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NO. COA09-416

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

Guilford County
No. 07 CRS 24654

BILLY RAY GRAHAM

Appeal by defendant from judgment entered 22 September 2008 by Judge Richard W. Stone in Guilford County Superior Court. Heard in the Court of Appeals 30 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State

Irving Joyner, for defendant-appellant.

CALABRIA, Judge.

Billy Ray Graham ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felony failure to appear. We find no error.

The State presented evidence tending to show that on 23 October 2006, a magistrate issued an order setting forth the terms of defendant's release on a charge of felony possession of cocaine. The order set a bond in the amount of \$500 and directed defendant to appear in court as stated in the order and at all times. Defendant's trial on the charge of felony possession of cocaine commenced at approximately 12:06 p.m. on 10 July 2007. The trial

continued for the duration of that day, the next day, and until approximately 11:07 a.m. on 12 July, 2007, when the jury began deliberations. The court allowed a break at that time and instructed everyone to return to the courtroom in fifteen minutes. Defendant, who had been present for all proceedings, left the courtroom during this break. Defendant failed to return to the courtroom by the resumption of court at 11:27 a.m. Defendant's attorney and the court bailiff left the courtroom and unsuccessfully attempted to locate defendant. No person could supply any information as to defendant's whereabouts. The court directed the bailiff to call out defendant's name. Defendant failed to answer and the court issued an order for defendant's arrest. After defendant never appeared in court the remainder of that day, the next day the clerk mailed the arrest order to the Rockingham County Sheriff's Department. Between 12 July 2007 and the date of service of the arrest order on 27 September 2007, defendant never appeared in court.

Defendant presented evidence tending to show that he left the courtroom during the recess and along with a friend went to the office of the register of deeds in the courthouse. Defendant called his attorney's office and left a message with his telephone number so he could be contacted by counsel when the jury returned a verdict. Defendant never heard anything from his attorney's office by 4:30 or 5:00 p.m. that day so he and his friend left the courthouse and returned home.

Defendant was subsequently arrested, and tried for felony failure to appear in Guilford County Superior Court. At the close of the State's evidence, defendant made a motion to dismiss for insufficient evidence, which was denied by the trial court. At the close of all the evidence, defendant again made a motion to dismiss which was also denied. The jury returned a verdict of guilty to felony failure to appear. Defendant made a motion to set aside the verdict, and the trial court denied this motion. Defendant was sentenced to a minimum term of six months to a maximum term of eight months in the North Carolina Department of Correction. Defendant appeals.

Defendant argues that the court erred by denying his motions to dismiss for insufficient evidence and to set aside the verdict. We disagree.

Upon a motion to dismiss, the trial court determines whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). In deciding a motion to dismiss, the court must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The court is to disregard contradictions and discrepancies in the evidence and leave them for resolution by a jury. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) A motion to set aside the verdict is addressed to the discretion of the trial

judge, and an abuse of discretion will not be found when there is sufficient evidence to support the verdict. *State v. Serzan*, 119 N.C. App. 557, 561-62, 459 S.E.2d 297, 301 (1995).

N.C. Gen. Stat. § 15A-543 provides, in pertinent part:

(a) In addition to forfeiture imposed under Part 2 of this Article, any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section.

(b) A violation of this section is a Class I felony if:

- (1) The violator was released in connection with a felony charge against him; or
- (2) The violator was released under the provisions of G.S. 15A-536.

N.C. Gen. Stat. § 15A-543 (2007).

Thus, to survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence: (1) the defendant was released on bail pursuant to Article 26 of the North Carolina General Statutes in connection with a felony charge against him or, pursuant to Section 15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful.

State v. Messer, 145 N.C. App. 43, 47, 550 S.E.2d 802, 805 (2001).

Defendant argues the evidence is insufficient to convict him of failure to appear in violation of N.C. Gen. Stat. § 15A-543 because he did appear in court on 9 July 2007 as directed by the trial calendar for the session of court. We disagree.

"A bail bond posted pursuant to [N.C. Gen. Stat. § 15A-534] is effective and binding upon the obligor throughout all stages of the

proceeding in the trial division of the General Court of Justice until the entry of judgment in the district court from which no appeal is taken or the entry of judgment in the superior court." N.C. Gen. Stat. § 15A-534(h) (2007).

A person once in court by service of summons or subpoena, or by giving bond for his appearance in a criminal action, must continue to appear, according to the precept of the court, until discharged, and in the latter case his sureties remain liable until the defendant is placed in custody or gives a new bond or is discharged on acquittal or by order of the court.

State v. Eure, 172 N.C. 874, 876, 89 S.E. 788, 789 (1916).

In the instant case, defendant executed an "Appearance Bond for Pretrial Release" that was not only signed by defendant, but also a surety and a magistrate. By signing this bond, defendant committed himself to appear "whenever required" in the action. The bond bound defendant and each surety "throughout all stages of the proceedings in the trial divisions of the general court of justice until the entry of judgment in the district court from which no appeal is taken or until the entry of judgment in superior court." The record shows that the trial judge directed all of the parties to return after the break on 12 July 2007. Defendant failed to appear in court after the break or at any time thereafter until his subsequent arrest.

We hold this evidence sufficed to withstand the motion to dismiss. We also hold the court did not abuse its discretion by denying the motion to set aside the verdict.

No error.

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Judges WYNN and STROUD concur.

Report per Rule 30(e).