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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-43

Filed: 17 May 2016

Union County, No. 13 CRS 052352, 14 CRS 000797

STATE OF NORTH CAROLINA

v.

TIMOTHY CHADWICK FLEMING

Appeal by defendant from judgment entered 15 September 2015 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Marilyn G. Ozer for defendant.

TYSON, Judge.

Timothy Chadwick Fleming ("Defendant") appeals from his convictions of felonious larceny and conspiracy. We find no error.

I. Background

Jonathan Nix is employed by TJ Maxx and Marshalls retail stores as an "organized retail crime investigator." On 24 April 2013, a "grab and run" theft occurred at the TJ Maxx store located in Monroe, North Carolina. Nix testified a

"grab and run" occurs when one or more individuals enters the store, selects and grabs merchandise, and runs out of the store without paying for it. Nix visited the Monroe store within twenty-four hours after the incident occurred and viewed the store surveillance video recording of the theft.

The store's surveillance camera covering the entrance and exit doors recorded a male enter the store at 3:03 p.m., and leave the store empty-handed at 3:22 p.m. A different male entered the store at 3:30 p.m. and ran out of the store at 3:31 p.m., carrying at least one handbag in each hand.

Another camera, angled to record the store's handbag department, recorded an individual moving around near the back of the handbag section at 3:30 p.m. At 3:31 p.m., he left the handbag section of the store carrying handbags. Nix explained the leather handbags were displayed at the back of the handbag department.

Based on the surveillance videos, Nix concluded six Michel Kors handbags had been stolen. He was unable to determine exactly which handbags were stolen, or their prices. Nix testified the lowest priced Michael Kors handbags sold by TJ Maxx in the Charlotte area during that time were $179.99. Nix estimated the value of the stolen handbags exceeded $1,000.00.

Prior to this incident, Nix had received numerous calls from other TJ Maxx and Marshalls stores throughout the Charlotte area, regarding similar "grab and run" thefts of handbags. Nix also investigated an incident at the TJ Maxx store in

Mooresville, which occurred 12 April 2013, twelve days before the theft in Monroe. Nix reviewed the surveillance footage from the Mooresville incident and concluded it showed the same two male perpetrators, whom the surveillance footage also recorded in Monroe. The first man entered the store, went to the handbag department, and left the store. The second man then entered the store, took Michael Kors handbags, and ran out. The jury was shown still images from the surveillance footage of the man leaving the Mooresville store with the handbags. Nix also investigated a similar larceny, which occurred at the Marshalls store on Rivergate Parkway in Charlotte on 30 April 2013.

Detective David Call was assigned to investigate the theft from the Mooresville TJ Maxx store. Detective Call and Detective Barry Kipp interviewed Defendant on 14 May 2013. The interview was recorded on video. During the interview, Defendant admitted to his involvement in numerous other similar crimes. The video recorded interview was admitted into evidence and published to the jury.

The jury found Defendant to be guilty of felonious larceny and felonious conspiracy. Defendant admitted to having attained the status of an habitual felon. The two charges were consolidated for judgment, and Defendant was sentenced to a minimum of 94 months and a maximum of 125 months in prison. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) allowing the State to introduce improper evidence under Rule 404(b), where the prejudicial effect outweighed the probative value; (2) allowing the State to introduce improper hearsay evidence; and (3) denying his motion to dismiss the charges of felonious larceny and conspiracy to commit felonious larceny, where the State presented insufficient evidence to establish the value of the stolen property exceeded $1,000.00.

III. Video Recorded Interview

Defendant argues the trial court erred by allowing the jury to hear incompetent and grossly prejudicial Rule 404(b) evidence in Defendant's recorded interview with Charlotte-Mecklenburg police detectives. We disagree.

A. Standard of Review

Our Supreme Court held:

> when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned

decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

B. Video Recorded Interview

In the 14 May 2013 recorded interview, Detective Call was joined by Charlotte-Mecklenburg police detective Barry Kipp. Detective Kipp sat at the far end of the interview table with a large notebook. Defendant was asked how he knew Roger McCain ("McCain"). Defendant responded he and McCain "got entwined" doing drugs together. Detective Kipp asked Defendant to list the cities where he had engaged in similar conduct with McCain. Defendant named Mooresville, Gastonia, Rock Hill, and Monroe. Call began suggesting other cities: Charlotte, Concord, Pineville, Salisbury, and Statesville. Defendant could not recall similar incidents in Concord or Salisbury.

After he asked questions about McCain's participation in the crimes, Detective Call added details about the thefts in the other cities and towns. Defendant admitted participating in some, but not all of the thefts. The detectives prompted Defendant when he showed difficulty remembering incidents.

At one point, Detective Kipp opened his notebook, removed an envelope and showed photographs to Detective Call. The jurors were able to see on the video that Detective Kipp's notebook contained many different sections of photographs, documents and DVD's. Detective Call asked Defendant, "how many of these places

you think ya'll done?" Detective Call stated to Defendant that he was having difficulty remembering all of the incidents because there were so many of them.

As Detective Call questioned Defendant, Detective Kipp continued to flip through his notebook, allowing the jury to see the many pages of photographs with DVD's attached to some of the pages. Detective Call told Defendant he knew why he was "doing this, you got a habit."

Detective Kipp asked Defendant how he valued the stolen merchandise, if he "had to do math." Detective Kipp repeated the list of cities and towns where he believed Defendant had committed thefts, including Mooresville, Gastonia, Pineville, Statesville, Monroe, Charlotte, and two locations in Rock Hill. Detective Kipp suggested the average price of a handbag was $200.00, and asked Defendant to multiple the number of stolen handbags by $200.00. Detective Kipp suggested the number 8, and multiplied $200.00 by 8, for a total of $1,600.00 of stolen merchandise per store.

Defendant argues this 404(b) evidence should have been excluded because the probative value was outweighed by the danger of unfair prejudice under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2015). "Though Rule 404(b) is a 'general rule of inclusion,' Rule 403 supplies an independent limitation on the ability of trial courts to admit evidence under that Rule." *State v. Hembree*, 368 N.C. 2, 13, 770 S.E.2d 77, 85 (2015) (citation omitted).

Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403. The jury was permitted to hear the detectives' accusations of the commission of numerous other crimes, and their suggestions of the value of stolen merchandise. The jury was not permitted to hear Nix's *voir dire* testimony that Defendant was charged in only four of the thirteen incidents Nix investigated.

The trial court instructed the jury to consider the video recorded evidence only to show identity of Defendant as the perpetrator of the offense, plan, motive, lack of mistake, or opportunity to commit the crime. The trial court instructed the jury not to consider the evidence for any other purpose. The jury is presumed to have followed the trial court's instruction. *State v. Golphin*, 352 N.C. 364, 462, 533 S.E.2d 168, 232 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

"Certainly, most evidence tends to prejudice the party against whom it is offered. However, to be excluded under Rule 403, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be *substantially* outweighed." *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 783 (1995) (emphasis in original). Defendant has failed to show the probative value of the video recorded interview was "substantially outweighed" by the danger of unfair prejudice to constitute an abuse of discretion. *Id.*; *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

IV. Hearsay

Defendant argues the trial court erred by allowing the State to introduce hearsay evidence to support elements of the crime charged.

Defendant challenges the following testimony of Nix:

> Q: Six. And were you able to determine a value of those handbags?
>
> A: Manager reported fourteen --
>
> MS. BROOKS: Objection, Your Honor.
>
> THE COURT: Don't -- don't go into what somebody else reported to you.
>
> A: Okay. The lowest price point handbag we carry and [sic] at that time in the Charlotte Metro market was one seventy-nine, ninety-nine for Michael Kors handbags.

Nix further testified he was unable to see the Michael Kors emblem on the handbags. Nix stated he "can tell you that we had counts because . . . the incidents were occurring so often that we were losing them; we were counting our bags daily." Nix further testified that he arrived at the value of $179.99 as the "lowest price point" of Michael Kors handbags, based upon his own "investigation throughout the Charlotte market and personally going in the stores . . . and looking at them with my own eyes."

Defendant argues Nix's knowledge of the value of the handbags is based solely upon hearsay evidence from the store's managers, who were not called to testify, and

without this evidence the jurors would have no basis to find the value of the handbags exceeded $1,000.00.

The trial court sustained Defendant's objection to "what somebody else reported to [Nix]." Nix's testimony that "the lowest price point handbag we carry . . . at that time in the Charlotte Metro market was one seventy-nine, ninety-nine for Michael Kors handbags," was admitted without objection, and was based upon Nix's own investigation. Defendant did not object to this testimony, has not argued plain error, and is not entitled to a plain error review. *State v. Joyner*, __ N.C. App. __, __, 777 S.E.2d 332, 335 (2015); N.C. Rule App. P. 10(b)(1). This argument is dismissed.

V. Felonious Larceny

Defendant argues the trial court erred by denying his motion to dismiss the charge of felonious larceny. We disagree.

A. Standard of Review

"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 (2000) (citation omitted). "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) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "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) (citation omitted).

B. Value of the Stolen Property

Defendant was indicted for stealing "a quantity of pocketbooks . . . having a value of more than $1,000.00." To convict Defendant of felonious larceny, the State must present sufficient evidence to prove Defendant "(1) took the property of another, (2) with a value of more than $1,000.00, (3) carried it away, (4) without the owner's consent, and (5) with the intent to deprive the owner of the property permanently." *State v. Owens*, 160 N.C. App. 494, 500, 586 S.E.2d 519, 523-24 (2003); N.C. Gen. Stat. § 14-72(a) (2015).

Pursuant to N.C. Gen. Stat. § 14-72, "defendant's larceny could be considered a felony, rather than a misdemeanor, only if the value of the property he took was more than $1,000.00 or if he committed the larceny in the course of a felonious breaking and entering." *State v. Matthews*, 175 N.C. App. 550, 556, 623 S.E.2d 815, 820 (2006). "[T]o convict of the *felony* of larceny, it is incumbent *upon the State* to

prove beyond a reasonable doubt that the value of the stolen property was more than two hundred dollars" [now $1,000.00]. *State v. Jones*, 275 N.C. 432, 436, 168 S.E.2d 380, 383 (1969) (emphasis in original); N.C. Gen. Stat. § 14-72(a) (2015).

"Where a merchant has established a retail price [,] which he is willing to accept as the worth of merchandise offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss." *State v. Odom*, 99 N.C. App. 265, 272-73, 393 S.E.2d 146, 151 (citation omitted), *disc. review denied*, 327 N.C. 640, 399 S.E.2d 232 (1990). The trial court instructed the jury on both felonious and non-felonious larceny.

Monroe Police Detective Jonathan Williams investigated the incident. He testified he read the store's incident report, which stated that over $1,000.00 worth of handbags were stolen. On cross-examination, Detective Williams testified the incident report stated the goods stolen as "eight Michael Kors handbags or wallets; total value fifteen hundred and ninety-nine dollars and ninety-two cents."

Nix stated the number of handbags listed on the incident report may not be reliable, because the person who estimated eight stolen handbags had not viewed the surveillance video of the larceny. Based upon his review of the store's surveillance video, Nix testified he believed six handbags were stolen.

The surveillance video, which was included in the record, shows no tags or other identifying markings on the handbags. The State did not introduce evidence of

a "count" or inventory of the handbags from the day of the theft or from any other day. Nix drew his conclusion the handbags were Michael Kors brand because of the numerous recent thefts of Michael Kors handbags in the TJ Maxx and Marshalls stores in the area. Nix testified the "lowest price point" Michael Kors handbag TJ Maxx stores sold in the Charlotte area at the time was $179.99. He multiplied $179.99 by six to determine the value of the stolen property as $1,079.94. He testified TJ Maxx sold at least two other brands of "high end" handbags during that time. The prices of those handbags ranged from $129.99 to three or four hundred dollars.

This Court has reviewed the surveillance video and notes the difficulty in determining the precise number of handbags the perpetrator carried out of the store. The jury also viewed the surveillance video. Nix's conclusions that Defendant stole six handbags and that the handbags were Michael Kors brand valued at $1,079.94 was fodder for cross-examination. The value of the stolen goods was an issue of fact for the jury alone to resolve.

"[I]t is not this Court's function to evaluate the credibility of a witness." *State v. Triplett*, 368 N.C. 172, 177, 775 S.E.2d 805, 808 (2015).

> If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury.
>
> When the State's evidence is conflicting -- some tending to incriminate and some to exculpate the defendant -- it is sufficient to repel a motion for judgment of nonsuit, and must be submitted to the jury.

State v. Horner, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958) (citations omitted).

The jury was satisfied beyond a reasonable doubt that the value of the handbags exceeded $1,000.00. The jury was also instructed they could have found Defendant guilty of non-felonious larceny, if the State failed to prove the value of the property stolen. This argument is overruled.

VI. Conclusion

Defendant has failed to show the trial court's Rule 404(b) admission of the video recorded interview with Detectives Call and Kipp was unduly prejudicial and "substantially outweighed" under Rule 403. *Lyons*, 340 N.C. at 669¸ 459 S.E.2d at 783. Without objection, Defendant failed to show the trial court erred by allowing improper hearsay testimony to support the property value element of the felonious larceny charge. Defendant has not argued plain error and is not entitled to plain error review.

Defendant has failed to show the State's evidence of value of the property stolen was insufficient to submit the charge of felonious larceny to the jury. Defendant received a fair trial, free from prejudicial errors he preserved and argued.

NO ERROR.

Judges CALABRIA and HUNTER, JR. concur.

Report per Rule 30(e).