NO. COA12-313
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v. Wayne County
No. 10 CRS 53496

DOMMANIK VANYALE COLEY

Appeal by defendant from judgment entered 31 August 2011 by Judge Arnold O. Jones, II, in Wayne County Superior Court. Heard in the Court of Appeals 30 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin, for the State.

James W. Carter for defendant appellant.

McCULLOUGH, Judge.

Dommanik Vanyale Coley ("defendant") appeals from his conviction for felony breaking or entering on the grounds that the trial court erred in admitting video evidence without a proper foundation, that defendant was denied effective assistance of counsel, that the trial court erred in denying defendant's motion to dismiss, and that the trial court erred in

ordering defendant to pay $100 in restitution. For the following reasons, we find no error.

I. Background

On 6 December 2010, defendant was indicted by a Wayne County Grand Jury for one count of felony breaking or entering, one count of larceny after breaking or entering, and one count of felony possession of stolen goods. The case came on for jury trial during the 29 August 2011 Criminal Session of Wayne County Superior Court, the Honorable Arnold O. Jones, II, presiding.

Evidence presented at trial tended to show that on the morning of 8 June 2010, $100 was discovered missing from the opening cash till of Domino's Pizza in Goldsboro, North Carolina ("Domino's"). A review of surveillance video from Domino's surveillance system revealed that a man entered Domino's after it closed on 7 June 2010, walked to the safe, and then entered Domino's office where he turned off the recording device. Both Mr. Edward Lasky ("Mr. Lasky"), Domino's franchise owner, and Ms. Chanel Bass, a Domino's employee, identified defendant as the man entering Domino's in the surveillance video.

As part of the investigation, Detective Richard Farfour ("Detective Farfour") was provided a copy of the surveillance video. Based on the surveillance video and the identification of

defendant by Mr. Lasky and other witnesses, Detective Farfour obtained and served an arrest warrant on defendant on 8 July 2010 for felony breaking or entering, larceny after a breaking or entering, and felony possession of stolen property.

At trial, the State offered the surveillance video into evidence. Defendant objected on the grounds that a valid chain of custody was not established. Defendant's objection was overruled and the surveillance video was admitted into evidence.

On 30 August 2011, the jury returned a verdict of guilty on the charge of breaking or entering and not guilty on the charges of larceny after breaking or entering and possession of stolen goods. The following day, the trial judge entered a guilty verdict and sentenced defendant to prison for a term of five to six months, with the sentence suspended upon the condition that defendant complete 30 months of supervised probation and pay restitution in the amount of $100. Defendant gave notice of appeal in open court.

II. Admission of Video Evidence

Defendant's first contention on appeal is that the trial court erred in admitting a surveillance video from Domino's into evidence without a proper foundation. We disagree.

When the State offered the surveillance video into evidence at trial, defendant objected on the grounds that an adequate chain of custody had not been established. Defendant's objection was properly overruled where testimony established that Mr. Lasky made a copy of the video; that he gave the copy of the video to Ms. Heather Hopewell, store manager of Domino's; and that Detective Farfour picked up the copy of the video from Ms. Hopewell at Domino's several hours later. Defendant now argues for the first time that the State failed to lay a proper foundation. Because defendant failed to preserve the issue of whether the State laid a proper foundation for the surveillance video by specific objection at trial, we review the admission of the video for plain error. See N.C.R. App. P. 10(a)(1) & (4).

"The general rule is that the admissibility of a videotape is governed by the same rules that apply to still photographs." *State v. Mason*, 144 N.C. App. 20, 24, 550 S.E.2d 10, 14 (2001) (citing *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970)). Thus, a videotape may be admitted into evidence for substantive purposes "upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. Gen. Stat. § 8-97 (2011).

> The prerequisite that the offeror lay a proper foundation for the videotape can be

> met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed, *Campbell v. Pitt County Memorial Hospital*, 84 N.C. App. 314, 352 S.E.2d 902, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987) (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . . ," *State v. Luster*, 306 N.C. 566, 569, 295 S.E.2d 421, 423 (1982); (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," *State v. Kistle*, 59 N.C. App. 724, 726, 297 S.E.2d 626, 627 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E.2d 694 (1983) (substantive purposes); or (4) "testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed,'" *State v. Johnson*, 18 N.C. App. 606, 608, 197 S.E.2d 592, 594 (1973).

State v. Cannon, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), *rev'd in part on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

In the present case, the State offered testimony concerning the video equipment. Specifically, Mr. Lasky testified that Domino's security system is a "basic DVR continuous recording system[]" that is running 24 hours a day. Mr. Lasky further testified that the system is basically a computer that stores the video on a hard drive, which can then be searched by date and time. In this instance, Mr. Lasky testified that after

reviewing the surveillance video on 8 June 2010, he transferred the video to a flash drive and then burned the video to a CD. Defendant now argues that this testimony was not adequate to meet the requirements of *Cannon*.

Whether or not Mr. Lasky's proffered testimony was sufficient to lay a proper foundation for admission of the surveillance video into evidence, had defendant made a specific objection as to lack of proper foundation at trial, the State could have easily presented additional testimony from Mr. Lasky to meet the foundation requirements. *See State v. Jones*, 176 N.C. App. 678, 683-84, 627 S.E.2d 265, 268-69 (2006) ("Cases addressing the admissibility of surveillance videotapes suggest it is a relatively straightforward matter to lay the necessary foundation. *See, e.g., State v. Mewborn*, 131 N.C. App. 495, 498–99, 507 S.E.2d 906, 909 (1998) (concluding that police officers' testimony was sufficient to lay an adequate foundation when they testified that they watched surveillance videotape twice on the day of the robbery, and that the clip shown at trial was in same condition and had not been edited)").

"Since defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that the videotape in this

case is inaccurate or otherwise flawed, we decline to conclude the [admission of the videotape into evidence] amount[ed] to plain error." *Jones*, 176 N.C. App. at 684, 627 S.E.2d at 269.

III. Effective Assistance of Counsel

Defendant's next argument on appeal is that he was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the North Carolina Constitution. We disagree.

"[I]neffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (internal quotation marks and citation omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). "The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions." *Id. at* 115, 604 S.E.2d at 876.

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show

> that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal quotation marks and citation omitted). We cannot say that defendant's representation necessitates an award of relief.

Defendant argues that his representation was deficient in that his counsel "failed to conform to an objective standard of reasonableness when she failed to make specific objections to the admission of the video surveillance tape . . . ." For the reasons set out *supra*, the admission of the videotape was not plain error. Had defendant's counsel objected "more vigorously and more specifically" as defendant asserts a reasonable attorney would have done, the State could have offered testimony to provide the necessary foundation. Defendant has not shown that such evidence would not have been forthcoming in this case. Therefore, defendant's counsel has not been shown to have been ineffective.

IV. Denial of Motion to Dismiss

Defendant's third contention on appeal is that the trial court erred in denying his motion to dismiss the felony breaking or entering charge. 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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "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 making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. 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.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (internal quotation marks and citations omitted).

"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. Williams***, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992) (citing N.C. Gen. Stat. § 14-54(a)(1986)).

> Thus, "the crime described in § 14-54 allows conviction on a showing of 'breaking ***or*** entering,' not breaking ***and*** entering," ***United States v. Bowden***, 975 F.2d 1080, 1084 (4th Cir. 1992) (emphasis in original); and it is therefore complete upon ***either*** a breaking or an entry, ***State v. Myrick***, 306 N.C. 110, 291 S.E.2d 577, 579 (1982). Moreover, it is immaterial whether the defendant actually completed the crime of larceny. ***State v. Smith***, 66 N.C. App. 570, 312 S.E.2d 222, 225 (1984); ***see also State v. Jones***, 272 N.C. 108, 157 S.E.2d 610, 611 (1967) ("The breaking of the store 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.").

U.S. v. Carr, 592 F.3d 636, 644 (4th Cir. 2010).

In this case, evidence in the form of a surveillance video presented at trial showed a man enter Domino's after it closed on 7 June 2010. The surveillance video then showed the man walk to the safe, open the safe, and then proceed to the office where it appeared he turned the recording device off. It was reported that $100 was missing from Domino's opening cash till. Witnesses identified defendant as the man in the video. Mr. Lasky further testified that defendant did not have permission or consent to be in Domino's after it was closed.

Viewing this evidence in the light most favorable to the State, we find substantial evidence of each element of felonious breaking or entering to allow the jury to decide the case. Accordingly, we find no error.

V. Restitution

Defendant's final contention on appeal is that the trial court erred in ordering him to pay $100 in restitution where the jury returned verdicts of not guilty on the charges of larceny after breaking or entering and possession of stolen property. We disagree.

"Provisions in probationary judgments requiring restitution are constitutionally permissible. However, the provision must be related to the criminal act for which defendant was convicted

. . . ." *State v. Bass*, 53 N.C. App. 40, 42, 280 S.E.2d 7, 9 (1981) (citations omitted). Furthermore, "[a] trial court's judgment ordering restitution 'must be supported by evidence adduced at trial or at sentencing.'" *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)).

In the present case, defendant argues that the order to pay restitution was not supported by evidence in that defendant was only convicted of breaking or entering, and there appeared to be no damage to Domino's as a result of the breaking or entering. Although we agree with defendant that the record evidence, considered in isolation, would have been insufficient to support the trial court's order requiring the payment of $100 in restitution on the suspended sentence for breaking or entering, we cannot find that the trial court erred where defendant stipulated to the amount of restitution.

Our Supreme Court has held that "[i]ssues at a sentencing hearing may be established by stipulation of counsel if that stipulation is definite and certain." *Id.* (internal quotation marks and citations omitted); *see also State v. Buchanan,* 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992) ("*In the absence of an agreement or stipulation* between defendant and the State,

evidence must be presented in support of an award of restitution." (emphasis added)). In this case, defendant's stipulation as to restitution was "definite and certain" where defendant's counsel stated at the sentencing hearing, "[a]nd we stipulate to the restitution being a hundred dollars." Therefore, no further evidence was needed to support the order for restitution.

VI. Conclusion

For the reasons set out above, we find no error.

No error.

Judges HUNTER, JR., (Robert N.) and ERVIN concur.

Report per Rule 30(e).