NO. COA10-63

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Sampson County
Nos. 08 CRS 52885-86

STEPHEN DARDEN,
Defendant.

Appeal by defendant from judgment entered 14 July 2009 by Judge Russell J. Lanier, Jr., in Sampson County Superior Court. Heard in the Court of Appeals 30 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Lisa G. Corbett, for the State.

Greene & Wilson P.A., by Thomas Reston Wilson, for defendant-appellant.

HUNTER, Robert C., Judge.

On 23 February 2009, defendant Stephen Darden was indicted on charges of felonious breaking and entering, larceny pursuant to breaking and entering, possession of stolen goods, and being a habitual felon.

Background

The State's evidence tended to establish the following facts at trial: On 3 August 2008, Barry Hayes went to a warehouse he rented at a mill on House Mill Road in Sampson County, North Carolina. Hayes stated that he went there because the mill had

been broken into previously, and he was "keeping a check on things." Hayes specifically noted that after a previous break-in, several motors were missing. When he went inside the mill, he saw defendant. Hayes testified that it was dark inside the mill, and he did not see defendant until defendant stepped out from behind a grain elevator. Defendant told Hayes that he had been sleeping in the mill. Hayes told defendant to leave, and that if he came back, the owners would have him "locked up." Defendant left the mill, and Hayes went up the road to his parent's house. Hayes returned to the mill after a few minutes because he had "seen something in the mill room that piqued my interest." Hayes testified that he had seen a "black tool bag with a bunch of tools . . . in it." Hayes decided to return to the mill to retrieve the bag, but upon returning to the mill, the bag was gone. Hayes observed defendant toting the bag down the road, wrapped in a t-shirt. After realizing that the bag was gone, Hayes went back to his car and retrieved a pair of binoculars. Hayes watched defendant through binoculars, and saw him being picked up by a woman in a red Jeep. Hayes followed the defendant, saw him get out of the car and place an object under a trailer. Hayes alerted the owner of the mill, Gerald Warren, the next day.

On 4 August 2008, Detective Christopher Godwin of the Sampson County Sheriff's Office went to the mill to investigate the break-in. Detective Godwin spoke with Warren and Hayes, and then followed Hayes to the trailer where Hayes saw defendant place the object. Detective Godwin discovered that the trailer had belonged

to defendant's deceased grandmother, that defendant had previously lived there, but the trailer was now vacant. Detective Godwin also learned that defendant dated a woman who drove a vehicle similar to a red Jeep.

Detective Godwin next proceeded to Dunn Scrap Iron and Metal in Dunn, North Carolina. Detective Godwin looked through receipts to see if any of the motors missing from Warren's mill had been sold there for scrap. Detective Godwin found several sales tickets that had defendant's name on it, as well as the name of Jennifer Minicozzi, who was defendant's girlfriend. Detective Godwin then went to defendant's residence and arrested him. Officer Godwin interviewed defendant, and defendant told Detective Godwin that he found and sold scrap metal for a living. Defendant admitted that he had taken motors and other scrap metal from the mill, but he thought it was okay because the mill "had been closed for a long time." Defendant further admitted that he had been at the mill on 3 August 2008, but denied taking anything from the mill on that date.

At trial, Brandon Harmon, who worked at Dunn Scrap Iron and Metal, testified that he was familiar with defendant. Harmon stated that he could not pinpoint an exact date, but defendant had been to the business sometime between 1 July 2008 and 12 August 2008. Harmon testified that, according to receipts, defendant had sold three electric motors to the business on 25 July 2008.

Defendant was convicted of felonious breaking or entering, non-felonious larceny, and being a habitual felon. The trial court

sentenced defendant to a term of 90 to 117 months imprisonment. Defendant timely appealed to this Court.

Analysis

Defendant first argues that the trial court erred by denying his motion to dismiss the charge of felonious breaking or entering for insufficiency of the evidence. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994) (citing *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991)). "'[I]f there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.'" *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quoting *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005)).

"'To support a conviction for felonious breaking and entering under G.S. § 14-54(a), there must exist substantial evidence of

each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein.'" *State v. Haymond*, __ N.C. App. __, __, 691 S.E.2d 108, 122 (2010) (quoting *State v. Walton*, 90 N.C. App. 532, 533, 369 S.E.2d 101, 103 (1988)). Here, Hayes testified that he found defendant inside the mill on 3 August 2008. Additionally, Warren testified:

> We have a chain link gate there to keep people from going in there. There's signs posted there that because OSHA requires us to keep signs up that there is no admittance, danger area, keep out. And I have got posted signs and keep out signs around there that, I mean, anybody can see that you're not supposed to go on that property.

Thus, there was evidence on the record to support a conclusion that defendant had entered the building without permission.

Defendant contends that the State failed to prove an essential element of larceny, namely, ownership of the property, and thus the motion to dismiss the charge of breaking and entering should have been allowed. "However, it was not incumbent upon the State to establish the ownership of the property which he intended to steal, the particular ownership being immaterial." *State v. Crawford*, 3 N.C. App. 337, 341, 164 S.E.2d 625, 628 (1968).

Regarding the final element, whether defendant had the intent to commit a felony upon breaking and entering, we conclude that the evidence presented by the State was sufficient to support a conclusion that defendant possessed the required intent. Defendant admitted to Detective Godwin to having previously taken electric motors and other scrap metal from the mill. Defendant further

admitted to going to the mill on 3 August 2008 "to get some metal to sell." Thus, a jury could reasonably infer that defendant entered the mill with an intent to commit a larceny. *See State v. Garcia*, 174 N.C. App. 498, 503, 621 S.E.2d 292, 296 (2005) ("The jury may infer the requisite specific intent to commit larceny at the time of the breaking and entering from the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged."). Therefore, we hold the trial court properly denied defendant's motion to dismiss at the close of the State's case.

Defendant next argues that the habitual felon statute, as applied to him, constitutes cruel and unusual punishment. Defendant asserts that the sentence he received is far in excess of the maximum sentence for felonious breaking and entering, a Class H felony.

Defendant pled guilty, was sentenced from the mitigated range of punishment, and does not raise an issue as to the calculation of his prior record level. Thus, defendant is not entitled to appellate review of his habitual felon conviction. *See* N.C. Gen. Stat. § 15A-1444(a1) and (a2) (2009). Furthermore, defendant failed to raise this issue in the trial court. "[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Therefore, we decline to consider defendant's argument. In any event, we would conclude that defendant's argument was wholly without merit. In *State v.*

Williams, 149 N.C. App. 795, 561 S.E.2d 925 (2002), this Court stated that "'our courts have held the procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees.'" *Id.* at 802, 561 S.E.2d at 929 (quoting *State v. Wilson*, 139 N.C. App. 544, 550, 533 S.E.2d 865, 870 (2000)). This Court is bound by prior decisions of this Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989) (where one panel of the Court of Appeals "has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

Finally, we note that the record indicates that defendant was convicted of felonious breaking and entering. However, the judgment only lists convictions for non-felonious larceny and being a habitual felon on the judgment form. Accordingly, we remand the judgment to the trial court for correction of this clerical error.

No prejudicial error; remanded for correction of a clerical error.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).