IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-290

Filed: 18 October 2016

Guilford County, No. 14 CRS 24373; 24375; 75911; 75913; 75914; 77247

STATE OF NORTH CAROLINA

v.

JARVIS JAVONE JONES, Defendant.

Appeal by defendant from judgment entered 5 October 2015 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Glenn Gerding, Appellate Defender, by Assistant Appellate Defender Emily H. Davis, for defendant.

ELMORE, Judge.

Jarvis Javone Jones (defendant) argues that the trial court erred in denying his motion to dismiss the first-degree burglary charge against him because the State presented insufficient evidence of the "breaking" element. After careful review, we find no error.

I. Background

The State's evidence tended to show the following: James Smith, Nicholas James, Alexander James, and Kevin Strayhorn lived together in an apartment in Greensboro. Strayhorn and defendant grew up together, and Strayhorn referred to defendant as his cousin even though they are not related. Strayhorn introduced defendant to his roommates, and defendant had visited the apartment numerous times.

At approximately 12:00 a.m. on 7 May 2014, James Smith heard a knock at the door of their apartment. Smith looked through the peephole of the door and saw defendant. Smith testified that defendant had been at the apartment a few hours earlier and on several prior occasions, and he was not surprised to see defendant. When asked why he was not surprised to see defendant, Smith testified, "Because he—he comes to the house to see his cousin most—some of the time. So you know, it's just like another, you know . . . like that's his friend."

Thus, upon seeing defendant through the peephole of the door, Smith opened the door. Defendant, as well as another man who was with defendant but not visible through the peephole, entered the apartment. Once inside, defendant immediately put on a latex glove, brandished a pistol, and said, "You know what this is." Defendant demanded that Smith "give him everything" and pistol-whipped Smith in the face when he refused. Some of the roommates began to wrestle with defendant, and defendant's accomplice fled through the back door. The roommates testified to

hearing numerous gunshots coming from the back of the apartment. Nick James testified that the accomplice reentered from the back of the apartment, had a gun, lined everybody up, and was "demanding stuff." Nick James further testified that the accomplice took his wallet, and the accomplice and defendant "tried to get everything they could" before fleeing from the apartment.

Strayhorn testified that after the incident, he told police officers that around three weeks prior to the incident, defendant called him and stated, "What if I robbed your roommates?" When Strayhorn told defendant "that's not right," defendant "laughed it off" and said "he was just playing."

Defendant testified that he and Strayhorn grew up together, that he had known Strayhorn for twelve or thirteen years, and that he referred to Strayhorn as his cousin despite not being related. Defendant admitted to going to the apartment around 11:45 p.m. on 6 May 2015. He testified, however, that he went to the apartment to pay Nicholas James twenty dollars and to purchase marijuana. Defendant testified that he and Nicholas James talked for a while before getting into an argument over the quality of the marijuana, and then they began fighting. Defendant testified that somebody in the apartment tackled him, he heard gunshots, everybody froze, and then he ran out of the apartment. Defendant denied having a gun inside the apartment, denied trying to rob anyone, and denied pistol-whipping anyone.

Following a jury trial, defendant was later found guilty of first-degree burglary, robbery with a dangerous weapon, assault with a deadly weapon inflicting serious injury, and three counts of attempted robbery with a dangerous weapon. Defendant appeals only from the first-degree burglary conviction.

II. Analysis

"The standard of review of a motion to dismiss for insufficient evidence is whether the State presented substantial evidence of each element of the offense and 'defendant's being the perpetrator.' " *State v. Hernandez*, 188 N.C. App. 193, 196, 655 S.E.2d 426, 429 (2008) (quoting *State v. Nettles*, 170 N.C. App. 100, 102–03, 612 S.E.2d 172, 174 (2005)). "Substantial evidence is relevant evidence that a reasonable person might accept as sufficient to support a conclusion." *Id.* (citations omitted). " 'If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence.' " *Nettles*, 170 N.C. App. at 103, 612 S.E.2d at 174 (quoting *State v. Tisdale*, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002)). "[T]he evidence is to be considered in the light most favorable to the State and . . . the State is entitled to every reasonable inference to be drawn therefrom." *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (citation omitted).

First-degree burglary is codified in N.C. Gen. Stat. § 14-51 (2015) as follows:

> There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree.

At common law, "[t]he elements of first-degree burglary are: '(1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) of another (6) which is actually occupied at the time of the offense (7) with the intent to commit a felony therein.' " *State v. Clagon*, 207 N.C. App. 346, 350, 700 S.E.2d 89, 92 (2010) (quoting *State v. Blyther*, 138 N.C. App. 443, 447, 531 S.E.2d 855, 858 (2000)). As stated above, defendant's argument pertains only to the first element.

"A breaking may be actual or constructive." *State v. Young*, 312 N.C. 669, 681, 325 S.E.2d 181, 189 (1985) (citing *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976)). "A constructive breaking, as distinguished from actual forcible breaking, occurs when entrance to the dwelling is accomplished through fraud, deception or threatened violence." *Id.* (citing *Wilson*, 289 N.C. at 539–40, 223 S.E.2d at 316).

Defendant argues that a constructive breaking did not occur and, "[a]t most, [the] evidence showed [defendant] knocked on the front door, stood silently, and entered the house when voluntarily admitted by resident James Smith." The State contends that defendant's argument is based on a non-existent "requirement that the

deception must involve the perpetrator speaking." The State relies on our Supreme Court's analysis in *State v. Smith*, 311 N.C. 145, 316 S.E.2d 75 (1984).

In *Smith*, the Court stated,

> Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads:
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> . . . .
>
> 5. When some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters; as, if one knock[s] at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being opened, enters. . . .
>
> [A]lthough there is no *actual breaking*, there is a breaking in law or by construction; 'for the law will not endure to have its justice defrauded by such evasions.' In all other cases, when no fraud or conspiracy is made use of or violence commenced or threatened *in order to obtain an entrance*, there must be an actual breach of some part of the house.

Id. at 148–49, 316 S.E.2d at 77–78 (quoting *State v. Henry*, 31 N.C. (9 Ire.) 463, 467–68 (1849)). Furthermore, the Court stated that "the list of five types of possible constructive breakings contained in *Henry* is not exhaustive but illustrative." *Id.* at 149, 316 S.E.2d at 78.

In *State v. Ball*, 344 N.C. 290, 306, 474 S.E.2d 345, 354 (1996), the defendant also argued that the trial court erred in denying his motion to dismiss a first-degree burglary charge, contesting the "breaking" element. The defendant, armed with a

concealed knife, rang the doorbell at Reverend Krantz's home. *Id.* at 306, 474 S.E.2d at 355. "Reverend Krantz recognized the defendant and asked him how he was doing. Defendant replied, '[n]ot so well,' and said, 'You told me that if I ever needed somebody to talk to that you would be there.' " *Id.* Reverend Krantz let the defendant into his home and within minutes the defendant attacked Reverend Krantz and his wife with the knife. *Id.*

Our Supreme Court held there was sufficient evidence to establish a constructive breaking because, "[t]he evidence, when viewed in the light most favorable to the State, tend[ed] to show that Reverend Krantz was induced to open the door by defendant's representation that he was there for help. Stated more accurately, the defendant obtained entry under the pretense that he was seeking help." *Id.* at 306–07, 474 S.E.2d at 355.

In *State v. Oliver*, the defendant, while holding a loaded gun, knocked on the door of an apartment, and "when asked 'Who is it,' defendant gave his name, and, [ ] when the door was opened, defendant entered. Once inside the doorway, defendant ordered Luis Ortega to 'give it up' and then shot and killed him." 334 N.C. 513, 524, 434 S.E.2d 202, 207 (1993). On appeal, we held that this "evidence supports the fifth type of constructive breaking—inducement of the occupant to open the door by knocking at the door under pretense of business." *Id.*

Here, when viewed in the light most favorable to the State and giving it every

reasonable inference, *see Grigsby*, 351 N.C. at 457, 526 S.E.2d at 462, the evidence showed that defendant, not his accomplice, knocked on the door of the apartment because defendant knew that the residents would recognize him as a friend and that he would gain entrance. As stated in *Smith*, "When some trick is resorted to to induce the owner to remove the fastening and open the door, . . . there is a breaking in law or by construction[.]" *Smith*, 311 N.C. at 148–49, 316 S.E.2d at 77–78 (quoting *Henry*, 31 N.C. at 467–68). Defendant induced Smith to open the door by knocking under the pretense that he was there, like with all of his previous visits, to see his "cousin" while he was actually there to commit an armed robbery. Defendant concealed his armed accomplice, who was a stranger to the residents. Immediately upon entering the apartment, defendant and his accomplice began the robbery. While defendant did not say anything as he stood at the door, the evidence showed that, similar to asking, "Who is there?" Smith inquired into and confirmed who was on the other side of the door by looking through the peephole. Based on the case law discussed above, the State's evidence of a constructive breaking was sufficient to withstand the motion to dismiss in this case.

III. Conclusion

The trial court did not err in denying defendant's motion to dismiss the first-degree burglary charge.

NO ERROR.

Judges DAVIS and ZACHARY concur.

Report per Rule 30(e).