NO. COA02-417

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 99 CRS 37782
99 CRS 41663

ROBERT WAYNE SMITH,
Defendant.

On writ of certiorari to review the judgment entered 15 February 2000 by Judge James C. Davis in Forsyth County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Dorothy Powers, for the State

Thomas, Ferguson & Charns, L.L.P., by D. Tucker Charns, for defendant-appellant.

HUDSON, Judge.

Defendant was charged with felonious breaking or entering and being an habitual felon. The case was tried at the 14 February 2000 Criminal Session of Forsyth County Superior Court.

The State presented evidence at trial that tended to show the following: In August 1999, the Clancy and Theys Construction Company was constructing a shopping center called Miller Street Market in Winston-Salem, North Carolina. Calvin Purdy was the job foreman at the construction site. On the morning of 20 August 1999, Purdy arrived at the site to find that one of the office

trailers had been broken into. Purdy found that glass was missing out of one of the windows, and a telephone, answering machine, and a fax machine were missing.

Karen Watson, a crime scene technician with the Winston-Salem Police Department, was called to investigate the break-in. Watson testified that she had found five latent fingerprints at the trailer, four on the exterior glass at the point of entry and one from a large piece of glass that was laying on a desktop inside the trailer. Watson found no other fingerprints that she could identify. Watson opined that the fingerprints "appeared to be new." Watson based her opinion on the fact that it was raining and that rain "could" destroy prints--or at least "might reduce the area of comparison somebody could use." The fingerprints were later identified as belonging to the defendant, and defendant stipulated that the fingerprints were his.

At trial, the State also presented evidence admitted pursuant to Rule 404(b) that defendant had been involved in another breaking or entering in April 1999. Detective Tammy Atkins of the Winston-Salem Police Department testified that she was called to the scene of a break-in at the Thruway Shopping Center. The Thruway Shopping Center is located within a mile of the Miller Street Market construction site. Detective Atkins testified that defendant was found in a hallway between two businesses that was to be used only by authorized employees or in case of an emergency. Defendant was found near a door that had sustained a substantial amount of damage. On 4 August 1999, defendant pled guilty to charges of

felonious attempted breaking or entering and was placed on probation.

Here, defendant was convicted of felonious breaking or entering and being an habitual felon and was sentenced to a term of 120 to 153 months' imprisonment. On 7 May 2001, this Court allowed defendant's petition for writ of certiorari to allow for review of his conviction.

Defendant argues that there was insufficient evidence linking him to the break-in to sustain the conviction. Defendant contends that the only evidence tending to show that he was ever near the trailer involved in the break-in were the fingerprints found on the broken window. Defendant does not deny that the fingerprints are his but argues that there must be substantial evidence presented from which a jury can find that the fingerprints could have been impressed only at the time the crime was committed. We agree and reverse defendant's conviction for felonious breaking or entering.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). Here, defendant argues that there is no substantial evidence that his fingerprints, discovered at the site of the break-in, were made at the time of the break-in and relies in part on *State v. Bass*, 303 N.C. 267, 272, 278 S.E.2d

212 (1981), as well as older cases from the Supreme Court.

More recently, this Court has applied this principle in a case with very similar facts and reversed a conviction on that basis. *See State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001). In *Gilmore*, the defendant was charged with felonious breaking or entering and larceny at two golf shops. As to one of the break-ins, the State's evidence included defendant's fingerprints, which were found on a piece of glass from a window broken in the break-in. The glass was found on the ground outside the store, and the evidence did not indicate whether the print was from the inside or the outside of the window. Defendant had been a customer in the store near or on the day of the break-in, and there were "no additional circumstances tending to show Defendant's fingerprint was impressed" at that time. *Id.* at 470, 542 S.E.2d at 698. Notwithstanding that the defendant was properly convicted at the same trial of breaking or entering at another golf shop as well, this Court reversed, noting that there was no evidence other than the fingerprint that defendant was the perpetrator. *Id.* at 470-71, 542 S.E.2d at 698.

We see no meaningful distinction between this case and *Gilmore*. Here, as in *Gilmore*, the evidence did not indicate whether defendant's print was from the inside or outside of the glass fragment. The other identifiable prints were all on the outside of the window. Until shortly before the break-in, the construction trailer was parked near a public street and contained the office where job applicants from the public would go seeking

employment. Mr. Purdy (from the construction company) testified that he did not see defendant on the site, but he missed a week of work before the break-in. We agree with defendant that the evidence of defendant's conviction for a different break-in one mile away several months earlier admitted under Rule 404(b) has no probative value on the question of when the prints were placed on this trailer window. This evidence might be probative to show that the prints were not left innocently or accidentally on the glass, but none of this evidence tends to establish that the prints could have only been impressed at the time of the break-in. Accordingly, even in the light most favorable to the State, we conclude there was insufficient evidence to sustain the conviction. As to the defendant's ancillary conviction upon a plea of guilty to the status of habitual felon, our Supreme Court has held that such a conviction is not a substantive offense upon which a sentence may be entered. *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977); N.C. Gen. Stat. § 14-7.1 *et seq*. Rather, a conviction of being a habitual felon establishes an increased sentence for the current substantive offense. Therefore, our holding on the felonious breaking or entering requires that we vacate the judgment entered on both the break-in and the habitual felon.

Reversed and judgment vacated.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).