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NO. COA14-605
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Forsyth County
No. 12 CRS 61452

PAUL DEWAYNE MOSES

Appeal by defendant from judgment entered 8 August 2013 by Judge C. Thomas Edwards in Forsyth County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General David W. Boone, for the State.

Kevin P. Bradley for Defendant.

ERVIN, Judge.

Defendant Paul Dewayne Moses appeals from a judgment entered based upon his convictions for first degree burglary, felonious larceny, and misdemeanor breaking or entering. On appeal, Defendant contends that the trial court erred by denying his motion to dismiss the charge of first degree burglary that had been lodged against him on the grounds that the record evidence did not support a conviction for anything greater than

felonious breaking or entering. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant's first degree burglary conviction should be vacated and that this case should be remanded to the Forsyth County Superior Court for the entry of a new judgment sentencing Defendant predicated on the understanding that he had been convicted of felonious breaking or entering rather than first degree burglary.

I. Factual Background

A. Substantive Facts

On 14 November 2012, Sandra Andrews lived with her husband at 1835 Maryland Avenue in Winston-Salem. Ms. Andrews had gone to bed at approximately 10 or 10:30 p.m. on the preceding evening, while her husband retired at approximately 12:30 a.m. Ms. Andrews did not awaken during the night and neither she nor her husband got up before morning.

At approximately 7:00 to 7:30 a.m., when it was light outside, Ms. Andrews got up. At that point, Ms. Andrews and her husband discovered that the blinds associated with a living room window had been pulled up and that the window and the front door were open. Upon realizing that someone had broken into the house, Ms. Andrews called the police. Following the completion of her telephone conversation, Ms. Andrews noticed that her

purse, which she kept on a small chair next to the bed, was missing. After she returned to the living room following the discovery that her purse was missing, Ms. Andrews looked outside and saw that her car was gone.

Officer Mohammed Khan of the Winston-Salem Police Department was dispatched to the Andrews residence after 7:00 a.m. As he walked around the house, Officer Khan observed a chair situated outside the opened living room window that could have been used to reach the window. After speaking with Ms. Andrews and looking around the premises, Officer Khan had the relevant information concerning Ms. Andrews' stolen vehicle entered into the relevant database.

Following his departure from the Andrews residence, Officer Khan drove to an area about a block away in order to finish typing his report. At "probably . . . 8 o'clock -- 0847 hours in the morning," while he was still at that location, Officer Khan observed a vehicle with tags matching those on Ms. Andrews' stolen vehicle drive past. At that point, Officer Khan began following the vehicle, called for assistance, activated his blue light, stopped the stolen vehicle, and had the driver, who was identified as Defendant, exit the vehicle. After placing Defendant under arrest and searching him, Officer Khan found a debit card belonging to Ms. Andrews on Defendant's person.

Officer Brian Anderson of the Winston-Salem Police Department responded to a call about a potential break-in at a residence located at 1828 Maryland Avenue in Winston-Salem. At the residence, which had been vacant for about a month, Officer Anderson met with the owner, Ted Little. Upon entering the residence, Officer Anderson found men's clothing, two pornographic magazines, unopened containers of beer, and some food. In addition, Officer Anderson found a purse, ascertained that the purse contained Ms. Andrews' driver's license, and determined that she lived across the street.

Detective Melly Kastle of the Winston-Salem Police Department interviewed Defendant about the break-in at 1828 Maryland Avenue. During the ensuing conversation, Defendant told Detective Kastle that he was homeless, that he knew the house was vacant, and that he had decided to enter the residence to get out of the cold. In addition, Defendant admitted that he had taken a vehicle from the house across the street and told Detective Kastle that investigating officers should be able to find clothes, pornography, a glass 40-ounce beer bottle, and "the lady's purse that I stole" in the residence at 1828 Maryland Avenue. Finally, Defendant stated that he had only been in the house for one night before he "took that car."

B. Procedural History

On 14 November 2012, a magistrate's order was issued charging Defendant with first degree burglary and possession of a stolen motor vehicle. On 16 November 2012, a magistrate's order was issued charging Defendant with misdemeanor breaking or entering. On 25 March 2013, the Forsyth County grand jury returned bills of indictment charging Defendant with first degree burglary, felonious larceny of a motor vehicle, felonious possession of a stolen motor vehicle, and misdemeanor breaking or entering.

The charges against Defendant came on for trial before the trial court and a jury at the 5 August 2013 criminal session of the Forsyth County Superior Court. On 8 August 2013, the jury returned verdicts convicting Defendant of first degree burglary, felonious larceny, and misdemeanor breaking or entering and acquitting Defendant of felonious possession of a stolen motor vehicle. At the conclusion of the ensuing sentencing hearing, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a term of 72 to 99 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

In his sole challenge to the trial court's judgment, Defendant contends that the trial court erred by denying his

motion to dismiss the first degree burglary charge that had been lodged against him for insufficiency of the evidence. More specifically, Defendant contends that the trial court should have dismissed the first degree burglary charge on the grounds that the State failed to adduce sufficient evidence to establish that he had broken into and entered the Andrews residence during the nighttime and that the trial court should have only allowed the jury to consider the issue of Defendant's guilt of the lesser included offense of felonious breaking or entering. Defendant's contention has merit.

A. Standard of Review

In ruling on a motion to dismiss for insufficiency of the evidence, the trial court must determine whether the record contains substantial evidence tending to establish the existence of each essential element of the offense with which Defendant has been charged, *State v. Davis*, 74 N.C. App. 208, 212, 328 S.E.2d 11, 14, *disc. review denied*, 313 N.C. 510, 329 S.E.2d 406 (1985), with the evidence to be considered in the light most favorable to the State and with the State being given the benefit of any inference that may be reasonably drawn from the evidence. *Id.* at 212, 328 S.E.2d at 14. On the other hand, in the event that the evidence raises nothing more than a mere suspicion of guilt, the defendant's dismissal motion should be

granted. *State v. Daniels*, 300 N.C. 105, 114, 265 S.E.2d 217, 222 (1980). We review a trial court's decision to deny a dismissal motion using a *de novo* standard of review. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Applicable Legal Principles

The offense of first degree burglary consists of (1) a breaking (2) and entering (3) in the nighttime (4) into the dwelling house or sleeping apartment of another (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein. *State v. Barnett*, 113 N.C. App. 69, 74, 437 S.E.2d 711, 714 (1993). "In North Carolina, there is no statutory definition of nighttime; however, our courts adhere to the common law definition of nighttime as that time after sunset and before sunrise 'when it is so dark that a man's face cannot be identified except by artificial light or moonlight.'" *Id.* (quoting *State v. Frank*, 284 N.C. 137, 145, 200 S.E.2d 169, 175 (1973)).

C. Evidentiary Analysis

The evidence adduced at trial, when considered in the light most favorable to the State, tended to show that Defendant broke into the Andrews residence sometime between 12:30 a.m., when Ms. Andrews' husband retired, and 7:00 a.m. to 7:30 a.m., when Ms. Andrews woke up. At the time that Ms. Andrews awakened, it was

light outside. The trial court took judicial notice of U.S. Naval Observatory records, which indicated that civil twilight on the date in question occurred at 6:30 a.m. and that sunrise had occurred at 6:57 a.m. As a result, the record contains evidence tending to show that Defendant could have broken into and entered the Andrews residence as little as three minutes and as much as one hour after daylight, depending both on whether one concludes that nighttime ended at either 6:30 a.m. or 6:57 a.m., and at what point in time between 7:00 a.m. and 7:30 a.m. Ms. Andrews arose.

A proper resolution of this issue is informed by our decision in *State v. Barnett*, in which the defendant was convicted of breaking into a residence and stealing a purse sometime between 10:00 p.m. on 3 April 1992 and 6:30 a.m. on 4 April 1992, when the victim woke up. 113 N.C. App. at 75, 437 S.E.2d at 715. On the date in question, civil twilight began at 5:41 a.m. and the sun rose at 6:07 a.m. *Id.* at 76, 437 S.E.2d at 715. On appeal, this Court held that:

[b]ecause the breaking and entering could have occurred at any time up until 6:30 a.m. on 4 April 1992, a time after which the sun rose, the evidence is only sufficient to raise a "suspicion or conjecture" that the breaking and entering of the Howerys' home occurred at nighttime. . . . Thus, the State failed to produce such relevant evidence that a reasonable mind might accept as adequate to support the conclusion that

when the breaking and entering occurred, it was that time "when it is so dark that a man's face cannot be identified except by artificial light or moonlight."

Id. at 75, 437 S.E.2d at 715. As a result, *Barnett* stands for the proposition that, where the breaking and entering could have occurred either in the night or after sunrise, the State must adduce some relevant evidence tending to show that the crime was actually committed during the hours of darkness in order to withstand a dismissal motion.

Our decision in *Barnett* is consistent with several decisions from the Supreme Court that have upheld the submission of a first degree burglary charge to the jury based upon the existence of circumstantial evidence tending to show that the relevant breaking and entering occurred at night. In *State v. Smith*, 307 N.C. 516, 299 S.E.2d 431 (1983), the defendant admitted he was on the victim's porch at a time when the police were using flashlights and investigating officers testified that it was dark when they arrived on the scene and apprehended the defendant. *Id.* at 519, 299 S.E.2d at 434. In *State v. Wood*, 286 N.C. 248, 210 S.E.2d 52 (1974), the defendant admitted having entered the motel in which the victim was staying "after the sun had gone down," having entered the specific motel room in which the victim was staying while the shower was running, and having left the town "that night." *Id.* at 254, 210 S.E.2d

at 54-55. As a result of the fact that the victim testified that he had showered at 11:00 p.m., *id.* at 254, 210 S.E.2d at 55, the Supreme Court held that the record supported a finding that the defendant had broken into and entered the motel room at night even though the victim did not realize that his possessions had been taken until he awoke after sunrise on the following morning. In *State v. Frank*, the defendant admitted that he always committed his burglaries between midnight and 4 a.m. "because this is the time that people sleep the soundest." *State v. Frank*, 284 N.C. 137, 146, 200 S.E.2d 169, 175 (1973). As a result, a first degree burglary conviction can be upheld in the event that the record contains evidence tending to show that the underlying breaking and entering occurred at an ascertainable point when it was dark. However, the present record is totally devoid of the type of evidence that sufficed to support the convictions at issue in *Smith*, *Wood*, and *Frank*.

After carefully reviewing the record, we are unable to reach any conclusion other than that the facts before us in this case are indistinguishable in any meaningful way from those at issue in *Barnett*. In both this case and *Barnett*, the State failed to adduce any evidence tending to indicate that Defendant broke into and entered the Andrews residence during the nighttime. Instead, the record simply tends to show that the

breaking or entering occurred sometime before the victims, who slept until after sunrise, woke up. As a result, given that the record simply shows that Defendant might have broken into and entered the Andrews residence either before or after daylight, the trial court should have dismissed the first degree burglary charge that had been lodged against Defendant and instructed the jury to consider the issue of whether Defendant was guilty of the lesser included offense of felonious breaking or entering.

In seeking to persuade us to reach a different result, the State argues that the facts contained in the present record make it more likely that the breaking and entering occurred during the nighttime than was the case in *Barnett*. As the State points out, the *Barnett* opinion does not reveal the location within the house from which the pocketbook was taken or establish the amount of time required to complete the commission of the crime for which the defendant was convicted. The evidence contained in the record developed in this case, on the other hand, shows that Defendant entered through a living room window that was "around the corner" from the Andrews' bedroom and made his way to that bedroom, where he took Ms. Andrews' purse from the chair beside the bed. The State asserts that this set of facts, coupled with the fact that Defendant was required to take a

certain amount of time in order to steal Ms. Andrews' vehicle,¹ establishes that Defendant did not have sufficient time between the end of the night and the point in time at which Ms. Andrews awoke to have both broken into and entered the Andrews residence and stolen Ms. Andrews' vehicle. However, nothing in the record in any way suggests that it would have taken more than a brief period of time for Defendant to have opened and climbed through the window, taken Ms. Andrews' purse from the bedroom, left the Andrews' residence, and taken Ms. Andrews' vehicle, particularly in the event that the lighting was good at the time that Defendant engaged in these activities. Thus, given that the record suggests that Defendant might have had at least a thirty minute window within which to have done everything that he appears to have done, the State's evidence simply does not provide any basis for believing that Defendant committed the criminal activities in which he engaged in the nighttime rather than after daybreak. As a result, we have no hesitation in

¹Even though the State asserts that Defendant took the purse across the street to 1828 Maryland Avenue before returning to take the car, the record neither confirms nor invalidates this theory. The fact that the purse was in the vacant house across the street at the time that Defendant was pulled over sometime after 8:00 a.m. does not eliminate the possibility that Defendant took the purse and the car at approximately the same time, drove across the street for the purpose of depositing the purse in the vacant residence in which he had spent the previous night, and then returned to the stolen vehicle in which he was subsequently apprehended.

concluding that the trial court erred by denying Defendant's motion to dismiss the first degree burglary charge that had been lodged against him.

Although the record does not contain sufficient evidence to support Defendant's first degree burglary conviction, it does contain sufficient evidence to support a determination that Defendant broke and entered the Andrews residence with the intent to commit larceny in violation of N.C. Gen. Stat. § 14-54(a). In the course of convicting Defendant of first degree burglary, the jury necessarily found facts that would support a verdict convicting Defendant of felonious breaking or entering. In cases, such as this one, in which the State failed to elicit sufficient evidence to establish that Defendant broke into and entered a residence in the nighttime, the jury's verdict is tantamount to a determination that the defendant should have been found guilty of felonious breaking or entering. *Barnett*, 113 N.C. App. 75-76, 437 S.E.2d at 715; see also *State v. Cox*, 281 N.C. 131, 135-36, 187 S.E.2d 785, 788 (1972) (vacating the defendant's first degree burglary conviction based upon the absence of sufficient evidence tending to show that the defendant broke into and entered the victim's residence in the nighttime and remanding the case to the trial court for the entry of a judgment sentencing the defendant on the basis of a

felonious breaking or entering conviction instead). As a result, we hold that Defendant's conviction for first degree burglary should be vacated and that this case should be remanded to the Forsyth County Superior Court for the entry of a new judgment based upon a determination that Defendant had been convicted of felonious breaking or entering and imposing a sentence predicated on the understanding that he had been convicted of felonious breaking or entering rather than first degree burglary.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erroneously denied Defendant's motion to dismiss the first degree burglary charge for insufficiency of the evidence. As a result, the trial court's judgment should be, and hereby is, vacated, and this case should be, and hereby is, remanded to the Forsyth County Superior Court for the entry of a new judgment predicated on the understanding that Defendant had been convicted of felonious breaking or entering rather than first degree burglary.

VACATED AND REMANDED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).