IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-179

Filed: 15 November 2016

Catawba County, No. 14CRS053308

STATE OF NORTH CAROLINA

v.

JOHN PHILLIP LOCKLEAR, Defendant.

Appeal by defendant from judgment entered on or about 19 August 2015 by Judge William R. Bell in Superior Court, Catawba County. Heard in the Court of Appeals 6 October 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Tiffany Y. Lucas, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgment convicting him of first degree burglary. For the following reasons, we find no error.

I. Background

Defendant was previously married to Susie,[1] but they separated and divorced. Susie's son, Greg, lived with her mother, Ann, in a mobile home on Wise Road, but

[1] Pseudonyms will be used to protect the identity of the minor involved.

Susie lived with her father, Greg's grandfather, on Heavner Road. Susie had lived on Heaver Road since January of 2014 when she left defendant. Furthermore, even before that, by the summer of 2013, Ann told defendant "not to ever come around us again. None of us. None of our property or anything." So before the incident which led to defendant's criminal charges and conviction occurred, defendant had been told to stay away from the Wise Road home and he was aware that his ex-wife, Susie, did not live there.

The State's evidence tended to show that around 10:00 p.m. on 12 June 2014, Greg was home alone, when his ex-stepfather, defendant, walked in to his bedroom where he was lying on the bed listening to music and asked where his mother was. Greg was frightened and surprised by defendant and he texted his mother, sister, and aunt. Susie panicked when she received the text, and she and several family members rushed to the mobile home to make sure defendant had left and was not hiding anywhere around the property.

Two days later, on 14 June 2014, Greg's grandmother Ann realized her camera bag, camera, SD cards, and laptop were missing from her home. Susie went to defendant's home and confronted him about the missing items. Thereafter, Susie and Ann went to defendant's home offering to pay for the SD cards of pictures, to which defendant replied, "You can give me some money, but you won't get your stuff back" and, "Well, their [(sic)] gone. You'll never see them." But later that night, defendant

called Susie and offered her the "stuff" in exchange for his lawnmower. The next day, 15 June 2014, Susie took the lawnmower to defendant; he brought a camera bag out to Susie, but it was empty.

On or about 6 April 2015, defendant was indicted for first degree burglary, and on or about 19 August 2015, a jury convicted him of the charge. The trial court sentenced defendant accordingly, and defendant appeals.

II. Motion to Dismiss

Defendant first contends that

> the State failed to present substantial evidence that . . . [he] broke into the mobile home or that he formed the intent to commit a larceny before he entered the mobile home. Trial counsel moved to dismiss on these grounds, but the trial court denied his motion. The trial court erred.

(Original in all caps.)

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

> Burglary is an offense which consists of five

> elements: (1) a breaking, (2) and entering, (3) of a dwelling house or sleeping apartment of another, (4) in the nighttime, and (5) with the intent to commit a felony therein. If the dwelling house or sleeping apartment is occupied, it is burglary in the first degree.

State v. Hobgood, 112 N.C. App. 262, 264, 434 S.E.2d 881, 882 (1993). Defendant challenges both the breaking and intent elements of the crime of burglary.

A. Breaking

Defendant first contends that "the State failed to present substantial evidence . . . [he] entered the mobile home by opening the back door himself[;] . . . the back door could have been open[.]" "A breaking is defined as any act of force, however slight, used to make an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. Proof of such a breaking usually requires testimony that prior to entry all doors and windows were closed." *State v. Eldridge*, 83 N.C. App. 312, 314–15, 349 S.E.2d 881, 883 (1986) (citation and quotation marks omitted).

Defendant essentially argues that in order to survive a motion to dismiss someone must have testified specifically "that prior to [defendant's] entry all doors and windows were closed[,]" but the State's witnesses did testify to this in their own words. *Id.* at 315, 349 S.E.2d at 882-83. Ann testified that when she left the home around 6:00 p.m. Greg was inside alone and she locked the back door. The evidence also showed that the front door of the mobile home was inoperable and did not open, so the back door was the only exterior door in use. Greg testified that when he saw

defendant standing in his room he was scared "because I didn't even know – like how he got in." Drawing every reasonable inference in favor of the State, *Johnson*, 203 N.C. App. at 724, 693 S.E.2d at 148, the evidence shows that Ann had closed and locked the back door and Greg had not opened it, which is why he was surprised and unsure of how defendant entered the home. And even if the door was not locked, defendant's act of opening the door would be a breaking. Thus, there was substantial evidence of the element of breaking. *See Eldridge*, 83 N.C. App. at 314–15, 349 S.E.2d at 882–83.

B. Intent

Defendant next contends that "the State failed to present substantial evidence that . . . [he] formed the intent to commit a larceny in the mobile home **before** he entered the mobile home." (Emphasis in original.) Defendant argues that his statements to Greg indicated he actually entered the home only to talk to Susie, Greg's mother. "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (citation and quotation marks omitted).

Greg testified that he actually did not live with his mother; he lived with his grandmother at one location, and his mother lived with his grandfather at another.

The evidence also showed that Ann had told defendant to stay away from her home and that defendant knew that Susie did not live in Ann's home. Drawing every reasonable inference in favor of the State, *Johnson*, 203 N.C. App. at 724, 693 S.E.2d at 148, the evidence indicates that defendant broke into the mobile home to commit a larceny and upon finding Greg, a boy who knew him well, in the bedroom, he came up with an excuse for being in the home, though not a particularly plausible one, since it was 10:00 p.m. at night and Susie did not live there. Therefore, the trial court did not err in denying defendant's motion to dismiss, and this argument is overruled.

III. Jury Instructions

Defendant next contends that the trial court erred in failing to instruct the jury on misdemeanor breaking or entering.

> This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by the instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Calderon, ___ N.C. App. ___, ___, 774 S.E.2d 398, 408–09 (2015) (citations, quotation marks, and brackets omitted).

"Misdemeanor breaking or entering, G.S. 14–54(b), is a lesser included offense

of felonious breaking or entering and requires only proof of wrongful breaking or entry into any building." *State v. O'Neal*, 77 N.C. App. 600, 606, 335 S.E.2d 920, 924 (1985).

> An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. However, where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required.

State v. Ricks, ___ N.C. App. ___, ___, 781 S.E.2d 637, 642 (2016) (citations and quotation marks omitted). Defendant again relies on his statement to Greg as proof that he did not intend to commit the larceny. Defendant's statement to Greg does not necessarily show that he did not have the intent to commit the larceny. As noted above, his statement may have been intended only as a cover story for Greg, to provide an explanation of why he had shown up in the mobile home that night. The State's evidence was "positive as to each element of the offense charged and there is no contradictory evidence relating to any element[.]" *Id.* We do not conclude that defendant's sole statement to Greg was evidence entirely negating the element of the intent to commit the larceny nor that "the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater[,]" and thus the trial court did not err in failing to give this instruction. *Id.*

IV. Right to Testify

Lastly, defendant contends that "the trial court failed to colloquy . . . [him] to determine if he understood his right to testify and if he wished to knowingly and voluntarily relinquish this right[.]" (Original in all caps.) Even assuming this issue were properly preserved for appeal, as the State contends it was not, North Carolina currently does not require the trial court to inquire into a defendant's knowledge of his right to testify. *See State v. Smith*, 357 N.C. 604, 618, 588 S.E.2d 453, 463 (2003) ("This Court has never required trial courts to inform a defendant of his right to testify or to make an inquiry on the record regarding his waiver of the right to testify.") This argument is overruled.

V. Conclusion

For the foregoing reasons, we conclude there was no error.

NO ERROR.

Judges McCULLOUGH and ZACHARY concur.

Report per Rule 30(e).