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NO. COA08-914

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2009

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 07 CRS 54014
07 CRS 22502

ORRONDO NIVEL BLACKBURN

Appeal by Defendant from judgment entered 15 January 2008 by Judge A. Moses Massey in Superior Court, Forsyth County. Heard in the Court of Appeals 12 February 2009.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State
Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

STEPHENS, Judge.

On 15 January 2008, a jury found Orrondo Nivel Blackburn ("Defendant") guilty of felonious breaking or entering. Defendant then pled guilty to attaining habitual felon status. The trial court sentenced Defendant to a term of 84 to 110 months in prison. The evidence presented at trial tended to show the following:

Facts

William Hardy ("Hardy") testified that on the morning of 23 April 2007, he observed Defendant open a window in the back of a house located up the street from Hardy's house, and crawl through

the window. The house belonged to Sandra Caldwell ("Ms. Caldwell"), Hardy's first cousin. When Hardy saw Defendant climbing through the window, Hardy called Ms. Caldwell on her mother's telephone and informed her of what he had seen. After he called Ms. Caldwell, Hardy continued to watch Ms. Caldwell's house from his window. Hardy did not see anyone come out of the house after he saw Defendant go inside. Ms. Caldwell and a group of family members, including Defendant's brother, Orlando Hawkins ("Hawkins"), were gathered a few blocks away at the home of Ms. Caldwell's mother, because Hawkins' father had passed away. Approximately five minutes after receiving Hardy's call, Ms. Caldwell and several other relatives arrived at Ms. Caldwell's home. Hardy joined them and entered the home.

Hardy testified that he found the house in disarray with items stacked by one of the windows "like someone was gon' take it out, you know." Hardy testified that several of his relatives were walking through the house looking for an intruder, and that he saw his nephew poking a stick into a pile of clothes in one of the bedroom closets. Hardy next saw Defendant being escorted out of the house by police. At that time, Hardy was able to recognize and identify Defendant as the individual he saw crawling through the window into Ms. Caldwell's house.

On cross-examination, Hardy testified that although the house which he saw Defendant entering belonged to Ms. Caldwell, Ms. Caldwell's daughter, Shauna Caldwell ("Shauna"), resided in the house. Shauna is Hardy's second cousin. Hawkins was staying there

as well. Hardy testified he had never seen Defendant at Ms. Caldwell's house prior to 23 April 2007.

Ms. Caldwell testified that on 22 April 2007, the night before the incident, she had secured the house by making sure all of the doors and windows were locked because Shauna was in the hospital. The next day, Ms. Caldwell received Hardy's call alerting her that he had seen someone go into the back window of her house, and she and several of her relatives rushed over to her house. When Ms. Caldwell entered the house, she found the air conditioner on the ground outside the window, two flat-screen televisions missing, and some prescription medicines that had previously been in a night stand scattered all over the bed. Ms. Caldwell testified that the relatives who accompanied her to her house that morning climbed in through the back window which was open at the time.

Ms. Caldwell testified further that Hawkins was with her at her mother's house on the morning of 23 April 2007. Hawkins did not accompany Ms. Caldwell and the relatives to Ms. Caldwell's house at first, but he eventually did come to her house. Ms. Caldwell testified that Hawkins stayed at her house with her daughter occasionally. On the night of 22 April 2007, no one was staying at Ms. Caldwell's home, and Shauna had given her the only key. The first time Ms. Caldwell saw Defendant on 23 April 2007, several of her relatives were on the floor in a room in the back of the house punching Defendant.

Ms. Caldwell testified that she had never given Defendant permission to enter her house. Ms. Caldwell described the house as

a two-bedroom home, and she stated that Shauna lived in the front bedroom. The back bedroom was vacant, but Ms. Caldwell occasionally slept there. Hawkins had also stayed at Ms. Caldwell's house in the back bedroom off and on for approximately two months. Although Hawkins stayed in the house occasionally, he did not have a key. Ms. Caldwell had the only key to the house at the time of the incident.

Officer Steven Richards ("Richards") of the Winston-Salem Police Department testified that he investigated the scene at Ms. Caldwell's house but was unable to find any fingerprints. Richards noticed during his investigation that some electronic items were placed on the bed and on the floor, and that the contents of a night stand in one of the bedrooms were dumped onto the bed.

At the close of the State's evidence, Defendant moved to dismiss all of the charges against him. The trial court granted Defendant's motion as to the larceny after breaking or entering charge, but denied Defendant's motion as to the breaking or entering charge.

Defendant presented the testimony of one witness, Hawkins. Hawkins testified that on 23 April 2007, he and his cousin, Shauna, were living in Ms. Caldwell's house, although he did not have a key to the house. Occasionally, when Hawkins needed to enter the house and Shauna was not home to let him in, he entered through either the back window or the side window. Hawkins testified that Defendant had been inside Ms. Caldwell's house with Hawkins four or five times, and that Defendant had spent the night in the house.

When Defendant spent the night, Hawkins told Defendant "to come in and lay his head down[,] " and Defendant slept on either the floor or the bed. Hawkins testified that on 22 and 23 April 2007, Defendant had Hawkins' permission to go into the house.

On 23 April 2007, Hawkins was at his aunt's house, located approximately three houses from Ms. Caldwell's mother's house. Hawkins eventually arrived at Ms. Caldwell's house where Ms. Caldwell and the other relatives were gathered. Hawkins did not inform the family members that Defendant had his permission to be in the house, however, because he thought they would be mad at him. Hawkins only told the relatives to stop hitting Defendant. Hawkins also did not inform law enforcement that Defendant had his consent at the time of Defendant's arrest, but Hawkins maintained in his trial testimony that Defendant had his permission to be at the house on 23 April 2007. Also, Hawkins stated that Hawkins was "[t]ore up" by the loss of his father.

Recalled as a rebuttal witness, Ms. Caldwell testified that on the day of the incident, Hawkins told the other relatives to stop hitting Defendant. Ms. Caldwell also stated that Hawkins repeatedly asked Defendant, "Why'd you do this, man? Why'd you do this?" Defendant objected to this testimony, but his objection was overruled by the trial court. Ms. Caldwell never told the officers about the statements Hawkins made to Defendant before testifying at trial. Lastly, Ms. Caldwell testified that she had not heard Hawkins say he had given Defendant permission to be in the house prior to his testimony at trial.

At the close of all the evidence, Defendant renewed his motion to dismiss the charge of breaking or entering. The motion was denied. The jury found Defendant guilty of felonious breaking or entering. Defendant then made a motion for a directed verdict, which the trial court denied. Defendant pled guilty to attaining habitual felon status. From the trial court's judgment and commitment, Defendant appeals.

Lack of Consent to Enter Dwelling

In assignments of error four and five, Defendant argues the trial court erred by denying Defendant's motion to dismiss because the evidence was insufficient to show that Defendant lacked consent to enter the house. We disagree.

"In considering a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged and substantial evidence that the defendant is the perpetrator" giving the State the benefit of all reasonable inferences which can be drawn. *State v. Rasor*, 319 N.C. 577, 585, 356 S.E.2d 328, 333 (1987). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). "Unless favorable to the State, the defendant's evidence is not to be taken into consideration." *State v. Young*, __ N.C. App. __, __, 671 S.E.2d 372, 375 (2009). "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *Rasor*, 319 N.C. at 585, 356 S.E.2d at 334.

"Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2007). "Thus, [t]he essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Brooks*, 178 N.C. App. 211, 214, 631 S.E.2d 54, 57 (2006), *review denied by*, 361 N.C. 222, 642 S.E.2d 708 (2007) (internal quotation marks and citation omitted). In order for an entry to be punishable under N.C. Gen. Stat. § 14-54(a), the entry must be without the owner's consent. *State v. Boone*, 297 N.C. 652, 655, 256 S.E.2d 683, 685 (1979). "[A]n entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under [N.C. Gen. Stat. §] 14-54(a)." *Id.* at 659, 256 S.E.2d at 687.

"A person entering a residence with the good faith belief that he has the consent of the owner or occupant or his authorized agent is not chargeable with the offense of breaking and entering." *State v. Tolley*, 30 N.C. App. 213, 215, 226 S.E.2d 672, 674, *disc. rev. denied*, 291 N.C. 178, 229 S.E.2d 691 (1976). In *Tolley*, this Court held that "[the defendant] could not have reasonably believed that [the homeowners' son] had authority to permit defendant to enter his parents' residence for the purpose of stealing valuables which belonged to his parents, and not to [the homeowner's son]." *Id.* Thus, the defendant in *Tolley* could not have had a good faith belief that he had consent to enter the house. *Id.*

Here, Defendant argues the State failed to offer substantial evidence that Defendant lacked consent or that he lacked a "good faith belief" that he had consent to enter Ms. Caldwell's house. See *id.* However, giving the State the benefit of all reasonable inferences, the evidence presented at trial tended to show that Defendant neither had consent nor believed he had consent to enter Ms. Caldwell's house. Ms. Caldwell, the owner of the house and mother of the occupant of the house, testified that she had not given Hawkins - from whom Defendant's purported consent arose - consent to be in her house. Ms. Caldwell testified that Hawkins did not live in the house and did not have a key. Ms. Caldwell also testified that Hawkins only stayed at the house occasionally, and he could only get inside the house when Shauna was home to let him inside. Accordingly, there was substantial evidence that Hawkins was not a tenant or a person with a legitimate claim of right to the house that would empower him to grant consent to third parties to enter. See *State v. Young*, __ N.C. App. __, __, 671 S.E.2d 372, 375 (2009) ("A breaking or entry is wrongful when it is without the consent of the owner or tenant or other claim of right"). Therefore, Hawkins could not have granted consent for Defendant to enter the house, as Hawkins was not empowered to grant such consent.

Furthermore, Defendant's own actions indicate that Defendant did not believe he had consent to enter the house. Defendant entered the house when no one else was on the premises - a fact of which Defendant was likely aware because of the death of Hawkins'

father, since Hawkins is Defendant's brother. Defendant entered the house through a window, which gives rise to an inference that he had not been granted permission to enter the house. Furthermore, Hardy testified that his relatives searched for Defendant inside Ms. Caldwell's house. From this testimony, it is reasonable to infer that Defendant did not readily present himself to the others, as someone with consent to be inside the house most likely would have done. Defendant's actions of climbing in through a window at a time he knew no one to be on the premises, and then not presenting himself to Ms. Caldwell and her relatives, amount to substantial evidence that Defendant did not believe he had consent to enter the house. Thus, we hold the State presented substantial evidence that Defendant had neither consent nor a good faith belief that he had consent to enter the house. These assignments of error are overruled.

Discovery Violation

Next, in assignments of error ten and eleven, Defendant argues the trial court erred by admitting Ms. Caldwell's testimony on rebuttal that Hawkins said, "Why'd you do this, man? Why'd you do this?" upon finding Defendant in the house. Defendant argues that the State had prior knowledge of Ms. Caldwell's testimony, and failed to produce this statement during discovery.

N.C. Gen. Stat. § 15A-903(a) requires that upon motion by Defendant, the State must

[m]ake available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the

defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

N.C. Gen. Stat. § 15A-903(a) (2007). The State has a continuing duty to disclose discoverable material throughout the trial should the State discover or decide to use additional evidence or witnesses. N.C. Gen. Stat. § 15A-907 (2007). If the trial court determines there has been a discovery violation, the trial court may: "(1) Order the party to permit the discovery or inspection, or (2) Grant a continuance or recess, or (3) Prohibit the party from introducing evidence not disclosed, or (3a) Declare a mistrial, or (3b) Dismiss the charge, with or without prejudice, or (4) Enter other appropriate orders." N.C. Gen. Stat. § 15A-910(a) (2007). "[T]he remedy for failure to provide discovery rests within the trial court's discretion. As such, its ruling is not reviewable on appeal absent an abuse of discretion." *State v. Dukes*, 305 N.C. 387, 390, 289 S.E.2d 561, 563 (1982).

At trial, Defendant presented the testimony of Hawkins, which included Hawkins' statement that he had given Defendant consent to enter Ms. Caldwell's house. After Hawkins' testimony, the State introduced rebuttal testimony that Ms. Caldwell had not heard Hawkins state he had given Defendant consent prior to Hawkins' testimony at trial. Ms. Caldwell's testimony on rebuttal included the following exchange:

Q. Good morning, Ms. Caldwell.

A. Good morning.

Q. Now, you've just heard the testimony of Orlando Hawkins.

A. Yes.

Q. Do you know him?

A. Yes.

Q. Now, was he there at 2059 Cherry Street when your family members were - were punching on [Defendant]?

A. Yes.

Q. And what, if anything, did he say to y'all?

A. He told us to stop hitting his brother.

Q. Did he say anything else?

A. And he kept asking his brother, "Why'd you do this, man? Why'd you do this?"

Q. And you were there for that conversation.

A. Yes.

. . . .

Q. When was the first time, ma'am, Ms. Caldwell, that you've heard from Orlando Hawkins saying that he had given [Defendant] permission to be in that house?

A. At - at - in this hear - just a moment ago.

Defendant argues that the State had advance knowledge of Ms. Caldwell's statements, and thus violated N.C. Gen. Stat. §§ 15A-903(a) and 15A-907. Defendant argues that because the State only asked Ms. Caldwell six questions and asked no further questions once eliciting this testimony, it appears the State had advance

knowledge of Ms. Caldwell's statements. Also, Defendant argues the State did not claim to be surprised by Ms. Caldwell's testimony.

The State, however, argues that it had no advance notice of Ms. Caldwell's statements. The State claims Ms. Caldwell's testimony was only intended to rebut Hawkins' testimony that he had provided consent to Defendant, which Ms. Caldwell had heard for the first time at trial. Prior to trial, Defendant renewed his discovery motion to disclose all prior statements, and the State said, "As far as I know, every prior statement that I have has been disclosed at this point." The State did not use Ms. Caldwell's statements during its opening statement. In his testimony, Hawkins admitted that he had not told the police he had provided consent prior to testifying at trial. Thus, the State claims it did not learn of Hawkins' statement until trial, at which point it introduced Ms. Caldwell's rebuttal testimony in response to Hawkins' testimony.

There is no violation of N.C. Gen. Stat. § 15A-903(a) when the State had no prior knowledge of the statement at issue. See *State v. Godwin*, 336 N.C. 499, 506-07, 444 S.E.2d 206, 210 (1994) (holding the State did not violate discovery rule where witness had not previously revealed the statement at issue to the State, and thus, the State could not have been expected to relate a statement of which it had no knowledge). Here, the record and trial transcript do not contain conclusive evidence as to whether the State had notice of Ms. Caldwell's rebuttal testimony in advance of Hawkins' testimony, and the evidence is, thus, insufficient to show

that any discovery violation occurred in this matter. We hold the trial court did not abuse its discretion in admitting Ms. Caldwell's statement. Accordingly, these assignments of error are overruled.

Defendant did not argue his remaining assignments of error, and they are deemed abandoned. N.C. R.App. P. 28(b)(6).

NO ERROR.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).