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NO. COA08-1434

NORTH CAROLINA COURT OF APPEALS

Filed: 16 June 2009

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 07 CRS 248414-15
08 CRS 7608

MONTIER LOPEZ JACKSON

Appeal by defendant from judgment entered 15 July 2008 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 June 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Ward Zimmerman, for the State.

Bryan Sates for defendant-appellant.

Slip Opinion

JACKSON, Judge.

On 5 November 2007, Montier Lopez Jackson ("defendant") was indicted for felonious breaking and entering, for possession of implements of housebreaking, and for resisting a public officer. Defendant later was indicted for attaining the status of an habitual felon on 4 February 2008. Defendant was tried during the 14 March 2008 session of Mecklenburg County Superior Court. At the close of the evidence, the trial court dismissed the possession of housebreaking implements charge. On 15 July 2008, a jury found defendant guilty of the remaining charges. The trial court entered

judgment sentencing defendant to 125 to 159 months active imprisonment.

The evidence at trial tended to show that on the evening of 12 October 2007, Officer Mike Hardin ("Officer Hardin") and Officer Roman McNeil ("Officer McNeil") of the Charlotte-Mecklenburg Police Department ("the Police Department") were conducting surveillance at the Southern Steel, LLC warehouse located at 3015 Wilkinson Boulevard. Officers from the Police Department previously had responded to this location on multiple occasions because it was a common location for burglars looking to steal copper wire.

The officers arrived after business hours and hid themselves inside the warehouse to apprehend burglars. Around 9:30 p.m., the officers noticed a group of five men enter the warehouse and shine flashlights at the copper wire on the warehouse's ceiling. Officer Hardin then called for backup and had other officers, including canine officers, create a perimeter around the building. As the first patrol car arrived, the suspects saw the car, said "po po," and ran out of the warehouse. The officers chased three suspects out of the back entrance to the warehouse, but the other two escaped.

The three suspects ran under a light, and Officer McNeil was able to see their clothing. One suspect was wearing a gray, hooded sweatshirt with brown cargo pants, one was wearing a black sweatshirt with tan colored pants, and the other was wearing a black sweatshirt with blue jeans. Officer McNeil also noticed that

the suspect wearing blue jeans had a bald head. However, he only saw the suspects' backs and did not see their faces.

Officer McNeil pursued the suspects as they ran towards a wooded area. The suspects reached a fence at the edge of the property, and Officer McNeil gained on them as they entered a hole in the fence. Officer McNeil ducked through the hole and continued to follow the suspects. Soon after he did so, he tripped on some railroad tracks and lost sight of the suspects. Officer McNeil then called a canine officer to track the suspects. Officer Charles Smith ("Officer Smith") arrived with a dog and began tracking the suspects through the wooded area.

Defendant was discovered about fifty feet from the spot where the dog began tracking; he was "laying down in some leaves right kind of on the edge of the trail and the woodline with his face down against us -- or face down into the ground." He was wearing a black sweatshirt and blue jeans and had a bald head. Officer McNeil explained:

When I stood him up his head was -- I mean there -- you know when you run hard you get big beads of sweat. It was like dripping down. Like I do a lot when I get on a foot chase I always put my hand on their heart and the heart was beating very rapidly.

Officer Smith also described defendant as extremely sweaty. Officer McNeil then handcuffed and arrested defendant.

Following the conclusion of the State's evidence, defendant moved to dismiss all charges. The trial court dismissed the possession of housebreaking implements charge, but denied defendant's motion as to breaking and entering and resisting an

officer. Defendant did not present any evidence, and he renewed his motion to dismiss, which the trial court again denied. The jury returned a verdict of guilty on both counts. The State then presented evidence on the habitual felon indictment, and the jury found defendant guilty of attaining the status of an habitual felon. After defendant was sentenced, he gave notice of appeal in open court.

On appeal, defendant raises only one assignment of error. Defendant argues that the trial court erred in denying his motion to dismiss as to the charge of felonious breaking and entering. We disagree.

When reviewing a motion to dismiss, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). A trial court properly may deny a motion to dismiss if "substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator." *Id.* "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).

Defendant's only challenge to the sufficiency of the evidence relates to the State's evidence that he was perpetrator of the breaking and entering. He does not challenge the State's proof regarding the elements of breaking and entering, nor does he challenge the remaining charges.

As an initial matter, we note that some of the State's evidence in the instant case is circumstantial. Our Supreme Court has stated that "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citing *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956)). Indeed, "[t]he evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt." *Id.* (citations omitted). "[A] motion to dismiss should be allowed where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt." *Id.* (citations omitted).

Defendant claims that the State's evidence merely raises suspicion that he was the perpetrator of the breaking and entering. We disagree. After reviewing the record, it is clear that all the facts and circumstances, taken together, give rise to the inference that defendant was the perpetrator. Officer McNeil witnessed a bald-headed man wearing a black sweatshirt and blue jeans flee the warehouse after the suspects spotted the arrival of the backup patrol cars. Officer McNeil chased the suspects, and, after losing sight of them, a police canine located defendant lying face down in the wooded area outside the Southern Steel property approximately fifty feet from where Officer McNeil first lost sight of the

suspects. Thus, defendant matched Officer McNeil's description and was in close proximity to the Southern Steel warehouse.

In addition, his physical condition and the circumstances under which he was found led to the inference that he was the suspect in question. Defendant was found at night in a wooded area adjacent the Southern Steel warehouse, he was sweating profusely, and had a rapid heart rate. Although some of the evidence is indeed circumstantial and may not be sufficient standing alone, "[i]t is immaterial that any individual piece of circumstantial evidence, taken alone, is insufficient to establish the identity of the perpetrator." *State v. Mercer*, 317 N.C. 87, 98, 343 S.E.2d 885, 892 (1986). We hold that the evidence presented by the State, given every reasonable inference, is sufficient to support a reasonable inference of guilt. See *Stone*, 323 N.C. at 452, 373 S.E.2d at 433. Accordingly, we hold the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges HUNTER, Robert C., and STEELMAN concur.

Report per Rule 30(e).