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NO. COA10-329

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

KEVIN STEFFON PEGUES,
Defendant.

Davie County
Nos. 08 CRS 1472
08 CRS 51083

Appeal by defendant from judgment entered 16 December 2009 by Judge Ted S. Royster, Jr. in Davie County Superior Court. Heard in the Court of Appeals 30 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

J. Clark Fischer for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Kevin Steffon Pegues appeals from the trial court's judgment entered pursuant to his conviction of felony larceny and his pleading guilty to being a habitual felon. After careful review, we find no error.

Facts

The State's evidence tended to establish the following facts at trial: Benji Goodings, an assistant manager at the Cooper Creek Road Walmart in Mocksville, North Carolina, worked the night shift from 8:00 p.m. to 7:00 a.m. on 19-20 April 2008. At the end of his shift, Mr. Goodings noticed that product appeared to be missing

from several shelves in the health and beauty aid section of the store. Mr. Goodings contacted the store's loss prevention department.

That same morning, Gary Curtis, who is in charge of loss prevention and safety at the store, reviewed the surveillance videotapes from the area of the missing products and determined that three people entered the store sometime after midnight, concealed the merchandise, and left the store without paying for it. Mr. Curtis then inspected the shelves where the merchandise was missing, took photographs of the area, and used the Store's "Telzon" inventory system to determine what merchandise was missing.¹ Mr. Curtis then input the PUC numbers of the missing merchandise into a cash register and the register generated a list of the missing items and their value, including: 40 units of Zyrtec (\$27.97 each), 12 units of Ibuprofen (\$8.37 each), 13 units of Motrin (\$5.82 each), some amount of Tylenol (no price stated), and some amount of sleep medication (\$9.97 each), as well as two battery-powered toothbrushes (\$34.94 each), one set of toothbrush refills (\$21.88 each), a second set of refills (\$19.78 each), and three toothbrush accessories (\$16.77 each). Mr. Curtis's list showed 138 items missing with a total value of \$2,210.52.

¹According to Mr. Curtis, the Telzon system tracks all of the merchandise that enters the store and removes each item from the system when it is sold at a cash register. The inventory in the Telzon system is updated on a daily basis for high-theft items, such as merchandise in the health and beauty section, and is usually accurate to within one item.

Defendant was arrested on 11 June 2008, when Siler City Detective Clarence Johnson, Jr., responded to a shop-lifting call at another Walmart. At that time, Detective Johnson identified defendant as one of the three individuals in the security video from the Cooper Creek Road Walmart. Defendant was charged with felony larceny and having attained habitual felon status. During trial on the larceny charge, defendant's motions to dismiss the charge of insufficient evidence were denied. Defendant was convicted of felony larceny and defendant subsequently pled guilty to being a habitual felon. The trial court consolidated both charges into one judgment and sentenced defendant to a presumptive-range term of 140 to 177 months imprisonment as a Level VI offender. Defendant gave oral notice of appeal in open court.

Discussion

Defendant's sole contention on appeal is that the trial court should have granted his motion to dismiss the felony larceny charge for insufficient evidence. An appellate court "reviews the denial of a motion to dismiss for insufficient evidence *de novo*." *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008). A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Defendant was charged with felony larceny in violation of N.C. Gen. Stat. § 14-72(a) (2009). The essential elements of felonious larceny are that the defendant: "(1) took the property of another, (2) with a value of more than \$1,000.00, (3) carried it away, (4) without the owner's consent, and (5) with the intent to deprive the owner of the property permanently." *State v. Owens*, 160 N.C. App. 494, 500, 586 S.E.2d 519, 523-24 (2003); N.C. Gen. Stat. § 14-72(a). Defendant contends that the State's evidence was "deficient" in that it failed to establish (1) what particular items were stolen and (2) the value of the missing items.

For purposes of N.C. Gen. Stat. § 14-72, the term "value" means fair market value. *State v. Morris*, 318 N.C. 643, 645 n.1, 350 S.E.2d 91, 93 n.1 (1986). "Where a merchant has established a retail price which he is willing to accept as the worth of merchandise offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss." *State v. Odom*, 99 N.C. App. 265, 272-73, 393 S.E.2d 146, 151, *disc. review denied*, 327 N.C. 640, 399 S.E.2d 332 (1990).

At trial, Mr. Curtis testified that he made a list of missing items by cross-referencing on-hand counts against the Telzon inventory system. He then used a cash register to generate a list of missing merchandise, the quantities missing, and the unit price. This list was admitted into evidence and indicates that 138 items were taken, totaling \$2,210.52. The items include: 40 units of Zyrtec (\$27.97 each), 12 units of Ibuprofen (\$8.37 each), 13 units of Motrin (\$5.82 each), some amount of Tylenol (no price stated), and some amount of sleep medication (\$9.97 each), as well as two battery-powered toothbrushes (\$34.94 each), one set of toothbrush refills (\$21.88 each), a second set of refills (\$19.78 each), and three toothbrush accessories (\$16.77 each). This evidence is sufficient to establish the identity of the merchandise stolen and the value of the property. *See State v. Austin*, 75 N.C. App. 338, 342, 330 S.E.2d 661, 663-64 (1985) (upholding larceny conviction where store's security guard "offered a detailed account of the 'approximate' number of different items she observed being stolen and the retail value of each item, and she testified that the approximate total value of the goods taken was \$596.00"). The fact that Mr. Curtis testified that the Telzon inventory system is highly accurate in tracking store inventory, but is not "infallible," goes to the weight of evidence, not its sufficiency. The trial court, therefore, properly denied defendant's motion to dismiss the felony larceny charge.

No Error.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).