IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-47

Filed: 15 August 2017

Forsyth County, Nos. 14 CRS 62057-58

STATE OF NORTH CAROLINA

v.

SEAN MIGUEL METTLER

Appeal by defendant from judgment entered 11 May 2016 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 7 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Nancy Hardison-Dunn, for the State.

Sean P. Vitrano for defendant-appellant.

DAVIS, Judge.

Sean Miguel Mettler ("Defendant") appeals from his convictions of first-degree burglary, larceny of a motor vehicle, larceny after breaking or entering, and driving while license revoked. On appeal, he argues that the trial court erred by (1) denying his motion to dismiss for insufficiency of the evidence to support the charge of larceny after breaking or entering; (2) instructing the jury on a theory of acting in concert as

to the charge of larceny after breaking or entering; and (3) denying Defendant's motion to dismiss one of the larceny charges based upon the "single taking" rule. After careful review, we find no error in part, vacate in part, and remand with instructions.

Factual and Procedural Background

The State presented evidence at trial tending to show the following facts: At 2:08 a.m. on 18 December 2014, Officer K.B. Sullivan of the Winston-Salem Police Department was patrolling the downtown area when he received a call informing him that a break-in had occurred at the residence of Arthur and Lorianne Shaver. When Officer Sullivan responded to the call, he inspected the premises and discovered that the intruder had gained entry into the house through a window. Mrs. Shaver informed him that $150 had been taken from her purse and the keys to the Shavers' Ford F250 pickup truck — which had been sitting on a table in the foyer — were missing. The truck had been parked in the driveway but was no longer there.

Mr. Shaver told Officer Sullivan that he believed Defendant "was responsible for taking his truck and breaking into the house." Mr. Shaver explained to Officer Sullivan that he had been allowing Defendant to stay in a detached garage apartment in order to "help[Defendant] through a rough patch of his life, to get back on his feet." He stated that during the previous afternoon Defendant had asked Mr. Shaver to give him a ride to and from a gas station near downtown Winston-Salem. After

picking Defendant up from the gas station, Mr. Shaver suspected that Defendant "might have been buying illegal drugs . . . from the area." Upon realizing that Defendant may have possessed drugs, Mr. Shaver dropped him off at the intersection of Reynolda Road and Valley Road and told him to remove his belongings from the residence.

Around 9:00 p.m. that evening, Defendant returned to the Shavers' home and knocked on the door. He was accompanied by a man who Mr. Shaver did not recognize and who was later identified as George Taylor. Defendant told Mr. Shaver that he needed $50 to pay for a ride to drive him back to the gas station. Mr. Shaver initially refused to give him money, but "after [Defendant] pestered him for a few minutes he gave him $20 and said that's all you're getting, get out of my house."

The next morning, Officer K.D. Freeman was sitting in his patrol car in a parking lot when Mr. Shaver approached him and informed him that Mr. Shaver had just observed his stolen pickup truck being driven on a nearby street. Officer Freeman followed the truck, confirmed it was the Shavers' stolen vehicle, and activated his blue lights. As he approached the pickup truck, he observed Defendant sitting in the front seat. Taylor and another man later identified as Timothy Wright were passengers in the vehicle.

Officer Freeman "asked [Defendant] why he had . . . Mr. Shaver's truck, and he said . . . he was about to return it to Mr. Shaver." Officer Freeman observed that

Defendant's fingers appeared "burnt from smoking crack cocaine." Upon searching the vehicle, Mr. Shaver – who had followed Officer Freeman to the scene – discovered that his wife's credit cards and checks were on the floor of the truck. Officer Freeman subsequently arrested Defendant, Taylor, and Wright.

Defendant was indicted by a grand jury for felonious larceny of a motor vehicle, first degree burglary, larceny after breaking or entering, and driving while license revoked. A jury trial was held beginning on 10 May 2016 before the Honorable Anderson D. Cromer in Forsyth County Superior Court. The State presented testimony from the Shavers, Officer Sullivan, and Officer Freeman. Defendant testified on his own behalf. Defendant moved to dismiss the charges against him both after the State's case had concluded and at the close of all the evidence. Both motions were denied.

On 11 May 2016, the jury found Defendant guilty of first degree burglary, felonious larceny after breaking or entering, larceny of a motor vehicle, and driving while license revoked. The trial court consolidated the convictions and sentenced Defendant to 72 to 99 months imprisonment. Defendant gave oral notice of appeal.

Analysis

I. Motion to Dismiss

Defendant argues that the trial court erred by denying his motion to dismiss on two grounds. Specifically, he argues that (1) the State presented insufficient

evidence that Defendant intended to permanently deprive the Shavers of their pickup truck; and (2) the State failed to offer evidence of two separate incidents of larceny.

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, __ N.C. __, 792 S.E.2d 508 (2016). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citation and quotation marks omitted).

A. Intent to Permanently Deprive Victim of Property

Defendant initially argues that the State failed to present sufficient evidence that he intended to permanently deprive the Shavers of their pickup truck. We disagree.

"Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Baskin*, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (2008) (citation and quotation marks omitted). Intent to commit a larceny "may be inferred by demonstrating that defendant did not intend to return the property and was indifferent as to whether the owner ever recovered the property." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citation omitted).

We have previously held that a defendant's intent to permanently deprive an owner of property may properly be inferred from the surrounding circumstances. *See, e.g.*, *id.* (holding defendant intended to permanently deprive owner of stolen vehicle where he abandoned the car); *State v. Jackson*, 75 N.C. App. 294, 297-98, 330 S.E.2d 668, 670 (1985) (intent inferred where stolen vehicle was never located by police); *State v. Wilson*, 14 N.C. App. 256, 259, 188 S.E.2d 45, 47 (1972) (intent of defendant to permanently deprive owner of property "and to convert it to his own use" could be inferred where he held gun to head of victim and demanded money); *see also State v. Smith*, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966) ("If one who has taken property

from its owner without any color of right, his intent to deprive the owner wholly of the property may, generally speaking, be deemed proved if it appears he kept the goods as his own [un]til his apprehension. . . ." (citation and quotation marks omitted)).

In the present case, the State's evidence was that Defendant came to the Shavers' house at 9:00 p.m. and asked for money so he could pay Taylor for a ride to downtown Winston-Salem. Mr. Shaver gave him $20 and told him to leave the property. The State's evidence allowed the jury to infer that later that night, Defendant broke into the Shavers' house, took the keys to the Shavers' truck from a table, and drove away in the Shavers' pickup truck. The manner in which the theft of the truck occurred — by breaking into a private residence in the middle of the night — clearly supports an inference that Defendant intended to permanently deprive the Shavers of their vehicle. Thus, although Defendant stated that he simply intended to "borrow" the vehicle and intended to return it, the trial court was required to view this evidence in the light most favorable to the State in evaluating Defendant's motion to dismiss. Accordingly, Defendant's argument is overruled.

B. "Single Taking" Rule

Defendant next argues that the evidence did not support more than one larceny count. The State contends that Defendant did not preserve this argument for appellate review because his general motion to dismiss did not present this specific

argument to the trial court. Assuming *arguendo* that Defendant has failed to preserve this issue for appellate review, Defendant has demonstrated that his argument has merit. Thus, in the interests of justice, we elect to exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to review his argument. *See State v. Rawlins*, 166 N.C. App. 160, 164, 601 S.E.2d 267, 271 (2004) (exercising discretion pursuant to Rule 2 to review defendant's argument regarding application of "single taking" rule).

"A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *State v. Jaynes*, 342 N.C. 249, 275, 464 S.E.2d 448, 464 (1995). Our appellate courts have previously applied this "single taking" rule where a defendant steals multiple items of property during the course of a breaking or entering into a private residence. *See, e.g.*, *State v. Marr*, 342 N.C. 607, 613, 467 S.E.2d 236, 239 (1996) (defendant and co-conspirators entered victim's property, stole tools from victim's mobile home and shop, and also stole victim's truck and car); *State v. Froneberger*, 81 N.C. App. 398, 402, 344 S.E.2d 344, 347 (1986) (defendant stole silver coins from mother's house and on four different occasions pawned them for money).

We find particularly instructive our Supreme Court's decision in *State v. Adams*, 331 N.C. 317, 416 S.E.2d 380 (1992). In that case, the defendant stole satellite equipment, various coins, and a pistol from a private residence. The

defendant was charged with both felonious larceny of a firearm and felonious larceny of property stolen pursuant to breaking or entering. *Id.* at 332-33, 416 S.E.2d at 389. He argued on appeal that the trial court erred in imposing consecutive sentences for both convictions. *Id.* Our Supreme Court held that only one larceny offense was committed because the defendant stole all the items "during the course of a single breaking or entering of the [victim's] residence." *Id.* at 333, 416 S.E.2d at 389. Thus, the Court vacated one of the felonious larceny convictions. *Id.*

While the State cites *State v. Jordan*, 128 N.C. App. 469, 495 S.E.2d 732 (1998), its reliance on that case is misplaced. In *Jordan*, the defendant entered the victim's home intending to steal her car. However, once he entered her home, "he stayed for fifteen to twenty minutes" and "walked through the victim's house, deciding what property he wanted to take." *Id.* at 474, 495 S.E.2d at 736. He ultimately stole credit cards and jewelry in addition to the victim's car. *Id.* On appeal, this Court held that the trial court properly sentenced the defendant for convictions of both armed robbery and larceny because the fifteen-to-twenty-minute lapse of time constituted evidence that there were, in fact, two takings. *Id.* at 475, 495 S.E.2d at 736.

However, we have since distinguished *Jordan* in cases where the evidence did not establish a comparable temporal break between the theft of multiple items. *See, e.g.*, *State v. Cobb*, 150 N.C. App. 31, 43, 563 S.E.2d 600, 609 (2002) (declining to

follow *Jordan* because "evidence fail[ed] to establish that [defendant's] alleged taking of the victim's vehicle was separate and apart from his taking of the victim's wallet").

In the present case, the State's evidence did not establish a temporal break in the thefts committed by Defendant in the Shavers' home. To the contrary, the State's evidence showed that both larcenies were part of a single, continuous transaction. Therefore, the trial court erred in denying Defendant's motion to dismiss and sentencing him for two separate larcenies. *See Froneberger*, 81 N.C. App. at 401-02, 344 S.E.2d at 346-48 (holding that trial court erred in denying defendant's motion to dismiss and vacating judgments based on "single taking" rule).

It is well established that where judgment must be arrested upon one of two sentences of equal severity "this Court has held for the sake of consistency the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken." *State v. Seagroves*, 78 N.C. App. 49, 58, 336 S.E.2d 684, 690 (1985) (citation and quotation marks omitted). Thus, because Defendant's larceny convictions are of equal severity and the conviction for larceny after breaking or entering is the second of the two larceny counts listed on the indictment, we instruct the trial court upon remand to arrest judgment on his conviction for larceny after breaking or entering. Furthermore, because the trial court consolidated all three of Defendant's convictions into one judgment for sentencing purposes, we remand for resentencing.

II. Jury Instruction

Finally, Defendant argues that the trial court erred in instructing the jury on the acting in concert doctrine. Pursuant to a request by the State, the trial court gave the jury an instruction on the theory of acting in concert as to each of the charges, stating as follows:

> For a defendant to be guilty of a crime it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit a crime each of them, if actually or constructively present, is guilty of the crime. A defendant is not guilty of a crime merely because the defendant is present at the scene even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty the defendant must aid or actively encourage the person committing the crime or in some way communicate to another person the defendant's intention to assist in its commission.

"Our Court reviews a trial court's decisions regarding jury instructions *de novo*." *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105 (2010). It is well established that "[a] trial judge should not give instructions which present to the jury possible theories of conviction not supported by the evidence." *State v. Odom*, 99 N.C. App. 265, 272, 393 S.E.2d 146, 150 (1990) (citations omitted). However, "[i]f a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance." *State v. Cornell*, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citation omitted).

"The following are the elements of acting in concert: (1) being present at the scene of the crime, and (2) acting together with another person who commits the acts necessary to constitute the crime pursuant to a common plan or purpose." *State v. Jackson*, 215 N.C. App. 339, 345, 716 S.E.2d 61, 66 (2011) (citation and quotation marks omitted). "If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the judge must explain and apply the law of acting in concert." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citation and quotation marks omitted).

In the present case, the jury could have reasonably inferred that Defendant had broken into the Shavers' home, taken a set of keys and the contents of Mrs. Shaver's purse, and driven away in the couple's pickup truck. Moreover, the State's evidence supported the theory that Defendant had burglarized the home with the help of Taylor and Wright. Mr. Shaver testified that earlier in the evening Defendant had come to his home accompanied by Taylor. Officer Freeman testified that he discovered Defendant driving the Shavers' pickup truck the next morning and that both Taylor and Wright were passengers in the vehicle. Mr. Shaver also testified that his wife's credit cards and checks were found on the floor of the truck, suggesting that the men had taken these items from the Shavers' home. Defendant testified both that he was in need of money and he knew that Taylor and Wright had a reputation for burglarizing homes.

Thus, the evidence presented at trial allowed the trial court to instruct the jury on an acting in concert theory. Accordingly, the trial court did not err in its jury instruction. *See id.* (evidence was sufficient to support instruction on acting in concert).

Conclusion

For the reasons stated above, we (1) find no error as to Defendant's convictions for first degree burglary, larceny of a motor vehicle, and driving while license revoked; and (2) remand for the trial court to arrest judgment on the count of larceny after breaking or entering and for resentencing. At the hearing on resentencing, the court in its discretion may use the prior sentencing hearing evidence in the new hearing and take any additional evidence it may require.

NO ERROR IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.

Judges HUNTER, JR. and MURPHY concur.

Report per Rule 30(e).