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NO. COA11-742
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Sampson County
No. 10 CRS 51955

JEROME COX

Appeal by defendant from judgment entered 24 February 2011
by Judge W. Allen Cobb, Jr., in Sampson County Superior Court.
Heard in the Court of Appeals 23 January 2012.

*Attorney General Roy Cooper, by Assistant Attorney General
Thomas D. Henry, for the State.*

William D. Spence for defendant-appellant.

ERVIN, Judge.

Defendant Jerome Cox appeals from a judgment sentencing him to 140 to 177 months imprisonment based upon his convictions for felonious breaking and entering and having attained the status of an habitual felon. On appeal, Defendant contends that the trial court erred by denying his motion to dismiss the felonious breaking or entering charge for lack of sufficient evidence and that the sentence that the trial court imposed upon him violated the constitutional guarantee against cruel and unusual punishment. After careful consideration of Defendant's

challenges to the trial court's judgment, we conclude that Defendant is not entitled to relief from that judgment.

I. Factual Background

A. Substantive Facts

On the early morning of 20 August 2010, a Clinton police officer responded to an alarm call at a local business. Upon arrival, the officer discovered that a window air conditioning unit had been pushed into the building. A few minutes later, investigating officers discovered Defendant hiding inside the building in an office area. At the time he was found inside the building, Defendant was wearing gloves. A flashlight was located on a desk near the point at which the air conditioning unit had been pushed into the building. Defendant did not have permission to be inside the building.

B. Procedural History

On 20 August 2010, a warrant for arrest charging Defendant with felonious breaking or entering was issued. On 4 October 2010, the Sampson County grand jury returned bills of indictment charging Defendant with felonious breaking or entering and having attained the status of an habitual felon. The charges against Defendant came on for trial before the trial court and a jury at the 21 February 2011 criminal session of the Sampson County Superior Court. On 24 February 2011, the jury returned

verdicts convicting Defendant of felonious breaking or entering and having attained habitual felon status. As a result, the trial court sentenced Defendant to 140 to 177 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Sufficiency of the Evidence

In his first challenge to the trial court's judgment, Defendant argues that the trial court erred by denying his motion to dismiss the felonious breaking or entering charge for lack of sufficient evidence. More particularly, Defendant contends that the record did not permit a finding that he intended to commit a felony or larceny when he entered the building. We do not find this argument persuasive.

"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 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)) cert. denied, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000). "The essential elements of felonious breaking or

entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992); N.C. Gen. Stat. § 14-54(a). The necessary intent may be proved through the use of circumstantial evidence and can be inferred from defendant's acts and "the general circumstances existing at the time of the alleged commission of the offense charged." *State v. Costigan*, 51 N.C. App. 442, 445, 276 S.E.2d 467, 469 (1981) (citation and internal quotation marks omitted).

The evidence presented at trial tends to show that Defendant forced his way into the building in the middle of the night, that he wore gloves despite the fact that this incident occurred in August, and that a flashlight was found near the point of entry. In addition, the record evidence tends to show that there were computers, a cash register, a small safe, and other office equipment in the area in which Defendant was discovered. We conclude that this evidence, when taken in the light most favorable to the State, is sufficient to permit a finding that Defendant entered the building in question with the intent to commit larceny. Thus, the trial court properly denied Defendant's dismissal motion.

B. Defendant's Sentence

Secondly, Defendant contends that the trial court's decision to sentence him as an habitual felon despite the fact that he committed a non-violent crime violated the constitutional prohibition against the imposition of cruel and unusual punishment. In essence, Defendant contends that the sentence imposed upon him by the trial court was excessive and grossly disproportionate given the nature of the crime for which he was convicted. We have previously upheld the imposition of similar sentences upon individuals who had been convicted of committing non-violent offenses and who had attained habitual felon status against challenges that those sentences amounted to cruel and unusual punishment. *State v. Dammons*, 159 N.C. App. 284, 298-99, 583 S.E.2d 606, 615, *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004). As the Supreme Court has stated, a sentence imposed in a non-capital case will only be found to be so grossly disproportionate as to violate the constitutional prohibition against the imposition of cruel and unusual punishment in rare instances. *State v. Todd*, 313 N.C. 110, 119, 326 S.E.2d 249, 254 (1985). This case is not one of them.

III. Conclusion

Thus, for the reasons set forth above, neither of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges ROBERT C. HUNTER and STEPHENS concur

Report per Rule 30(e).