NO. COA01-65

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

STATE OF NORTH CAROLINA

v. Meckenburg County
Nos. 99 CRS 105861,
ERNEST JUNIOR IVEY 105863, 105870, 105872

Appeal by defendant from judgment entered 6 April 2000 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for the State.

Dolly Bevan Manion for defendant appellant.

McCULLOUGH, Judge.

Defendant Ernest Junior Ivey was tried at the 3 April 2000 Criminal Jury Session of Mecklenburg County Superior Court upon separate indictments alleging three counts of felonious breaking and entering, three counts of larceny after breaking and entering, and six indictments of habitual felon status as to each substantive crime. Evidence for the State showed that Mr. Steven Martucci was the general manager of the U-Haul storage facility in Charlotte, North Carolina, during July and August 1998. The U-Haul facility consisted of two buildings with approximately 800 storage rental

compartments (storage units). The buildings were located behind a showroom. Each building had two levels of storage units, and each unit was accessible from a door in the interior hallway and from an overhead door which opened onto an exterior loading dock. Each door opening onto the interior hallway had a lock on it. Customers were asked to sign in at the front desk before proceeding to their individual storage units, though the practice was not strictly enforced.

Part of Mr. Martucci's daily duties was to walk through the 800 storage units and check to see that they were secure. On 29 July 1998, he discovered that unit 306 was missing a lock. The next day, he noticed that unit 404, across the hall from unit 306, was also missing a lock. Mr. Martucci contacted the renter of unit 404, who came to the U-Haul facility; the renter did not find anything missing from his unit. On 31 July 1998, Mr. Martucci discovered that unit 308, next to unit 306, was also missing a lock.

After discovering the missing locks, Mr. Martucci reviewed the sign-in sheet in the front office. The sheet revealed that only one customer, Raven Washington, signed in on each of the three days he found missing locks on storage units. Mr. Martucci recalled seeing Ms. Washington enter the building each day to visit unit 304, the unit she began renting on 28 July 1998. Mr. Martucci later testified that Ms. Washington always had someone with her when she visited the U-Haul facility. Each time she visited the U-Haul facility, she signed in and entered the unit from the interior hallway, while her companion drove around and parked at the loading

dock.

On 1 August 1998, Mr. Martucci noted that Ms. Washington was the only customer who signed in at the front desk. He began his walk-through shortly thereafter, and noticed Ms. Washington standing in the hallway outside her open unit. As he walked past her, Mr. Martucci noticed that unit 316 was missing a lock. Upon entering the unit, Mr. Martucci saw a black man in the room; he approached the man and told him to get out of the unit, since it did not belong to him. He then escorted the man out of unit 316. The man briefly went into Ms. Washington's unit, and the two then left the U-Haul facility.

On 5 August 1998, the renters of unit 316 came to the facility. While they were there, Ms. Washington arrived. Along with Ms. Washington was a "stocky black gentleman sloppily dressed." The man was driving a Honda Accord; in the backseat was a small child holding a large stuffed "Tigger." The sign-in sheet indicated that Ms. Washington returned again on 5 August 1998. In total, Ms. Washington had signed in twice on 29 July, twice on 30 July, twice on 31 July, three times on 1 August, twice on 4 August, and twice on 5 August 1998.

During the week of the alleged break-ins, Mr. Martucci testified that two sets of bolt cutters were missing from the U-Haul facility's garage, which was accessible from the storage facility and the showroom. He later testified that a photo produced by the State depicted an identical set of bolt cutters. Mr. Martucci also positively identified State's Exhibit 6 as a

photograph of Ms. Raven Washington.

At the conclusion of Mr. Martucci's testimony, the State called the owners of the unlocked storage units to testify regarding their missing property. The renters of unit 306 testified that many items were missing from their unit, including speakers, clothing, two dorm refrigerators, a word processor, a radio, and a TV/VCR. The total value of the items was about $1,050.00. The renters of unit 316 also testified that many of their electronic items were missing from the unit, which they valued at over $2,000.00. They visited their unit on 5 August 1998 and saw Ms. Washington at the facility on that occasion. The renters also saw a black man driving a Honda Accord, and they also testified that the child in the backseat had a stuffed "Tigger" that was identical to the one stolen from their unit. While the manager of U-Haul talked to the man in the Honda Accord, Ms. Washington got into the car and they drove away. However, the renters wrote down the license plate number of the vehicle before it left.

On 1 August 1998, Investigator Amy Helms of the Charlotte Mecklenburg Police Department discovered an abandoned red Lincoln Town Car. In the trunk of the car, Investigator Helms found a pair of bolt cutters, a dorm refrigerator, a computer, a keyboard, two speaker covers, a battery charger, a circular saw, some coolers, a drill, a camera, assorted clothing, children's toys, and a notebook. The notebook contained prior arrest documents bearing the name "Ernest Ivey." After defendant objected and moved to

strike, the trial court instructed the jury not to consider Investigator Helms' testimony regarding the arrest documents bearing the name "Ernest Ivey." Additionally, Investigator Helms testified that she found a photograph of Raven Washington in the interior of the car. Investigator Helms stated that the back of the photo had an inscription which read, "To my sweetheart Ernest. With love, Raven. 7/21/98"

Investigator Helms determined that the registered owner of the Lincoln Town Car was Mr. Gary Phillips. After meeting with him, she determined that none of the items in the car belonged to him, though she was unable to determine to whom the items belonged. On 8 August 1998, Investigator Helms was conducting a routine patrol near the Villager Lodge and discovered a gray Honda Accord with its back left vent window broken out. She testified that she ran its tag number through the police system and learned the car was stolen. Before she left, a black woman approached her and began speaking with her. Investigator Helms recognized her as the woman in the photo, Raven Washington. Ms. Washington gave Investigator Helms permission to come to her room at the Villager Lodge.

Once inside, Investigator Helms saw a black man in the room. He identified himself as "Jay McClain" and allowed Investigator Helms to search his pockets. She found his birth certificate, with the name Ernest Ivey. Defendant was then arrested on an outstanding warrant. Later that day, Investigator Helms met with the registered owner of the Honda Accord. He acknowledged that the car was his, but did not recognize the items recovered by police.

Investigator Nelson Bowling of the Charlotte Mecklenburg Police Department was assigned to investigate the break-ins at the U-Haul facility. He determined that the license plate number given to him by one of the renters was for a gray Honda Accord, the same one recovered by Investigator Helms. Investigator Bowling also spoke to Raven Washington and was given permission to search her room at the Villager Lodge. He later identified many of the items in the room as those stolen from the U-Haul storage units in July and August. He also retrieved two pawn shop tickets from Ms. Washington and tracked down several of the stolen items. He later returned the items to their respective owners.

On 26 August 1998, Investigator Bowling took a statement from defendant at the Mecklenburg County Jail. Defendant stated he took Ms. Washington to the U-Haul facility and helped her get things out of her unit. He also took her to a pawn shop because she said she needed to sell things to get money. He stated he did not know where she got the items, and he denied breaking into any of the U-Haul units at any time.

The State was unable to locate Raven Washington for trial. After the State presented its evidence, defendant moved to dismiss the case against him. The trial court dismissed one count of breaking and entering, one count of larceny, and two habitual felon counts due to insufficient evidence. Defendant presented no evidence. The jury returned verdicts of not guilty on the two breaking and entering charges, but did find defendant guilty of two counts of larceny. Defendant admitted his habitual felon status on

the two larceny counts. The trial court then dismissed the two habitual felon counts that were attached to the breaking and entering charges for which defendant was found not guilty. Defendant was sentenced to 80-105 months' imprisonment, and appealed.

On appeal, defendant argues the trial court committed reversible error by (I) allowing the State to introduce the photograph of Raven Washington; (II) allowing the State to introduce testimony regarding what Gary Phillips and Scott Smith told Investigator Helms; (III) allowing the State to introduce evidence that the Honda Accord was stolen; (IV) failing to dismiss the two counts of felonious larceny pursuant to breaking and entering for insufficient evidence at the close of all the evidence; and (V) failing to arrest judgment upon the larceny convictions because they were inconsistent with the jury's verdict of not guilty as to the breaking and entering charges. For the reasons set forth herein, we disagree with defendant's arguments and find no error in his trial.

Photograph of Raven Washington

By his first assignment of error, defendant argues the trial court erred in overruling his objection to the State's introduction of the unredacted photograph of Raven Washington, which was retrieved from the interior of the abandoned red Lincoln Town Car. The State, on the other hand, argues that the photograph was offered merely to show a connection between defendant and Ms. Washington around the time of the U-Haul break-ins.

Defendant argues the information on the back of the photograph was inadmissible hearsay. The photo read, "To my sweetheart Ernest. With love, Raven. 7/21/98." It was found by Investigator Helms in the passenger area of the abandoned Lincoln Town Car on 1 August 1998; the trunk of that car contained stolen items from U-Haul units, as well as a pair of bolt cutters later identified as property of the U-Haul facility. Defendant notes that none of the State's witnesses could identify him as the man driving the gray Honda Accord on 5 August 1998, nor could Mr. Martucci identify defendant as the man he escorted out of unit 316 on 1 August 1998. Defendant admitted to the police that he accompanied Ms. Washington to remove items from her storage unit, even though he did not state what type of vehicle he was driving. Although he contends the State established him as the driver of the Honda Accord by use of inadmissible hearsay, in actuality the jury could infer he was the driver based on his admission.

Defendant also takes issue with the fact that the State allowed the jury to infer that the inscription on the photograph was written by Ms. Washington. He argues that there must be satisfactory proof of genuineness. *See* N.C. Gen. Stat. § 8C-1, Rule 901 (1999); *Woody v. Spruce Co.*, 175 N.C. 545, 547, 95 S.E. 905, 906 (1918). He further argues the State cannot show that the error was harmless, as it is required to do under N.C. Gen. Stat. § 15A-1443(b) (1999). Defendant contends the only evidence of his guilty knowledge was the evidence that he stole two cars, one of which may have been used to assist Ms. Washington with her criminal

activities.

The State argues the photograph was admitted into evidence in the same condition it was found by Investigator Helms on 1 August 1998 and was offered only to show a relationship between defendant and Ms. Washington around the time of the U-Haul break-ins and a link between the Lincoln Town Car (which contained the bolt cutters from the U-Haul facility) and the Honda Accord. The State denies that the photo was admitted to make the jury believe defendant was a car thief and committed the larcenies with which he was charged. The trial court carefully avoided misconceptions regarding the Lincoln Town Car; it was consistently referred to as "abandoned" rather than "stolen." In fact, defendant's own attorney was the one who first mentioned that defendant had a warrant out for his arrest for larceny of an automobile. Additionally, the trial court allowed testimony from Investigator Helms that she found documents in the car bearing defendant's name, but made sure to instruct the jury to disregard Investigator Helms' testimony that those papers were arrest documents bearing defendant's name.

Finally, the State contests defendant's invocation of N.C. Gen. Stat. § 8C-1, Rule 901, regarding authentication of documents. Here, the trial court compared the sign-in log at the U-Haul facility, which Mr. Martucci testified he had seen Ms. Washington sign, with the writing on the back of Ms. Washington's photograph. The jury also had an opportunity to look at the sign-in log after requesting it during deliberations. *See* N.C. Gen. Stat. § 8C-1, Rule 901(b)(3) (allowing the trier of fact to compare specimens

which have been authenticated to the document in question). *See also State v. Ferguson*, ___ N.C. App. ___, 549 S.E.2d 889, *disc. review denied*, ___ N.C. ___, 554 S.E.2d 650 (2001). Based on this rule, as well as the evidence at trial indicating a relationship between defendant and Ms. Washington, we conclude that the trial court did not err in admitting Ms. Washington's unredacted photograph over defendant's objection. Defendant's first assignment of error is overruled.

Investigator Helms' Testimony

Defendant next argues the trial court erred by allowing Investigator Helms to testify regarding what the owners of the Lincoln Town Car and Honda Accord told her. The State argues that Helms' testimony was not hearsay because it focused on her own actions. After examining the transcript of the proceedings below, we believe Investigator Helms' testimony was properly admitted.

Investigator Helms testified that she ran a check on the Lincoln Town Car and determined that the registered owner was Mr. Gary Phillips; she then met with him and showed him the items found in the car, including a dorm refrigerator and other small items. She did not, however, relinquish control of the items to him after they met. Defendant argues that Mr. Phillips either actually stated to Investigator Helms that the items were not his or acted in a non-assertive manner with respect to the items. Either way, defendant argues, Investigator Helms' testimony was hearsay under N.C. Gen. Stat. § 8C-1, Rules 801, 802, 803, and 804 (1999).

Investigator Helms also testified that she met with the owner

of the Honda Accord, Mr. Scott Smith, on 8 August 1998. He told her the items found in the Honda were not his. After the conversation, Investigator Helms met with Mr. Phillips again, and he accepted the items taken from the Honda Accord. Defendant maintains this testimony was offered to prove Mr. Phillips owned the items in the Honda Accord, which had been stolen from his car initially.

Defendant's arguments challenge the "hearsay character" of the evidence. *See Trust Co. v. Wilder*, 255 N.C. 114, 120, 120 S.E.2d 404, 409 (1961). Defendant contends the evidence was particularly damaging because the photograph of Ms. Washington in the Lincoln Town Car and the stolen items in the Honda Accord (which were later determined to belong to the owner of the Lincoln Town Car) tied defendant to both vehicles, one of which (the Lincoln Town Car) contained the bolt cutters and the other (the Honda Accord) containing the stuffed "Tigger" toy one of the U-Haul facility renters identified as hers. Defendant maintains that he could not have been convicted of larceny without this evidence.

The State argues that Investigator Helms' testimony was not hearsay because she testified about her own actions, based on her own personal knowledge, and such information was properly placed before the jury. *See State v. Smith*, 66 N.C. App. 570, 577, 312 S.E.2d 222, 226, *disc. review denied*, 310 N.C. 747, 315 S.E.2d 708 (1984). In *Smith*, the trial court allowed a detective to testify, over objection, "that after talking to shop owners where defendant allegedly sold the stolen property, he determined that the shop

owners' descriptions of the seller fit the defendant." *Id.* This Court rejected defendant's contention that the detective's testimony was inadmissible hearsay, because "[the detective] did not testify as to what the shop owners said. His testimony was based on personal knowledge and was entitled to jury consideration." *Id.* The same situation is presented by the facts in the case at bar. Investigator Helms testified about her own observations of the two vehicles and the items found therein. Such evidence was based on her personal knowledge gained during her investigation of the case, and it was entitled to jury consideration, as was the testimony of the detective in *Smith*. *See also State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978).

Lastly, the State argues that, to the extent it can be inferred from Investigator Helms' testimony and conduct that the car owners affirmatively or negatively expressed ownership of the items she showed them, her testimony is admissible to explain why she returned property found in the Honda Accord to Mr. Phillips after she talked with Mr. Smith. *See State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990) (allowing testimony to explain the subsequent conduct of one to whom a statement was made). Therefore, after careful consideration of the parties' arguments, we conclude the trial court did not err in admitting the testimony of Investigator Helms over defendant's objection. Defendant's second assignment of error is hereby overruled.

Stolen Nature of the Honda Accord

By his third assignment of error, defendant argues the trial

court erred in allowing evidence that the Honda Accord was a stolen vehicle, because such evidence constituted both improper character evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999) and unreliable hearsay. The State maintains that the evidence was properly admitted to explain Investigator Helms' later conduct in having the car towed. After careful consideration of the parties' contentions, we agree with the State.

The State argues Investigator Helms' testimony was not admitted for the truth of the matter--that the Honda Accord was stolen--but rather to explain her conduct in trying unsuccessfully to contact the car's owner and then falling back on standard procedure and having the car towed. "'[S]tatements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made.'" *Coffey*, 326 N.C. at 282, 389 S.E.2d at 56 (quoting *State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979)).

Investigator Helms' testimony was not offered to help determine who stole the Honda Accord, so it was not evidence of other crimes, wrongs, or acts by defendant to show action in conformity therewith. *See* N.C. Gen. Stat. § 8C-1, Rule 404(a) and (b) (1999). We agree with the State that the evidence was admissible to explain Investigator Helms' actions. *See Smith* and *Coffey*. Defendant's third assignment of error is overruled.

Motion to Dismiss

Defendant next argues the trial court erred in denying his motion to dismiss at the close of all the evidence the two

remaining counts of felonious larceny pursuant to breaking and entering. He argues the resulting verdicts of guilty of felonious larceny were inconsistent with the jury's not guilty verdicts for breaking and entering. The State contends that the verdicts were consistent and the trial court properly denied the motion to dismiss. We agree with the State.

When a defendant makes a motion to dismiss based on insufficiency of the evidence,

> "[t]he evidence is to be viewed in the light most favorable to the State. All contradictions in the evidence are to be resolved in the State's favor. All reasonable inferences based upon the evidence are to be indulged in. Our cases also establish that defendant's evidence may be considered on a motion to dismiss where it clarifies and is not contradictory to the State's evidence or where it rebuts permissible inferences raised by the State's evidence and is not contradictory to it. The same principle obtains where, as here, the defendant's statement is introduced by the State. Finally, while the State may base its case on circumstantial evidence requiring the jury to infer elements of the crime, that evidence must be real and substantial and not merely speculative. Substantial evidence is evidence from which a rational trier of fact could find the fact to be proved beyond a reasonable doubt."

State v. Reid, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994) (quoting *State v. Reese*, 319 N.C. 110, 138-39, 353 S.E.2d 352, 368 (1987) (citations omitted)). If the State proves the essential elements of the crime, the motion is properly denied and the case may go to the jury. *See State v. Grooms*, 353 N.C. 50, 78-79, 540 S.E.2d 713, 731 (2000), *cert. denied*, ___ U.S. ___, ___ L. Ed. 2d

___ (2001). The trial court must consider all evidence favorable to the State which has been admitted, whether competent or not. *See State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). The test for sufficiency is the same whether the evidence presented is direct or circumstantial, or both. *Id.*

"'To convict of larceny, there must be proof that defendant (a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently.'" *State v. Cummings*, 346 N.C. 291, 326, 488 S.E.2d 550, 571 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998) (quoting *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988)). To prove acting in concert, the State must show two or more persons acted together in pursuit of a common plan or purpose. Each person, actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan. *See State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *judgment vacated in part*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972). Defendant maintains that the crimes of breaking and entering and larceny were committed by Ms. Washington, and that he is guilty of, at most, possession of stolen goods under N.C. Gen. Stat. § 14-72(c) (1999), because all he did was later help her move items from her storage unit to the car. Finally, defendant asserts there is no evidence that he removed any items from units 306 or 316. The pawn tickets retrieved from the room at the Villager Lodge by Investigator Bowling were in Ms. Washington's

name; the two refrigerators defendant moved from Ms. Washington's unit did not come from units 306 or 316, and the only evidence against defendant is that he was in the Villager Lodge room with Ms. Washington and some stolen goods. Even that evidence, he argues, does not show he exercised rights to or dominion over the room or the property contained therein.

The State, on the other hand, argues that the evidence, viewed in the light most favorable to the State, was sufficient to survive defendant's motion to dismiss. If the evidence supports a reasonable inference of defendant's guilt, "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965). Given the evidence recited earlier in this opinion, we conclude the trial court did not err in denying defendant's motion to dismiss at the close of all the evidence; defendant's fourth assignment of error is therefore overruled.

Failure to Arrest Judgment on the Larceny Convictions

Lastly, defendant argues that the guilty verdicts in the two larceny counts were inconsistent with the jury's not guilty verdicts in the two breaking and entering counts. Thus, defendant argues, the trial court should have arrested judgment in the two larceny convictions to correct this error. The State argues the larceny guilty verdicts are consistent and should stand. Once again, we agree with the State.

Defendant argues that *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982) requires the trial court to reject a guilty verdict for felonious larceny when the jury finds the defendant not guilty of the crime of felonious breaking and entering, unless the jury finds that the property stolen exceeded the statutory amount. *Id.* at 230, 287 S.E.2d at 812. Defendant attempts to distinguish *State v. Curry*, 288 N.C. 312, 218 S.E.2d 374 (1975), and *State v. Marlowe*, 73 N.C. App. 443, 326 S.E.2d 351 (1985) by arguing that there is no evidence he was present at the time of the break-ins and rendered aid, encouragement or assistance to Ms. Washington or conspired with her. He also argues he is, at most, guilty of possession of stolen goods.

The State argues that defendant's case falls under *Curry* and *Marlowe*, such that the verdicts are not inconsistent. Essentially, the State argues that the *Curry* Court found consistent verdicts because the facts and jury instructions led the jury to conclude defendant aided and abetted his codefendants in a larceny they committed pursuant to a breaking and entering by them, but did not aid and abet them in the actual breaking and entering. The State distinguishes *Perry* because the State, in *Perry*, relied solely on the doctrine of recent possession; there was no evidence regarding the breaking and entering, no evidence linking the defendant to the breaking and entering, and no evidence as to how the defendant acquired the stolen goods. Moreover, in *Perry*, the State did not contend or put on evidence to show a jury that the defendant aided

or abetted another defendant's larceny pursuant to a breaking and entering.

After careful consideration of the proceedings below, we conclude that, in the present case, the jury verdicts were consistent because the jury was instructed on acting in concert and there was ample evidence in the record for the jury to conclude defendant acted in concert with Ms. Washington to commit felonious larceny after the breaking and entering of U-Haul units 306 and 316. *See State v. Pearcy*, 50 N.C. App. 210, 211, 272 S.E.2d 610, 611 (1980), *disc. review denied*, 302 N.C. 400, 279 S.E.2d 355 (1981) (stating that the rule in *Curry* applies "when the defendant is tried for acting in concert with others").

Finally, we note that the United States Supreme Court has ruled that inconsistent verdicts in criminal cases do not necessarily have to be set aside, because they may be seen as a demonstration of the jury's leniency. *Dunn v. U.S.*, 284 U.S. 390, 393-94, 76 L. Ed. 356, 358-59 (1932), *overruled on other grounds by Sealfon v. U.S.*, 332 U.S. 575, 92 L. Ed. 180 (1948). "The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." *United States v. Powell*, 469 U.S. 57, 66, 83 L. Ed. 2d 461, 469 (1984). The *Dunn* rule was recognized by our Court in *State v. Barnes*, 30 N.C. App. 671, 228 S.E.2d 83 (1976).

Given the testimony in the record regarding the value of the items of property from U-Haul units 306 and 316, we conclude that

the State successfully proved the elements of N.C. Gen. Stat. § 14-72(b)(2) (1999), such that defendant's convictions for felonious larceny are supported by the evidence. We also conclude defendant's case falls under the *Curry* and *Marlowe* scenarios, and the trial court was not required to arrest judgment on the larceny convictions. Defendant's final assignment of error is overruled.

After careful consideration of the entire record, we conclude that defendant received a fair trial, free from reversible error.

No error.

Judges GREENE and CAMPBELL concur.

Report per Rule 30(e).