NO. COA06-1317

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v. Wayne County
No. 04 CRS 56716

NORMAN LEE FILLERS

Appeal by defendant from judgment entered 15 March 2006 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 30 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

William Solomon, Jr., for defendant-appellant.

LEVINSON, Judge.

Norman Lee Fillers (defendant) appeals from a judgment imposing an active sentence of imprisonment for his conviction of attempted second-degree rape, breaking and entering, felonious assault on a female, and habitual misdemeanor assault.

On 15 March 2006, defendant was convicted by a jury of attempted second-degree rape, felonious breaking and entering and felonious assault on a female. In addition, defendant stipulated to the underlying convictions supporting the charge of misdemeanor assault and admitted to his status as an habitual felon for

sentencing purposes. The trial court sentenced defendant to a minimum of 108 months and a maximum of 139 months for the attempted second-degree rape conviction and imposed a second sentence of the same duration for the remaining convictions to run consecutively to the first sentence.

At trial, the State introduced evidence tending to show the following: On 27 July 2004, Lindsey Ann Matthews left work early to go home to mow her lawn and to prepare for her husband's return from a two-week trip in Texas. As she was mowing her lawn, she was approached by defendant who lived next door. Indicating that he knew her husband was out of town, defendant offered her the use of his riding lawn mower but Ms. Matthews declined. Defendant then complained to Ms. Matthews that his air conditioning was not working properly and stated that he believed the problem was related to the size of his air vents. Defendant then requested to measure the vents in Ms. Matthew's home for comparison purposes, and Ms. Matthews agreed.

After entering the house, defendant requested paper and pen to record his measurements. Defendant first measured vents in the laundry room and kitchen and then moved to the bedroom and bathroom to take additional measurements. As defendant gave her numbers to write down from the bathroom, Ms. Matthews realized that defendant was giving her three numbers for a two-dimensional measurement which made her suspicious. Defendant next asked if they could move a dresser in the bedroom so that he could measure an additional vent and Ms. Matthews refused. Defendant then wrapped his arms

around Ms. Matthews, forced her to the floor and began to grope her. Defendant removed her shorts and underwear. After Ms. Matthews told defendant that she was menstruating, that he did not need to do this and that she was sorry for anything she did to provoke his actions, defendant stopped. Ms. Matthews led defendant out of the house, promising defendant that she would not tell anyone what had happened. Defendant apologized and left the house telling Ms. Matthews that he would never look at her or her husband again.

Immediately following the incident, Ms. Matthews left her house and returned to her office on Seymore Johnson Air Force Base. She told her supervisor what had happened and then called the police. Her supervisor then accompanied Ms. Matthews to the Wayne County Sheriff's Office to report the incident.

In the police investigation that followed, police matched defendant's DNA to DNA found on a pair of sunglasses left on the dresser in Ms. Matthews' bedroom. In addition, measurements of the vents taken by police did not match those written on the piece of paper that had been used to record the defendant's measurements.

Defendant's first assignment of error is that the trial court erroneously denied his motion to dismiss the charge of felonious breaking and entering because there was insufficient evidence that defendant committed a breaking and entering. The State responds that defendant failed to preserve his right to appellate review of this issue as it was not included in defendant's assignments of error as required by N.C.R. App. P. 10(c)(1). Specifically, the

State asserts that the sole assignment of error related to defendant's conviction for felonious breaking and entering challenges the sufficiency of the evidence for the separate element of intent to commit a felony.

The crime of felonious breaking and entering requires proof of (1) the breaking and entering (2) of any building (3) with the intent to commit any felony or larceny therein. N.C. Gen. Stat. § 14-54(a) (2005); *State v. Garcia*, 174 N.C. App. 498, 502, 621 S.E.2d 292, 295-96 (2005). Defendant has failed to include a challenge to the sufficiency of the evidence on the breaking and entering element of the crime in his assignments of error. *See* N.C. R. App. P. 10(c)(1). As a result, this issue is beyond the scope of appellate review, and we do not address it. *See* N.C.R. App. P. 10(a).

Defendant has, however, preserved his remaining claim that there was insufficient evidence on the separate element of intent to commit a felony at the time of the breaking and entering. When reviewing a motion to dismiss, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 803, 163 L. Ed. 2d 79 (2005). If we find that "substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to [have denied] the motion." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

Defendant asserts that the State presented no evidence that defendant intended to rape or assault Ms. Matthews at the time that he entered her home. Defendant correctly asserts that for the crime of felonious breaking and entering the intent must have been formed prior to the entry. *See* G.S. § 14-54(a). However, this Court has previously recognized that such intent is "seldom provable by direct evidence; it ordinarily must be proved by circumstances from which it may be inferred." *State v. Quilliams*, 55 N.C. App. 349, 351, 285 S.E.2d 617, 619 (1982). Furthermore, the necessary felonious intent may be found from a defendant's actions after he has entered. *State v. Houston*, 19 N.C. App. 542, 547, 199 S.E.2d 668, 672 (1973) (holding that the intent of defendant could be found where the defendant tied up and threatened a resident after entering the home).

Here, the State presented evidence that defendant assaulted Ms. Matthews in her bedroom after she permitted defendant to enter her home. In addition, the State's evidence showed that defendant knew Ms. Matthews' husband was not at home when he asked to enter her home; that defendant noted three figures for measurements of a two-dimensional vent opening; and that these measurements were later found to be different than those made by detectives. Further, after Ms. Matthews permitted defendant to measure vents in the laundry room and in the kitchen, defendant asked to take additional measurements in her bedroom and bathroom. We conclude

that this evidence is sufficient to permit a jury to make a reasonable inference that defendant used the request to measure Ms. Matthews' vents as a ruse for gaining entry to her home for the purpose of committing the felonies of attempted second-degree rape and felonious assault on a female.

No error.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).