NO. COA03-329

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 01 CRS 35350
BOBBY RAY DOUGLAS 01 CRS 59100

Appeal by defendant from judgment entered 13 September 2002 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 9 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

James N. Freeman, Jr. for defendant-appellant.

TIMMONS-GOODSON, Judge.

On 26 November 2001, a Forsyth County grand jury indicted defendant on one count of felony larceny and two counts of breaking or entering. It also charged defendant with being an habitual felon. Due to defects in the indictment for the substantive offenses, the State dismissed the charge of felony larceny and signed a bill of information on 11 September 2002, alleging that defendant had committed two counts of felonious breaking or entering. Defendant and his attorney signed a waiver of indictment and allowed the case to proceed on the bill of information.

The State introduced evidence at trial tending to show the following: On 9 September 2001, the owner and operator of a self storage facility, Kenneth W. Tsuruta ("Tsuruta"), noticed a door was open to one of the units after 9:00 p.m. He was about five feet away when he saw an individual backing away from the light at the front of the unit and crouching down in the back of the unit. Tsuruta sprinted about 300 yards to his home and contacted police. David S. Rivera("Rivera"), Tsuruta's roommate and a security employee, grabbed a shotgun and ran to the storage facility.

As he approached the storage facility, Rivera saw an individual "crouched . . . in a small . . . run anxiously trying to get through a fence." As soon as the individual broke the tree line and entered an area illuminated by street lights, Rivera ordered him to stop. The individual, who was later identified as defendant, complied and sat on the ground. Officer George Reavis ("Reavis"), responded to the call at 9:54 p.m. and saw defendant sitting on the ground with Rivera standing with a shotgun over his shoulder. He did not see any property around defendant, and he did not seize any property from defendant.

When Tsuruta returned to the storage facility that night, he observed that five of the storage units had scuff marks, damage to the doors, and some of the locks were cut. Two other storage units had been opened, and the fence surrounding the storage facility had been cut or pulled away from a pole. The hole was not present when Rivera had checked the fence on the afternoon of 9 September 2001. On the other side of the hole in the fence, police recovered

a cellular telephone. It displayed a telephone number that defendant had provided to a police officer on 14 August 2001. Police subsequently discovered an air compressor, a videocassette recorder and other items which had been stored in the opened storage units on the outside of the fence in the surrounding weeds and wooded area. The trial court denied defendant's motion to dismiss at the close of the State's evidence.

Defendant presented no evidence and renewed his motion to dismiss. The trial court again denied the motion and subsequently instructed the jury as to the charges. After the jury began deliberating, they asked to review the testimony of Tsuruta "regarding at what point he saw the defendant's face[.]" The trial court overruled defendant's objection to the request and had the court reporter produce Tsuruta's testimony. After the State and defense counsel reached an agreement as to what would go to the jury, twelve copies were delivered to the jury room along with the verdict sheet. The jury then found defendant guilty of two counts of felonious breaking or entering, and defendant admitted his habitual felon status. After consolidating the offenses for judgment, the trial court sentenced defendant to a term of 107 to 138 months imprisonment. From the trial court's judgment, defendant appeals.

Defendant first argues the trial court committed reversible error by allowing the jury to take the transcribed testimony of a witness into the jury room over his objection. He contends the trial court's action was contrary to N.C. Gen. Stat. § 15A-1233

(2003) and was prejudicial to him. We are not persuaded by defendant's argument.

Pursuant to N.C. Gen. Stat. § 15A-1233(a), "[i]f the jury after retiring for deliberation requests a review of certain testimony . . . , the jurors must be conducted to the courtroom. The judge in his discretion . . . may direct that requested parts of the testimony be read to the jury . . . ." The statute "does not give the trial court authority, discretionary or otherwise, to provide copies of trial transcripts to jurors." *State v. Abraham*, 338 N.C. 315, 354, 451 S.E.2d 131, 152 (1994). By having Tsuruta's testimony transcribed and delivered to the jury room in response to the jury's request, the trial court erred.

In order for this error to warrant reversing his conviction, however, defendant is required to show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2003); *see also State v. Demos*, 148 N.C. App. 343, 350, 559 S.E.2d 17, 21-22, *cert. denied*, 355 N.C. 495, 564 S.E.2d 47 (2002). Defendant failed to meet this burden.

In addition to Tsuruta's testimony at trial of having seen defendant in one of the units, Rivera positively identified defendant as the man whom he saw "crouched . . . in a small . . . run anxiously trying to get through a fence" and whom he detained immediately thereafter with a shotgun. On the other side of the hole in the fence, police recovered a cellular phone which displayed a telephone number that defendant had previously provided

to a police officer on 14 August 2001. In light of this evidence of defendant's guilt, a reasonable possibility does not exist that the trial court's ruling on the jury's request would have resulted in a different outcome. This assignment of error is therefore overruled.

Defendant also argues the trial court erred by denying his motion to dismiss the charges for insufficiency of the evidence. He contends the evidence presented at trial failed to link him to any larceny or any stolen materials. We disagree.

"When ruling on a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. The State is entitled to every reasonable inference which can be drawn from the evidence presented," and all contradictions and discrepancies are resolved in the State's favor. *State v. Davis*, 325 N.C. 693, 696-97, 386 S.E.2d 187, 189 (1989)(citation omitted). "If there is substantial evidence--whether direct, circumstantial, or both--to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 582 (1975). "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Mitchell*, 109 N.C. App. 222, 224, 426 S.E.2d 443, 444 (1993). Defendant here only challenges the sufficiency of the element of intent to commit any felony or larceny.

"An intent to commit larceny at the time of the breaking or entering may be inferred from the defendant's conduct and other circumstances shown by the evidence." *State v. Thomas*, 153 N.C. App. 326, 334, 570 S.E.2d 142, 147, *appeal dismissed and disc. review denied*, 356 N.C. 624, 575 S.E.2d 759 (2002). When viewed in the light most favorable to the State, the evidence tended to show the owner of the storage facility discovered defendant in an unlawfully opened unit after 9:00 p.m. on 9 September 2001. As the owner approached the open unit, defendant retreated away from the light into the back of the unit. The locks on two other nearby storage units had been cut, and they were also open. Another storage facility employee shortly afterwards saw a man whom he identified as defendant that was crouched in a small "run". He observed defendant as he was trying to get through a hole in the fence, around the storage facility, where the fence had been cut or pulled away from a pole. The hole was not present in the fence when the employee had checked it earlier that afternoon. Police subsequently discovered an air compressor, a videocassette recorder and other items which had been stored in the opened units outside the fence in the surrounding weeds and wooded area. This evidence was sufficient to permit the jury to infer that defendant did break and enter the units with the intent to commit larceny. The trial court properly denied defendant's motion and submitted the charges to the jury. This assignment of error is overruled.

No error.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).