NO. COA12-1507
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v. Durham County
No. 11 CRS 5819 & 50309

JOSHUA L. FRYE

Appeal by Defendant from judgment entered 2 February 2012 by Judge Henry W. Hight in Durham County Superior Court. Heard in the Court of Appeals 23 May 2013.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.

Irving Joyner, Esq., for Defendant.

DILLON, Judge.

Joshua Frye (Defendant) appeals from judgment entered 2 February 2012 upon jury verdicts convicting him of felonious breaking and entering, larceny after breaking or entering, possession of stolen goods, and of being an habitual felon. We find no error at trial, but we arrest judgment on Defendant's possession of stolen property conviction and remand this case to the trial court to correct the judgment accordingly.

The evidence of record tends to show the following: On 13 January 2011, Officer Matthew Farrell investigated a break-in at a home on Harvard Avenue in Durham, North Carolina. A neighbor provided a brief description of the perpetrator and stated that the perpetrator had "a pair of pliers in his hand . . . [and was] walking back and forth from his car[,]" which was "a green Volvo[,]" carrying "a kitchen sink, a silver box, a box of . . . laundry soap[,] and a dish drying rack." Officer Brian King also observed a green Volvo leaving the residence and heading toward Truce Street. Officer King pulled the vehicle over.

Officer Farrell observed a stainless steel sink, a dish drying rack, a hard hat, and a tool bag containing screwdrivers and pliers in the back seat of the car. Officer King also observed various items in the vehicle, including a sink, a hard hat, a tool belt, and a dog. Officer King engaged the driver, Defendant, in conversation as they waited for another officer to arrive, and Defendant told Officer King that he was picking up materials on the side of the road. Defendant said he had picked up the sink just down the street.

Investigator Tyson Christensen testified at trial that after he read Defendant his Miranda rights, Defendant told him the following:

> He explained to me eventually that what he was doing was he was a scrapper. And by definition of scrapper, he collects scrap metal for recycling in exchange for monies from the local recycling yards. He said that on that date, he was walking past the incident location and observed a door open. He looked inside the residence and observed a broken DVD player in the kitchen area. And then he said he looked deeper into the home and he saw some dishwashing soap, a kitchen sink and a plastic drying rag. . . . He then explained that he entered the residence and took the items. He said that he intended on using the dish soap and drying rack for his own personal purposes, but he intended on selling the sink for scrap metal.

Officer King testified that he went to the Harvard Avenue residence and stated that it "looked like no one had been living there for a little while." The "side door was ajar" and "the screen door was busted on the side." However, the front door was "secure." Investigator Stacey Johnson stated that the screen door "had been cut[,]" and "there was a big void, a big hole in the counter where you would assume . . . would be the sink."

The residence on Harvard Avenue was owned by Williams Holdings LLC. William Bishop, a partner in Williams Holdings LLC, testified that a stainless steel sink had been taken out of the Harvard Avenue residence. Bishop said the door had been "busted in," the "wiring cut out," and the sink removed.

Defendant was indicted on one count of felonious breaking and entering, two counts of larceny, and one count of felonious possession of stolen property. Defendant's case came on for trial in the 30 January 2012 session of Durham County Superior Court. The jury found Defendant guilty of felonious breaking and entering, larceny, and felonious possession of stolen goods. The court arrested judgment as to the felonious possession of stolen goods conviction. Defendant then pled guilty to having attained the status of an habitual felon. The trial court entered judgment sentencing Defendant to 84 to 110 months incarceration. From this judgment, Defendant appeals.

I: Jury Instruction on Abandonment and Mistake of Fact

In Defendant's first argument, he contends the trial court erred by failing to instruct the jury on abandonment and mistake of fact. We disagree.

The essential elements of felonious breaking and entering are "(1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Jones*, 188 N.C. App. 562, 565, 655 S.E.2d 915, 917 (2008) (citation and quotation marks omitted). It is well established that the entry component of felonious breaking and entering is punishable "only if it is wrongful, i.e., without the owner's

consent." *State v. Wheeler*, 70 N.C. App. 191, 195, 319 S.E.2d 631, 634 (1984), *cert. denied*, 316 N.C. 201, 341 S.E.2d 583 (1986). Furthermore, "property which has been abandoned by the owner cannot be the subject of larceny[;]" however, the party asserting the affirmative defense of abandonment must prove by "clear, unequivocal, and decisive evidence" that the owner intended to permanently terminate his or her ownership of the property. *State v. Hall*, 57 N.C. App. 544, 546, 291 S.E.2d 873, 875 (1982) (citations omitted).

"'[W]hen a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.'" *Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 335, 540 S.E.2d 57, 60 (2000), *disc. review denied*, 353 N.C. 371, 547 S.E.2d 442 (2001) (quotation omitted).

In this case, Defendant submitted written requests for jury instructions on abandonment and mistake of fact. On appeal, Defendant contends that the trial court erred in denying these

requested jury instructions because "the undisputed evidence presented by the parties supported the conclusion that [Defendant] saw a house which appeared to be abandoned." We do not believe this to be the case. Here, Defendant did not provide clear, unequivocal, and decisive evidence that the owner of the Harvard Avenue residence intended to permanently terminate his or her ownership of the property. *See State v. Hall*, 57 N.C. App. 544, 546, 291 S.E.2d 873, 875 (1982) (holding there was no error in the trial court's decision not to instruct on abandonment when the building had been damaged by fire because "[t]he mere fact that defendant observed other people in the building after the fire, along with contradictory evidence of the physical condition of the personal property, is not enough to create a basis for the legitimate belief that the property had been abandoned"). Because Defendant's requested instruction for mistake of fact was premised upon his argument that Defendant believed that the house was abandoned, Defendant's argument pertaining to mistake of fact must also necessarily fail.

II: Evidence of Prior Break-Ins

In Defendant's second argument, he contends the trial court erred by not allowing Defendant to admit evidence pertaining to prior break-ins at the Harvard Avenue residence. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* "Evidence which is not relevant is not admissible." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223, *cert. denied*, __ U.S. __, 181 L. Ed. 2d 529 (2011). "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *Id.*

In this case, Defendant sought to introduce evidence obtained from the Durham Police Department of prior break-ins that had occurred at the Harvard Avenue residence. At trial, the following colloquy occurred:

> MR. NYDICK: I'm going to, I guess, move these into evidence at this time as Defense Exhibit G, the block if that's acceptable.
>
> THE COURT: Any objection?
>
> MR. MORENO: Your Honor, at this time, the state would object to relevance. This is from the fall of 2010. The incident in question is January of 2011.

THE COURT: Ladies and gentlemen, I'll excuse you for a few moments. While you're there, don't discuss the case amongst yourselves, nor should you form or express an opinion about any issue at this trial. At this time, you're excused to the jury room.

(Jury left the courtroom at 2:37 p.m.)

. . . .

THE COURT: So this is attempted to be offered into evidence in this case for the purpose of showing the condition of the dwelling as it existed on the 13th day of January 2011.

MR. NYDICK: Yes, sir, and to support the testimony of witnesses. Some witnesses testified as to earlier periods during this time period – for instance, Ms. Deans – about what the condition of it before, but ultimately as to the condition – condition of it at the time.

THE COURT: Anything on behalf of the state?

MR. MORENO: Your Honor, we would just object to the relevance to this. It's not an element of the crime alleged or the condition in the property to be an affirmative defense. Furthermore, this would – we would argue that if admissible, this would be under 403. It would mislead the jury that there are prior events that are not before this Court.

MR. NYDICK: I don't see any misleading, Your Honor. It's quite clear that this is not relating to any – this individual, but as it relates to the status of the property.

MR. MORENO: Misleading, may confuse the

> issues.
>
> THE COURT: I don't think it's relevant as to the condition of the property [on] January 13th. Irrelevant as to this case. I think it's fairly undisputed that the lady who lived here left because she'd been broken into. I don't know that it helps on the state's evidence.
>
> MR. NYDICK: It's true. The point has been made a number of times in a way it's duplicative, not knowing what evidence has been coming in.
>
> THE COURT: Objection sustained.

Defendant attempted to admit this evidence to show the "condition" of the house "as it existed on the 13th day of January 2011." However, the trial court noted that testimony that the house had previously been broken into had already been admitted into evidence. The "condition" of the residence had been thoroughly discussed through various witnesses, both for the State and for Defendant. Moreover, police reports about prior break-ins do not supply "clear, unequivocal, and decisive evidence" that the owner intended to permanently terminate his or her ownership of the property. *Hall*, 57 N.C. App. at 546, 291 S.E.2d at 875. Therefore, we hold that the trial court did not err by excluding the foregoing evidence.

III: Motion to Dismiss: Larceny and Breaking or Entering

In Defendant's third argument, he contends the trial court erred by denying his motion to dismiss the charges of felonious breaking and entering and larceny. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation and quotation marks omitted).

"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, 265 S.E.2d 164, 169 (1980). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. "If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the

circumstances." *Id.* "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *Id.*

A: Felonious Breaking and Entering.

The essential elements of felonious breaking and entering are "(1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Jones*, 188 N.C. App. 562, 564-65, 655 S.E.2d 915, 917 (2008) (citation and quotation marks omitted).

On appeal, Defendant contends there was insufficient evidence to support the third element, that Defendant had the "intent to commit any felony or larceny therein."[1] The evidence in this case showed that Defendant entered the Harvard Avenue residence without the consent of its owner and emerged therefrom with items he did not have upon entering, including but not

[1] Defendant also contends that the language of the indictment in this case "required [the State] to present evidence that supported its allegation that Appellant intended to commit a felony, as opposed to a larceny[.]" However, a defendant may be convicted of felonious larceny if he committed the larceny pursuant to a breaking or entering. *See* N.C. Gen. Stat. § 14-72(b)(2); *State v. Tanner*, 364 N.C. 229, 232, 695 S.E.2d 97, 100 (2010). Moreover, "an indictment for felonious breaking and entering does not have to specify the underlying felony." *State v. Farrar*, 361 N.C. 675, 678, 651 S.E.2d 865, 867 (2007).

limited to, a kitchen sink that matched the description of the sink installed in the residence by the owner. We believe this evidence was substantial evidence supporting the third element of the crime of felonious breaking and entering, such that the question of whether Defendant intended to commit a felony or larceny in the residence was properly one for the jury. The trial court did not err by denying Defendant's motion to dismiss.

B: Larceny

"The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002).

On appeal, Defendant contends there was "no evidence presented . . . that Williams Holding LLC was the owner of or was otherwise in possession of the particular kitchen sink which was located in the . . . Harvard Avenue structure." This argument is without merit. The State presented evidence through the testimony of William Bishop that a single-basin stainless steel sink was in the Harvard Avenue house, which was owned by Williams Holdings LLC. Ms. Deans testified that she saw

Defendant enter the house with tools and leave the house carrying a sink. Officer Farrell stopped Defendant's car and discovered a single-basin stainless steel sink in the back seat. We believe the foregoing is substantial evidence to support the element challenged by Defendant in this case. The trial court did not err by denying Defendant's motion to dismiss.

IV: Larceny and Possession

In Defendant's fourth argument, he contends the trial court erred by entering judgments convicting Defendant of larceny after breaking and entering and possession of stolen property. We agree with Defendant that it is "improper to punish a person for larceny and possession of the same property." *See State v. Dow*, 70 N.C. App. 82, 87, 318 S.E.2d 883, 887 (1984) (holding that "[s]ince the defendant can only be convicted of either the larceny or the possession of stolen property, judgment must be arrested in one of the two cases"). In this case, however, the trial court did arrest judgment on Defendant's felonious possession of stolen property conviction, stating "the Court is going to find that in this matter that – is going to arrest judgment in the felonious possession of stolen goods charge, the jury having found the defendant guilty of felonious breaking and/or entering and felonious larceny." The foregoing

notwithstanding, the written judgment entered by the trial court in this case, which consolidated all convictions and sentenced Defendant to 84 to 110 months incarceration, still reflects Defendant's conviction of possession of stolen property. We, therefore, arrest judgment on Defendant's possession of stolen property conviction. Because the trial court consolidated Defendant's convictions in the judgment in this case, we remand this case to the trial court for resentencing.

NO ERROR, in part; JUDGMENT ARRESTED, in part; and REMANDED.

Judge ELMORE and Judge GEER concur.

Report per Rule 30(e).