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NO. COA08-1284

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

STATE OF NORTH CAROLINA

v.

MARSHALL MCNEIL

Union County
Nos. 06 CRS 50297
06 CRS 13455

Appeal by defendant from judgment entered 8 April 2008 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 17 June 2009.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angel, for the State.

L. Jayne Stowers, for defendant-appellant.

ELMORE, Judge.

Defendant was charged with felonious breaking and entering, felonious larceny, injury to real property, possession of burglary tools, and having attained habitual felon status. At the close of the State's evidence, the charges of breaking and entering, felony larceny, and injury to real property were dismissed for defective indictments. Defendant was found guilty of possession of burglary tools and pleaded guilty to being an habitual felon. Defendant was sentenced to a term of 127 to 162 months' imprisonment.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss the charge of possession of burglary tools due to insufficient evidence.

In reviewing the denial of defendant's motion to dismiss, this Court must determine "whether there is substantial evidence -- either direct, circumstantial, or both -- to support a finding that the crime charged has been committed and that defendant was the perpetrator." *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). We assess the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence." *Clark*, 325 N.C. at 682, 386 S.E.2d at 194 (citation omitted).

Defendant was charged under N.C. Gen. Stat. § 14-55 which provides:

If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be punished as a Class I felon.

N.C. Gen. Stat. § 14-55 (2005). The statute defines three separate offenses. *State v. Garrett*, 263 N.C. 773, 775, 140 S.E.2d 315, 317 (1965). It is the second defined offense, possession of an

implement of housebreaking without lawful excuse, which is applicable in this case. "[T]he burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse." *State v. Boyd*, 223 N.C. 79, 84, 25 S.E.2d 456, 459 (1943).

Possession alone of the article is not the crime; the gist of the offense is its possession for the unlawful purpose of breaking into a building. Hence, although a prosecution under G.S. 14-55 does not require proof of any specific intent to break into a particular building at a particular time and place, the burden rests on the State to show beyond a reasonable doubt that the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking.

State v. Bagley, 300 N.C. 736, 740-41, 268 S.E.2d 77, 79-80 (1980) (citation omitted).

In this case, the State's evidence tended to show that on 12 January 2006, at approximately 2:44 a.m., Union County Deputy Sheriff Billy Joe Osteen responded to a call that someone was ringing doorbells in The Reserves housing development. Upon entering the development, Deputy Osteen proceeded to the first stop sign and saw defendant running out of the fog holding a screwdriver in his hand. Deputy Osteen exited his vehicle and told defendant to drop the screwdriver. Defendant was out of breath, wet, and covered in mud. After securing the screwdriver, Deputy Osteen asked defendant to identify himself and what he was doing in the development at 3:00 a.m. Defendant stated his name and told the

deputy that he was delivering appliances. However, upon further questioning by the deputy, defendant was unable to provide the name of the company for whom he was making the delivery or the delivery address. The deputy asked defendant to direct him to the vehicle. The deputy secured defendant in the back of his patrol vehicle and traveled about two hundred feet to a red pickup truck. Deputy Osteen exited his vehicle and observed that the truck's rear axle was mired in mud in the front yard of a house under construction. There was mud on the gas pedal, brake pedal, seats, and steering wheel. Deputy Osteen observed a washer and refrigerator under a blue tarp in the back of the pickup truck. The deputy noticed that the water hoses on the washing machine had been cut.

Subsequently, Deputy Osteen deemed it necessary to check the house. Upon entering the house, Deputy Osteen observed an area in the garage where the washer had been located. He saw two pieces of hose attached to hot and cold water spigots remaining where they had been cut. There was a dolly in the garage and muddy wheel tracks leading to the front door. There was no one inside the house.

Detective Lynn Yow with the Union County Sheriff's Department arrived on the scene at approximately 4:00 a.m. She observed cut lines on the washing machine and cut plumbing lines outside the wall of the house that internally connect the washing machine. The water line connected to the refrigerator was pulled from the wall and the water line to the ice maker in the refrigerator was also pulled from the wall. There was mud on the kitchen floor, laundry

room, and throughout the floor leading to the front door. There was mud throughout the house. Detective Yow testified that a box cutter, screwdriver and tire tool were recovered inside the red pickup truck.

We conclude, based on the evidence recited above, that a jury could reasonably infer that defendant possessed the box cutter, screwdriver, and tire tool for the purpose of using the items to facilitate a housebreaking. Accordingly, the assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).