

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2023-NCCOA-17

No. COA22-551

Filed 17 January 2023

McDowell County, No. 20 CRS 280

STATE OF NORTH CAROLINA

v.

JUSTIN MESSER, Defendant.

Appeal by defendant from judgment entered 17 September 2021 by Judge Nathaniel J. Poovey in McDowell County Superior Court. Heard in the Court of Appeals 29 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary S. Crawley and Assistant Attorney General Phillip T. Reynolds, for the State.

Shawn R. Evans for Defendant-Appellant.

CARPENTER, Judge.

¶ 1

Justin Messer (“Defendant”) appeals from judgment after a jury convicted him of felony breaking or entering and felony larceny after breaking or entering. Defendant argues the trial court erred by: (1) denying Defendant’s motion to dismiss the breaking or entering and larceny charges, and (2) ordering him to pay the victim, Joshua McKinney (“McKinney”), \$300.00 in restitution. After careful review, we find

no error.

I. Factual & Procedural Background

¶ 2 The State’s evidence presented at trial tends to show the following: Defendant and McKinney lived together as roommates from February 2020 until April or May 2020. McKinney testified regarding his relationship with Defendant before, during, and after their rooming arrangement, including a break-in of McKinney’s home which occurred in June 2020, approximately one month after Defendant moved out.

¶ 3 McKinney owned his home for over a decade before Defendant moved in. McKinney met Defendant about seven years ago through McKinney’s then-girlfriend. Before asking Defendant if he would like to be his roommate, McKinney had not spoken to Defendant for about five years. As part of the rental agreement, the two agreed to share equally in food, rent, and utilities. McKinney gave Defendant a key to the home upon moving in. Defendant was the only person to whom McKinney rented a room in the home or gave a key.

¶ 4 Defendant lost his job within a week of moving in with McKinney. Towards the end of their rooming arrangement, McKinney’s girlfriend made comments to Defendant about “not finding a job[,] and not wanting to work and staying out partying all night”; Defendant subsequently removed most of his belongings from the home. McKinney texted Defendant shortly thereafter telling him, “he had to get out of the house.” Defendant did not return the key, although McKinney asked

Defendant's mother over the phone for the key to be returned. McKinney inspected Defendant's room after he moved out and noticed Defendant left a small table and a bed, which Defendant never asked to pick up. No one moved into the home after Defendant moved out.

¶ 5 On 10 June 2020 at about 7:00 p.m., McKinney came home from a trip to Shelby, North Carolina and found his couches pulled back, cushions and mattress pushed to the side, and dresser drawers pulled half out. McKinney did not see any sign of forced entry into his locked home, but he noticed some of his personal belongings appeared to be missing. Defendant's table and bed remained in the room where he used to reside.

¶ 6 Upon noticing someone had entered the home, McKinney called Defendant's mother, and then called law enforcement to report the break-in. A deputy from the McDowell County Sheriff's Office came out to the home and completed a report. McKinney advised the deputy that he believed Defendant was the suspect, and that Defendant had never returned his house key. Approximately one week after the break-in, Defendant "kept trying to contact [McKinney,] saying he had [McKinney's] stuff."

¶ 7 McDowell County Sheriff's Detective Burlin Ballew ("Detective Ballew") also testified for the State. Detective Ballew called Defendant on 26 June 2020, and

Defendant agreed to come to the sheriff's office for an interview and to "bring some stuff[.]"

¶ 8

On 29 June 2020, Detective Ballew conducted the interview, which was audio and video recorded. At that time, Defendant surrendered several items belonging to McKinney, including five PlayStation 4 games, a PlayStation 4 controller, a quick-release arrow, a gun case and 9mm magazine, a Blu-ray disc, mail, and two motorcycle helmets. Defendant admitted to entering McKinney's home with a woman on 9 June or 10 June 2020. Defendant stated the woman who accompanied him took the games and controllers, and together, they sold two games and one controller to a game store that same day. When Detective Ballew asked Defendant about the woman, Defendant responded, "I will take the rap for it. Just forget about her." On 8 July 2020, McKinney retrieved his belongings from the sheriff's office.

¶ 9

On 14 September 2020, a McDowell County grand jury indicted Defendant on the charges of breaking or entering, in violation of N.C. Gen. Stat. § 14-54(a), and larceny after breaking or entering, in violation of N.C. Gen. Stat. § 14-72(b)(2).

¶ 10

On 16 September 2021, a jury trial commenced before the Honorable Nathaniel J. Poovey, judge presiding. At the close of the State's evidence, Defendant moved to dismiss the charges, and the trial court denied the motion. Defendant did not present any evidence. Defendant renewed his motion to dismiss, which was again denied.

¶ 11 On 17 September 2021, the jury found Defendant guilty of felony breaking or entering and felony larceny after breaking or entering. The trial court sentenced Defendant to two consecutive terms of eight to nineteen months. It suspended each sentence and placed Defendant on supervised probation for thirty months. In its written judgment, the trial court ordered, *inter alia*, Defendant to pay \$300.00 in restitution to McKinney. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

¶ 12 This Court has jurisdiction to address Defendant’s appeal pursuant to N.C. Gen. Stat. § 15A-1444(a) (2021).

III. Issues

¶ 13 The issues before this Court are whether: (1) the trial court erred in denying Defendant’s motion to dismiss the charges at the close of the State’s evidence, and (2) the State made a sufficient evidentiary showing to support the trial court’s award of \$300.00 in restitution to McKinney.

IV. Motion to Dismiss

¶ 14 In his first argument, Defendant contends the trial court erred in denying his motion to dismiss the charges of felony breaking or entering and felony larceny.

A. Standard of Review

¶ 15 “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).

“Upon [the] 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.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *writ denied*, 531 U.S. 890, 121 S. Ct. 213, 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. Stone*, 323 N.C. 447, 451, 373 S.E.2d 430, 433 (1998) (citation omitted).

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial 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.

Fritsch, 351 N.C. at 378–79, 526 S.E.2d at 455 (citations omitted).

B. Analysis

¶ 16 On appeal, Defendant does not challenge the sufficiency of the evidence with respect to the larceny charge. Rather, Defendant argues the State failed to prove his intent to commit a felony when he entered McKinney’s home in June 2020 because

he used a key and intended to remove only his own property. We therefore examine the intent element of the breaking or entering charge.

¶ 17 “The elements of felonious breaking [or] entering are: (1) the breaking [or] entering (2) of any building (3) with the intent to commit a felony or larceny therein.” *State v. Garcia*, 174 N.C. App. 498, 502, 621 S.E.2d 292, 295–96 (2005) (citations omitted); *see also* N.C. Gen. Stat. § 14-54(a) (2021). The breaking element may be demonstrated by “the opening of a locked door with a key.” *State v. Tippet*, 270 N.C. 588, 594, 155 S.E.2d 269, 273 (1967) (citation omitted).

¶ 18 Common law 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 to convert it to the taker’s own use.” *State v. Boykin*, 78 N.C. App. 572, 576, 337 S.E.2d 678, 681 (1985) (citations omitted); *see also* N.C. Gen. Stat. § 14-72 (amending the common law larceny offense by creating levels of punishment based on the value of the goods stolen, the nature of the goods stolen, or the method by which the goods were stolen).

¶ 19 “The criminal intent of the defendant at the time of breaking or entering may be inferred from the acts he committed subsequent to his breaking or entering the building.” *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992) (citations omitted). “[I]ntent may [also] be inferred from the circumstances surrounding the

occurrence.” *State v. Myrick*, 306 N.C. 110, 115, 291 S.E.2d 577, 580 (1982) (citation and quotation marks omitted).

¶ 20 As support for his assertion that he lacked intent to commit a felonious larceny, Defendant relies on a statement made during his voluntary interview with law enforcement in which he indicated “he entered . . . McKinney’s home with his own key . . . to retrieve his own person[al] property and not to steal anything from . . . McKinney.” Because Defendant’s personal effects remained in McKinney’s home even after the break-in, we find this argument unconvincing.

¶ 21 Defendant also contends it is unclear from the State’s evidence as to whether McKinney “ever[] directly informed [Defendant] that their roommate arrangement had been terminated and that [Defendant] was no longer welcome in the home.” McKinney testified that he texted Defendant that “he had to get out of the house” and asked Defendant’s mother to return the key. This evidence tends to show McKinney terminated his rental agreement with Defendant, and McKinney did not consent to Defendant re-entering the home. Defendant’s right to use the key extended only to the period in which Defendant had permission to enter the home. Therefore, Defendant’s use of the key to open the door of McKinney’s home supports the “breaking or entering of a building” elements for the felony breaking or entering charge. *See Tippet*, 270 N.C. at 594, 155 S.E.2d at 273.

¶ 22

Here, in the light most favorable to the State, there are several circumstances from which a reasonable juror could find Defendant possessed the intent to commit a larceny when he entered McKinney's home. *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455; *Garcia*, 174 N.C. App. at 502, 621 S.E.2d at 295–96; *see also* N.C. Gen. Stat. § 14-54(a). Defendant entered McKinney's home without permission about one month after Defendant had moved out, using a key he failed to return to McKinney after he surrendered the room he was renting. At the time Defendant entered the home, McKinney's vehicle was not in the driveway where he normally parked when he was home. There was no evidence tending to show Defendant removed any property belonging to Defendant. When McKinney returned home, his couch cushions and mattress were upended, and his drawers were open, but there was no sign of forced entry. Thus, there was substantial circumstantial evidence tending to show Defendant broke into McKinney's home and took McKinney's property. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

¶ 23

Furthermore, a reasonable juror could infer through Defendant's actions after the break-in that he possessed the intent to commit a larceny. *See Williams*, 330 N.C. at 585, 411 S.E.2d at 818. Here, Defendant sold some of McKinney's possessions the same day Defendant stole the items, and Defendant did not return any of McKinney's belongings until after the police contacted Defendant. *See id.* at 585, 411 S.E.2d at 818. Finally, McKinney's testimony tends to show Defendant called McKinney after

McKinney reported the break-in to law enforcement, and Defendant told McKinney “he had [his] stuff” and “he was sorry [for] what he did.”

¶ 24 Because substantial evidence exists that would allow a reasonable jury to infer Defendant committed the crimes charged, the trial court did not err in denying Defendant’s motion to dismiss. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

V. Restitution Award

¶ 25 In his second argument, Defendant contends the trial court erred in ordering Defendant to pay McKinney \$300.00 in restitution because the State “failed to meet the evidentiary threshold necessary to support an award of restitution.” The State argues “Defendant’s statement [at sentencing] was a definite and certain stipulation to the \$300.00 amount of restitution,” and thus, sufficiently supported the trial court’s restitution award. We agree with the State.

A. Standard of Review & Issue Preservation

¶ 26 “This Court reviews *de novo* the issue of whether the amount of restitution ordered by the trial court is supported by competent evidence adduced at trial or at sentencing.” *State v. Watkins*, 218 N.C. App. 94, 107, 720 S.E.2d 844, 853 (citation omitted), *disc. rev. denied*, 365 N.C. 553, 724 S.E.2d 509 (2012). “[A] defendant’s failure to specifically object to the trial court’s entry of an award of restitution does not preclude appellate review.” *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777 (2010) (citations omitted); *see* N.C. Gen. Stat. § 15A-1446(d)(18) (2021)

(allowing appellate review of errors based on an illegal or invalid sentence imposition, even when the defendant did not preserve the issue by objection).

B. Analysis

¶ 27 Defendant maintains this case is factually comparable to *State v. Lance*, where this Court vacated and remanded the restitution portion of the defendant’s judgment because the State did not present testimony or documentation to support the trial court’s restitution award of \$40,000.00. 277 N.C. App. 627, 2021-NCCOA-236, ¶ 46. We disagree.

¶ 28 “A trial court’s judgment ordering restitution must be supported by evidence adduced at trial or at sentencing. Issues at a sentencing hearing may be established by stipulation of counsel if that stipulation is definite and certain.” *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (citation and quotation marks omitted). “[I]t is essential that [the terms of the stipulation] be assented to by the parties or those representing them.” *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (citations omitted). Nevertheless, “a defendant need not make an affirmative statement to stipulate [at sentencing], particularly if defense counsel had an opportunity to object to the stipulation but failed to do so.” *Id.* at 829, 616 S.E.2d at 918.

¶ 29 In *Lance*, the State presented only a restitution worksheet at sentencing, indicating the requested the amount of \$40,000.00. *Lance*, 277 N.C. App. 627, 2021-

NCCOA-236, ¶ 46. There was no testimony or documentation to support the award sought on the restitution worksheet. *Id.* We held the restitution award was not supported by sufficient evidence. *Id.*

¶ 30 We reject Defendant’s contention that *Lance* is on point. In *Lance*, there was no valid stipulation between the parties. Whereas in this case, the following exchange took place during sentencing between counsel for Defendant, the prosecutor, and the trial court:

The Court: Do you have restitution?

[Prosecutor]: I do have a draft restitution order here.

The Court: Okay.

[Prosecutor]: It has the amount of \$300.

. . . .

The Court: Okay. Do you stipulate that the amount [of] restitution the State is seeking is accurate, or do you wish to be heard about that at all?

[Defense Counsel]: I don’t have anything contrary to present, Your Honor.

¶ 31 Defense counsel’s response that he didn’t “have anything contrary to present” when asked if the stipulated amount of restitution was accurate, indicated his manifestation of assent to the amount of \$300.00. There is nothing in the transcript indicating counsel for Defendant did not understand or contested the proposed amount of restitution or another term of the stipulation. Furthermore, defense

counsel had ample opportunity to object to the proposed stipulation. *See Alexander*, 359 N.C. at 829, 616 S.E.2d at 918. Thus, we conclude the terms of the stipulation, including the specific amount of the restitution award, were “definite and certain” and were sufficient to afford the trial court a basis for its decision. *See Mumford*, 364 N.C. at 403, 699 S.E.2d at 917; *see also Alexander*, 359 N.C. at 828, 616 S.E.2d at 917.

VI. Conclusion

¶ 32 For the foregoing reasons, we find no error in the trial court’s denial of Defendant’s motion to dismiss, and the trial court’s ordering Defendant to pay \$300.00 in restitution.

NO ERROR.

Judges TYSON and GRIFFIN concur.

Report per Rule 30(e).