NO. COA07-30

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

STATE OF NORTH CAROLINA

v. Montgomery County
No. 05 CRS 50135, 50138

ROBERT DEAN LACEN, JR.

Appeal by defendant from judgments entered 20 July 2006 by Judge James Edward Hardin, Jr. in Superior Court, Montgomery County. Heard in the Court of Appeals 27 August 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph L. Herrin, for the State.

Gilda C. Rodriguez, for defendant-appellant.

WYNN, Judge.

This appeal arises out of Defendant Robert Dean Lacen, Jr.'s conviction on the charges of first-degree burglary, discharging a weapon into an occupied property, injury to personal property, and injury to real property. We find no error in his trial.

The underlying facts tend to show that on 25 January 2005 sometime after 3:30 a.m., Annette Warner heard a noise outside her residence after her husband had departed for a construction job in Virginia. She walked out of her first floor bedroom and down the hallway to investigate. As she walked into the living room, she "heard commotion" coming from the carport adjoining the living

room. She noted that the door to the carport area was unlocked. As she was locking the deadbolt lock, she noticed the door handle turn. She heard the voice of Defendant, who was her neighbor. Frightened, she communicated to Defendant that she was calling 911, then she proceeded to the office area of her residence and to call.

As she talked to the 911 dispatcher, she heard gunshots and ran upstairs to her daughter's bedroom. Again, she dialed 911 after she heard glass breaking. Subsequently, she heard the police sirens arriving at the residence and the dispatcher reported that the police had a suspect in custody. After the residence was secured, Ms. Warner proceeded downstairs where she noticed a broken window and a window blind on the floor. She also observed blood on the floor of the mud room, walls, bed sheets, and door handle of the front door to the residence. Additionally, her car window was shattered.

Officer Robert Scott Macfayden of the Montgomery County Sheriff's Department testified that at approximately 5:00 a.m. on 25 January 2005 he received a dispatch regarding a possible break-in at 540 Substation Road. He arrived at the residence and spoke to Ms. Warner. Shortly thereafter he received a radio communication that another officer had apprehended Defendant as he stepped out of some woods onto the main roadway. Defendant had in his possession a .243 caliber rifle and blood was oozing from a laceration on his hand.

Officer Macfayden observed that the back glass of the vehicle parked in the garage/carport was shattered, that a bullet hole was

in the headrest of the driver's seat, that two gunshot holes were in the front windshield of the vehicle, that two spent .243 caliber shell casings were located in front of the vehicle, that a .22 caliber pistol was laying near the vehicle[1], and that a bullet hole was present in a boat shed right across from the vehicle. The officer also observed outside the residence that an air compressor was turned over at a broken window. Inside the residence he observed that blood was spattered on the wall of the hallway, the floor, and a bed.

Defendant testified that on the night the incident occurred, he was having hallucinations of people trying to "blow [him] up, blow the house up" and that he went to the Warner residence seeking Mr. Warner's help. He thought that Mr. Warner had the weapons he could use to shoot the people who were trying to kill him. He banged on the door of the Warner residence and hollered to Ms. Warner asking to be let into the house because people were trying to kill him. He saw two people coming toward him so, he fired a shot through the windshield of the Toyota vehicle which downed one attacker and fired a second shot which downed the second attacker. Fearing that others were coming to kill him, he broke into the residence looking and hollering for Mr. Warner. When he realized Mr. Warner was not inside the residence, he walked out the front door and through the woods. He surrendered to law enforcement.

Following a jury trial, Defendant was convicted of first-

[1]Mrs. Warner stated, that she has never seen the pistol in question prior to the incident.

degree burglary, discharging a weapon into an occupied property, injury to personal property, and injury to real property; and sentenced to a minimum term of seventy-seven months and a maximum term of one hundred two months imprisonment for the first degree burglary conviction. As for the remaining convictions, Defendant received a minimum term of twenty-nine months and maximum term of fourty-four months suspended for sixty months to start at the expiration of first degree burglary sentence. Defendant appeals, contending to this Court that: (I) the trial court erred by denying his motion to dismiss the first degree burglary charge and (II) it was ineffective assistance of counsel not to effectively cross-examine the State's witnesses.

I.

Defendant first contends the trial court erred by denying his motion to dismiss the charge of first degree burglary. We disagree.

A motion to dismiss is to be denied if substantial evidence is presented to establish every element of the charged offense and to identify the defendant as the perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002). In deciding a motion to dismiss, a court must examine the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown,* 310 N.C. 563, 566,

313 S.E.2d 585, 587 (1984).

The defendant's evidence is to be disregarded unless it is favorable to the State or does not conflict with the State's evidence. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The test is the same whether the evidence is direct or circumstantial, and if the motion "calls into question the sufficiency of circumstantial evidence, the issue for the court is whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991). The court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a motion to dismiss. *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E.2d 431, 433 (1956).

"The elements of first degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996). Defendant contends that the evidence is insufficient to establish the seventh element, i.e., that he entered with the intent to commit a felony therein. Defendant does not challenge the sufficiency of the evidence to establish the other elements or his perpetration thereof.

"Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d

506, 508 (1974).

> The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house. . . . However, the fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary. It is only evidence from which such intent at the time of the breaking and entering may be found. Conversely, actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary.

State v. Tippett, 270 N.C. 588, 594, 155 S.E.2d 269, 274 (1967)(citation omitted).

Viewed in the light most favorable to the State, the evidence shows that Defendant came to the Warner residence armed with a .243 caliber rifle, that he fired shots into Ms. Warner's vehicle and the boat shed, that he broke and entered the residence and went into Ms. Warner's bedroom, and that he had possession of the rifle when he was apprehended. Based upon this evidence, we conclude a jury could reasonably infer that defendant had the intent to commit a felony, namely, assault with a deadly weapon with intent to kill, when he entered the residence.

II.

Defendant next contends that he was denied effective assistance of counsel. We dismiss this argument because this issue is not properly before this Court.

The scope of appellate review is limited to those issues raised in an assignment of error set out in the record on appeal, N.C. R. App. P. 10(a), and where "no assignment of error can fairly

be considered to encompass" an additional issue that a party seeks to raise at the appellate level, that issue is not properly before the appellate court. *State v. Burton*, 114 N.C. App. 610, 615, 442 S.E.2d 384, 387 (1994).

Here, Defendant did not raise this issue by an assignment of error listed in the record on appeal and this Court denied Defendant's motion to amend the record to add an assignment of error raising the issue. Accordingly, this contention is dismissed.

No error.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).