NO. COA08-232

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v. Wayne County
Nos. 06 CRS 057862-64

LEONARD RICKY KELLY

Appeal by defendant from judgment entered 24 July 2007 by Judge Russell J. Lanier, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 15 September 2008.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

ELMORE, Judge.

Defendant appeals from judgment entered consistent with a jury verdict finding him guilty of two counts of breaking or entering, two counts of larceny after breaking or entering, two counts of possession of stolen goods, one count of misdemeanor larceny, one count of misdemeanor possession of stolen goods, and habitual felon status.

The State's evidence tends to show that on the morning of 19 November 2006, Jay Faison Joyner (Joyner) was lying on the couch in his living room when he heard a truck pull into the carport. From

the living room window, Joyner saw defendant grab a toolbox from under the carport and place it in the back of the truck. Joyner then observed defendant entering a storage room, at which point Joyner went to call the police. When he returned to the living room, Joyner not only saw that defendant's truck had been backed up to the garage, he also saw defendant enter the garage and walk out with a leaf blower. Joyner went outside and confronted defendant while still on the phone with the police, at which point defendant threw the leaf blower down, got in the truck, and drove away. Joyner gave the police a description and the license plate number of the truck.

Patrolman Richard Strickland (Strickland) was responding to the call about the breaking and entering at Joyner's home when he saw a truck matching the description and license plate number Joyner had given to the police. After attempting to pull the driver over for approximately two miles, Strickland followed the truck into a residential driveway. Strickland testified that defendant jumped out of the truck and ran to another truck parked at the residence. Defendant was then arrested. Among the items found in the truck were a toolbox, a bag of hand tools, a cordless drill, and a circular saw. At the close of the State's evidence, defendant moved to dismiss all eight counts. The trial court denied the motion.

Defendant testified he went to Joyner's house in order to "take something." He took the toolbox and the bag of tools from the carport and placed them in his truck. Defendant states he

entered the garage, picked up the leaf blower, decided not to take it, and placed it back down. He then exited the garage and left. Defendant testified he did not enter the storage room. At the close of all the evidence, a bench conference was held off the record. The jury found defendant guilty as charged. The Court imposed a sentence of a minimum term of 121 months and a maximum term of 155 months in prison, with credit for time served in pre-judgment custody. Defendant appeals.

Defendant first argues the trial court erred in failing to dismiss two of the three larceny charges. The State contends this assignment of error is not properly before this Court pursuant to N.C. R. App. P. 10(b)(3) (2007). However, defendant raises an ineffective assistance of counsel claim due to trial counsel's failure to preserve the issue by renewing the motion to dismiss at the close of all the evidence. We now analyze defendant's ineffective assistance of counsel claim.

In order to prove that his constitutional right to effective counsel was violated, defendant must show (1) that counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (adopting the federal standard set out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). The benchmark for evaluating counsel's conduct is whether it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

Strickland, 466 U.S. at 686, 80 L. Ed. 2d at 693. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698.

In reviewing an ineffective assistance claim, we must consider the totality of the evidence before the jury. *Id.* at 695, 80 L. Ed. 2d at 698. Here, the record does reflect a reasonable probability there would have been a different result in the proceedings. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. Although it is unlikely that, in the face of the evidence against him, defendant might have been found not guilty of larceny, there is a reasonable probability that trial counsel's renewal of the motion to dismiss at the close of all the evidence might have led the trial judge to dismiss two counts of larceny. As discussed below, the State did not present evidence of three separate incidents of larceny to support three separate larceny charges. Had counsel supported the renewed motion to dismiss with the argument that defendant stole the various items during one continuous transaction, thus committing only one larceny offense, there is a reasonable probability that defendant would have been convicted of only one count of larceny instead of three. This point is reviewed further below.

We recognize that defendant's burden to prove trial counsel's deficient performance is a heavy one to bear, because "[j]udicial scrutiny of counsel's performance must be highly deferential."

Strickland, 466 U.S. at 689, 80 L. Ed. 2d at 694. Even a professionally unreasonable error does not warrant vacating the judgment if it had no effect on the judgment. *Id.* at 691, 80 L. Ed. 2d at 696. Furthermore, counsel is given wide latitude regarding trial strategy. *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). However, we are unable to discern a strategic motive behind trial counsel's decision in this case. Defendant asserts it is a logical conclusion that his trial counsel renewed his motion to dismiss during the unrecorded bench conference, but unfortunately there is no such record. Notwithstanding what may or may not have been done at the bench conference, trial counsel should have made sure a motion to dismiss at the close of all the evidence was reflected in the record. By failing to do so, trial counsel did not preserve the question for appellate review and barred defendant from raising such a claim on appeal.

The Supreme Court in *Strickland* stated, "Most important, in adjudicating a claim of actual ineffectiveness of counsel . . . the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696, 80 L. Ed. 2d at 699. Under these circumstances, we find that defendant was denied his constitutional right to effective assistance of counsel, and we now turn to defendant's substantive argument on the merits.

Defendant contends the trial court erred by not dismissing two of the three counts of larceny. Since the State did not present

evidence of more than one continuous act or transaction, defendant claims only a single larceny offense was committed. *See State v. Marr*, 342 N.C. 607, 613, 467 S.E.2d 236, 239 (1996).

This Court has held:

> [T]he plain language of the statute and the interpretation placed thereon by our appellate courts, manifests that the purpose of G.S. 14-72 is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses. Nothing in the statutory language suggests that to charge a person with a separate offense for each [item] stolen in a single criminal incident was intended.

State v. Boykin, 78 N.C. App. 572, 576, 337 S.E.2d 678, 681 (1985). As a result, when a perpetrator steals several items at the same time and place as part of one continuous act or transaction, a single larceny offense is committed. *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992).

Here, defendant contends he took the items from Joyner's residence at the same time, thus he should have been charged with only one count of larceny. In support of his argument, defendant cites *State v. Marr*, 342 N.C. 607, 467 S.E.2d 236 (1996), in which our Supreme Court addressed a similar situation. There, the defendant was convicted of four separate larcenies after he unlawfully entered a mobile home and a workshop, stole tools and other items from both buildings, then stole two vehicles. *Id.* at 613, 467 S.E.2d at 239. The trial court arrested judgment on the conviction of larceny after entering the mobile home. *Id.*, 467 S.E.2d at 238. Although the defendant was convicted of two counts of felonious entering, the Court found the incident to be a single

transaction for the purpose of larceny and arrested judgment on two of the remaining three larceny convictions. *Id.*, 467 S.E.2d at 239.

The State argues that because defendant stole items from the carport, storage room, and garage, the evidence is sufficient to establish three separate takings from three different places at three different times. We find the State's argument unpersuasive. The State relies on cases in which the question of whether there was a single transaction turned on, in part, a lapse of time between takings. In *State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996), the Court upheld the defendant's convictions of armed robbery and larceny after finding that the evidence supported the existence of two separate takings. There, the defendant stole the victim's wallet, left the murder scene for some time, then returned to the scene to steal the victim's car. *Id.* at 84, 463 S.E.2d at 224. This Court determined that the events occurring between the time the defendant left the scene and came back were intervening; thus the taking of the wallet and the taking of the car constituted two separate transactions. *Id.* The State also cites *State v. Jordan*, 128 N.C. App. 469, 495 S.E.2d 732, *disc. review denied*, 348 N.C. 287, 501 S.E.2d 914 (1998), in which the defendant was convicted of and sentenced for both larceny and armed robbery. In that case, this Court found that the defendant was initially motivated by his desire to steal the victim's car, but once he entered the house, he stayed for fifteen to twenty minutes, walked around deciding what

to take, took credit cards and jewelry, then stole the car. *Id.* at 474-75, 495 S.E.2d at 736. The lapse of time between stealing the credit cards and jewelry and stealing the car gave rise to two separate takings. *Id.* at 475, 495 S.E.2d at 736.

We find, however, that *Robinson* and *Jordan* are distinguishable from the instant case. Here, there is neither an intervening event nor a temporal break severing defendant's acts into individual occurrences. Defendant remained on the property during the entire incident, and Joyner was still on the phone with the police when defendant left, suggesting the brevity of the event. Thus, we find that the taking of the toolbox and other items occurred nearly simultaneously and were linked together in one continuous transaction. *See State v. Jaynes*, 342 N.C. 249, 276, 464 S.E.2d 448, 464 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

The State further argues that because defendant stated he did not initially intend to take anything from the garage but the evidence supports a showing that he did take a leaf blower from the garage, this change in intent indicates a separate transaction. In support of this argument, the State relies on *State v. West*, 180 N.C. App. 664, 638 S.E.2d 508 (2006), *disc. review denied and appeal dismissed*, 361 N.C. 368, 644 S.E.2d 562 (2007), in which the defendant was convicted of larceny of a shotgun stolen from a truck and larceny of a car. There, the defendant stole the shotgun to shoot a stranger and then stole the car to travel to his mother's house. *Id.* at 667, 638 S.E.2d at 511. The Court noted, "[T]he

different purpose for which the shotgun and automobile were used suggests that each taking was motivated by a unique criminal impulse or intent and constitutes multiple takings." *Id.* The State emphasizes defendant's testimony that he did not intend to steal anything from the garage, so when he decided to take the leaf blower from the garage, defendant's change of mind establishes a separate act. However, in recognizing the defendant's different purposes, this Court in *West* cited *State v. Weaver*, 104 N.C. 758, 10 S.E. 486 (1889), which indicates "[w]hen several articles are taken at one time, and 'the transaction is set in motion by a single impulse and operated upon by a single, unintermittent force, it forms a continuous act, and hence must be treated as one larceny, not susceptible of being broken up in a series of offenses, no matter how long a time the act may occupy.'" *Weaver*, 104 N.C. at 760, 10 S.E. at 487 (citation omitted). Furthermore, this Court in *West* distinguished the facts from those in *Marr* and noted that in the latter, the defendant took each item with the single objective of stealing the victim's tools for the defendant's own use and for resale.

We find the facts of the instant case to be more similar to those in *Marr*. Here, defendant testified that he was driving down the street when he saw the toolbox in the carport, at which point he decided to go to Joyner's home to "take something." The impulse, intent, and objective to take something set in motion all the events that transpired at Joyner's residence. Like the facts in *Marr*, there is insufficient evidence that defendant had the

"unique criminal impulse or intent motivating multiple takings" as the State suggests. *West*, 180 N.C. App. at 667, 638 S.E.2d at 511. Based on the evidence and the foregoing analysis, we find defendant's acts were part of a single transaction. Because of the State's failure to show that defendant stole the items on three separate occasions, two convictions of larceny must be vacated. Further, since all of the convictions were consolidated into one judgment for sentencing purposes, the matter must be remanded for re-sentencing.

By his last argument, defendant contends the trial court erred by failing to arrest judgment for two counts of felonious possession of stolen goods and one count of misdemeanor possession of stolen goods when it entered judgment for larceny of the same goods. We agree.

In reviewing the record, we observe that the indictment in case No. 06 CRS 57863 charged defendant with two counts of larceny after breaking and entering and one count of misdemeanor larceny; that the indictment in case No. 06 CRS 57864 charged defendant with two counts of felonious possession of stolen goods and one count of misdemeanor possession of stolen goods; that the jury found defendant guilty of both counts of larceny after breaking and entering, both counts of felonious possession of the same property, misdemeanor larceny, and misdemeanor possession of the same property under the indictment; and that the court entered judgment punishing defendant for all of the offenses.

Notwithstanding the State's evidence supporting both felonious possession of stolen goods charges and the misdemeanor possession of stolen goods charge, the convictions for these offenses violate the rule stated in *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). In *Perry*, our Supreme Court held that a defendant may be indicted and tried on charges of both larceny and possession of the same property; however, he may be convicted of and sentenced for only one of those offenses. *Id.* at 237, 287 S.E.2d at 817. Although they are separate and distinct offenses, the "[l]egislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole." *Id.* at 235, 287 S.E.2d at 816. Consequently, because defendant was convicted on both the larceny and possession charges, the judgment entered upon the three convictions of possession of stolen goods in 06 CRS 057864 must be vacated. The matter must also be remanded for re-sentencing and entry of a corrected judgment.

In conclusion, we find no error in defendant's convictions for each of the two counts of breaking or entering, and no error in defendant's conviction for one of the two counts of felony larceny pursuant to a breaking or entering. We reverse defendant's convictions and vacate defendant's sentences for the remaining count of felony larceny pursuant to a breaking or entering and for the misdemeanor larceny offense. We arrest the judgment entered against defendant for each of the three possession of stolen goods convictions. The matter is remanded for re-sentencing.

No. 06-CRS-057862, count 51, breaking or entering: No error.
No. 06-CRS-057862, count 52, breaking or entering: No error.
No. 06 CRS-057863, count 51, larceny after breaking or entering: No error.
No. 06 CRS-057863, count 52, larceny after breaking or entering: Judgment of conviction reversed and sentence vacated.
No. 06 CRS-057863, count 53, misdemeanor larceny: Judgment of conviction reversed and sentence vacated.
No. 06-CRS-057864, count 51, felony possession of stolen goods: Judgment arrested.
No. 06-CRS-057864, count 52, felony possession of stolen goods: Judgment arrested.
NO. 06-CRS-057864, count 53, misdemeanor possession of stolen goods: Judgment arrested.

Judges WYNN and GEER concur.

Report per Rule 30(e).