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NO. COA09-176

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

Iredell County  
Nos. 06 CRS 13966, 54610

BARRY DEAN WALLS

Appeal by defendant from judgment entered 12 February 2008 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 30 November 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State.*

*Linda B. Weisel, for defendant-appellant.*

CALABRIA, Judge.

Barry Dean Walls ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felonious larceny. We find no error.

On 27 November 2006, defendant was indicted for felonious larceny and for attaining the status of an habitual felon. Defendant was tried on 11 February 2008 in Iredell County Superior Court for charges related to an alleged theft of over \$1,000.00 worth of merchandise from a Harris Teeter store in Mooresville, North Carolina around 10:00 p.m. on 10 May 2006.

The State's first witness was Kellie Beaver ("Ms. Beaver"), the Health and Beauty Clerk at Harris Teeter store number 99 ("the store" or "store 99"). Ms. Beaver was responsible for ordering, stocking, and taking inventories of the merchandise in her section. Ms. Beaver worked from 10:00 a.m. to 6:00 p.m. on 10 May 2006, and during her shift, Ms. Beaver stocked the health and beauty section. She explained that stocking involves retrieving health and beauty products from a truck and placing them on the store shelves. Ms. Beaver testified that when she left for the day, the shelves were "perfect," straightened, and full.

When Ms. Beaver arrived to work at store 99 the next morning, she noticed that the shelves in her section were "pretty empty" and that there were "holes everywhere." Ms. Beaver testified that she "flipped out," because she had just stocked the shelves, and she immediately contacted her manager regarding the missing products. Ms. Beaver then assisted in scanning the inventory to determine which items were missing. She recalled that some of the missing products were Crest White Strips, Sonicare Replenish Brush, Tylenol, Advil, foot creams, Prilosec, and Zantac. Ms. Beaver testified that, to her knowledge, none of the missing items were subsequently located in the store. Sharon Lloyd ("Ms. Lloyd"), the store's Customer Service Manager, also assisted in counting the missing products.

Audrey Edwards ("Ms. Edwards"), the store's Loss Prevention Specialist, also testified for the State. Ms. Edwards testified that she was familiar with the store's system for stocking

products, as well as its computerized warehouse inventory system. She explained that, when an item becomes low in number, the associate assigned the section is responsible for scanning the item with a gun ("order gun"), which automatically submits an order for the item to the Harris Teeter distribution center. Then, after the item is delivered to the store, the associate is responsible for unpacking the items and checking them against the order sheet to ensure that the order is correct. Ms. Edwards testified that, to her knowledge, this was the procedure that was used on 10 May 2006 in the health and beauty section.

Ms. Edwards knew about the incident that occurred the night before when she arrived at the store around 9:00 a.m. on 11 May 2006. She immediately went to the health and beauty section to look at the quantity of items on the shelves. Next, she went to the manager's office to review a video tape of the incident, which showed a man removing products from shelves in the health and beauty section. At trial, Ms. Edwards identified defendant as the man in the video removing the products. She then returned to the health and beauty section to look at the shelves and match what she had seen on the video. Ms. Edwards also spoke with Ms. Beaver about the missing items. She asked Ms. Beaver to identify any items that Ms. Beaver remembered placing on the shelves the previous day, but were missing. According to Ms. Edwards, she and Ms. Beaver also watched the video to help determine which items were removed from the shelves.

Ms. Edwards then retrieved an order gun and scanned the items that were received on 10 May 2006. Ms. Edwards also ran reports from the cash registers to determine whether any of the items were sold. Because Ms. Edwards knew what had been received the day before, she was able to determine if any of the items were sold between the time they had been stocked on 10 May 2006 and the time she scanned them the next day. Based on the foregoing, Ms. Edwards prepared a report showing the items that were missing from the shelves but not purchased. The report was introduced into evidence, and listed the UPC ("universal product code") for each missing product, the quantity missing, the retail price, and the wholesale price. Ms. Edwards testified that there were 93 missing products, and that the missing products had a total retail value of \$3,861.69.

After scanning the items, Ms. Edwards searched the store for any items that may have been placed on a wrong shelf or any abandoned grocery baskets containing the missing items. She did not find any of the items that were missing.

Next, Michael Bowers ("Mr. Bowers") testified for the State. Mr. Bowers is a Loss Prevention Specialist for Harris Teeter Supermarkets. On 10 May 2006, Mr. Bowers was in Reston, Virginia during the incident, but Harris Teeter's digital recorder network allowed him to view live images from the store's sixteen video cameras remotely. On 10 May 2006, Mr. Bowers received a call from Nolan Wynn ("Mr. Wynn"), a fellow loss prevention employee, who asked Mr. Bowers to pull up live video from store 99, because two

suspected shoplifters had pulled into the store's parking lot. Mr. Bowers thereafter monitored the activities of defendant and his associate, Kenneth Griggs ("Mr. Griggs") inside the store on his laptop. At trial, Mr. Bowers identified defendant as one of the men in the video. He testified that Mr. Griggs entered around 9:50 p.m. and defendant entered around 9:54 p.m. The video stops around 10:16 p.m., after Mr. Griggs exited the store through the public entrance. Mr. Bowers was speaking with Mr. Wynn on the telephone while he was watching the video, and, shortly after Mr. Griggs left, Mr. Wynn notified Mr. Bowers that defendant left through the fire exit. Mr. Bowers testified that he did not see defendant leave, because the fire exit does not have a camera.

Mr. Wynn, the Director of Loss Prevention, was the last witness to testify. Mr. Wynn oversees Harris Teeter's field loss prevention specialists and is responsible for the design of Harris Teeter's video system. On 10 May 2006, Mr. Wynn and several other loss prevention associates traveled to Gastonia, North Carolina to conduct surveillance on defendant and Mr. Griggs. In the early evening, Mr. Wynn verified that defendant was home and then he and his team parked approximately one block away from defendant's house. Defendant and Mr. Griggs left in a Chevy Camaro around 6:00 p.m. Mr. Wynn and his team followed defendant and Mr. Griggs around until approximately 9:45, at which time they arrived at the store. Mr. Wynn immediately contacted Mr. Bowers and requested that he monitor the suspects' activities inside the store.

Mr. Wynn also had a video camera and recorded defendant and Mr. Griggs in the parking lot. A copy of the video recording was entered into evidence at trial. Mr. Wynn watched defendant and Mr. Griggs enter the store separately and then saw Mr. Griggs leave approximately twenty minutes later. Mr. Griggs then entered his car and drove around to the back of the store. Mr. Wynn recorded defendant carry three grocery baskets full of merchandise out of the fire exit and enter Mr. Griggs' car with the merchandise, but he could not specifically identify the products in the baskets. Mr. Wynn followed the suspects back to their residence, and then contacted Ms. Edwards to determine the value of the items that were stolen.

Following the conclusion of the State's evidence, defendant moved to dismiss the felonious larceny charge, which the trial court denied. Defendant did not present any evidence, and he renewed his motion to dismiss at the close of all evidence, which the trial court again denied. On 12 February 2008, the jury returned a verdict finding defendant guilty of felonious larceny. Defendant then entered a plea of no contest to attaining the status of an habitual felon. On 12 February 2008, the trial court entered judgment and sentenced defendant to a minimum term of 135 months to a maximum term of 171 months in the North Carolina Department of Correction. Defendant appeals.

Defendant raises only one argument on appeal. Defendant contends that the trial court erred in denying his motion to dismiss as to the charge of felonious larceny. 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 may properly deny a motion to dismiss where "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).

Pursuant to N.C. Gen. Stat. § 14-72, "defendant's larceny could be considered a felony, rather than a misdemeanor, only if the value of the property he took was more than \$ 1,000.00 or if he committed the larceny in the course of a felonious breaking and entering." *State v. Matthews*, 175 N.C. App. 550, 556, 623 S.E.2d 815, 820 (2006). "[T]o convict of the felony of larceny, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than \$ 200.00 [now \$1000.00]." *State v. Holloway*, 265 N.C. 581, 583, 144 S.E.2d 634, 635 (1965).

Defendant's challenge to the sufficiency of the evidence relates to the State's evidence regarding two elements of felonious larceny. Because none of the State's witnesses personally observed defendant remove specific items from the shelves and take them out of the store without permission, defendant claims that the State's

evidence was insufficient to establish that he took and carried away property of another and that the value of the property exceeded \$1,000.00.

The State's evidence in the instant case is circumstantial. However, it is well-established that ". . . the essential facts [of larceny] can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture." *State v. Boomer*, 33 N.C. App. 324, 327, 235 S.E.2d 284, 286 (1977) (internal citations omitted). Moreover, 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)).

After reviewing the record, we find that the challenged elements are supported by sufficient evidence to withstand a motion to dismiss. Ms. Beaver testified that her shelves were full when she left for the day on 10 May 2006 and were empty when she returned the next day. Several of the State's witnesses identified defendant as the person who removed items from the health and beauty section in the video. Mr. Wynn witnessed defendant leave through the store's fire exit with three grocery baskets full of merchandise. Finally, Ms. Edwards was able to create a report containing the description, quantity, and value of the missing items. Although none of the State's witnesses personally saw



defendant remove 93 specific items from the store's shelves and leave without paying for them, all the facts and circumstances, taken together, constitute substantial evidence to support the inference that defendant carried away the items in question without consent and that the value of the items exceeded \$1,000.00. The evidence is indeed circumstantial and may not be sufficient standing alone, but "[i]t is immaterial that any individual piece of circumstantial evidence, taken alone, is insufficient to establish [the elements of the crime]." *State v. Mercer*, 317 N.C. 87, 98, 343 S.E.2d 885, 892 (1986). We conclude 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, defendant's assignment of error is overruled.

No error.

Judges WYNN and STROUD concur.

Report per Rule 30(e).