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NO. COA06-593

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

New Hanover County
No. 04 CRS 69507

ERVIN CORNELL HARLEE

Appeal by defendant from judgments entered 8 November 2005 by Judge Anthony M. Brannon in New Hanover County Superior Court. Heard in the Court of Appeals 11 December 2006.

Attorney General Roy Cooper, by Associate Attorney General Kathryne E. Hathcock, for the State.

William D. Spence for defendant-appellant.

LEVINSON, Judge.

At approximately 6:00 p.m. on 29 December 2004, Crystal Jenkins (Jenkins) walked from her house, located in the Greenfield Lake area of Wilmington, to her van parked in front of the house. When Jenkins approached the driver's side door, she noticed a man staring at her from inside her van. The man, who wore a dark gray hat and a camouflage jacket, did not have permission to be inside Jenkins' van. Upon questioning, defendant stated that he was sleeping. After the police were called, the man exited the van and began walking down the street. Jenkins inspected the interior of

her van and noticed that the glove box was opened, her spare change was missing, and the compact disk player was "hanging out" of its compartment.

Four hours later, Wilmington Police Officer John Musacchio responded to a dispatch call to investigate a suspicious person pulling on car doors in the same residential area where Jenkins lived. While Officer Musacchio checked the vehicles in the area, he observed a man in a green Land Rover, "laying on the center console." Officer Musacchio banged on the window and asked the man, later identified as defendant, to step out of the vehicle. When Officer Musacchio asked defendant if the Land Rover belonged to him, defendant initially answered that the vehicle was his, but then said, "no, it's not." Officer Musacchio patted defendant down for weapons for safety reasons. Under defendant's clothing, Officer Musacchio found loose change consisting of 474 pennies, 41 nickels, 50 dimes, 17 quarters and one dollar bill; and a cigarette box containing a ceramic pipe and residue from a marijuana joint. Malcolm Campbell, the owner of the Land Rover, told another officer at the scene that he had not given the defendant permission to be inside his Land Rover. Campbell testified that he inspected the interior of his vehicle the next morning and noticed that spare change that he kept in the console was missing and that a "hard pocket" that held maps was smashed and pulled out from the door panel.

Defendant was transported to the police station and interviewed. Defendant told Sergeant Mike Fanta that he went into

Campbell's vehicle "to sleep." Both Officer Musacchio and Sergeant Fanta testified at trial that the ceramic pipe found on defendant's person was a "crack pipe." Officer Musacchio noted that the ceramic pipe had "burn marks where a lighter had been used to heat the crack cocaine." Defendant did not present any evidence.

A jury found defendant guilty of breaking and entering the motor vehicle of Malcolm Campbell and of possession of drug paraphernalia. The trial court sentenced defendant to 9 to 11 months imprisonment for the breaking and entering conviction and 120 days for the drug paraphernalia conviction. Defendant appeals.

The sole issue on appeal is whether the trial court erred in denying defendant's motion to dismiss based on insufficiency of the evidence. The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citation omitted). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant

dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

To prevail on the charge of breaking and entering into a motor vehicle, the State must show "(1) a breaking or entering (2) without consent (3) into any motor vehicle (4) containing . . . anything of value (5) with the intent to commit any felony or larceny therein." *State v. Riggs*, 100 N.C. App. 149, 155, 394 S.E.2d 670, 673 (1990); N.C. Gen. Stat. § 14-56 (2005). 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 (2002).

When viewed in the light most favorable to the State, the evidence tended to show that police discovered defendant in the Land Rover without Campbell's permission; that defendant had a great amount of loose change on his person; and that Campbell noticed change missing from his vehicle. We conclude this evidence was sufficient to justify submission of the issue of defendant's intent to the jury.

Under N.C. Gen. Stat. § 90-113.21 (2005), "drug paraphernalia" is defined as "all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act, including . . . ingesting, inhaling, or otherwise introducing controlled substances

into the human body." Further, drug paraphernalia includes:

(12) Objects for ingesting, inhaling, or otherwise introducing marijuana, cocaine . . . into the body, such as:

a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes. . . .

N.C. Gen. Stat. § 90-113.21(a)(12)a (2005). In order to sustain a conviction under G.S. § 90-113.22, the State must prove both (1) possession of drug paraphernalia and (2) "the intent to use [the paraphernalia] in connection with controlled substances." *State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992). Defendant again challenges the State's evidence on the element of intent.

Viewing the evidence in the light most favorable to the State, the evidence tended to show that police found the ceramic pipe among defendant's layers of clothes. Officer Musacchio testified that, through his experience as a police officer, a ceramic pipe is "used to ingest crack cocaine" and that defendant's ceramic pipe had "burn marks where a lighter had been used to heat the crack cocaine." Sergeant Mike Fanta also testified that it was apparent to him that the pipe seized from defendant was a crack pipe. We conclude that this evidence is substantial and supports an inference of defendant's intent to use the ceramic pipe in connection with controlled substances and, thus, sufficient for the trial court to submit the issue to the jury. Accordingly, the trial court properly denied defendant's motion to dismiss the charges against him.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).