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NO. COA06-641

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v.

Columbus County  
No. 04 CRS 054631

HAROLD CHADWICK WALKER

Appeal by defendant from judgment entered 1 November 2005 by Judge William C. Gore, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 10 January 2007.

*Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.*

*William L. Davis, III, for defendant-appellant.*

TYSON, Judge.

Harold Chadwick Walker ("defendant") appeals from judgment entered after a jury found him to be guilty of felonious breaking or entering and attempted felonious larceny. We find no error.

#### I. Background

The State's evidence tended to show Brenda ("Brenda") and Grady ("Grady") Nealey resided in a house ("the Nealey home") in Chadbourne, North Carolina. Brenda operated a tanning salon located twelve feet behind the Nealey home. Defendant lived behind the Nealey's home and tanning salon. Brenda has known defendant since his birth. Defendant and the Nealey children grew up

together, visited each other at their families' homes, and often entered each others families' homes without knocking.

On 9 December 2004, Brenda was working in the tanning salon. Brenda had locked the back door to the Nealey home, but had not locked the deadbolt. At approximately 1 p.m., Brenda observed defendant, twenty-five-years-old, walk in the direction of the Nealey home. Defendant passed by the tanning salon, but did not pass the Nealey home. Brenda was curious where defendant had gone and decided to walk out of the tanning salon. As Brenda exited the tanning salon, Brenda observed the backdoor to the Nealey home close.

Brenda entered the Nealey home to investigate. Brenda walked into her bedroom and saw defendant standing in front of Grady's dresser. Brenda testified Grady keeps his medicine, Xanax, on top of his dresser. Upon seeing defendant inside her bedroom, Brenda asked him, "[W]hat are you doing?" Defendant replied, "Fixing to get Grady's medicine. I've got to go to court this evening and I need something." On 7 February 2005, defendant was indicted on charges of felonious breaking and/or entering and felonious larceny.

Brenda testified: (1) defendant had not been invited to the Nealey home on 9 December 2004; (2) it had been approximately one year since defendant had regular access to the Nealey home; (3) defendant did not have permission to take Grady's medication out of the Nealey home; and (4) defendant did not have permission to be in Brenda and Grady's bedroom. Defendant offered no evidence.

On 1 November 2005, a jury found defendant to be guilty of felonious breaking or entering and attempted felonious larceny. Defendant appeals.

## II. Issues

Defendant contends: (1) the trial court erred by denying his motions to dismiss the charges at the close of the State's evidence and all the evidence; (2) the trial court erred by admitting improper Rule 404(b) evidence and in instructing the jury on Rule 404(b) evidence; (3) the prosecutor committed reversible error by asking improper Rule 404(b) or prior bad acts questions; (4) the trial court committed reversible error by denying his motion for mistrial based upon the State introducing improper Rule 404(b) evidence; and (5) the trial court improperly instructed the jury on the charge of attempted felonious larceny.

## III. Defendant's Motions to Dismiss

Defendant moved to dismiss the charges against him at the close of the State's evidence. The trial court granted defendant's motion and dismissed the charge of felonious larceny, but found sufficient evidence to submit attempted felonious larceny to the jury. Defendant argues insufficient evidence of any charge was presented to the jury.

### A. Standard of Review

Our Supreme Court has stated:

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such

offense. If so, the motion is properly denied.

. . . .

The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

*State v. Powell*, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117 (1980) (internal citations omitted).

B. Defendant's Argument

Defendant asserts the trial court erred by denying his motion to dismiss and argues: (1) he was an invitee and (2) insufficient evidence was presented that he intended to commit a felony or larceny in the Nealey home. We disagree.

"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. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986) (citation omitted).

"The essential elements of larceny are that defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (citing *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982)), *cert. denied*, 314 N.C. 118, 332 S.E.2d 492 (1985).

Larceny is a felony, without regard to the value of the property in question, if the larceny is committed in violation of N.C. Gen. Stat. § 14-54. N.C. Gen. Stat. § 14-72(b)(2) (2005). Defendant was charged with committing larceny pursuant to a violation of N.C. Gen. Stat. § 14-54, felonious breaking or entering. "The elements of an attempt to commit a crime are (1) an intent to commit the crime, (2) an overt act done for that purpose, going beyond mere preparation, (3) but falling short of the completed offense." *State v. Collins*, 334 N.C. 54, 60, 431 S.E.2d 188, 192 (1993).

The State introduced substantial and uncontroverted evidence that: (1) defendant was inside the Nealey home on 9 December 2004; (2) defendant had not been invited to the Nealey home on 9 December 2004; (3) approximately one year had passed since defendant had regular access to the Nealey home; (4) defendant did not have permission to be in Brenda and Grady's bedroom; and (5) defendant did not have permission to take Grady's medication out of the Nealey home.

The State also introduced substantial and uncontroverted evidence tending to show defendant entered the Nealey home with the intent to take Grady's medication. When Brenda confronted defendant about his actions, defendant responded he was, "Fixing to get Grady's medicine. I've got to go to court this evening and I need something."

Substantial evidence of each essential element of felonious breaking and/or entering and attempted felonious larceny was presented. *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. The State

also presented substantial evidence that defendant was the perpetrator of these offenses. The trial court properly denied defendant's motions. *Id.* This assignment of error is overruled.

#### IV. Rule 404(b) Evidence

Defendant's assignments of error two, three, and four all argue the trial court erred by allowing inadmissible Rule 404(b) evidence of prior bad acts. Defendant contends the trial court erred by: (1) admitting improper Rule 404(b) evidence; (2) instructing the jury on Rule 404(b) evidence; and (3) denying his motion for a mistrial based on the State improperly introducing Rule 404(b) evidence.

##### A. Improperly Admitted Rule 404(b) Evidence

Defendant contends the trial court erred by admitting Rule 404(b) evidence to show propensity or a pattern of behavior by him. Defendant argues that allowing Brenda to testify, he "went in my building one time before and took a check out," was error. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) provides, in relevant part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

During defendant's trial the following exchange occurred:

Q. Did you have concerns about an abuse problem on behalf of [defendant]?

Defense Counsel: Well, objection, your Honor.

Court: Sustained.

Defense Counsel: Motion to strike.

Court: Strike this question, ladies and gentlemen; do not consider it.

Q. Why did you say, "Son, this can't go on"?

Defense Counsel: Objection.

Court: Overruled.

A: He had went in my building one time before and took a check out.

Defense Counsel: Objection. Motion to strike.

Court: Sustained. Ladies and gentlemen, strike the answer; do not consider it.

Defense Counsel: Your Honor --

Court: Yes, sir.

Defense Counsel: I would like to be heard outside the presence of the jury.

At this point in the trial, the jurors were excused from the courtroom and defense counsel moved for a mistrial. The trial court denied defendant's motion. Defense counsel argued the jury had been unduly prejudiced against defendant. The State argued Brenda's answer was admissible Rule 404(b) evidence. The jury returned to the courtroom and the trial court gave further instructions to the jury regarding the admissibility of Rule 404(b) evidence.

The State never repeated the stricken question and answer to the witness. Brenda's answer, that defendant "had went in my

building one time before and took a check out," was never admitted into evidence.

The jury is presumed to follow the trial court's instructions in a criminal case. *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Defendant has failed to show the jury disregarded the trial court's instructions to strike Brenda's answer. This assignment of error is overruled.

B. Instructing the Jury on Rule 404(b) Evidence

Defendant contends the trial court erred in instructing the jury on Rule 404(b) evidence. Defendant argues the trial court's instructions were prejudicial because the trial court expressed an opinion that he committed the alleged prior bad acts. We disagree.

Defendant failed to object to the jury instructions at trial. Our Supreme Court has stated:

Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, by rule or law was deemed preserved or taken without any such action, or that the alleged error constitutes plain error.

In so doing, a party must, prior to arguing the alleged error in his brief, (a) alert the appellate court that no action was taken at trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court.

*State v. Oliver*, 309 N.C. 326, 335, 307 S.E.2d 304, 312 (1983). Defendant has not argued plain error. Defendant failed to preserve



or to argue plain error to obtain appellate review and "we may not consider the alleged defects in the jury instructions." *State v. Bright*, 78 N.C. App. 239, 241, 337 S.E.2d 87, 88 (1985), *disc. rev. denied*, 315 N.C. 591, 341 S.E.2d 31 (1986). This assignment of error is dismissed.

C. Denial of Defendant's Motion for Mistrial

Defendant contends the trial court erred by denying his motion for a mistrial for improper direct examination questions by the State. Defendant argues the State's questions presented improper prior bad acts by him which resulted in substantial and irreparable prejudice to him. We disagree.

Our Supreme Court has stated:

The trial court is required to declare a mistrial upon a defendant's motion if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. It is within the trial court's discretion to determine whether to grant a mistrial, and the trial court's decision is to be given great deference because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable.

*State v. Hill*, 347 N.C. 275, 296-97, 493 S.E.2d 264, 276 (1997) (internal quotation and citation omitted), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998).

Here, after each inappropriate question by the State, defendant objected and moved to strike the question or testimony. After each objection and motion, the trial court sustained defendant's objection, granted defendant's motion to strike, and further instructed the jury regarding Rule 404(b) evidence.

Defendant has failed to show the trial court abused its discretion in denying defendant's motion for a mistrial. This assignment of error is overruled.

V. Attempted Felonious Larceny Jury Instruction

Defendant contends the trial court erred in its instructions to the jury regarding the attempted larceny charge. Defendant argues the trial court erred in instructing the jury that he had attempted to take "prescription drugs", when the original indictment referenced "[a]ssorted [m]edications." Defendant objected to the instruction and requested the trial court to re-instruct the jury. The trial court denied defendant's request to re-instruct the jury and took judicial notice, outside the presence of the jury, that Xanax is a prescription drug.

Defendant argues the trial court violated N.C. Gen. Stat. § 8C-1, Rule 201(e) and (g), and argues: (1) he was not given an opportunity to be heard by the trial court and (2) the trial court failed to instruct the jury that it may, but is not required to, accept as conclusive the judicially noticed fact. We disagree.

This Court has stated:

On appeal, this Court reviews jury instructions contextually and in their entirety. If the instructions present the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, then they will be held to be sufficient. *The appealing party must demonstrate that the error in the instructions was likely to mislead the jury.*

*State v. Crow*, 175 N.C. App. 119, 127, 623 S.E.2d 68, 73 (2005) (internal quotations and citations omitted) (emphasis supplied), *disc. rev. denied*, 360 N.C. 485, 632 S.E.2d 485 (2006).

Here, defendant has failed to argue or "demonstrate that . . . [any] error in the instructions was likely to mislead the jury." *Id.* This assignment of error is overruled.

#### VI. Conclusion

The State presented substantial evidence of each essential element of felonious breaking and/or entering and attempted felonious larceny. *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. The State also presented substantial and uncontested evidence tending to show defendant was the perpetrator of these offenses. The trial court properly denied defendant's motions to dismiss the charges against him.

The trial court did not admit improper Rule 404(b) evidence against defendant. Defendant failed to object to the trial court's limiting instruction regarding Rule 404(b) evidence. Defendant failed to assign or argue plain error. Defendant failed to preserve this error for appellate review. "[W]e may not consider the alleged defects in the jury instructions." *Bright*, 78 N.C. at 241, 337 S.E.2d at 88. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant failed to demonstrate any error by the trial court during jury instructions "was likely to mislead the jury." *Crow*, 175 N.C. App. at 127, 623 S.E.2d at 73. Defendant received a fair

trial, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges STEPHENS and STROUD concur.

Report per Rule 30(e).