NO. COA05-1282

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v. Cabarrus County
No. 04CRS053165

LISA CAROL WARD

Appeal by defendant from judgment entered 29 March 2005 by Judge Steve A. Balog in Cabarrus County Superior Court. Heard in the Court of Appeals 8 May 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Ann Stone, for the State.

Charlotte Gail Blake for defendant-appellant.

HUNTER, Judge.

Lisa Carol Ward ("defendant") appeals from a judgment imposed on a jury conviction of first degree burglary. Defendant was sentenced to a term of 90 to 117 months. After a thorough review, we find no error.

The State presented evidence tending to show that between 2:00 a.m. and 3:00 a.m. on 2 August 2004, Edward Jeffrey Rothman ("Rothman") heard a noise in his house. He got out of bed to investigate and encountered defendant standing in the kitchen. Defendant asked him for a beer and then asked to use the restroom. Rothman declined both requests and pushed her out of the house.

Rothman shut the door behind her and locked it. As Rothman walked to check on his children in another part of the house, he heard glass breaking. Rothman ran back and saw defendant climbing out the window in the computer room at the front of the house. Defendant ran out into the yard and down the street. The next day Rothman discovered that a case containing computer games and software was missing from the computer room.

Defendant did not present any evidence.

Defendant first contends the court erred by denying her motion to dismiss the charge. In deciding a motion to dismiss, the trial court determines whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The court must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Contradictions and discrepancies in the evidence are to be disregarded and left for resolution by a jury. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

The elements of first degree burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) with the intent to commit a felony (5) into a dwelling house or a room used as a sleeping apartment (6) which is actually occupied at the time of the offense. *State v. Davis*, 282 N.C. 107, 116, 191 S.E.2d 664, 670 (1972). Defendant argues the evidence is insufficient to establish

she had the intent to commit a felony at the time she entered the residence.

"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. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974). "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house." *State v. Tippett*, 270 N.C. 588, 594, 155 S.E.2d 269, 274 (1967). In the case at bar, the evidence shows that after Rothman pushed defendant out the door and locked it, Rothman heard glass break and saw defendant exit the computer room through the window. Rothman discovered that a box containing computer games and software was missing from the computer room. Based upon this evidence, a jury could reasonably infer that defendant had the intent to steal at the time she broke and entered the computer room. This assignment of error is overruled.

Defendant next contends that the court erred by not submitting the lesser offense of misdemeanor breaking or entering. Defendant concedes that because she did not request submission of the lesser offense, appellate review is by the plain error standard. *See State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). Defendant also argues that counsel's failure to request the instruction constituted ineffective assistance of counsel.

Under the plain error standard, appellate review is limited to determining whether a case is

> "the exceptional case where, after reviewing the entire record, it can be said the claimed

> error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has '"resulted in a miscarriage of justice or in the denial to appellant of a fair trial"' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)). To prove that counsel rendered ineffective assistance in violation of constitutional standards, a defendant must show (1) that counsel's performance was deficient and (2) that defendant was prejudiced by counsel's deficient performance. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). Reversal of a conviction is warranted only when, based upon a totality of the evidence, "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248.

The primary distinguishing factor between burglary and the lesser offense of misdemeanor breaking and entering is that an intent to commit a felony after entry is not required to establish the lesser offense. *State v. Dawkins*, 305 N.C. 289, 290, 287 S.E.2d 885, 887 (1982). Submission of the lesser offense is required only when there is evidence of non-felonious intent. *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

Here, the evidence is clear and uncontradicted that defendant broke and entered the computer room and took a case containing compact discs of computer games and software. There is no evidence that defendant broke and entered the computer room with anything other than felonious intent. There is no reasonable probability that a different verdict would have resulted.

Defendant lastly contends that she was denied her right to a jury trial because the jury deliberated for only seventeen minutes. Defendant did not object to the brevity of the jury's deliberative process and she does not cite any case in support of the proposition that a jury must deliberate for a certain minimum period of time. In accordance with N.C.R. App. P. 30(e)(3), the State cites an unpublished opinion of this Court in which this Court overruled a similar contention that the defendant was denied his rights to due process and a jury trial due to the jury's short deliberative process. In that opinion, *State v. Jenkins*, 168 N.C. App. 241, 607 S.E.2d 56 (2005), the full text of which is attached as an addendum to the State's brief, this Court noted that the defendant did not object to the brief deliberations (eight minutes) of the jury, and the defendant did not cite any authority for the proposition that a jury must deliberate for a certain minimum of time in order to satisfy constitutional requirements. For the same reasons, we overrule defendant's contention in this case.

We find no error.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).