NO. COA10-1359
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

STATE OF NORTH CAROLINA

v. Wake County
No. 09 CRS 38133; 09 CRS 49109

CHARLES D. BECTON

Appeal by Defendant from judgment entered 10 June 2010 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 12 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Thomas D. Henry, for the State.

Mercedes O. Chut for Defendant.

BEASLEY, Judge.

Charles D. Becton (Defendant) appeals from judgment entered on his convictions of felony breaking and entering, felony larceny, and habitual felon status. For the reasons stated below, we conclude there is no error.

On 1 April 2009 at 7:00 a.m., Kathryn Cashwell, a paralegal at the law firm of McAngus, Goudelock & Courie, PLLC, came to work and discovered a broken back window and shattered glass on the floor near her desk. It appeared that a cinder block was

used to break the window and enter the office. Cashwell called the police and then noticed that several items were missing, including a 40-inch television with a polycom, a VCR and DVD player, an attorney's rolling briefcase, and an unknown amount of cash. She estimated the value of the missing property to be approximately $10,000.

Cashwell, along with office manager Claire Lussman, noticed that the office's front door had a red substance smeared on it that looked like blood. That same day, the City County Bureau of Identification (CCBI) sent employees to the office to collect evidence. Latent fingerprints taken from the crime scene were sent to David Mishoe, a forensic analyst for the CCBI who was accepted by the court as an expert in this field. During his analysis, he found that two prints matched the left and right thumb of Defendant. Mishoe was unable to determine when the prints were impressed.

Detective Jonathan Layman arrested Defendant and told him, "[W]e have fingerprints linking you to the crime scene." Defendant's response was that he had never been to the law office. Detective Layman obtained two search warrants to take Defendant's DNA sample.[1]

[1] Detective Layman obtained the second search warrant because

The DNA sample was sent to Keisha Stewart, a forensic serologist employed by the North Carolina State Bureau of Investigation (SBI) and accepted by the trial court as an expert in the field of forensic serology. The Raleigh Police Department had also sent Stewart two blood samples from the crime scene. Upon analyzing the samples, Stewart determined that they were indeed blood.

Courtney Cowan, a special agent with the SBI, testified as an expert on the subject of DNA analysis. She received the swabs taken from the interior door handle and found that the DNA profile matched that of Defendant.

At the close of the State's evidence, Defendant, who proceeded *pro se*, made a motion to dismiss the charges. The trial court denied the motion. Defendant then offered the testimony of his only witness, his girlfriend, Yolanda Jordan. She testified that Defendant was at her house the night of the break-in, that she never saw the missing items from the firm, and therefore Defendant could not have committed the crime.

Defendant made a motion to dismiss at the close of all evidence, which was again denied. The jury returned a verdict

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Defendant did not cooperate in submitting a sample after the first search warrant was obtained.

of guilty on the charges of felony breaking and entering and felony larceny.

I.

Defendant argues that the trial court erred in admitting fingerprint and DNA evidence as the State failed to lay a proper foundation for its admission. We disagree.

The standard of review to determine the admissibility of evidence is *de novo*. *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009). When a defendant fails to object at trial to the admission of evidence, this Court must determine if the admitted evidence constitutes error. *State v. Locklear*, 172 N.C. App. 249, 259, 616 S.E.2d 334, 341 (2005). If there is error, the court then considers whether it was prejudicial, such that "there is a reasonable possibility that a different result would have been reached at the trial out of which the appeal arises" had the error not been committed. N.C. Gen. Stat. § 15A-1443(a) (2009).

Defendant contends that "all evidence about the fingerprint, blood and DNA evidence was admitted in error, causing certain prejudice to Mr. Becton[.]" Defendant supports his argument by a discussion of chain of custody requirements in evidence law. Assuming *arguendo* that the chain of custody as to

the fingerprint and DNA evidence was not adequately established, Defendant still would not prevail because he "invited error." *See State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1988).

Invited error occurs when a defendant cross-examines the State's witnesses and elicits information concerning evidence about which the defendant now objects. *See State v. Rivers*, 324 N.C. 573, 575, 380 S.E.2d 359, 360 (1989). N.C. Gen. Stat. § 15A-1443 states that "a defendant is not prejudiced . . . by error resulting from his own conduct" by inviting error. N.C. Gen. Stat. § 15A-1443(c) (2009).

Here, Defendant sought a multitude of information regarding the DNA and fingerprint evidence from the State's witnesses on cross-examination. For example, Defendant asked analyst Mishoe about the results of the fingerprint evidence.

> [Defendant:] What did your evidence speak as it relates to this fingerprint?
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> [Mishoe:] As I stated yesterday in my testimony on direct examination, that on two latent prints in this case I identified to the defendant Charles Becton, one is his right thumb and one is his left thumb. . . .
> . . . .
> [Defendant:] What did the fingerprint say?
>
> [A:] To me it says that the – that the defendant touched those surfaces [at] some point in time with his thumb. The left thumb and the right thumb at some point in time came in contact with those surfaces. .

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Defendant further elicited information from Detective Layman about the location of the fingerprint and whether "there was anything additional that was related to this fingerprint that caused [him] to get . . . an arrest warrant." Detective Layman stated that "[t]he fingerprint was located in a secure facility that was in a conference room. There was no legal reason why that particular fingerprint would be located in that particular room." Moreover, Defendant questioned Cowan, the SBI agent, about the likelihood of selecting an unrelated individual based upon the crime scene samples. Cowan replied, "[t]he probability of randomly selecting an unrelated individual with a DNA profile that matches the DNA profile . . . is one in greater than one trillion . . . [w]hich is more than the world population." Accordingly, if chain of custody was not properly established, Defendant is not entitled to relief due to these instances of invited error. For this reason, we find no error in the trial court's admission of the DNA and fingerprint evidence taken from the crime scene.

II.

Defendant argues that the trial court erred in failing to dismiss the charges at the close of the State's evidence and at

the close of all evidence because as the fingerprint and DNA evidence was inadmissible, there was not "substantial evidence" that Defendant committed the crimes. We disagree.

It is well established that

> [w]hen ruling on a motion to dismiss, the trial court must determine whether the prosecution has presented substantial evidence of each essential element of the crime. Substantial evidence is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The trial court must view the evidence in the light most favorable to the [S]tate, giving the [S]tate the benefit of every reasonable inference that might be drawn therefrom.

State v. Coltrane, 188 N.C. App. 498, 505, 656 S.E.2d 322, 327 (2008) (internal quotation marks and citations omitted).

Defendant's argument that there was insufficient evidence to support the charges rests on his initial contention that the DNA and fingerprint evidence were inadmissible. However, we have concluded that the challenge to the admission of the DNA and fingerprint evidence is meritless. Therefore, Defendant's assignment of error as to insufficient evidence is overruled.

III.

Defendant's third argument on appeal is that the trial court erred by not instructing the jury on the lesser included offense of misdemeanor breaking and entering because there was

evidence presented from which the jury could find that the breaking and entering was committed without a felonious intent. We disagree.

Jury instructions given by the trial court are subject to *de novo* review. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A] trial judge must instruct the jury on all lesser included offenses that are supported by the evidence, even in the absence of a special request for such an instruction, and . . . the failure to do so is reversible error which is not cured by a verdict finding the defendant guilty of the greater offense." *State v. Montgomery*, 341 N.C. 553, 567, 461 S.E.2d 732, 739 (1995). "The trial court is not required to submit a lesser-included offense 'when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged.'" *State v. Bellamy*, 159 N.C. App. 143, 150, 582 S.E.2d 663, 668 (2003) (quoting *State v. Smith*, 110 N.C. App. 119, 134, 429 S.E.2d 425, 432 (1993)).

Defendant contends that an instruction on the lesser-included offense of misdemeanor breaking or entering should have been given. "Misdemeanor breaking or entering, G.S. 14-54(b), is a lesser included offense of felonious breaking or entering

and requires only proof of wrongful breaking or entry into any building." *State v. O'Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985). Felony breaking and entering requires not only a breaking and entering, but also intent to commit a felony or larceny therein. *See* N.C. Gen. Stat. § 14-54 (2009). "[E]vidence of what a defendant does after he breaks and enters a house is evidence of his intent at the time of the breaking and entering." *State v. Gray*, 322 N.C. 457, 461, 368 S.E.2d 627, 629 (1988).

Defendant argues that the trial court was required to submit the lesser-included offense of misdemeanor breaking and entering where the State relied on the missing television and briefcase to prove intent at the time of the breaking and entering. Defendant contends that proof of the missing items is not dispositive of Defendant's intent to commit larceny and therefore the trial court was required to submit the lesser-included offense to the jury. However, we have previously concluded that evidence of missing items after a breaking or entering is sufficient to dispose of the necessity to instruct on misdemeanor breaking or entering. *See State v. Hamilton*, 132 N.C. App. 316, 321-22, 512 S.E.2d 80, 85 (1999); *State v. Berry*, 58 N.C. App. 355, 358, 293 S.E.2d 650, 652 (1982) (holding that

it was not necessary to instruct on the misdemeanor offense of breaking or entering since all the evidence indicated that whoever broke in intended to steal). In *Hamilton*, the Court distinguished between two scenarios: (i) when there was an independent reason for the defendant to be in the premises aside from committing larceny, and (ii) when there was "no other explanation [] given for the unauthorized entry." *Id.* at 321-22, 512 S.E.2d at 85. In the second scenario, the court held that "there was no need to instruct the jury on the lesser included offense[.]" *Id.* at 322, 512 S.E.2d at 85.

Here, Defendant offered no valid justification for his presence in the office of McAngus, Goudelock & Courie, PLLC that could have warranted an instruction on the lesser included offense of misdemeanor breaking or entering, such as Defendant working as an employee or being a client of that office. Furthermore, there is sufficient evidence that Defendant intended to commit larceny-fingerprint and DNA evidence linked Defendant to a broken window and missing items. Since there was nothing to suggest that Defendant was on the premises for a purpose other than to commit larceny, the trial court had no grounds to instruct the jury on the lesser- included offense of

misdemeanor breaking or entering. Therefore, Defendant's arguments are without merit.

IV.

Defendant's final argument is that the trial court erred in proceeding with the habitual felon phase in Defendant's absence. We disagree.

It is well established by the North Carolina Constitution, as well as North Carolina case law that a defendant has a right to be present for all phases of trial. *State v. Jones*, 346 N.C. 704, 708-709, 487 S.E.2d 714, 717 (1997); N.C. Const. art. I, § 23. However, this right is not absolute, and can be waived by a defendant in noncapital felony trials. *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991) (citations omitted). "A defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver . . . . [T]he burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred." *Id.*; *see also State v. Mulwee*, 27 N.C. App. 366, 219 S.E.2d 304 (1975).

At trial, after Defendant's motion to dismiss at the close of all evidence was denied, the trial court permitted Defendant to leave the courthouse and be placed on "telephone standby"

during the jury's deliberation. After the jury notified the trial court that it had reached a verdict, Defendant was telephoned. He told the trial court that it would take him fifteen minutes to return. After waiting twelve minutes, the trial court deemed Defendant's absence unacceptable and summoned the jury to return. The jury announced its verdict finding Defendant guilty of all charges. Defendant was not present, nor was his location known; he did not appear for the habitual felon stage.

Regarding Defendant's absence, the trial court entered the following statement:

> I do want it on the record that the jury notified the Court at 3:40 that they had a verdict in the case and Mr. Becton was immediately called and told that he would be here in 15 minutes.
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> He was recalled and told that that's not acceptable and he needed to be back and he is not here and the time is now 3:51, 3:52 and I am going to bring the jury to take their verdict since Mr. Becton has chosen not to appear.
>
> We granted -- the Court granted him the privilege of being on telephone standby but he has not returned after having been called.

Defendant urges that the trial court could have waited fifteen minutes instead of twelve minutes for Defendant to

return before reconvening, noting that he was *pro se* and probably should not have been allowed to leave the courthouse while the jury was deliberating. However, the fact that Defendant was *pro se* does not confer on him any special privileges. *State v. Brincefield*, 43 N.C. App. 49, 52, 258 S.E.2d 81, 83-84 (1979). Furthermore, Defendant had not returned in fifteen minutes and never returned on 8 June 2010.

At no point did Defendant attempt to explain his absence, for which there was an opportunity on 10 June 2010 when Defendant reappeared in court for sentencing purposes. Thus, waiver can be inferred from Defendant's lack of explanation and from his prolonged absence. *See Richardson*, 330 N.C. at 178, 410 S.E.2d at 63 (waiver inferred where inconsistent explanations were given to the trial court regarding defendant's absence); *State v. Skipper*, 146 N.C. App. 532, 535-36, 553 S.E.2d 690, 692-93 (2001) (waiver inferred where defendant did not return from a five-minute recess when the habitual felon proceeding had already begun, and did not offer any explanation or justification for his absence). For these reasons, we hold that the trial court did not abuse its discretion by proceeding with the habitual felon phase in Defendant's absence.

No Error.

Judges MCGEE and STROUD concur.

Report per Rule 30(e).