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NO. COA08-73

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

STATE OF NORTH CAROLINA

v.

CUJUAN AARON SPENCER

Gaston County

Nos. 06 CRS 19030

06 CRS 65469

06 CRS 65475

06 CRS 65476

06 CRS 65479

Court of Appeals

Appeal by defendant from judgments entered 10 October 2007 by Judge J. Gentry Caudill in Gaston County Superior Court. Heard in the Court of Appeals 30 June 2008.

Attorney General Roy Cooper, by Assistant Attorney General Edwin Lee Gavin II, for the State.

Slip Opinion

Carol Ann Bauer, for defendant-appellant.

CALABRIA, Judge.

Cujan Aaron Spencer ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of resisting a public officer, felony larceny, conspiracy to commit larceny, misdemeanor shoplifting, concealment of goods and simple possession of a controlled substance. We find no error.

The State presented evidence that on 25 October 2006, Rebecca York ("Ms. York") was working at Sam's Club in Gastonia, North Carolina when she noticed a black male in his early twenties pushing a shopping cart with large quantity of boxes of diet pills.

The male, later identified as defendant, was accompanied by another man. She noticed clothing had been placed over the diet pills, as if to conceal the diet pills. Since Ms. York thought it was unusual to see someone with a large quantity of diet pills in his cart, she alerted the store manager, Jim Conway ("Mr. Conway").

Mr. Conway observed defendant pushing the cart filled with over twenty boxes of diet pills, an item consistently stolen from the store. After reaching the end of an aisle, defendant shoved the diet pills into a black trash bag and then headed toward the store entrance. The man accompanying defendant exited first. Defendant followed, pushing his cart past the point of sale and into the vestibule. Mr. Conway ran up behind Defendant, grabbed the cart, and demanded that the cart stay in the store because the contents had not been purchased. Defendant grabbed the trash bag but it ripped apart. Defendant exited the second set of entrance doors into the parking lot and met the man who had accompanied him to Sam's Club. The recovered pills and other items in the trash bag were later valued at over \$1,376.02.

Mr. Conway called 911 while he observed defendant and his companion walk across the parking lot and around a Burger King restaurant. Although Mr. Conway lost sight of them, Matthew Blackman ("Mr. Blackman") saw four men, including defendant, enter a vehicle parked in the Burger King parking lot. As Mr. Conway and Mr. Blackman stood near the Burger King drive-thru, a white vehicle quickly passed with the engine racing. Mr. Conway saw two men crouching in the back seat, wearing the clothes worn by defendant

and his companion in the Sam's Club store. The vehicle drove in the direction of the Walmart. Mr. Conway provided the vehicle license plate number to the 911 dispatcher.

Officer W.D. Griffing of the Gastonia Police Department ("Officer Griffing") arrived at the Sam's Club Store and interviewed Mr. Conway regarding the shoplifting incident. Fifteen minutes later, Officer Griffing was advised that Sergeant Jeff Clark of the Gastonia Police Department ("Sergeant Clark") had located the white vehicle in the Walmart parking lot. Two men, Brian Lynch and Phairlever Lynch (collectively, "the Lynches"), were in the vehicle. Mr. Conway went to the Walmart and confirmed the vehicle's identity. Jeff Franklin ("Mr. Franklin"), the Sam's Club loss prevention specialist, went into the Walmart with Sergeant Clark. Mr. Franklin advised Mr. Conway by cell phone that defendant and another man were inside the Walmart stuffing a bag with diet pills. Mr. Conway then entered the Walmart and saw defendant and the same man who accompanied defendant in the Sam's Club store stuffing a bag with diet pills. Sergeant Clark told defendant that he was under arrest. While defendant struggled with the officer, his companion escaped. The total value of the pills in the bag was \$1,686.00. Defendant was restrained in handcuffs and removed from the store, where he again tried to flee. Pursuant to a search incident to the arrest, the officers found a bottle of thirty-four Xanax pills in one of his pants pockets.

On 10 October 2007, in Gaston County Superior Court, the jury returned verdicts finding defendant guilty of resisting, delaying

and obstructing a public officer, felony larceny, felony possession of stolen goods, conspiracy, misdemeanor shoplifting, concealment of goods and simple possession of a controlled substance. The Honorable J. Gentry Caudill sentenced defendant to an active sentence of a minimum of 8 months to a maximum of 10 months in the North Carolina Department of Correction, a consecutive sentence of 45 days and a suspended consecutive sentence of a minimum of 6 months to a maximum of 8 months with 36 months of supervised probation. From the judgments, defendant appeals.

I. Motion to Dismiss

In his sole argument on appeal, defendant contends the trial court erred in denying his motion to dismiss the charge of conspiracy to commit felonious larceny. We disagree.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). "In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). "[C]ontradictions and inconsistencies do not warrant

dismissal; the trial court is not to be concerned with the weight of the evidence." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted). "[I]f the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Ford*, 136 N.C. App. 634, 641, 525 S.E.2d 218, 223 (2000).

Defendant asserts the State failed to present substantial evidence that he conspired with the Lynches to commit felony larceny against Sam's Club as alleged in the indictment. However, we find substantial evidence of defendant's participation in the conspiracy to commit felony larceny.

Our Supreme Court has held that:

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.

State v. Bindyke, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975) (internal quotations and citations omitted). "Those who aid, abet, counsel or encourage, as well as those who execute their designs are conspirators." *State v. Covington*, 290 N.C. 313, 342, 226 S.E.2d 629, 648 (1976).

Although the State had no direct evidence of conspiracy, after reviewing the evidence in the light most favorable to the State, we

conclude there was sufficient circumstantial evidence to support the charge that defendant conspired with the Lynches to commit larceny. The State presented evidence that after defendant abandoned the shopping cart filled with diet pills in the vestibule, defendant, his companion who accompanied him in the Sam's Club and two other men entered a white vehicle behind a nearby Burger King restaurant. The store manager of Sam's Club observed defendant and his companion crouched in the back seat as the vehicle sped away. Fifteen minutes later, police officers located the vehicle at a Walmart parking lot and the Lynches were sitting in the vehicle. While the Lynches sat in the vehicle, defendant and his companion were inside Walmart attempting to shove merchandise into a black bag just as they had done at Sam's Club. A reasonable juror could infer from this evidence that a "mutual, implied understanding" existed between the four men to work together to accomplish the goal of taking and carrying away the personal property of Sam's Club. *Bindyke*, 288 N.C. at 616, 220 S.E.2d at 526. Therefore, we conclude the State presented "substantial evidence of each essential element of the charged offense." *Cross*, 345 N.C. at 716-17, 483 S.E.2d at 434. This assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).