NO. COA14-359
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Wake County
No. 12 CRS 227541

WALTER LEMLEY, JR.

Appeal by defendant from judgment entered 31 July 2013 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 7 October 2014.

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

Jarvis John Edgerton, IV for defendant.

HUNTER, Robert C., Judge.

Defendant appeals the judgment entered after a jury convicted him of attempted first degree burglary. On appeal, defendant argues that: (1) the trial court erred in denying his motion to dismiss because the State failed to present substantial evidence that defendant knew that the townhouse was "actually occupied"; and (2) the trial court committed plain

error in failing to instruct the jury on attempted second degree burglary.

After careful review, we find no error.

Background

On 8 December 2012, around 10:30 p.m., Roger Vanostrand ("Mr. Vanostrand") testified that he was at home in Raleigh, North Carolina watching a movie in the upstairs portion of his townhouse. The lights were off, and all the doors and windows were locked. Someone rang Mr. Vanostrand's doorbell several times. Because he was not expecting visitors, Mr. Vanostrand remained upstairs watching his movie and did not answer the door. Within moments, Mr. Vanostrand heard "creaking, cracking, destructive-type noise" in the downstairs portion of his townhouse. He began coming down the stairs and saw two flashlights shining through the kitchen window. In addition, he saw two men standing outside the window "messing" with it. Mr. Vanostrand returned upstairs, called 911, and, based on the 911 operator's instructions, locked himself in an upstairs bathroom until the police could arrive. .

Lieutenant Bill McGregor, an officer with the Raleigh Police Department, was on patrol that evening and responded to Mr. Vanostrand's 911 call. After arriving and walking to the

back of the townhouse, Lt. McGregor saw a man, later identified as Mondarius Moore, standing in front of the kitchen window. Lt. McGregor ordered Mr. Moore to get down on the ground. Before placing Mr. Moore in handcuffs, Lt. McGregor saw another individual, later identified as defendant, standing near the patio door. After seeing the officer, the individual ran. Lt. McGregor stayed with Mr. Moore but radioed other offices about the fleeing suspect. After handcuffing Mr. Moore, Lt. McGregor found a flashlight and screwdriver on the ground behind Mr. Vanostrand's townhouse.

Shortly after Officers Stefan Mazzara and Daniel Helms arrived on the scene, they heard Lt. McGregor's radio call about the suspect. Both officers saw defendant run from Mr. Vanostrand's building to a nearby tree line. Defendant tripped and fell, and the officers arrested him. Defendant was wearing gloves when the officers caught him. They also found a pocketknife and ski mask in defendant's pockets.

After the police arrived, Mr. Vanostrand testified that he went downstairs and turned on the lights. He noticed that his back door had been pushed in with the dead bolt "popped out"; the door was fastened only by a flip latch. The screen to the

kitchen window had also been cut and the window's outer pane was cracked.

On 28 January 2013, defendant was indicted for attempted first degree burglary. The matter came on for trial on 29 July 2013. The jury found defendant guilty, and the trial court sentenced him to a minimum term of 44 months to a maximum term of 65 months imprisonment, which is in the presumptive range of sentences based on defendant's prior record points. Defendant appealed.

Arguments

Defendant first argues that the State failed to provide substantial evidence of each element of attempted first degree burglary. Specifically, defendant contends that, because he was charged with attempted first degree burglary, the State must prove that defendant intended to commit first degree burglary. According to defendant, since a dwelling must be "actually occupied" to sustain a conviction for first degree burglary, the State must show that defendant knew Mr. Vanostrand's townhouse was "actually occupied" at the time he attempted to burglarize it. 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). To defeat a motion to dismiss, the State must present "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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations omitted).

The elements of first-degree burglary are: "(i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein." *State v. Brown*, __ N.C. App. __, __, 732 S.E.2d 584, 586-87 (2012). The only difference between first degree and second degree burglary is whether the dwelling is "actually occupied" at the time of the breaking and entering. *State v. Hobgood*, 112 N.C. App. 262, 264, 434 S.E.2d 881, 882 (1993). However, the element of "actually occupied" does not require a defendant have subjective knowledge that the dwelling is occupied. *State v. Tippett*, 270 N.C. 588, 595, 155 S.E.2d 269, 274 (1967), *superseded by statute*, N.C. Gen. Stat. § 15A-924(a)(5), *as recognized in State v. Worsley*, 336 N.C. 268, 279, 443 S.E.2d 68, 73 (1994). "An attempt to commit a crime is an act done with intent to commit that crime, carried beyond

mere preparation to commit it, but falling short of its actual commission." *State v. Goodman*, 71 N.C. App. 343, 345, 322 S.E.2d 408, 410 (1984). Thus, the issue is whether a defendant's knowledge that a dwelling is "actually occupied" is a required element for attempted first degree burglary.

In support of his argument, defendant contends that an attempt offense is similar to the offense of aiding and abetting, which requires that a defendant know that the person whom he is advising, assisting, or encouraging is committing a crime. *See generally State v. Young*, 196 N.C. App. 691, 692, 675 S.E.2d 704, 705 (2009) ("Under North Carolina law, to prove aiding and abetting the State must show, *inter alia*, that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person to commit that crime.") Consequently, defendant argues that the State must show that defendant knew he was committing first degree burglary which could only be established if defendant knew the townhouse was "actually occupied."

In support of his argument, defendant relies on *State v. Bowman*, 188 N.C. App. 635, 656 S.E.2d 638 (2008), *disc. review denied*, 666 S.E.2d 649 (2008). In *Bowman*, the defendant was charged with aiding and abetting statutory rape. *Id.* At 638,

656 S.E.2d at 643. At trial, the court refused to instruct the jury that the defendant had to know that the victims were less than 16 years old to convict him. *Id.* At 647, 656 S.E.2d at 648. On appeal, this Court granted the defendant a new trial, concluding that "[o]ur case law clearly establishes that aiding and abetting is a crime that involves an element of knowledge." *Id.* at 649, 656 S.E.2d at 649.

However, defendant's reliance on *Bowman* is misplaced. Unlike aiding and abetting which requires the defendant have subject knowledge that he is aiding a crime, *see State v. Estes*, 186 N.C. App. 364, 369, 651 S.E.2d 598, 602 (2007) (to convict for aiding and abetting, the State must show that the defendant knowingly aided in the commission of the crime), attempt does not have an element of knowledge or a requirement that a defendant act "knowingly." In contrast, attempt requires that the defendant "inten[d] to commit the substantive offense." *State v. Mueller*, 184 N.C. App. 553,562, 647 S.E.2d 440, 448 (2007).

Furthermore, this Court has addressed a similar argument in *State v. Sines*, 158 N.C. App. 79, 579 S.E.2d 895 (2003), and rejected the proposition that attempt requires the defendant have specific knowledge that his conduct constitutes a crime.

In *Sines*, the defendant was convicted of attempted statutory sexual offense. *Id.* at 80, 579 S.E.2d at 897. On appeal, the defendant argued that attempted statutory sexual offense requires a showing that the defendant knew the victim was underage. *Id.* at 84, 579 S.E.2d at 899. However, the Court disagreed, concluding that "the intent element of attempted statutory sexual offense does not require that the defendant intended to commit a sexual act with an underage person, but only that defendant intended to commit a sexual act with the victim." *Id.* at 86, 579 S.E.2d at 900.

Therefore, similar to *Sines*, to sustain a conviction for attempted first degree burglary, the State is only required to show that a defendant acted with felonious intent when he attempted to burglarize a dwelling, not that he intended to break and enter an occupied dwelling Accordingly, for purposes of attempted first degree burglary, like the substantive offense, the "actually occupied" element is satisfied regardless of whether defendant knew the dwelling was occupied at the time he attempted to burglarize it. Here, since the State presented substantial evidence of defendant's felonious intent at the time he attempted to burglarize Mr.

Vanostrand's townhouse, the trial court did not err in denying defendant's motion to dismiss.

Next, defendant argues that the trial court committed plain error in failing to instruct the jury on attempted second degree burglary. We disagree.

The plain error standard is well-established:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Defendant contends that the State's evidence "supported a jury instruction for attempted second degree burglary." However, this Court has noted that "[t]he appellate courts of this State have repeatedly held that where there is no evidence that the dwelling house was unoccupied at the time of the breaking and entry, the trial court may not instruct the jury that it may return a verdict of burglary in the second degree." *State v. Thomas*, 52 N.C. App. 186, 191, 278 S.E.2d 535, 539-40 (1981). Therefore, since it is undisputed that Mr. Vanostrand's townhouse was actually occupied at the time defendant attempted

to burglarize it, as with the substantive offense, the trial court could not have instructed on attempted second degree burglary. Accordingly, the trial court did not err, much less commit plain error, in failing to instruct on attempted second degree burglary.

Conclusion

Based on the foregoing reasons, defendant's trial was free from error.

NO ERROR.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).