make a determination that its value was more than $1,000.00.

Second, we need not make a holding concerning the sufficiency of the evidence for the value of the four-wheeler. N.C. Gen. Stat. § 14-72(b)(2) (2009) states:

> (b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is any of the following:
>
> . . . .
>
> (2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54, 14-54.1, or 14-57.

The jury found that the larceny was committed pursuant to N.C.G.S. § 14-54(a): "Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." As we held above, there was sufficient evidence at trial to survive Defendant's motion to suppress the charge of felonious larceny pursuant to N.C.G.S. § 14-54. Therefore, there was also sufficient evidence to submit the charge of felonious larceny to the jury pursuant to N.C.G.S. § 14-72(b)(2). Defendant's final argument is without merit.

Defendant makes no argument that the trial court erred by denying his motion to dismiss with respect to the charges of

felonious possession, felonious conspiracy, or felonious delivery of cocaine. Therefore, any such arguments have been abandoned.

No error.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).