Rel: October 25, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0378

Marcus Terrell Tate

v.

State of Alabama

Appeal from Lee Circuit Court
(CC-18-84)

COLE, Judge.

Marcus Terrell Tate appeals his convictions for first-degree burglary, a violation of § 13A-7-5, Ala. Code 1975, and fourth-degree theft of property, a violation of § 13A-8-5,

Ala. Code 1975, and his resulting concurrent sentences of 14 years and 1 year, respectively.

Facts and Procedural History

The evidence at trial showed that Tate broke into an apartment occupied by Theresa Monk and her family and stole a television. (R. 125-26.) Before Monk began living in the apartment, Monk's friend, Kevia Staples, had lived in that apartment. (R. 128.) Tate had previously been Staples's boyfriend, and he had often stayed at the apartment overnight, but apparently had never lived there. (R. 191.) When Staples moved out of the apartment, she subleased the apartment to Monk's boyfriend. (R. 154.) Staples also told Monk that she could have the furniture and other items remaining in the apartment after Staples moved out. (R. 130.)

On December 3, 2016, Monk, her teenaged daughter, and others were entering the apartment when Tate entered the apartment without an invitation and went into the bedroom. (R. 127.) Tate removed a television from the bedroom dresser and left the apartment with the television. (R. 131-33.) After Tate left, Monk locked the front door. Immediately thereafter, Tate kicked the door open, came inside, and

removed another television from the living room, together with a game system and cords. (R. 133-36.)

One of the persons with Monk told Tate that the television was not his. Tate lifted his shirt to show them his pistol, and said "it's mine now." (R. 135-36.) Tate left the apartment with both televisions, and Monk telephoned the police. Monk and her daughter identified Tate from a lineup and identified Tate again at trial. (R. 128, 143, 175, 181, 231-32.)[1]

Staples testified that she used to date Tate and that Tate had no belongings at the apartment. (R. 191-92.) Staples also testified that she never told Tate that he could take the television in the bedroom. (R. 194.)

Tate did not testify at trial, but the State presented evidence of Tate's interview with police investigators several months after the burglary. Tate's written statement read as follows:

> "My name is Marcus Terrell Tate. On December 3rd of 2016, I went over to my old apartment in Woodbend Apartments. I was going to get my T.V.s and had been talking to my ex-girlfriend, Kavia Ellington [Staples], about doing so. When I got there, her

[1]On appeal, Tate does not claim that he was not the person who came into the apartment and took the television.

> friend, Theresa, was there and had been living there. I walked in behind her and got two T.V.s. One was mine and one was--and the other was one I had given to Kavia. I did not bust in the door. It was damaged from a prior incident where I kicked the door in two years prior. I did have a pistol on me in my pocket and it was sticking out, but I never pulled it out. Theresa just let--let me get my stuff and everything was cool. The kids asked who I was and Theresa said she knew me. I then left in my silver Grand Marquis. This statement has been read by me and is true and correct."

(R. 239-40.)

Standard of Review

> "'In determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider the evidence in the light most favorable to the prosecution.' Faircloth v. State, 471 So. 2d 485, 489 (Ala. Cr. App. 1984), affirmed, Ex parte Faircloth, [471] So. 2d 493 (Ala. 1985)."

White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989).

The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003).

Discussion

On appeal, Tate claims (1) that the evidence was insufficient to support the verdict, (2) that there was a fatal variance between the indictment and the evidence, and

(3) that it violated principles of double jeopardy to convict him of both burglary and theft based on the same incident.

Sufficiency of the Evidence and Variance Between Indictment and Proof

Tate argues (1) that the evidence was insufficient to support the verdict because, he says, the State did not prove that Monk owned or rented the apartment or that she owned the television that was stolen and (2) that, as to both charges, there was a material variance between the indictment and the proof regarding ownership.

Section 13A-7-5, Ala. Code 1975, defines first-degree burglary as:

> "(a) A person commits the crime of burglary in the first degree if he or she knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, the person or another participant in the crime:
>
> "....
>
> "(3) In effecting entry, is armed with a deadly weapon or dangerous instrument or, while in the dwelling or immediate flight from the dwelling, uses or threatens the immediate use of a deadly weapon or dangerous instrument against another person."

(Emphasis added.)

The burglary indictment alleged that Tate

> "did on or about December 3, 2016, knowingly and unlawfully enter or remain unlawfully in the dwelling of another, to-wit: Theresa Monk, with intent to commit a crime therein, to-wit: theft of property, and while effecting entry or while in the dwelling or in immediate flight therefrom, the defendant or another participant was armed with a deadly weapon or dangerous instrument, or while in the dwelling or in immediate flight therefrom, use or threaten the immediate use of a deadly weapon or dangerous instrument, to wit: a pistol in violation of §13A-7-5(a)(3) of the Code of Alabama against the peace and dignity of the State of Alabama."

(C. 12 (emphasis added).)

The circuit court instructed the jury that, to convict Tate of burglary, it must find that Tate "knowingly and unlawfully entered or remained unlawfully in the dwelling of Theresa Monk with intent to commit a crime therein, to-wit, theft of property in the fourth degree." (R. 281.)[2]

Fourth-degree theft of property is a violation of § 13A-8-5(a), Ala. Code 1975, which provides:

> "The theft of property which does not exceed five hundred dollars ($500) in value and which is not taken from the person of another constitutes theft of property in the fourth degree."

[2]Tate did not object to the content of the jury instructions. (R. 293.)

Section 13A-8-2(a), Ala. Code 1975, defines "theft of property" as: "(a) A person commits the crime of theft of property if he or she: (1) Knowingly obtains or exerts unauthorized control over the property of another, with intent to deprive the owner of his or her property."

The theft indictment alleged that Tate

> "on or about December 3, 2016, did knowingly obtain or exert unauthorized control over the property of another, to wit: One (1) Television, the property of, to-wit: Theresa Monk and the property having a value not in excess of Five Hundred Dollars ($500) in violation of § 13A-8-5 of the Code of Alabama against the peace and dignity of the State of Alabama."

(C. 13 (emphasis added).)

With respect to the theft charge, the circuit court instructed the jury that it must find that Tate "knowingly obtained or exerted unauthorized control over the property of Theresa Monk, more specifically, a television," and that Tate "acted with intent to deprive Ms. Monk of her property." (R. 289-90.)

Tate argues (1) that the evidence was insufficient to support a conviction because, he says, the evidence showed that Monk was not the "owner" of the apartment or the television and (2) that there was a material variance between

the indictment and the proof regarding Monk's ownership of the apartment and the television. Specifically, Tate argues that the indictment alleged that the dwelling was Monk's, but the evidence at trial refuted that allegation by showing that the apartment was actually being subleased by Monk's boyfriend and that Monk was just visiting. Likewise, Tate argues that the television did not belong to Monk, as alleged in the indictment.

With respect to the burglary charge, Tate argues:

> "An essential averment in a charge for an offense against property is the negation of the defendant's ownership or possessory right, so as to affirmatively show that the property, general or special, against which the crime is laid, is in another. Emmonds v. State, 87 Ala. 12, 6 So. 54. Wilson v. State, 247 Ala. 84, 22 So. 2d 601, (1945)."

(Tate's brief, p. 20.)

This argument fails because "[b]urglary, like trespass, is an offense against the possession, and hence the test for the purpose of determining in whom the ownership of the premises should be laid in an indictment is not the title, but the occupancy or possession at the time the offense was committed." Folsom v. State, 668 So. 2d 114, 116 (Ala. Crim. App. 1995) (citations omitted). See also Gaines v. State, 460

So. 2d 240, 241 (Ala. Crim. App. 1984) (where the building burglarized was occupied by the establishment named in the indictment "it [is] immaterial who owned the building"); Hamilton v. State, 283 Ala. 540, 545, 219 So. 2d 369, 374 (1969) (dwelling owned by a family member of the person alleged in the indictment to be in possession of the dwelling); Fuller v. State, 28 Ala. App. 28, 29, 177 So. 353, 354 (1937) (store operated by the wife of the person named in the indictment as the owner).

To prove burglary, the State does not need to prove who has legal title to the burglarized building or dwelling, or the exact nature of the victim's ownership interest. Instead, it is enough that the State prove that the victim had a right to possess or occupy the building and that the defendant did not have ownership or a right of possession or occupancy.

Tate's citations to Emmonds, 82 Ala. 12, 6 So. 54 (1889), and Wilson, 247 Ala. 84, 22 So. 2d 601 (1945), do not support his argument because those cases involved common-law burglary, and not the current statutory offense. Further, both of those cases stressed the need for the State to refute the

possibility that the defendant was an owner of the building burglarized.

In this case, the evidence was sufficient to establish that Monk had a possessory interest in the apartment, and it is immaterial that she was not the sublessee of the apartment. Further, the evidence was sufficient to show that Tate was not an owner or lawful occupant of the apartment and that he had no right to enter without permission.

Likewise, the evidence indicating that Monk owned the television was sufficient to support Tate's conviction for theft. Tate does not make an adequate argument regarding the elements of theft, and Alabama law is contrary to his position. With respect to theft, an owner is defined as "[a] person, other than the defendant, who has possession of or any other interest in the property involved, even though that interest or possession is unlawful." § 13A-8-1(9), Ala. Code 1975. See Cogburn v. State, 473 So. 2d 625 (Ala. Crim. App. 1985) (holding that, with respect to theft, the ownership of the alleged stolen property is properly laid in the person who is in the rightful possession thereof at the time of the theft); Mauldin v. State, 376 So. 2d 788, 793 (Ala. Crim. App.

1979) (the fact that an item of personal property was within the victim's possession at the time of the theft is sufficient for the property to be described as his in the indictment). See also Phillips v. State, 446 So. 2d 57, 62 (Ala. Crim. App. 1983). Accordingly, the evidence was sufficient to show that Monk had a sufficient ownership interest in the television to support a theft conviction.

Tate also argues that there was a fatal variance between the indictment and the evidence regarding Monk's ownership of the apartment and regarding ownership of the television. Tate's entire argument regarding this issue is:

> "In addition: ... 'a variance as to the name alleged in the indictment from that proved by the evidence must be such as to be misleading or substantially injurious to accused in making his defense, or to expose him to the danger of a second trial on the same charge.' Rupert v. State, 45 Ala. App. 84, 86, 224 So. 2d 921, 923 (1969);... and 'the proof at trial must correspond with the material allegations of the indictment.' Owens v. State, 46 Ala. App. 591, 246 So. 2d 478 (1971). House v. State, 380 So. 2d 940, (1979)."

(Tate's brief, pp. 20-21.)

The cases cited by Tate merely state generalized principles of law, and do not specifically address the elements of burglary and theft, or the issue presented here.

Further, to the extent that there was a variance regarding Monk's ownership of (or right to possess) the apartment and the television, the variance was not material. In Gaines v. State, 460 So. 2d 240 (Ala. Crim. App. 1984), this Court held that there was not a fatal variance between an indictment alleging the burglary of a building owned by an individual and proof that the building was actually owned by his corporation. Again, this Court noted that "'[b]urglary is an offense against possession or occupancy of a building, and the test for determining ownership of premises for purposes of indictment is not title to the property broken and entered, but its occupancy or possession at the time the offense was committed.' Nicholson v. State, 366 So. 2d 1142 (Ala. Crim. App. 1979)." Gaines, 460 So. 2d at 241.

The Gaines Court concluded, with regard to the alleged variance:

> "The indictment sufficiently identified the offense with which the appellant was charged and the state's evidence at trial proved the same offense. The identity of the building burglarized and the name of the establishment in possession of the premises were adequately set out in the indictment. ... The appellant was aware of the offense against which he had to defend and he disputed neither the identification of the building nor the

> identification of the business which he allegedly burglarized.
>
> "Where, by indictment, the defendant is given proper notice and identification of the charges, which are subsequently proven during the trial of his case, 'no substantial injury to the defendant results' and there is no material (fatal) variance between the indictment and proof. Vaughn v. State, 236 Ala. 442, 445, 183 So. 428, 430 (1938);... Therefore, there was no material variance in this case."

Gaines, 460 So. 2d at 241. See also Phillips v. State, 446 So. 2d 57, 62 (Ala. Crim. App. 1983) (holding that there was no material variance between an indictment alleging that a truck was owned by an individual and proof that the truck was owned by the individual and his wife's corporation).

In this case, we conclude that the indictment and proof thereon were appropriate but that, even if a variance between the indictment and the proof regarding ownership did exist, that variance was not material. Burglary is an offense against possession of property, and the identity of the actual sublessee is not material. Furthermore, although Staples testified that she was not opposed to Tate having one of the televisions, there was testimony that both televisions had been owned by Staples and were given to Monk. (R. 194, 130.) Thus, the reference to Monk's dwelling and Monk's television

was adequate to give Tate notice of the facts necessary to prepare a defense.

Tate does not explain how he was prejudiced by the failure of the indictment to allege the identity of the actual sublessee of the apartment. The identity of the building burglarized was adequately set out in the indictment, and Tate did not dispute the identity of the building or the individual victims involved. Nor does Tate contend that he was a tenant or occupant of the dwelling or that he had a right to be there except with the permission of Monk or her boyfriend.

Double Jeopardy

Tate next argues that it violates principles of double jeopardy to convict him of both burglary and theft based on one incident. Specifically, Tate argues that the theft of the television in the living room was used both to establish the theft offense and to establish the "intent to commit a crime therein" element of the burglary offense. Tate argues that the theft was a lesser-included offense of the burglary offense. Tate cites general principles of law, but he does not cite any authority specifically addressing double jeopardy as it relates to burglary and theft.

Alabama law is contrary to Tate's position. In Canyon v. State, 218 So. 3d 871, 873 (Ala. Crim. App. 2016), this Court stated:

> "We note that there was no impropriety as to Canyon's burglary conviction and one of the theft-of-property convictions. Because the circuit court imposed concurrent sentences of 20 years' imprisonment for Canyon's burglary conviction and his theft conviction, there was no double-jeopardy error.
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> > "'[T]he appellate courts of this state have consistently held that where a defendant is charged with both burglary and theft (or larceny) arising from a transaction that is the foundation for both charges, the defendant may receive only one punishment. Vason v. State, 574 So. 2d 860, 863 (Ala. Crim. App. 1990) (holding that although the defendant could receive only one sentence for two offenses arising out of the same transaction, the defendant was properly convicted of both burglary and theft that arose from the same transaction);...'
>
> "Ex parte McKelvey, 630 So. 2d 56, 57–58 (Ala. 1992)(footnote omitted). See also Brown v. State, 821 So. 2d 219, 225 (Ala. Crim. App. 2000)('A court may sentence a defendant for burglary and theft if the sentences are made concurrent, rather than consecutive.')."

Tate cites no authority to the contrary.

As noted in Ex parte McKelvey, supra, Brown v. State, supra, and other cases, Tate can receive only one punishment for the burglary and theft convictions. However, his

sentences were made to run concurrently, which is all that is required. Tate is not entitled to any relief regarding his double-jeopardy claim.

Conclusion

For these reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Kellum, J., concurs in the result.