NO. COA11-71
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 234653

PATRICK JAMAAL CHAMBERS

Appeal by Defendant from judgment entered 29 September 2010 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 June 2011.

Attorney General Roy Cooper, by Assistant Attorney General Karen A. Blum, for the State.

Harrington, Gilliland, Winstead, Feindel & Lucas, LLP, by Anna S. Lucas, for Defendant.

BEASLEY, Judge.

Patrick Jamaal Chambers (Defendant) appeals from judgment entered on his conviction of felonious breaking and entering. For the following reasons, we conclude there is no error.

On 13 April 2009, Defendant was indicted on one count of felonious breaking and entering. The case came on for trial on 29 September 2010. Ashley Olisky testified that shortly after awaking at 6:00 or 6:30 a.m. on 23 July 2008, she heard a noise

coming from her living room. Upon investigation, she caught Defendant trying to enter her home through the living room window, as he had already managed to get his head, arms, and one leg inside. Wearing only boxer shorts, Defendant was also carrying a tube sock and a pair of white gloves, one of which he was wearing on the hand he used to lift the window. Ms. Olisky recognized the intruder as her neighbor, "J," whom she had known for about one month and who had been in her house before. She also observed that her window screen had been slashed.

Ms. Olisky began screaming at Defendant, who then backed out of the window and attempted to flee. Ms. Olisky chased him and then confronted Defendant, demanding to know "what he was doing and why he was coming through [the] window." Defendant explained "that he was coming in to warn [Ms. Olisky] because there had been break-ins in the neighborhood." When Ms. Olisky responded, "J, you are the one breaking into my house," he offered no further excuse. He tried only to quiet Ms. Olisky so as not to disturb his mother next door and begged her not to call the police. Ms. Olisky said that she was indeed going to call, and Defendant ran away. Upon going back inside, Ms. Olisky did not see anything missing but did call the police.

The trial court denied Defendant's motions to dismiss following the State's evidence as well as after the close of all

the evidence, and, on 29 September 2010, the jury returned a verdict finding Defendant guilty of felonious breaking and entering. That same day, the trial court imposed a mitigated-range sentence of five to six months in prison, after finding that Defendant had a support system in the community. On 5 October 2010, the judgment was corrected to place Defendant in the custody of the Sheriff instead of the Department of Correction. Defendant appeals.

I.

Defendant first contends that the trial court erred in denying his motion to dismiss the charge of felonious breaking and entering because there was insufficient evidence that he intended to commit a larceny in the residence. We disagree.

We review *de novo* the denial of a motion to dismiss, *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007), and "the question for this Court is whether there is substantial evidence of each essential element of the offense charged." *State v. Borkar*, 173 N.C. App. 162, 165, 617 S.E.2d 341, 343 (2005). "'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate or would consider necessary to support a particular conclusion[.]" *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citations omitted). Upon a criminal defendant's motion to dismiss, "the

trial court must consider all the evidence admitted in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom[.]" *State v. Pigott*, 331 N.C. 199, 207, 415 S.E.2d 555, 559 (1992).

"The test of the sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both[,]" and "[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." *State v. Stone*, 323 N.C. 447, 451-52, 373 S.E.2d 430, 433 (1988). Thus, the motion to dismiss should be denied and the case submitted to the jury if a reasonable inference of the defendant's guilt may be drawn from the circumstances. *State v. Haymond*, __ N.C. App. __, __ 691 S.E.2d 108, 122 (2010).

To withstand a motion to dismiss on a charge of felonious breaking or entering, the State must have substantial proof that the defendant committed "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992); *see also* N.C. Gen. Stat. § 14-54(a) (2009) ("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."). Defendant's sufficiency of the evidence argument

addresses only the intent element, and we limit our review of the trial court's denial of the motion to dismiss accordingly.

"Although a breaking and entering indictment is not required to state the specific felony a defendant intended to commit, when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged[.]" *State v. Ly*, 189 N.C. App. 422, 430, 658 S.E.2d 300, 306 (2008) (internal quotation marks and citations omitted). Here, the indictment specifically alleged larceny; thus, the State had to prove that Defendant intended to commit larceny[1] at the time he broke or entered Ms. Olisky's residence. *See State v. Hill*, 38 N.C. App. 75, 78, 247 S.E.2d 295, 297 (1978) ("An essential element of the crime is that the intent exist at the time of the breaking or entering.").

Because felonious intent is "seldom provable by direct evidence," *State v. Chillo*, __ N.C. App. __, __, 705 S.E.2d 394, 398 (2010) (internal quotation marks and citation omitted), "[t]he 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

[1] Larceny consists of the taking and carrying away of the property of another, without the owner's consent, and with the intent to permanently deprive the owner thereof. *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 127 (2002).

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) (internal quotation marks and citation omitted); *see also State v. Wright*, 127 N.C. App. 592, 597, 492 S.E.2d 365, 368 (1997) (holding "felonious intent is a state of mind [that] may be inferred from a defendant's acts, conduct, and inferences fairly deducible from all the circumstances" (internal quotation marks omitted)).

While "[t]he intent to commit the felony must be present at the time of entrance," the same may "be inferred from the defendant's subsequent actions." *State v. Montgomery*, 341 N.C. 553, 566, 461 S.E.2d 732, 739 (1995). To be sure, a defendant's accomplishment of his criminal objective may be one such subsequent action, but intent "is not determinable on the basis of the success of his felonious venture." *State v. Smith*, 266 N.C. 747, 749, 147 S.E.2d 165 (1966). In fact, if a person breaks or enters a building with the intent to commit a larceny within, "he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent[.]" *Id.*; *see also State v. Avery*, 48 N.C. App. 675, 678, 269 S.E.2d 708, 711 (1980) ("The frustration of defendant's felonious efforts, however, does not reduce the degree of his crime.").

Here, evidence of Defendant's conduct and actions, both during and subsequent to the break-in, together with the general circumstances surrounding the occurrence, created a reasonable inference that Defendant intended to commit larceny inside Ms. Olisky's home. The State's evidence showed that Ms. Olisky had known Defendant for approximately one month prior to the break-in and believed that he lived with his mother next door. In the span of those few weeks, Defendant had been inside Ms. Olisky's house at least twice. On one occasion, Defendant had been in the living room and "asked to see the rest of the house." Having "no reason to say no," Ms. Olisky had walked him "through down the hallway" so that Defendant "knew the layout of the whole house" and "what was in the whole house." On the date of the breaking and entering, Defendant attempted to enter Ms. Olisky's home in the early morning hours through the living room window, from which a 20-inch television could be seen.

While Ms. Olisky's discovery of Defendant thwarted his felonious efforts and nothing was ultimately taken, the frustration of what can be reasonably viewed as a planned larceny does not negate Defendant's intent to commit the same. *Cf. State v. Wooten*, 1 N.C. App. 240, 161 S.E.2d 59 (1968) (holding motion for nonsuit on charge of breaking and entering with intent to commit larceny was properly overruled where

defendant's efforts to break into a service station were frustrated before he gained entry, nothing was taken, and he was chased from the scene and later hiding behind a bush 600 yards away from the station).

> "[W]hen there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent."

State v. Keitt, 153 N.C. App. 671, 674-75, 556 S.E.2d at 35, 38 (2002) (quoting *State v. McBryde*, 97 N.C. 393, 397, 1 S.E. 925, 927 (1887)). Our Court has explained that the inclusion of the nighttime element in this so-called *McBryde* inference does not preclude application of the inference to daytime break-ins. *See State v. Roberts*, 135 N.C. App. 690, 696-97, 522 S.E.2d 130, 134 (1999) (holding requisite intent for felony breaking and entering could be inferred from defendant's entry of bedroom window at 7:00 a.m., where defendant offered no exculpatory evidence as to his intent). We reasoned: "[T]he *McBryde* court's reference to nighttime was more a reference to the underlying burglary charge than a judicial pronouncement that the inference of intent only applies to crimes at night. In fact, this Court

has previously applied the inference to breakings and enterings during the daytime."). *Id.*; *see also State v. Costigan*, 51 N.C. App. 442, 445, 276 S.E.2d 467, 469 (1981).

Likewise here, "'[w]ithout other explanation for breaking into the building or a showing of the owner's consent,' the requisite intent can be inferred." *Roberts*, 135 N.C. App. at 696, 522 S.E.2d at 134 (quoting *State v. Myrick*, 306 N.C. 110, 115, 291 S.E.2d 577, 580 (1982)).

Accordingly, even if the State did not rule out every hypothesis pursuant to which Defendant may not have intended to commit larceny, the evidence "reasonably supports a logical and legitimate deduction as to the existence" of such an intent. *Piggott*, 331 N.C. at 207, 415 S.E.2d at 559-60; *see also State v. Patton*, 80 N.C. App. 302, 304-05, 341 S.E.2d 744 (1986) ("Where the defendant's actions could be subject to more than one interpretation, it is the function of the jury to infer the defendant's intent."). Thus, a reasonable inference of his guilt may clearly be drawn from the circumstances, and the trial court did not err in denying Defendant's motion to dismiss.

II.

Defendant contends "[t]he trial court committed plain error in permitting irrelevant and prejudicial victim impact evidence during the guilt-innocence phase of the trial."

At trial, the State asked Ms. Olisky how the break-in made her feel, to which Ms. Olisky responded that she "was terrified at the time"; "didn't stay at the house for like three weeks after it happened"; and was overall "[j]ust very cautious, careful of people after that." She also indicated that she "went out and bought locks for all of the windows and they couldn't open anymore." Defendant did not object but now argues that it was plain error for the trial court to admit this testimony, as it "likely steered the jury toward a guilty verdict given the shortcomings and inconsistencies in the evidence against [him]." We disagree.

In criminal cases, an evidentiary issue not preserved by objection at trial may be reviewed pursuant to the plain error standard on appeal. N.C.R. App. P. 10(a)(4). "A reversal for plain error is only appropriate in the most exceptional circumstances and when the defendant establishes that absent the error, the jury probably would have reached a different result." *State v. Taylor*, 362 N.C. 514, 543, 669 S.E.2d 239, 263 (2008) (internal quotation marks omitted).

A trial court errs when it admits irrelevant evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2009) (evidence which is not relevant is not admissible). Victim impact evidence, which includes evidence of "physical, psychological, or emotional

injury, [or] economic or property loss suffered by the victim," N.C. Gen. Stat. § 15A-833 (2009), is usually irrelevant during the guilt-innocence phase of trial and must be excluded, *see State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007) (explaining that while "[v]ictim impact evidence is generally relevant and admissible in sentencing," such evidence "often has no tendency to prove whether a particular defendant committed a particular criminal act against a particular victim; therefore victim impact evidence is usually irrelevant during the guilt-innocence phase of a trial and must be excluded").

Assuming *arguendo* that Ms. Olisky's testimony about the crime's effect on her was irrelevant victim impact evidence, Defendant has not met his burden of showing that the jury would have reached a different verdict if that evidence had not been admitted. As detailed above, there was substantial evidence from which a reasonable inference of Defendant's guilt could be drawn. We do not perceive a likelihood that the jury would have acquitted Defendant had Ms. Olisky's brief testimony regarding how the break-in affected her been excluded. As such, Defendant has not carried his burden of proving that any error in the trial court's admission thereof amounted to plain error.

No Error.

Judges BRYANT and GEER concur.

Report per Rule 30(e).