IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-898

Filed: 3 April 2018

Transylvania County, Nos. 15 CRS 51760, 51768

STATE OF NORTH CAROLINA

v.

ROBERT TOBIAH LEONARD

Appeal by defendant from judgments entered 15 February 2017 by Judge Alan Z. Thornburg in Transylvania County Superior Court. Heard in the Court of Appeals 7 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.

Stephen G. Driggers for defendant-appellant.

DAVIS, Judge.

Robert Tobiah Leonard ("Defendant") appeals from his convictions for misdemeanor larceny and misdemeanor breaking or entering. On appeal, he argues that the trial court erred by (1) denying his motion to dismiss the charge of larceny; and (2) instructing the jury on a theory of acting in concert regarding the larceny

charge. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence tending to establish the following facts: During the summer of 2015, Don Beatty and his wife, Donna Beatty, were living in Franklin, Tennessee. The couple owned a vacation home (the "Vacation Home") in Connestee Falls, North Carolina and spent many holidays there with their children and grandchildren. The Beattys employed several individuals to work at the Vacation Home: a housekeeper, Catherine Ashmore ("Catherine"); a "backup" housekeeper; a pest control agent; and Defendant, a maintenance worker. Each of these four individuals was given the access code to the vacation home.

Mr. Beatty hired Defendant to perform repairs in the Vacation Home in the spring of 2015 at the recommendation of Catherine, who was Defendant's mother. In early July 2015, Defendant was working on an assignment to paint the deck. Mr. Beatty informed Defendant that his family would be coming to the Vacation Home for the 4 July 2015 weekend. Defendant was upset when the Beattys arrived a few days earlier than expected. He told Mr. Beatty, "You've got to let me know when you're coming." Mr. Beatty testified that he thought this was a strange reaction given that he — rather than Defendant — was the owner of the house. The family left the

Vacation Home on approximately 13 July 2015, and Catherine cleaned the home after they left.

On 5 August 2015, Mr. Beatty was checking the electronic access logs to the Vacation Home and learned that Defendant had entered the home at 4:30 a.m. that morning. Mr. Beatty had not assigned a new task to Defendant at that time and was confused as to why Defendant would need to be at the home. He texted Defendant and asked, "Why are you in my house at 4:30 in the morning?" Defendant texted him in response that he was "working on some ceiling tiles." Mr. Beatty told Defendant that he had never instructed him to work on ceiling tiles. He told Defendant to "leave the premises" and that he was fired.

In the days following Defendant's dismissal, Catherine called Mrs. Beatty. Catherine told her that while she was cleaning the house, she had entered the master bathroom and walked in on a young woman getting out of the shower. According to Catherine, the woman had a "casual attitude" and acted "as though she belonged there[,]" which led Catherine to assume that the woman was Mrs. Beatty's daughter, apologize to the woman, and leave the house. She apologized once more to Mrs. Beatty over the phone and stated that she had not realized anyone would be at the Vacation Home.

Mrs. Beatty informed Mr. Beatty of Catherine's phone call, and they confirmed that none of their children or grandchildren were staying at the Vacation Home. Two

or three days later, Mr. Beatty drove to the Vacation Home and found it to be in disarray. He observed cigarette ashes throughout the home, stains on the floor, unmade beds, furniture that had been moved or broken, a damaged speaker, bodily fluid stains on an oriental rug, and feminine hygiene products in various trash cans. Mr. Beatty also discovered a personal check bearing the name "Uchetta" in the washing machine. In addition, he noticed that several bottles of alcohol were missing from his liquor cabinet while other bottles had been emptied. There was also a tequila bottle in the cabinet that was not his.

On 12 August 2015, Mr. Beatty called the Transylvania County Sheriff's Office to report that someone had broken into his home. Deputy James Dodson responded to the call. Deputy Wade Abram subsequently assisted with the case. As a part of their investigation, the deputies requested that Defendant come to the Sheriff's Office for an interview.

During his interview with Deputy Abram, Defendant conceded that he had given several people the access code to the Vacation Home. He stated that one of these people was his cousin, Matthew Leonard ("Matthew"), who had assisted Defendant in his work at the Vacation Home.

Defendant admitted to Deputy Abram that he had entered the Vacation Home at 4:30 a.m. on 5 August 2015 in order to "use the restroom and to change out some tiles" and that he had stayed overnight. He informed Deputy Abram that Matthew

and a woman named Danielle Uchetta ("Danielle") were also staying at the home overnight and that the three of them had smoked cigarettes and methamphetamine as a part of "a week long binge" at the Beattys' Vacation Home. Defendant stated that although he had only remained at the home for a day, Matthew and Danielle had "stayed there a couple days after [Defendant] had stayed there . . . with them."

Defendant also admitted to Deputy Abram that he was aware Matthew and Danielle "[were] using [the speaker] when [he] came to the house" and that he knew "the . . . speaker was damaged." In addition, he informed Deputy Abram that "Matthew and Danielle Uchetta drank [Mr. Beatty's] liquor" but stated that he himself did not drink alcohol. Defendant also showed Deputy Abram two videos on his cell phone that he had recorded of Matthew and Danielle inside the Vacation Home during the "week long binge."

On 29 October 2015, Defendant was charged with felonious larceny and felonious breaking or entering. A jury trial was held before the Honorable Alan Z. Thornburg in Transylvania County Superior Court beginning on 13 February 2017. The State presented testimony from Mr. Beatty, Deputy Dodson, Deputy Abram, Catherine, Sharon Jackson (the "chief of security at Connestee Falls"), and Barbra Leonard (Defendant's estranged wife). The defense offered testimony from Catherine. Defendant did not testify on his own behalf.

At the close of the State's evidence, Defendant moved to dismiss the charges of felonious larceny and felonious breaking or entering due to insufficiency of the evidence, but the motion was denied. He renewed this motion at the close of all the evidence, and it was denied once again. In the trial court's jury instructions, the jury was instructed not only on the charged offenses but also on the lesser-included offenses of misdemeanor larceny and misdemeanor breaking or entering.

On 15 February 2017, the jury found Defendant guilty of misdemeanor larceny and misdemeanor breaking or entering. The trial court sentenced Defendant to 120 days imprisonment for the breaking or entering charge. It imposed a consecutive sentence of 120 days imprisonment for the larceny charge but suspended the sentence and placed him on supervised probation for 24 months to begin after his incarceration ended. Defendant filed a notice of appeal.

Analysis

I. Appellate Jurisdiction

As an initial matter, we must determine whether we possess jurisdiction over this appeal. Defendant's notice of appeal did not state the correct date of the judgment from which he was appealing to this Court as required by Rule 4(b) of the North Carolina Rules of Appellate Procedure. N.C. R. App. 4. The notice stated that the judgment was entered on 16 February 2016 rather than 15 February 2017.

Defendant has filed a petition for a writ of *certiorari* in the event we find his notice of appeal was insufficient to confer jurisdiction upon this Court based on his failure to state the correct date of the judgment as required by Rule 4. The State has not asserted that it was misled by the inaccurate date on the judgment.

"[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) (citation, quotation marks, and ellipsis omitted). Accordingly, we grant Defendant's petition for writ of *certiorari* and proceed to consider the merits of his appeal. *See State v. Regan*, __ N.C. App. __, __, 800 S.E.2d 436, 438 (2017) (allowing defendant's petition for writ of *certiorari* where notice of appeal referred to inaccurate date of judgment in violation of Rule 4).

II. Denial of Motion to Dismiss

Defendant argues that the trial court erred by denying his motion to dismiss the larceny charge based on insufficiency of the evidence.[1] We disagree.

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the

[1] Defendant does not challenge on appeal the denial of his motion to dismiss the breaking or entering charge.

offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

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). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. . . . However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citation and quotation marks omitted).

In order to find a defendant guilty of larceny, "the State must prove that the defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent, and (4) with the intent to deprive the owner of the property permanently." *State v. McNeill*, 243 N.C. App. 762, 769, 778 S.E.2d 457, 462 (2015) (citations and quotation marks omitted), *disc. review denied*, 368 N.C. 689, 781 S.E.2d 482 (2016).

"Under a theory of acting in concert, a jury can find a defendant guilty where he is present at the scene and acting together with another or others pursuant to a common plan or purpose to commit the crime." *State v. Glidewell*, __ N.C. App. __, __, 804 S.E.2d 228, 234 (2017) (citation and quotation marks omitted). Our Supreme Court has held that "[f]or purposes of the doctrine, a person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime." *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (citation, quotation marks, and brackets omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

The State presented evidence tending to show that (1) Defendant possessed the access code to the Beattys' Vacation Home; (2) he gave that access code to Matthew and either directly or indirectly allowed Danielle to enter the home as well; (3) Defendant, Matthew, and Danielle stayed at the home in early August of 2015 as part of a "week long binge" during which they smoked cigarettes and methamphetamine in the home; (4) after Mr. Beatty learned Defendant had entered the Vacation Home at 4:30 a.m. on 5 August 2015, he called Defendant and told Defendant he was fired, instructing him to remove his belongings from the house; (5) despite no longer being employed by Mr. Beatty, Defendant remained in the house with Matthew and Danielle; (6) although Defendant claimed not to drink alcohol, he admitted knowing that Matthew and Danielle had consumed alcohol belonging to Mr.

Beatty; (7) Defendant took two videos of Matthew and Danielle inside the Beattys' home; and (8) Mr. Beatty subsequently discovered that several of his liquor bottles were missing and others had been emptied.

Taking the evidence and the reasonable inferences therefrom in the light most favorable to the State, substantial evidence was presented that Defendant not only knew that Matthew and Danielle drank liquor belonging to Mr. Beatty but also that he made it possible for them to do so by providing them access to the Beattys' home — regardless of whether he personally consumed any of the alcohol himself. The evidence shows that Defendant did not make them leave the home after he was fired and instead encouraged their "week long binge" in the house during which they consumed Mr. Beatty's liquor. Indeed, Defendant took videos of Matthew and Danielle engaged in recreational activities while they remained in the Vacation Home.

This evidence — although circumstantial in nature — was sufficient to establish that Defendant had a common plan with Matthew and Danielle to commit larceny. *See State v. Stroud*, __ N.C. App. __, __, 797 S.E.2d 34, 43 ("While much of this evidence was circumstantial, circumstantial evidence is all a trial court needs to deny a defendant's motion to dismiss for insufficient evidence, and it is then for the jury to resolve conflicts in the evidence and determine the defendant's guilt beyond a reasonable doubt."), *disc. review denied*, 369 N.C. 754, 799 S.E.2d 872 (2017).

Defendant asserts that his "mere presence" alone was insufficient to support a theory of acting in concert. *See, e.g.*, *State v. Rankin*, 284 N.C. 219, 223, 200 S.E.2d 182, 184-85 (1973) ("The mere presence of the defendant at the scene of a crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense."). However, as discussed above, we reject his contention that he was merely present during the relevant time period. Between Defendant, Matthew, and Danielle, only Defendant was given the access code by Mr. Beatty. He abused this access by allowing Matthew and Danielle to gain entry to the home. He was fired by Mr. Beatty but did not leave the home, instead remaining there and — by his own admission — participating in a "week long binge" at the Vacation Home. Moreover, he admitted having knowledge that Mr. Beatty's alcohol had been consumed by Danielle and Matthew. Therefore, the "mere presence" doctrine does not apply.

Thus, the State's evidence was sufficient to survive Defendant's motion to dismiss based on a theory of acting in concert. *See State v. Perkins*, 181 N.C. App. 209, 219, 638 S.E.2d 591, 598 (2007) (holding that State presented "substantial evidence that defendant and Brooks acted together in pursuit of a common plan or purpose and that defendant is, therefore, guilty of larceny, even though the breaking or entering to steal the credit cards was actually committed by Brooks"). Accordingly, we overrule Defendant's argument.

III. Acting in Concert Instruction

Defendant's final argument is that the trial court erred by instructing the jury on the acting in concert doctrine with respect to the larceny charge. Pursuant to a request by the State, the trial court gave the jury an acting in concert instruction as to each of the charges, stating as follows:

> Now, for a defendant to be guilty of a crime it is not necessary that the defendant do all the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit felonious larceny, each of them, if actually or constructively present, is guilty of the crime.
>
> A defendant is not guilty of a crime merely because the defendant is present at the scene, even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty the defendant must aid or actively encourage the person committing the crime or in some way communicate to another person the defendant's intention to assist in its commission.

"Our Court reviews a trial court's decisions regarding jury instructions *de novo*." *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105, *disc. review denied*, 364 N.C. 245, 698 S.E.2d 664 (2010). It is well established that "[a] trial judge should not give instructions which present to the jury possible theories of conviction not supported by the evidence." *State v. Odom*, 99 N.C. App. 265, 272, 393 S.E.2d 146, 150 (citations omitted), *disc. review denied*, 327 N.C. 640, 399 S.E.2d 332 (1990). However, "[i]f a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction

at least in substance." *State v. Cornell*, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citation omitted).

As set out above, the evidence at trial supported a theory that Defendant acted in concert with Matthew and Danielle. Therefore, the trial court did not err in instructing the jury on this theory.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).