NO. COA06-85

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v.

Wayne County
Nos. 04 CRS 10137, 54624

WILLIAM BILLY BOWDEN, JR.
Defendant.

Appeal by defendant from a judgment entered 23 February 2005 by Judge Donald M. Jacobs in Wayne County Superior Court. Heard in the Court of Appeals 16 October 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Susan K. Nichols, for the State.

D. Tucker Charns for defendant-appellant.

BRYANT, Judge.

On 3 January 2005, defendant William Billy Bowden, Jr., was indicted on charges of felonious breaking or entering and having attained the status of an habitual felon. The case was tried at the 21 February 2005 Criminal Session of Wayne County Superior Court.

The State presented evidence at trial which tended to show the following: On 24 May 2004, at approximately 4:30 a.m., Vernon Lee was leaving his home to go to work when he noticed a light on in a small barn that was on his property. Lee testified that the barn was used for recreation, and contained a pool table, television, table and chairs, and a bathroom. When he approached the barn, he saw a person inside. Lee went back in his house, told his fiancée to call the police, grabbed a shotgun and went back to the barn where he found that a window had been broken. Lee peeked in the window and saw defendant coming out of the bathroom. Lee recognized defendant because he

used to live nearby, and had been over to the Lee house previously for parties. Lee asked defendant what he was doing in the barn. Defendant told Lee "Nothing, I'm getting a drink." Lee told defendant he "ought" to shoot him. Defendant threw up his hands and asked Lee not to shoot him. Lee went to the front of the barn to approach defendant, and defendant jumped out the back window. Lee threatened to shoot defendant if he moved, and defendant ran.

Afterwards, Lee returned to the barn and found a trash bag filled with some cans of soda and beer. The bag was located on a table near the window that defendant jumped out of when he ran. Lee testified he did not put the sodas or beer in the bag, had not noticed them there the previous evening, and had not given defendant permission to put sodas and beer in the bag and take them. Later the same morning, defendant was arrested by Mount Olive Police officers. Defendant was returned to Lee's property where Lee positively identified him.

Defendant was convicted of felony breaking or entering and having attained the status of an habitual felon and was sentenced to a term of 121 to 155 months imprisonment. Defendant appeals.

Defendant raises four issues on appeal: (I) whether his trial attorney's failure to request recordation of the jury *voir dire* and closing arguments rose to the level of ineffective assistance of counsel; (II) whether the trial court erred in failing to order recordation of jury *voir dire* and closing arguments *sua sponte*; (III) whether the trial court committed error by denying his motion to dismiss for insufficiency of the evidence; and (IV) whether the trial court erred in determining his habitual felon status for sentencing purposes.

I

Defendant first argues he received ineffective assistance of counsel because his attorney failed to request recordation of the jury *voir dire* and closing arguments. Defendant contends that the failure of his trial counsel to request recordation deprived him of full appellate review and effective assistance of appellate counsel. We are not persuaded.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a

two-prong test.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Here, defendant cites no error that occurred in the unrecorded portions of the trial. Thus, even assuming *arguendo* that counsel's performance was deficient for failure to request that the proceedings be recorded, defendant shows no prejudice. *Id*; *see also State v. Crawford*, 163 N.C. App. 122, 128, 592 S.E.2d 719, 724 (2004) (trial attorney's failure to request a recording of jury *voir dire* did not constitute ineffective assistance of counsel). Furthermore, defendant's argument that the failure of trial counsel to request recordation deprived him of effective appellate review and effective assistance of appellate counsel was expressly rejected by this Court in *State v. Verrier*, 173 N.C. App. 123, 617 S.E.2d 675 (2005). Accordingly, the assignment of error is overruled.

II

Defendant next argues the trial court abused its discretion by failing to *sua sponte* order recordation of jury *voir dire* and closing arguments, depriving him of meaningful appellate review and the effective assistance of appellate counsel. However, this Court rejected the same argument in *State v. Price*, 170 N.C. App. 57, 67, 611 S.E.2d 891, 898 (2005). Accordingly, this assignment of error is likewise overruled.

III

Defendant next argues the trial court erred by denying his motion to dismiss the felony breaking or entering charge for insufficiency of the evidence. Specifically, defendant contends that there was insufficient evidence that he had the requisite intent to commit a felony or larceny inside the barn.

After careful review of the record, briefs and contentions of the parties, we find no error. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994) (citing *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991)). Furthermore, "defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *State v. Scott*, 356 N.C. 591, 596-97, 573 S.E.2d 866, 869 (2002).

In the instant case, defendant was charged with felony breaking or entering. "'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. Friend*, 164 N.C. App. 430, 438, 596 S.E.2d 275, 281 (2004) (quoting *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986)). In *State v. Speller*, 44 N.C. App. 59, 259 S.E.2d 784 (1979), this Court found that a larceny was complete when "handguns were removed from a locked case and placed in a cardboard box which was found hidden behind the gun case." *Id.* at 60, 259 S.E.2d at 785. The Court determined that during the interval when the guns were removed from the case and before their discovery by police, they "were under the control of the thieves and severed from the possession of the owner." *Id.* at 61, 259 S.E.2d at 785. Similarly, here, when defendant placed the beer and sodas in a trash bag on a table near the window he jumped out, he severed possession from the owner, and clearly intended to take the items. Moreover, defendant admitted to the owner when questioned as to why he was inside the barn that he was "getting a drink." Accordingly, in the light most favorable to the State, a reasonable jury could conclude that defendant broke and entered the barn with the

intention of committing a larceny.

IV

We finally consider whether the trial court erred in sentencing defendant as a Prior Record Level V. Defendant contends there "was no constitutionally proper stipulation." Specifically, defendant argues that his counsel's stipulation was insufficient to prove his prior record level because there was no inquiry from the trial court regarding whether defendant understood what it meant to stipulate. We find no error.

North Carolina General Statutes, Section 15A-1340.14 provides that the State bears the burden of proving by the preponderance of the evidence that "a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2005). A defendant's prior convictions may be proven by any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information ["DCI"], the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

Id. See also State v. Riley, 159 N.C. App. 546, 556, 583 S.E.2d 379, 386 (2003).

In the instant case, counsel stipulated that defendant was a Level V felon. Thus, defendant's prior record level was proven by stipulation pursuant to N.C.G.S. § 15A-1340(f)(1). Defendant cites no authority for the proposition that he must be examined before the trial court can accept the stipulation, and we find none. Accordingly, we find no error.

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).