NO. COA08-424

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

IN THE MATTER OF:

Guilford County
No. 06 JB 762

J.O.

Appeal by juvenile from order entered 21 November 2007 by Judge Sherry T. Alloway in District Court, Guilford County. Heard in the Court of Appeals 21 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General P. Bly Hall, for the State.

James N. Freeman, Jr. for juvenile-appellant.

WYNN, Judge.

The issue on appeal is whether the record shows sufficient evidence to establish that the juvenile in this matter was the perpetrator of larceny. Because the record shows insufficient evidence to establish that the juvenile was the perpetrator or acted in concert with the perpetrator of the offense, we hold that the trial court erred in denying his motion to dismiss.

At the adjudication hearing of the juvenile in this matter J.O., the State presented evidence tending to show that on 27 June 2007, J.O. visited the Digital Lifestyle Center, a gaming center located at Quaker Village in Greensboro, where customers pay by the

hour to play video games on consoles located throughout the Center. The Center was open until midnight and there were approximately five to eight customers in the store that evening.

Steve Allegrezza, the employee on duty that night, testified that sometime around 10:00 p.m. J.O. came into the Center with B.S., a co-juvenile adjudicated delinquent on the same charge. The two juveniles did not rent anything, but went to the back of the Center and sat on a couch, adjacent to an Nintendo Wii gaming station. Afterward, the two went into the unisex bathroom together, came out of the bathroom, and then left the Center. The two juveniles were inside the Center for no "more than five to ten minutes." Mr. Allegrezza testified that he had not noticed anything unusual at the time the juveniles left the Center. Additionally, he stated that it "wasn't . . . terribly unusual" for customers to come in and only stay for a few minutes if their friends were not there. Further, he stated that the juveniles "had come in before and sat around" and that, at the time, he had not noticed anything unusual about their behavior.

The next day, one of the store's owners notified Mr. Allegrezza that a Wii console and a set of cables were missing. According to the store's records, the missing Wii had been last played sometime around six or seven o'clock on 27 June.

One of the Center's owners reported the incident to Officer T. D. Dell, a Greensboro Police Officer who had worked in an off-duty capacity on the evening of 27 June. After an initial conversation with Mr. Allegrezza, who mentioned that the two juveniles visited

the store between nine and ten o'clock that evening, Officer Dell reviewed the video surveillance tapes and photographs from that time period, which were maintained by the Quaker Village security office.

At the hearing, the State submitted to the court still images and surveillance footage of two juveniles, identified by Officer T.D. as J.O. and B.S., entering and leaving the Center. The officer testified that he believed the images, captured as the two juveniles left the Center, showed a "large, distinct bulge" in the back of B.S.'s shirt that had not been present at the time B.S. first entered the Center. He stated that the Wii had a distinct "trapezoidal" shape and that the video showed a "trapezoidal shape in the small of the back" of B.S.'s shirt. He also testified that the video showed B.S. "walking from side to side as if something is shifting in the small of his back or something is shifting behind him." Further, he concluded that approximately ten minutes after the juveniles were recorded leaving the property, the surveillance tape shows them returning, and the "bulge" that he had identified in B.S.'s shirt was no longer visible.

After reviewing the surveillance footage, Officer Dell conducted a non-custodial interview with J.O. in the presence of his father, and with B.S. in the presence of his mother. Both juveniles denied stealing the Wii in the interview and at the hearing. J.O. and B.S. further testified that they later learned that another juvenile, B.P., had stolen the Wii from the Center.

Officer Dell was "unable" to contact B.P. and did not interview any of the other patrons who were in the store that night.

Following the hearing, the trial court entered an order adjudicating J.O. delinquent for committing misdemeanor larceny in violation of N.C. Gen. Stat. § 14-72(a) (2007). The trial court placed J.O. on Level One probation for three months and ordered him to pay restitution, jointly and severally, in the amount of $250.00. J.O. now appeals, arguing dispositively that the trial court erred in denying his motion to dismiss.

To survive a motion to dismiss in a juvenile delinquency adjudication proceeding, the State must present "substantial evidence of each element of the charged offenses sufficient to convince a rational trier of fact *beyond a reasonable doubt* of [the juvenile's] guilt." *State v. Griffin*, 319 N.C. 429, 433, 355 S.E.2d 474, 476-77 (1987) (emphasis added). On review, the evidence, either direct or circumstantial, must be taken in the light most favorable to the State. *See In re T.S.*, 133 N.C. App. 272, 275, 515 S.E.2d 230, 232, *disc. review denied*, 351 N.C. 105, 540 S.E.2d 751 (1999). Further, "the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence" presented. *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the [juvenile] as the perpetrator of it, the motion [to dismiss] should be allowed. This is true even though the suspicion so aroused by the evidence is strong." *State*

v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted).

Here, the petition against J.O. alleged that he violated N.C. Gen. Stat. § 14-72(a) by committing misdemeanor larceny of a "Wii gaming system property of Digital Lifestyle Center . . . with a value of $300.00." Under North Carolina law, larceny is the wrongful taking and carrying away of personal property of another without his or her consent, with the intent to permanently deprive the owner of his or her property, and to appropriate it to the taker's own use. *See, e.g., State v. Smith*, 66 N.C. App. 570, 312 S.E.2d 222, disc. *review denied*, 310 N.C. 747, 315 S.E.2d 708 (1984); *State v. White*, 85 N.C. App. 81, 354 S.E.2d 324, disc. *review allowed*, 320 N.C. 176, 358 S.E.2d 68 (1987), *aff'd,* 322 N.C. 506, 369 S.E.2d 813 (1988). Additionally, "[i]t is settled law that all who are present (either actually or constructively) at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose, to the knowledge of the actual perpetrator, are principals and are equally guilty." *State v. Holland*, 234 N.C. 354, 358, 67 S.E.2d 272, 274 (1951) (citations omitted). Mere presence, without more, is insufficient to constitute aiding and abetting, unless the individual present is "a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection." *State v. Hargett*, 255 N.C. 412, 415, 121 S.E.2d 589, 592 (1961).

At the adjudication hearing, the State presented evidence tending to show that the video surveillance camera captured images of J.O. entering the Center with B.S. and exiting the Center approximately five to ten minutes later. Mr. Allegrezza testified that, while in the store, the two juveniles sat on a couch near the location of the missing console, went to the bathroom together, and then exited the Center without arousing suspicion. The only evidence purporting to link the two juveniles to the larceny of the Wii is the testimony of Officer Dell. Officer Dell testified that he believed the surveillance video showed J.O. leaving the Center with B.S., at which time B.S. had "large block shape in the small of his back." Officer Dell opined that this shape is the same as a Wii gaming system. However, both juveniles denied any involvement with the missing Wii during their interviews with the officer and at the hearing, and contended that the "bulge" was merely B.S.'s stocky physique.

Even when viewed in the light most favorable to the State, the evidence presented at the hearing was sufficient to raise only a suspicion or conjecture that J.O. aided and abetted in the "wrongful taking and carrying away" of the property. *Smith*, 66 N.C. App. at 576, 312 S.E.2d at 225. Even if Officer Dell's suspicions, based on the surveillance images of the shopping plaza, are taken as accurate, there is no evidence, direct or circumstantial, that J.O. possessed the Wii on the evening of 27 June or at anytime thereafter, or that he aided or abetted B.S. in the commission of larceny.

The State presented evidence that both juveniles were near the gaming system sometime after the console disappeared, that they were in the bathroom at the Center together, and that J.O. and B.S. left the Center together. However, evidence of his mere presence is not sufficient to support the trial court's finding that J.O. was present at the time or participated in the wrongful taking and carrying away of the missing Wii. Although the testimony by Mr. Allegrezza creates a strong suspicion that J.O. was with B.S. at the time the Wii was allegedly taken, it is not sufficient to support a finding that J.O. aided and abetted the commission of the offense.

Accordingly, we hold that the trial court erred in denying J.O.'s motion to dismiss. Though it is dispositive to hold that the trial court erred by not dismissing the charges against J.O., in the interest of completeness of review, we have reviewed J.O.'s remaining issues and find them to be without merit.

Reversed and remanded.

Judge BRYANT concurs.

Judge ARROWOOD concurs prior to 31 December 2008.

Report per Rule 30(e).