NO. COA06-16

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v.

ROBERT LAWRENCE GILBERT,
Defendant.

Gaston County
Nos. 04 CRS 18296-97,
04 CRS 26161,
04 CRS 64133,
04 CRS 64779

Appeal by defendant from a judgment dated 27 July 2005 by Judge Albert Diaz in Gaston County Superior Court. Heard in the Court of Appeals 30 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for the State.

Mary Exum Schaefer for defendant-appellant.

BRYANT, Judge.

Robert Lawrence Gilbert (defendant) appeals a judgment dated 27 July 2005, and entered consistent with a jury verdict on several charges and defendant's subsequent guilty plea to the remaining charges. For the reasons below we hold defendant received a trial free of error, but vacate his conviction for felonious possession of stolen goods and remand for resentencing.

Facts and Procedural History

In November and December of 2004, the Gaston County grand jury indicted defendant on charges of felonious breaking and entering,

felonious larceny, felonious possession of stolen goods, larceny of a motor vehicle, driving while license revoked, driving while impaired, transporting an open container of alcoholic beverage after drinking, exceeding a safe speed, and driving left of center. The grand jury also charged defendant with two counts of having attained the status of an habitual felon.

At trial, the State introduced evidence tending to show the following: Officer Joshua Self testified that he was working at an off-duty security job at a shopping center on 21 August 2004. He was in uniform and was driving a marked patrol car at the time. At approximately 9:50 p.m., Officer Self heard an alarm call dispatched for a nearby business. Because he was within sight of the building, he decided to assist patrol and check out the building.

Upon his arrival, Officer Self observed that a side door had been broken out. He saw movement inside the building and aimed his spotlight into its doorway. Officer Self saw a person whom he identified as defendant standing in the doorway, and defendant stepped through the broken door and began walking toward Officer Self. After handcuffing defendant and placing him in the patrol car's backseat, Officer Self noticed defendant was sweating. Officer Self saw a Skilsaw outside of the building's doorway, and he saw some hand trucks which had been used to move a poker machine to a location right by the doorway.

The business's office manager, Carletta McIntosh, testified the Skilsaw was normally kept approximately thirty feet from the

front door and the poker machine was approximately fifty feet from the front door. She stated that the Skilsaw's value was about $800 to $900 and that the poker machine's value was $2,000. Ms. McIntosh further testified that the business was not open for business at 9:50 p.m. on 21 August 2004 and that defendant did not have permission to break or enter the building at that time.

At the close of the State's evidence, defendant made a motion to dismiss the charges due to insufficient evidence. The trial court denied the motion, and defendant declined to present any evidence. After receiving the trial court's instructions as to the charges of felonious breaking or entering, felonious larceny, and felonious possession of stolen goods, the jury found defendant guilty of the three charges.

Out of the jury's presence, defendant entered an *Alford* plea pursuant to a plea arrangement to the charges of larceny of a motor vehicle, driving while license revoked, transporting an open container of alcoholic beverage after drinking, and driving while impaired. Defendant also admitted to one count of habitual felon status. The State dismissed the charges of exceeding a safe speed and driving left of center, along with the remaining habitual felon indictment. In accordance with the plea arrangement, the trial court consolidated all of the substantive offenses into one judgment and sentenced defendant as an habitual felon to a term of 135 to 171 months imprisonment. From the trial court's judgment, defendant appeals.

I

Defendant first contends the trial court erred by denying his motion to dismiss the charge of felonious breaking or entering. He argues the evidence was insufficient to show an intent to commit a felony inside the building. Defendant's argument is not persuasive.

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). "'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.'" *Id.* (quoting *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) (citation omitted). Defendant only challenges the sufficiency of the evidence as to 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 (citation omitted), *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 defendant was discovered inside a closed business without permission. The glass in a side door was broken out, and two items of merchandise with a combined value of at least $2800 had been moved a total of eighty feet from their normal locations in the business. One item was outside of the building, and the other item was next to the door. After handcuffing defendant and placing him in the patrol car, Officer Self observed defendant was sweating. This evidence was sufficient to permit the jury to infer that defendant did break and enter the building with the intent to commit larceny. The trial court properly denied defendant's motion and submitted the charge of felonious breaking or entering to the jury. This assignment of error is overruled.

II

In his second argument, defendant contends the trial court erred by denying his motion to dismiss the charge of felonious larceny. He argues the evidence was insufficient to show a "complete severance of the object from the owner's possession, to such an extent that the defendant has absolute possession of it." *State v. Carswell*, 36 N.C. App. 377, 379, 243 S.E.2d 911, 913, *reversed*, 296 N.C. 101, 249 S.E.2d 427 (1978). His argument is without merit.

Pursuant to N.C. Gen. Stat. § 14-72 (2005), larceny requires proof beyond a reasonable doubt that a defendant "(1) took the

property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (citations omitted). The required element of taking and carrying away or asportation does not require removal of the property from the owner's premises.

> While there must be a taking and carrying away of the personal property of another to complete the crime of larceny, it is not necessary that the property be completely removed from the premises of the owner. The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation.

State v. Walker, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969) (citation and internal quotations omitted). In *Carswell*, our Supreme Court held that picking an air conditioner up from its stand and placing it on the floor was sufficient to put the object briefly under the defendant's control and sever it from the owner's possession. *Carswell*, 296 N.C. at 104, 249 S.E.2d at 429. When viewed in the light most favorable to the State, the evidence in the instant case tended to show that one item had been moved thirty feet and out of the building and that the other item had been moved approximately fifty feet and was next to the door. This evidence was sufficient for the trial court to submit the charge of felonious larceny to the jury. This assignment of error is overruled.

III

Although not raised by defendant, the judgment does contain an

error which must be addressed. In entering judgment on both the felonious larceny and possession of stolen goods convictions, which were based on the taking and possession of the same items, the trial court violated the rule established in *State v. Perry* that while a defendant may be indicted and tried on charges of larceny and possession of the same property, the defendant may be convicted of only one of the offenses. *Perry*, 305 N.C. at 236-37, 287 S.E.2d at 817. The judgment should therefore have been arrested as to the felonious possession of stolen goods conviction. *State v. Owens*, 160 N.C. App. 494, 499, 586 S.E.2d 519, 522-23 (2003). Because consolidation of the convictions for judgment does not cure this error, that portion of the judgment is vacated and remanded for entry of judgment and sentencing on the remaining convictions. *State v. Barnett*, 113 N.C. App. 69, 78, 437 S.E.2d 711, 717 (1993).

No error as to trial; vacated in part and remanded for resentencing.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).