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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-999

Filed: 17 April 2018

Mecklenburg County, Nos. 15 CRS 40811, 223054-55

STATE OF NORTH CAROLINA

v.

DIONDRE MONTREZ BITTLE

Appeal by defendant from judgment entered 17 February 2017 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Regina T. Cucurullo, for the State.

Paul F. Herzog for defendant-appellant.

ZACHARY, Judge.

A jury found defendant guilty of felonious breaking or entering, conspiracy to commit breaking or entering, and having attained habitual felon status.[1] The trial

[1] Defendant was found not guilty of larceny after breaking or entering.

court sentenced him to an active prison term of 78 to 106 months'. Defendant gave timely notice of appeal.

The State's evidence tended to show the following: On the afternoon of 1 July 2015, Deborah Chappell observed two men carrying a large package from her neighbor's residence on Milton Morris Drive in Charlotte, North Carolina. The men placed the package in the back seat of a burgundy four-door car parked in the neighbor's driveway before "quickly . . . leaving the neighborhood" in the car. Thirty minutes later, at approximately 2:00 p.m., Ms. Chappelle looked outside and "saw this same particular car parked on the street between Miss [Sheila] Douglas's house and another house." Stepping onto her front porch, Ms. Chappelle used a pair of binoculars to view the car's license plate number, which she wrote down on a piece of paper.

Sheila Douglas drove home from work early on 1 July 2015, arriving at her residence on Milton Morris Drive between 2:00 and 2:30 p.m. The residence had an attached garage with a "side garage door leading into the house[.]" Pulling into her driveway, she observed two strangers standing at the side door of her attached garage. Although Ms. Douglas did not see the two men actually "coming out the door" to her garage, they appeared to be "just walking out together." Ms. Douglas identified defendant in court as one of the two men she saw standing at the side door to her

garage. The second man – denominated "the dark-skin gentleman" at trial – was holding a "red and ugly blue pair" of tennis shoes belonging to her son.

Remaining in her vehicle, Ms. Douglas asked the two men what they were doing and whether they were with her son. Defendant walked toward her and "started mumbling" while the second man "went to put the shoes back in the garage." Seeing her open garage door, Ms. Douglas "figured [she] was getting robbed," and started backing her car out of the driveway. Defendant and the second man, who was no longer holding the tennis shoes, "walk[ed] towards the car that they were driving" and "got in the car together." Ms. Douglas called 911 and tried to position her vehicle in the street to block their car "so they couldn't go forward." She described the suspects' car as "bright red" and "like an old Cadillac" and noted that defendant was driving. Eventually, defendant maneuvered the car around Ms. Douglas's vehicle and "shot around [her]" up the road. She followed the car until she saw "a gun come out of the window." Ms. Douglas could not recall which of the two men brandished the gun.

Ms. Douglas returned home and discovered that the interior garage door leading into the house was damaged as though "somebody took a tool and just . . . knocked the lock off." The knob to the door "was taken completely off." The television from her upstairs bedroom was placed "right by the garage door" next to her son's tennis shoes. The interior of her house had been ransacked with papers strewn

"everywhere," furniture drawers open and their contents "poured out," and "[e]verything . . . pulled out [from] underneath the beds[.]" Two tablet devices were missing from the residence.

Ms. Douglas's 911 call was received at 2:37 p.m. Charlotte-Mecklenburg police responded to the scene and obtained statements from Ms. Douglas and Ms. Chappell. Ms. Chappell also gave police the license plate number of the burgundy car she saw earlier that afternoon.

Officers arrested defendant on 3 July 2015 after spotting his burgundy Buick car at an address on the north side of Charlotte. Defendant waived his *Miranda* rights and was interviewed by a detective. Before being informed about the events at Ms. Douglas's house, defendant told the detective that he and his friend "Jay" drove into the Morris Farms' neighborhood on 1 July 2015 after "dropp[ing] off a girl[,]" and that a "lady" followed him out of the neighborhood for an unknown reason. Defendant denied breaking into Ms. Douglas's home and assured the officer that neither his fingerprints nor DNA would be found inside. A recording of the detective's interview of defendant was published to the jury.

Shown a photograph of defendant's burgundy Buick at trial, both Ms. Douglas and Ms. Chappell identified it as the car they observed on 1 July 2015. Ms. Douglas explained that her initial impression of the car as a Cadillac was based on the "emblem on the front, the little round circle." Upon viewing the photograph of the

burgundy Buick, she confirmed that its front emblem was similar to that of the car driven by defendant on 1 July 2015.

Defendant did not testify or present evidence. The trial court denied his motion to dismiss at the conclusion of the evidence.[2]

On appeal, defendant claims the trial court erred in denying his motion to dismiss the charges of breaking or entering and conspiracy to commit breaking or entering. "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). "In considering a motion to dismiss made at the close of all the evidence the trial court's *sole* function is to determine 'whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence.' " *State v. Gilliam*, 54 N.C. App. 617, 620, 284 S.E.2d 203, 205 (1981)(emphasis omitted) (quoting *State v. Smith*, 40 N.C. App. 72, 78-79, 252 S.E.2d 535, 540 (1979)). "[T]he court considers the evidence in the light most favorable to the State, resolves all contradictions and discrepancies therein in its favor, and gives it the benefit of every reasonable inference which can be drawn from the evidence." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975). " 'The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both.' " *State v. Bradshaw*, 366 N.C.

[2] After the jury returned its verdicts on the substantive charges, the trial proceeded to a second phase in which the jury found defendant guilty of being an habitual felon. Because defendant's appeal does not address his conviction of attaining habitual felon status, we will not discuss this stage of his trial.

90, 93, 728 S.E.2d 345, 347 (2012) (quoting *State v. Lynch*, 327 N.C. 210, 216, 393 S.E.2d 811, 814 (1990)). Accordingly,

> "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)).

The crime of felonious breaking or entering consists of "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986); *see also* N.C. Gen. Stat. § 14-54(a) (2017). "Either a breaking or an entering with the requisite intent is sufficient to constitute a violation of the statute." *State v. Bronson*, 10 N.C. App. 638, 640, 179 S.E.2d 823, 825 (1971). "Larceny is the felonious taking and carrying away of the personal property of another without his consent and with the intent to permanently deprive the owner of his property." *State v. White*, 85 N.C. App. 81, 89, 354 S.E.2d 324, 330 (1987), *aff'd*, 322 N.C. 506, 369 S.E.2d 813 (1988); *see also* N.C. Gen. Stat. § 14-72(b)(2) (2017). "In the absence of a showing of a lawful motive, an intent to commit larceny may be reasonably inferred from an unlawful entry." *State v. Quilliams*, 55 N.C. App. 349, 351, 285 S.E.2d 617, 619, *cert. denied*, 305 N.C. 590, 292 S.E.2d 11 (1982)(citation omitted).

Defendant notes that "[n]o witness saw [him] go into or come out of Ms. Douglas['s] home." He further contends "there was insufficient evidence that [he] 'acted in concert' with the second man to commit the substantive crimes for which he was convicted." While not disputing that "the dark-skin gentleman" entered Ms. Douglas's home with the intent to commit larceny, defendant insists the State's evidence was insufficient to allow the jury to attribute this conduct to him.

Under the doctrine of concerted action, "[a] person may be found guilty of committing a crime if he is at the scene acting together with another person with a common plan to commit the crime, although the other person does all the acts necessary to commit the crime."[3] *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993). " 'The theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes.' " *State v. Hill*, 182 N.C. App. 88, 93, 641 S.E.2d 380, 385 (2007) (quoting *State v. Giles*, 83 N.C. App. 487, 490, 350 S.E.2d 868, 870 (1986), *cert. denied*, 319 N.C. 460, 356 S.E.2d 8 (1987)). However, a person's mere presence at the scene of a crime is insufficient to show concerted action "even though he may silently approve of the crime or secretly intend to assist in its commission." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999).

> [T]o be guilty he must aid or actively encourage the person committing the crime or in some way communicate to this

[3] The trial court also instructed the jury that the principle of acting in concert did not apply to the conspiracy charge.

> person his intention to assist in its commission. The communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.

Id. (citations omitted). "[W]hen the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." *Id.*; *accord State v. Rankin*, 284 N.C. 219, 223, 200 S.E.2d 182, 185 (1973).

In challenging the State's evidence that he acted in concert with "the dark-skin gentleman," defendant relies on our Supreme Court's decision in *State v. Gaines*, 260 N.C. 228, 132 S.E.2d 485 (1963). In *Gaines*, Billy Hill entered a jewelry store with co-defendants Andrews and Gaines. *Id.* at 229, 132 S.E.2d at 486. Hill reached over the store counter, grabbed a box of diamonds, and turned to face his two associates. *Id.* The three men then ran from the store and drove away in a car owned by Hill's father. *Id.* at 229-31, 132 S.E.2d at 486. The store owner "did not see Gaines or Andrews 'do anything to encourage or entice or assist Billy Hill in taking the diamonds[.]' " *Id.* at 230, 132 S.E.2d at 486. Moreover, "[t]he State offered in evidence the statements made by Billy Hill, Gaines and Andrews to the effect that Gaines and Andrews had nothing to do with the theft and had no knowledge that Billy Hill entered the store with intent to steal[,]" but instead thought "that he had gone in to buy a ring for his girl friend[.]" *Id.* at 231, 132 S.E.2d at 487. Finding no evidence to contradict these exculpatory statements, the *Gaines* Court deemed the State to be

bound thereby. *Id*. at 232, 132 S.E.2d at 487. The Court concluded that Gaines's and Andrews's presence in the store and flight with Hill were insufficient to show they aided and abetted the larceny.[4] *Id*. at 232, 132 S.E.2d at 487-88.

The instant case is readily distinguishable from *Gaines*. Unlike the suspects' presence in a retail store open to the public, the evidence *sub judice* suggests no innocent purpose for defendant to be standing at Ms. Douglas's open garage door while his associate removed her son's shoes from the residence, or for defendant to approach Ms. Douglas's vehicle mumbling incomprehensibly while his associate placed the shoes back in the garage. The ransacked condition of Ms. Douglas's home, including the removal of the upstairs television to the garage, indicates activity of some duration, rather than the swift and unexpected taking of diamonds in *Gaines*. Moreover, unlike the exculpatory evidence in *Gaines*, defendant's statement that he was merely driving through the area with Jay and had no idea why an unknown woman followed him out of the neighborhood is contradicted by Ms. Douglas's testimony placing defendant at her garage door "together" with the second man, as well as by Ms. Chappell's observations. *See Rankin*, 284 N.C. at 223-24, 200 S.E.2d at 185. Finally, defendant supplied the car used to travel to and from Ms. Douglas's residence and drove his associate away from scene after Ms. Douglas confronted

[4] Our Supreme Court has since characterized the distinction between acting in concert and aiding and abetting as "of little significance." *State v. Davis*, 301 N.C. 394, 398, 271 S.E.2d 263, 265 (1980).

them. *Cf. Gaines*, 260 N.C. at 231, 132 S.E.2d at 487 (citing "evidence [that] Gaines and Andrews walked into the store with Billy Hill . . . and that they left Cherryville in a Chevrolet car operated by Billy Hill and owned by Billy Hill's father"). From these circumstances, a reasonable juror could infer not only that defendant communicated his willingness to assist his associate but that defendant actively rendered such assistance by – at a minimum – transporting the man to and from the site of break-in.

Also misplaced is defendant's reliance on *State v. Bowden*, 216 N.C. App. 275, 717 S.E.2d 230 (2011), in which the evidence showed the following:

> [A]n unknown man, who appeared to be concealing his identity with a hoodie, was seen walking around the Hernandez yard and carrying property later determined to have been taken from the Hernandez home. This unknown man fled when he saw police officers and was never apprehended or identified. Defendant was also seen in the Hernandez yard, but was never seen entering or leaving the home or carrying any property belonging to Mr. or Ms. Hernandez. Defendant also fled from law enforcement officers. However, no evidence linked Defendant to the unknown man. In sum, the only evidence that could link Defendant to the break-in was (1) his presence in the back yard of the home just after the unknown man was seen carrying stolen property in the area, and (2) his flight from the crime scene when he saw the police officers.

Id. at 279, 717 S.E.2d at 233. In finding a lack of evidence of concerted action, the *Bowden* Court emphasized that "[d]efendant and the unknown man were never seen together at the Hernandez home and did not flee together. They were never seen to

have any interaction and there is no known connection between them[.]" *Id.* at 280, 717 S.E.2d at 234. Plainly, defendant's proximity to the second man at Ms. Douglas's garage door and their subsequent departure together in defendant's car render *Bowden* inapposite.

We conclude the State adduced substantial evidence that defendant acted in concert with his associate to commit a felonious breaking or entering of Ms. Douglas's home.[5] Defendant also excepts to the trial court's denial of his motion to dismiss the charge of conspiracy to commit felonious breaking or entering. However, he offers no separate argument with regard to this charge, relying entirely on his assertion of "insufficient evidence that [he] 'acted in concert' with the second man . . . ." *See generally* N.C.R. App. P. 28(b)(6)(2017) ("Issues not presented in a party's brief, *or in support of which no reason or argument is stated*, will be taken as abandoned." (emphasis added)).

"A criminal conspiracy has been defined in this state as 'an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.' " *State v. LeDuc*, 306 N.C. 62, 75, 291 S.E.2d 607, 615 (1982) (quoting *State v. Abernathy*, 295 N.C. 147, 164, 244 S.E.2d 373, 375 (1978)), *overruled in non-pertinent part by State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267

[5] Ms. Douglas directly observed an unlawful entry into her garage. The circumstantial evidence amply demonstrates an intention to commit larceny therein. *See State v. McNair*, __ N.C. App. __, __, 799 S.E.2d 631, 638, *cert. denied*, __ N.C. __, 803 S.E.2d 394 (2017); *see also Quilliams*, 55 N.C. App. at 351, 285 S.E.2d at 619.

(1987). "[T]he agreement may be 'a mutual, implied understanding' rather than an express understanding." *Id.* (quoting *Abernathy*, 295 N.C. at 164, 244 S.E.2d at 375). "The existence of a conspiracy may be established by direct or circumstantial evidence." *Bindyke*, 288 N.C. at 616, 220 S.E.2d at 526.

Absent any contrary argument by defendant, *see* N.C.R. App. P. 28(b)(6), we are satisfied that his concerted action with an associate to complete the felonious breaking or entering is sufficient to prove at least a "mutual, implied understanding" between them to commit the offense. *Abernathy*, 295 N.C. at 164, 244 S.E.2d at 375. The trial court properly denied defendant's motion to dismiss.

NO ERROR.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).