NO. COA07-1495

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v. Cleveland County
Nos. 05 CRS 54541-42

THOMAS LEWIS PARKS

Appeal by Defendant from judgment entered 11 April 2007 by Judge Richard D. Boner in Cleveland County Superior Court. Heard in the Court of Appeals 14 May 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Kimberly P. Hoppin for Defendant.

STEPHENS, Judge.

At the 9 April 2007 criminal session of Cleveland County Superior Court, Defendant Thomas Lewis Parks was tried by a jury and convicted in file number 05 CRS 54541 of one count of felonious breaking and entering, one count of felonious larceny, and one count of felonious possession of stolen goods. Defendant was then tried by a jury and convicted of attaining habitual felon status. Prior to sentencing, Defendant entered guilty pleas to a second set of charges in file number 05 CRS 54542 of felonious breaking and entering, felonious larceny, and achieving habitual felon status.

On 11 April 2007, the trial court arrested judgment on the

charge of possession of stolen goods and entered one consolidated judgment upon the remaining two jury verdicts in file number 05 CRS 54541, committing Defendant to a prison term of 132 to 168 months. Pursuant to a plea agreement, the trial court committed Defendant to a concurrent prison sentence of 121 to 155 months in file number 05 CRS 54542. From the judgment and commitment in file number 05 CRS 54541, Defendant appeals.

I. Facts

On 16 June 2005, Julius Key gave Defendant a ride to the grocery store. While in the store, Defendant became involved in an incident which resulted in Defendant's running outside, pushing Key aside, and taking Key's silver/tan colored Mazda 626 automobile. Key reported the car stolen to the Shelby Police Department on 17 June 2005, shortly after the incident. Later that evening, Key witnessed Defendant and two other persons in his car. Key again reported the car stolen.

In the early morning of 23 June 2005, Stateline Grocery ("Stateline") and the Polkville Community Mart ("Polkville"), located on opposite sides of Cleveland County, were broken into within an hour and a half of each other. The doors on each store were severely damaged, indicating that possibly a vehicle or something very large had pushed them in, shattering the glass.

On 24 June 2005, the Shelby Police Department located Key's car. On 27 June 2005, Detective Paul Wesley Love of the Cleveland County Sheriff's Office processed the car at a storage facility. Detective Love observed broken double-paned glass near the

vehicle's windshield wipers and scratches on the right-side bumper. He recovered two packs of Newport cigarettes, two receipts, and a pair of sunglasses from the floorboard of the vehicle. Although some fingerprints were lifted from the vehicle, none of the prints matched Defendant's.

A video surveillance tape of the Polkville break-in revealed a white or silver Mazda vehicle pulling up to the store doors and slowly pushing them in. Travis Lee of the Cleveland County Sheriff's Office, who responded to the Polkville break-in alarm, reviewed the surveillance video. He testified that, in addition to showing the vehicle pushing through the doors, the video also showed a man going into the store, going behind the counter, and going back out, twice. Lee testified that the man "was holding something and there was [sic] a few pack of cigarettes and maybe a cigarette carton trail leading from behind the counter out to the parking lot. There may have been one pack of cigarettes out in the parking lot, but I'm not exactly sure."

Detective Love identified the person in the surveillance video as Defendant. Love testified that the Mazda 626 recovered by the Shelby Police Department was consistent with the vehicle captured on the surveillance video, but he was unable to determine if the car recovered was the same vehicle seen in the surveillance video. Detective Love further testified that there was no surveillance video from the Stateline break-in, nor were there any witnesses.

Larry Lail, the owner of Stateline, and Lisa House, an employee of Stateline, both identified the receipts recovered from

the floorboard of the Mazda as cash transaction receipts from Stateline which contained Ms. House's writing. Additionally, both Detective Love and Mr. Lail testified that the serial numbers from the two cigarette packs recovered from the car matched the serial numbers on cigarettes on the Stateline rack. Neither the cigarettes recovered from the car nor the cigarettes remaining at the store were preserved as evidence, nor were their serial numbers recorded.

Defendant was tried only on charges related to the Stateline break-in, although the surveillance video from the Polkville break-in was allowed into evidence, pursuant to Rule 404(b) of the North Carolina Rules of Evidence, as the trial court determined that "the evidence [] tends to show method and plan, and also is probative of identity in this case; [and] that the evidence is more probative than prejudicial[.]"

II. Motion to Dismiss

Defendant first argues that the trial court erred in denying his motion to dismiss the charges of felonious larceny, felonious possession of stolen goods, and felonious breaking and entering for insufficiency of the evidence.

When a defendant moves to dismiss based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence (1) of each element of the crime charged and (2) that the defendant is the perpetrator. *State v. Scott*, 356 N.C. 591, 573 S.E.2d 866 (2002). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be

proved beyond a reasonable doubt." *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998) (quotation marks and citations omitted). "The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citation omitted). However, if the evidence, when considered in light of the foregoing principles, is sufficient only to raise a suspicion, even though the suspicion may be strong, as to either the commission of the crime or that the defendant on trial committed it, the motion to dismiss must be allowed. *Scott*, 356 N.C. 591, 573 S.E.2d 866.

A. Felonious Larceny

The essential elements of felonious larceny are that the defendant (1) took the property of another, (2) carried it away, (3) without the owner's consent, (4) with the intent to deprive the owner of his property permanently, *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982), (5) pursuant to a breaking and entering. N.C. Gen. Stat. § 14-72(b)(2) (2005).

Here, the indictment alleged that Defendant "unlawfully, willfully, and feloniously did steal, take and carry away assorted cigarettes the personal property of Larry Lail d/b/a Stateline Grocery[.]" Defendant asserts there was insufficient evidence that "assorted cigarettes" were actually taken from Stateline.

Detective Love recovered two receipts and two packs of Newport Cigarettes from the passenger-side floorboard of the Mazda 626. Mr. Lail and Ms. House both identified the recovered receipts as

items from Stateline which contained Ms. House's writing. Detective Love and Mr. Lail testified that the serial numbers from the recovered packs of cigarettes matched the serial numbers on packs of cigarettes remaining at Stateline after the break-in. From this evidence, a jury could reasonably infer that the cigarettes recovered from the Mazda were taken from Stateline. Accordingly, we conclude there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that the cigarettes were taken from Stateline. Defendant's argument is thus overruled.

B. Felonious Possession of Stolen Goods

The essential elements of felonious possession of stolen goods are "(1) possession of personal property, (2) which was stolen pursuant to a breaking and entering, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a breaking and entering, and (4) the possessor acting with a dishonest purpose." *State v. Hargett*, 148 N.C. App. 688, 691, 559 S.E.2d 282, 285, *disc. review improvidently allowed*, 356 N.C. 423, 571 S.E.2d 583 (2002).

Defendant again asserts there was insufficient evidence that "assorted cigarettes" were actually taken from Stateline. For the reasons stated above, we reject this argument. Defendant further argues there was insufficient evidence that he possessed the cigarettes found in the Mazda.

Possession of stolen property may be actual or constructive. *Alston*, 131 N.C. App. 514, 508 S.E.2d 315. "When the defendant,

while not having actual possession, . . . has the intent and capability to maintain control and dominion over the [property], he has constructive possession of the item." *State v. Glasco*, 160 N.C. App. 150, 156, 585 S.E.2d 257, 262 (quotation marks and citation omitted), *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003). Where stolen property is found on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss. *See State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972). If, however, a defendant does not maintain control of the premises, other incriminating circumstances must be established for constructive possession to be inferred. *State v. Alston*, 91 N.C. App. 707, 373 S.E.2d 306 (1988). "[C]onstructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury." *Glasco*, 160 N.C. App. at 157, 585 S.E.2d at 262 (quotation marks and citations omitted).

Here, on 24 June 2005, the Shelby Police recovered the Mazda 626 and towed it to the Phillips 66 storage facility at 212 Kimmel Street. Detective Love did not search the vehicle until 27 June 2005. As the evidence is silent as to what security was employed at the storage facility or who may have had access to the vehicle while it was stored at the facility, other incriminating circumstances must be established for constructive possession of the cigarettes to be inferred. *Alston*, 91 N.C. App. 707, 373 S.E.2d 306. The evidence introduced by the State tends to show the following: Key identified Defendant as the person who stole his

Mazda. The vehicle was recovered one day after the break-ins at Stateline and Polkville. Surveillance videotape from Polkville showed a Mazda consistent with the vehicle stolen by Defendant pushing in the front doors of the store, shattering the glass. One man, later identified as Defendant, was shown entering and exiting Polkville twice, holding something. Stateline and Polkville were broken into within about an hour and a half of each other, and both stores were broken into with the doors pushed in and the glass shattered. When the Mazda was recovered, the two packs of Newport cigarettes were found together with the two Stateline receipts on the passenger-side floorboard of the Mazda.

From this evidence, it is reasonable to infer that Defendant broke into Stateline in the same Mazda that was videotaped in his exclusive control only an hour and a half before at the Polkville break-in, took the cigarette packs and the Stateline receipts, placed them in the Mazda, and fled the scene. We conclude that, when viewed in the light most favorable to the State, substantial evidence exists from which a rational trier of fact could find beyond a reasonable doubt that Defendant was in possession of the stolen cigarettes. Defendant's argument is overruled.

C. Felonious Breaking and 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. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986).

> Whether [a defendant] had the requisite intent to commit a larceny therein [is] a question

> for the jury to decide and could be inferred from [a] defendant's conduct and the surrounding circumstances. *State v. Cochran*, 36 N.C. App. 143, 242 S.E.2d 896 (1978). In the absence of any proof or evidence of lawful intent, the jury could reasonably infer an intent to commit larceny from the unlawful entry. *Id.*

State v. Evans, 99 N.C. App. 88, 93, 392 S.E.2d 441, 444 (1990).

In *State v. Parker*, 268 N.C. 258, 150 S.E.2d 428 (1966), the North Carolina Supreme Court found the evidence of defendant's breaking and entering with the intent to commit a felony and larceny insufficient to send the charge to the jury. A men's clothing store was broken into and five suits were taken. Although a witness testified that he saw "a person who looked just like the defendant drop *something* on the [train] tracks[,]" *id.* at 262, 150 S.E.2d at 430, near the clothing store, the witness could not positively identify the defendant as the man he had observed. Another witness later recovered a suit belonging to the store on the nearby train tracks. Despite these witnesses, no evidence placed the defendant in the store at the time of the breaking and entering or established that the stolen suits were in his possession. The North Carolina Supreme Court held that the evidence offered was insufficient to support the indictment and reversed the lower court's decision to deny the defendant's motion for nonsuit.

Here, the evidence introduced by the State tended to show the following: Key identified Defendant as the person who stole his Mazda. Several days after Key's vehicle was stolen, and the day before it was recovered, Stateline and Polkville were broken into.

Surveillance videotape from Polkville showed a Mazda consistent with the vehicle taken by Defendant pushing in the front doors of the store, shattering the glass. One man, later identified as Defendant, was shown entering and exiting Polkville twice, holding something. About an hour and a half before the Polkville break-in, Stateline was broken into with the doors pushed in and the glass shattered in a manner similar to that displayed at Polkville. When the Mazda was recovered, broken glass consistent with the doors at Stateline and Polkville was discovered in the area of the windshield wipers, scratches were found on the car bumper, cigarettes were found in the car, and two receipts were recovered from the car's floorboard. The serial numbers from the recovered packs of cigarettes matched the serial numbers on packs of cigarettes remaining at Stateline after the break-in, and the two receipts were positively identified as cash transaction receipts prepared by Ms. House during two days leading up to the break-in and thrown away in the trash can inside Stateline.

Thus, unlike in *Parker* where no evidence placed the defendant in the store at the time of the breaking and entering, here, the cigarette packs and Stateline receipts found in the Mazda that was videotaped in Defendant's exclusive control only an hour and a half after the Stateline break-in, placed Defendant inside Stateline. Furthermore, it could be reasonably inferred from the condition of the Mazda stolen by Defendant that the Mazda had been used to push open the Stateline doors. Finally, it is reasonable to infer from the surveillance video of the Polkville break-in that Defendant,

acting alone, pushed through the doors of Stateline with the Mazda and entered the store.

Furthermore, "[i]n the absence of any proof or evidence of lawful intent," *Evans*, 99 N.C. App. at 88, 392 S.E.2d at 444, Defendant's intent to commit larceny can be inferred from his unlawful entry of Stateline, the fact that cigarettes were strewn about the register and floor in an apparent hasty departure, and from his actions caught on the surveillance video at Polkville. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charge of felonious breaking and entering. This argument is overruled.

For the foregoing reasons, we find no error in the trial court's denial of Defendant's motion to dismiss the charges.

III. Calculation of Prior Record Level and Sentencing

Defendant finally argues that the trial court erred in miscalculating his prior record level points and, as a result, sentenced Defendant at the incorrect record level.

The trial court's calculation of prior record level is a question of law and is reviewed *de novo*. *State v. Fraley*, __ N.C. App. __, 643 S.E.2d 39 (2007). Because Defendant presents an issue concerning an invalid sentence, this court may properly consider the issue regardless of whether Defendant raised an objection at trial. N.C. Gen. Stat. § 15A-1446(d)(18) (2005).

When calculating a defendant's prior record level, the State bears the burden of proving the existence of a prior conviction by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f)

(2005). Prior convictions can be proved by stipulation of the parties. *Id.* Convictions used to establish a defendant's status as an habitual felon cannot be used in determining a defendant's prior record level. N.C. Gen. Stat. § 14-7.6 (2005). When determining prior record level, "if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14(d) (2005). When calculating prior record level, two points are assessed for each prior Class H or I felony conviction and one point is assessed for each class A1 or Class 1 non-traffic misdemeanor or driving while impaired conviction. N.C. Gen. Stat. § 15A-1340.14(b) (2005). A defendant with nine to fourteen points is sentenced as a Level IV felon, while a defendant with fifteen to eighteen points is sentenced as a Level V felon. N.C. Gen. Stat. § 15A-1340.14(c) (2005).

In *State v. Lee*, 150 N.C. App. 701, 564 S.E.2d 597 (2002), the State's habitual felon indictment listed five underlying felonies, despite only being required to list three felonies to show the habitual felon status of the defendant. This court held that "[b]y using the five felony convictions in the habitual felon indictment, the State was precluded from using the same five convictions to increase defendant's prior record level points pursuant to G.S. § 14-7.6." *Id.* at 704, 564 S.E.2d at 598.

Furthermore, in *State v. Hughes*, 118 N.C. App. 573, 455 S.E.2d 912 (1995), this Court determined that, pursuant to N.C. Gen. Stat.

§ 15A-923(e), an indictment may not be amended. "An amendment is defined to be any change in the indictment which would substantially alter the charge set forth in the indictment." *Id.* at 576, 455 S.E.2d at 914 (quotation marks and citations omitted). A change or substitution of a felony conviction relied upon by the State to support the charge of habitual felon "is a substantive change in the indictment as it alters the allegations supporting an element of the offense." *State v. Little*, 126 N.C. App. 262, 269-70, 484 S.E.2d 835, 840 (1997).

In this case, Defendant's habitual felon indictment listed three felonies of which Defendant was convicted to show habitual felon status: (1) felony assault with a deadly weapon inflicting serious injury occurring on 4 October 1989, (2) felony breaking or entering occurring on 21 May 1997, and (3) felony breaking or entering occurring on 15 February 2001. To calculate Defendant's prior record level, the State submitted to the trial court Defendant's convictions of three Class A1 or Class 1 misdemeanors and five Class H or I felonies. Defendant stipulated that he had the convictions presented by the State but did not stipulate to the numbers of points they represented. The State concedes that calculation of Defendant's prior record level points based on the convictions submitted to the trial court results in thirteen points, not the fifteen points used for sentencing. The calculation used by the trial court resulted in Defendant's being sentenced as a Level V felon, instead of as a Level IV felon.

The State contends that had different felony convictions been substituted in Defendant's habitual felon indictment, an additional felony would be available to add points to Defendant's prior record level, resulting in sixteen points. However, the State may not amend or substitute Defendant's habitual felon indictment in order to raise Defendant's prior record level, as this amounts to a substantial change and is prohibited. *Little*, 126 N.C. App. 262, 484 S.E.2d 835. Furthermore, as in *Lee*, the State may not use any of the underlying felonies from the habitual felon indictment to calculate Defendant's prior record level. We thus conclude that the trial court erred in sentencing Defendant as a prior record level V. Accordingly, Defendant's sentence must be vacated and this cause remanded to the trial court for resentencing at the appropriate level.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).