NO. COA10-633

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 209836

TAROLUS LAMAR SANDERS,
Defendant.

Appeal by defendant from judgment entered 15 October 2009 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 November 2010.

Roy Cooper, Attorney General, by Phyllis A. Turner, Assistant Attorney General, for the State.

Kimberly P. Hoppin, for defendant-appellant.

THIGPEN, Judge.

Defendant was indicted for felonious breaking and entering on 22 September 2008. The charges of felonious breaking or entering and ethnic intimidation were joined for trial. This case came for trial on 12 October 2009. A jury convicted defendant of felonious breaking of a building, but found him not guilty of ethnic intimidation. The trial court sentenced defendant to a minimum of six and a maximum of eight months in the custody of the Department of Correction, and ordered defendant to pay restitution in the amount of $325.00 to the victim. Defendant gave notice of appeal in open court.

The State's evidence tended to show that on the morning of 27 February 2008, the victim was in her kitchen. She saw two men looking inside her house, knocking on the door, and ringing the doorbell. The victim did not know the men. The victim then saw the men move their small green car to the driveway of the vacant house next door. Then the men went around to the back of the victim's house and tried to open the windows and door. They were unsuccessful at gaining entry to the home and the victim called the police. While the victim was on the phone with the police, the men threw a rock through one of the windows breaking the glass. The victim fled out the front door, setting off her security alarm. The men fled after the security alarm sounded. The victim flagged down her neighbor who was leaving for work. When asked what was happening the victim pointed to her home and said in Spanish "robber." The neighbor saw the two men run from behind the victim's house to the driveway of the vacant house next door, get in a green four-door Pontiac and drive away. The victim noticed that the trunk of the car was open. The neighbor took the phone from the victim and told the police the direction the men were traveling. Police arrived about five minutes after the men fled the scene. When the police arrived, the neighbor went inside to help translate for the victim. She noticed that one of the windows on the back door was broken. An officer with the Charlotte-Mecklenburg Police Department received a "Be on Look Out" call for a green Pontiac. The officer noticed a car matching that description. He apprehended the driver and the passenger of the

car. The victim's neighbor was taken to the scene to make an identification. She was one-hundred percent sure that the car was the same car she saw fleeing the area and that the men were the same men seen running from behind the victim's home. Defendant was arrested, waived his rights, and submitted to an interview with police. The interview was recorded and later transcribed. Defendant admitted that he and his cousin "targeted some Mexicans," that he and his cousin had entered the backyard, and that they had been responsible for the rock.

Defendant first challenges the trial court's order that defendant pay restitution in the amount of $325.00. Defendant argues that the amount of restitution was not supported by the evidence as required by N.C. Gen. Stat § 15A-1340.36(a) (2009). We agree.

"While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18)." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004). "In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution. Further, it is elementary that a trial court's award of restitution must be supported by competent evidence in the record." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992). This Court in *Buchanan* also stated that "the unsworn statements of the prosecutor" do "not constitute evidence and cannot support the

amount of restitution recommended." *Id.* This Court has held "that a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *State v. Mauer*, __ N.C. App. __, __, 688 S.E.2d 774, 778 (2010).

In the record before us, the issue of restitution was addressed as follows at trial:

> [PROSECUTOR]: Your Honor, I failed to mention one thing, there is restitution of $325.00 for the broken window, and I have the restitution worksheet if you care to see that, as well as the prior record level worksheet for felony sentencing purposes. May I approach?
>
> COURT: Have you seen the restitution worksheet and the prior record level calculations?
>
> [DEFENSE COUNSEL]: I have seen the prior record level but I have not seen the restitution worksheet.
>
> (WHEREUPON, the Assistant District Attorney . . . presented the restitution worksheet to Defense Attorney . . . for review.)
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.
>
> (WHEREUPON, the Assistant District Attorney . . . presented the restitution worksheet and the prior record level worksheet to the Presiding Judge for review.)
>
> . . . .
>
> COURT: All right. Mr. Sanders, is there anything that you want to say? I'm sorry - yes. Mr. Sanders, is there anything that you want to say?
>
> DEFENDANT: No, sir.
>
> [DEFENSE COUNSEL]: Your Honor, if I may?
>
> COURT: Yes, ma'am.

> [DEFENSE COUNSEL]: I didn't tell you, but he does have one day credit on this case and I do have 28.2 hours in this matter.
>
> COURT: All right. Again, Mr. Sanders, is there anything that you wish to say at this time?
>
> DEFENDANT: No, sir.

Based on this exchange, the State argues that defendant stipulated to the restitution because his attorney failed to object at the time she reviewed the restitution worksheet. However, in *Mauer*, this Court expressly rejected this argument:

> The State further objects to review of the restitution award, arguing that defendant stipulated to the restitution award by remaining silent when the trial court explained to her that it was ordering her to pay $259.25 in restitution. "While it is true that '[s]ilence, under some circumstances, may be deemed assent,' a stipulation's terms must nevertheless 'be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them.'" *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) (quoting *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005)). Under the facts of this case, defendant's silence while the trial court orally entered judgment against her does not constitute a stipulation to [the] amount of restitution.

__ N.C. App. at __, 688 S.E.2d at 778.

Because the record in the case *sub judice* otherwise shows that no competent evidence was presented regarding the issue of restitution, we vacate and remand this portion of defendant's sentence for a rehearing.

Defendant also contends the trial court erred in sentencing him at a prior record level of II. He contends the State failed to

prove his prior convictions, prior record level points, and prior record level. We disagree.

"A stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object and failed to do so." *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007). Where a prior record level worksheet is submitted to the trial court, and a defendant fails to object to the convictions contained therein, this Court has held that the defendant has stipulated to the charges. *Id.* at 299, 639 S.E.2d at 86. Since the transcript of trial, quoted *supra*, shows that defendant offered no objection to the prior record level worksheet, we conclude that defendant stipulated to his prior record level.

Defendant next challenges the trial court's instructions to the jury stating that it was plain error to instruct the jury on the theory of "acting in concert." He argues there was insufficient evidence presented of a common plan or purpose to commit larceny. He posits his statement to police indicates only that he and his cousin had a plan to "target some Mexicans" and break the victim's window. We disagree.

> [I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose; that is, the common plan to rob, or as a natural or probable consequence thereof.

State v. Westbrook, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971) (internal quotation marks omitted), *death penalty vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972). Although defendant only admitted to throwing the rock and "targeting some Mexicans," additional evidence shows that larceny, if not the primary motive, was at least a natural and probable consequence of defendant's actions. The victim testified that two men rang her doorbell and knocked loudly on her front door. She testified these men then came to the back of the house and tried to gain entry via the doors and windows and when they could not, they threw a rock through the window of the back door. This evidence would suggest that the men intended to reach through and unlock the door. Further evidence shows that the defendants left the trunk of their car open as if to make it easier to load stolen goods from the victim's house. A probable consequence of several failed attempts to gain entry without the owner's consent, followed by what could reasonably be perceived as another attempt to forcefully enter the home, is that the men intended to commit larceny therein.

Regardless, defendant has failed to meet his heavy burden under the plain error standard. "Under the plain error standard of review, defendant has the burden of showing: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (internal quotation marks omitted), *cert. denied,* 543 U.S. 1023, 160 L. Ed. 2d. 500 (2004). Assuming

arguendo that there was error in the trial court's instruction, we cannot conclude that the error would have caused the jury to reach a different verdict, as the jury was instructed on breaking or entering and the theory of acting in concert, nor can we conclude that this error would have been so fundamental as to result in a miscarriage of justice.

Defendant next contends the trial court erred in denying defendant's motion to dismiss based on insufficiency of the evidence. "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986). The victim's testimony and defendant's statement both indicate that a rock was thrown and that defendant threw the rock. The victim's neighbor testified to seeing the broken window in the victim's home. This establishes the first and second elements of felonious breaking or entering. "The breaking of the . . . window, with the requisite intent to commit a felony therein, completes the offense even though the defendant is interrupted or otherwise abandons his purpose without

actually entering the building." *State v. Jones*, 272 N.C. 108, 109, 157 S.E.2d 610, 611 (1967).

Finally, defendant argues there was insufficient evidence of his intent to commit larceny. We conclude there was substantial evidence of defendant's intent to commit larceny inside the victim's home. "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002).

> Intent . . . is a mental attitude, which seldom can be proved by direct evidence, but must ordinarily be proved by circumstances from which it may be inferred; . . . the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged.

State v. Hill, 38 N.C. App. 75, 79, 247 S.E.2d 295, 297 (1978) (internal quotation marks omitted) (alterations original). In this case, defendant and his cousin attempted to gain entry to the front door by knocking and ringing the doorbell. When this failed, they drove their car to the driveway of the vacant house next door. When defendant fled the scene, the victim noticed that the trunk of the car was open. A jury could reasonably infer from this evidence defendant's intent to place into the trunk items taken from the house. They then approached the back of the victim's house and tried to forcefully gain entry through the back door and windows. When this attempt was also unsuccessful, defendant and his cousin threw a rock through the window. Under the circumstances this could be seen as another attempt to gain entry to the home. The

men fled after the security alarm was set off and tried to evade the police officer attempting to stop their car. Thus, we conclude there was sufficient evidence of defendant's intent to commit larceny.

Based on the foregoing, we vacate the restitution award and remand this case back to the trial court for an evidentiary hearing. Otherwise, we find no error in the jury's verdict.

No error in part; vacated and remanded in part.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).