IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-482

No. COA21-587

Filed 5 July 2022

Johnston County, Nos. 19 CRS 742, 52508, 52754

STATE OF NORTH CAROLINA

v.

JACKIE LYNN ROOK, JR., Defendant.

Appeal by Defendant from judgments entered 26 April 2021, 6 August 2021, and 10 September 2021 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 6 April 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan R. Marx, for the State.

Mary McCullers Reece for the Defendant.

DILLON, Judge.

¶ 1 Defendant appeals from judgments entered upon his convictions for breaking and entering, larceny after breaking and entering, felony conspiracy to commit breaking and entering, obtaining property by false pretenses, and having attained the status of habitual felon.

I. Background

¶ 2 Defendant was charged with several crimes in connection with a break-in of a residence. The evidence at trial tended to show the following: On 23 January 2019, Ms. Sheppard and her son ("J.G.") were away from their home in Selma. That day, two handymen were repairing a pipe at their home but left briefly to purchase supplies at a home improvement store. During this time, the Sheppards' front door was unsecured due to a loose doorknob. When the handymen returned, they observed a red Honda Pilot parked in the Sheppards' driveway. The handymen recognized the passenger and driver as Jackie Rook, Jr., ("Defendant") and Defendant's father,[1] respectively. The handymen knew Defendant and his father because they were also tenants of the Sheppards' landlord.

¶ 3 The handymen asked Defendant and his father why they were at the Sheppard's property. Defendant and his father replied that they were looking at an air conditioner on the property for use as scrap metal. The air conditioner was located in a trailer about five hundred yards away from the Sheppards' home. Defendant and his father then left the Sheppards' property.

¶ 4 When the Sheppards returned, the handymen informed them that Defendant and his father were present at their property unsupervised. J.G. noted that his

[1] Defendant's father is Jackie Rook, Sr.

PlayStation video game console, controllers, and video games were missing. The Sheppards reported the theft to law enforcement and provided the PlayStation's serial number. J.G. also noticed that someone had logged into his PlayStation account a few days after the theft. Law enforcement discovered that someone using an email address containing "JackieRook85" had logged into the stolen PlayStation three days after the theft from an IP address assigned to Jackie Rook.[2]

¶ 5 Several months after the theft, Defendant sold the PlayStation and video games to a third-party purchaser, who then resold the PlayStation to a GameStop store. In a video provided to the third-party purchaser to prove that the PlayStation was operational, Defendant and his wife are visible. Law enforcement seized the PlayStation from GameStop by tracking its serial number. Police officers subsequently arrested Defendant at his home for the theft of the PlayStation. Defendant tried to run away when police officers first arrived at his home.

¶ 6 Defendant was indicted for breaking and entering, larceny after breaking and entering, felony conspiracy to commit breaking and entering, obtaining property by false pretenses, and having attained the status of habitual felon. Defendant pleaded guilty to having attained the status of habitual felon. A jury found Defendant guilty of all substantive offenses. After the trial court sentenced Defendant, he timely

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[2] The IP address was simply registered to a "Jackie Rook" without indicating "Jr." or "Sr."

appealed to our Court.

II. Analysis

A. Motion to Dismiss Breaking and Entering and Larceny Charges

¶ 7 Defendant argues that the trial court erred in denying his motion to dismiss the charges of (1) breaking and entering and (2) larceny after breaking and entering, based on the insufficiency of evidence that he was the perpetrator. We disagree.

¶ 8 We review the denial of a motion to dismiss *de novo*. *State v. Webb*, 258 N.C. App. 361, 364, 812 S.E.2d 182, 185 (2018). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). In making this determination, the trial court considers the evidence in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 9 The elements of breaking and/or entering are: "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *Webb*, 258 N.C. App. at 365, 812 S.E.2d at 186. Larceny is: "the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent *permanently* to deprive the owner of his property and convert it to the taker's own use." *State v. McCrary*, 263 N.C. 490,

492, 139 S.E.2d 739, 740 (1965) (emphasis in original).

¶ 10 Defendant argues in part that the jury was not entitled to assume that he was the perpetrator of the larceny because the evidence showing his possession of the stolen items did not show that he had possession near the time of the theft. The doctrine of recent possession is the rule that "upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property." *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981). Further, "when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property *recently* after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering." *Id.* at 674, 273 S.E.2d at 293 (emphasis added).

¶ 11 Whether an inference is permitted concerning the amount of time between a theft and evidence of possession depends on the type of property involved. *State v. Hamlet*, 316 N.C. 41, 43-44, 340 S.E.2d 418, 420 (1986). "[I]f the stolen property is of a type normally and frequently traded in lawful channels, a relatively brief time interval between the theft and the finding of an accused in possession is sufficient to preclude an inference of guilt from arising." *Id.* at 44, 340 S.E.2d at 420. There is no bright-line rule on the amount of time deemed too long to support an inference of recent possession. *See id.* at 45, 340 S.E.2d at 421.

¶ 12 Here, the trial court properly determined that (1) there was substantial evidence of each essential element of the crimes of larceny and breaking and entering, and (2) Defendant was the perpetrator. Defendant and his father had access to the Sheppard's home and were observed at the property by the handymen. The excuse provided to the handymen did not support their being in the Sheppards' driveway. Most importantly, evidence showed that Defendant (or his father) was in possession of the PlayStation three days after the theft, and again, several months later when the property was sold to a third-party. Defendant's possession was evidenced by the PlayStation being used by an IP address registered to Defendant's home and email address and his direct sale to the third party. The passage of time between the theft and evidence of Defendant's possession was not too stale for the jury to infer that Defendant was in wrongful possession of stolen property.

¶ 13 There was substantial evidence of each essential element of these crimes and that Defendant was the perpetrator (directly or through a conspiratorial agreement). Therefore, we conclude that the trial court did not err in denying Defendant's motion to dismiss the charges of larceny and breaking and entering.

B. Motion to Dismiss Conspiracy Charge

¶ 14 Defendant also argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to commit breaking and entering because the evidence was insufficient to submit this charge to the jury. We disagree, examining

this issue under the same standard set out in Section II(A) above.

¶ 15 "A criminal conspiracy is 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. Abernathy*, 295 N.C. 147, 164, 244 S.E.2d 373, 384 (1978). It is not necessary that the parties agree expressly; "rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense." *Id*. at 164, 244 S.E.2d at 384.

¶ 16 Here, when considered in the light most favorable to the State, there was substantial evidence of the crime of conspiracy between Defendant and his father: Defendant's father drove the red Honda Pilot with Defendant as a passenger. The jury could infer that Defendant's father lied to the handymen about the reason for their presence at the Sheppards' home. While the handymen did not observe Defendant or his father take property from the Sheppards' home, the jury could reasonably infer from the circumstances that the parties had an implied understanding of larceny as a common goal. Therefore, the trial court did not err in denying Defendant's motion to dismiss the charge of conspiracy to commit breaking and entering.

C. Motion for Mistrial

¶ 17 Defendant also argues that the trial court abused its discretion by denying his motion for a mistrial. We disagree.

¶ 18 "The decision to grant or deny a mistrial rests within the sound discretion of the trial court." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). A trial court should only grant a mistrial "when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *Id.*

¶ 19 Our Supreme Court has instructed that a "trial court's curative instructions should occur promptly after the [offending] comment is made rather than in general jury charges of instruction." *State v. Kemmerlin*, 356 N.C. 446, 482, 573 S.E.2d 870, 894 (2002). Further, jurors are presumed to follow a trial court's instructions. *State v. Prevatte*, 356 N.C. 178, 254, 570 S.E.2d 440, 482 (2002).

¶ 20 In *State v. Upchurch*, 332 N.C. 439, 421 S.E.2d 577 (1992), a prosecutor discussed a probation officer as a potential witness within earshot of the jury before evidence of the defendant's prior convictions was admitted into evidence. *Id.* at 451-52, 421 S.E.2d at 584. The trial court delivered a curative instruction to the jury and denied the defendant's motion for a mistrial. *Id.* at 452-53, 421 S.E.2d at 585. Our Supreme Court concluded that the prosecutor's reference to a probation officer "did not sufficiently prejudice defendant's case to warrant a mistrial." *Id.* at 454, 421 S.E.2d at 586.

¶ 21 In *State v. Kornegay*, 70 N.C. App. 579, 320 S.E.2d 421 (1984), a member of a jury recognized the defendant's probation officer in the courtroom and asked why she

was there. *Id*. at 581, 320 S.E.2d at 422. The probation officer responded that she was the defendant's probation officer. *Id*. at 581, 320 S.E.2d at 422. The trial court examined the jury but chose not to deliver a curative instruction. *Id*. at 581, 320 S.E.2d at 422. Our Court upheld the trial court's denial of a mistrial, concluding that the trial court did not abuse its discretion. *Id*. at 581, 320 S.E.2d at 422.

¶ 22 In this case, a detective testified that he contacted Defendant's probation officer in order to determine his residence. Defendant lodged an objection, which the trial court sustained. The trial court then excused the jury for the evening and heard arguments as to Defendant's motion for a mistrial. The following morning, the trial court struck that portion of the detective's testimony and delivered a curative instruction:

> Ladies and gentlemen: Members of the jury, I have, as you heard, sustained the objection and I am granting a motion to strike in regard to Detective Godwin's last statement that he spoke with someone. Since I have granted the motion to strike, that means that Detective Godwin's statement is stricken from the record, and I'm instructing you to totally disregard and not consider that statement in your deliberations in this case. Is there anyone on this jury who thinks they cannot strike this statement from their mind and who will not or who cannot refrain from holding against this particular defendant in this case, by a show of hands.

All members of the jury affirmed that they could continue with the case. The trial court then denied Defendant's motion for a mistrial.

¶ 23 Here, the trial court delivered a prompt curative instruction to the jury. It was not an abuse of discretion for the trial court to dismiss the jury for the remainder of the day to consider arguments from counsel concerning the offending testimony and motion for mistrial. When the jury was assembled again the next morning, the trial court polled the jury to determine if any members felt that they could not continue to serve, struck the offending testimony, and delivered its curative instruction apart from the general jury instructions. The trial court's actions cured any prejudice Defendant potentially faced following the detective's reference to his probation officer. Ultimately, the improper testimony in this trial was not "so serious that [it] substantially and irreparably prejudice[d] the defendant's case and ma[de] it impossible for the defendant to receive a fair and impartial verdict." *See Bonney*, 329 N.C. at 73, 405 S.E.2d at 152. Therefore, the trial court did not abuse its discretion in denying Defendant's motion for a mistrial, striking the offending testimony, and delivering a curative instruction to the jury.

D. Jail Credit

¶ 24 Lastly, Defendant argues that the trial court erred in failing to indicate that he should receive jail credit for time served as to his convictions for conspiracy and false pretenses. We decline to address this argument as this issue is not properly before our Court.

¶ 25 N.C. Gen. Stat. § 15-196.4 (2020) provides that "[u]pon committing a defendant

upon the conclusion of an appeal, or a parole, probation, or post-release supervision revocation, the committing authority shall determine any credits allowable on account of these proceedings[.]" Further, "[u]pon reviewing a petition seeking credit not previously allowed, the court shall determine the credits due and forward an order setting forth the allowable credit[.]" *Id*.

¶ 26 Our Courts have determined that the issue of entitlement to jail credit is not properly before us if the issue was never brought before the trial court. *State v. Cloer,* 197 N.C. App. 716, 722, 678 S.E.2d 399, 403-04 (2009). Our Court has stated:

> [T]he proper procedure to be followed by a defendant seeking to obtain credit for time served in pretrial confinement in addition to that awarded at the time of sentencing or the revocation of the defendant's probation is for the defendant to initially present his or her claim for additional credit to the trial court, with alleged errors in the trial court's determination subject to review in the Appellate Division following the trial court's decision by either direct appeal or *certiorari*, as the case may be.

Id. at 721, 678 S.E.2d at 403.

¶ 27 Here, Defendant did not present the issue of entitlement to jail credit before the trial court. Therefore, we conclude that the issue is not properly before us and dismiss this portion of his appeal without prejudice to his ability to file a motion for an award of additional credit at the trial court level.

III. Conclusion

¶ 28 We conclude that the trial court did not err in denying Defendant's motions to

dismiss the charges of breaking and entering, larceny, and conspiracy to commit breaking and entering. Further, the trial court did not err in denying Defendant's motion for a mistrial. Finally, we dismiss Defendant's argument as to jail credit without prejudice to his ability to file a motion for an award of additional credit in the Superior Court of Johnston County.

NO ERROR IN PART; DISMISSED IN PART.

Judges DIETZ and GRIFFIN concur.

Report per Rule 30(e).