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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-225

Filed 19 December 2023

Graham County, Nos. 21 CRS 285, 288, 299

STATE OF NORTH CAROLINA

v.

BRYAN AARON BERRYMAN

Appeal by defendant from judgments entered 13 July 2022 by Judge Jesse B. Caldwell, IV in Superior Court, Graham County. Heard in the Court of Appeals 29 November 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Eric R. Hunt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for defendant-appellant.

ARROWOOD, Judge.

Bryan Aaron Berryman (“defendant”) appeals from judgment entered upon his convictions for felony breaking and entering, felony larceny, felony possession of stolen goods, and conspiracy to commit felony breaking and entering. For the following reasons, we affirm the trial court’s judgment and remand for correction of

clerical errors.

I. Background

On 19 April 2021, Ms. Maria Maready (“Maready”) was supervising construction workers in the backyard of her home. Around mid-morning, Maready testified that she saw two men “walking up and down [her] road” that fronts her property for about an hour. According to Maready, “[defendant] was older and [Joseph Bryan Pressley (“Pressley”)] was younger” and both were wearing dark sweatshirts.

Maready testified that at one point she saw Pressley go onto the property of her neighbor, Mr. Dennis Crisp (“Crisp”). According to Maready, Pressley went between Crisp’s standalone garage and a single-wide trailer. Maready testified that while Pressley went on Crisp’s property, defendant went “the opposite way” of Crisp’s property and was no longer in her line of sight. Maready testified that she later saw Pressley leave Crisp’s property and walk back onto the road by himself, and when Pressley saw Maready looking at him, he dropped a weed eater and toolbox into a ditch.

Maready reported the incident to the local sheriff’s office, and Sheriff Jerry Lee Crisp (“Sheriff Crisp”) and Deputy Sheriff Courtney Heaton (“Deputy Heaton”) were dispatched to Maready’s home. Upon Sheriff Crisp and Deputy Heaton’s arrival, Maready described to them what defendant and Pressley looked like and “that they had proceeded up” the road. Sheriff Crisp and Deputy Heaton then proceeded up the

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road approximately 150 yards and saw defendant and Pressley. Sheriff Crisp asked defendant and Pressley what they were doing in the road, and defendant stated that “they were coming to see [a] friend” but did not provide a name for the friend. Sheriff Crisp patted them down for weapons and told them that he was detaining them for further investigation into the alleged “break-in, the theft.” In response, defendant said okay but that “[w]e’ve not done anything.”

Defendant and Pressley were put in the back of Deputy Heaton’s patrol vehicle and transported back near Maready’s home for “a show-up identification” with Maready. Maready identified defendant and Pressley while they were sitting in the patrol car as the two men she previously observed. Defendant and Pressley were then arrested.

When Crisp returned home that afternoon, he confirmed he owned the items that were dropped in the ditch and that the items had been in his garage when he left home that morning. Crisp also testified that the garage door was locked when he left that morning and that upon his return, the combination lock used to secure the door was missing.

On direct examination at trial, Maready testified that she “saw two guys walking back and forth trying to hide objects underneath the jacket. And then [she] saw them throw everything down into the ditch, and then they took off.” Defendant’s counsel did not object to this testimony. However, Maready later stated that she never saw anything in defendant’s hands. Specifically, when asked to “describe what

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items, if any, [did defendant have] in his hands that were thrown into the ditch[.]" Maready testified, "I hate to say it, but [Pressley] was the one that had the box and the weed eater. I did not see anything in [defendant's] hands. Everything else was in the ditch." Moreover, Maready testified that, after Pressley went onto Crisp's property and defendant went in the opposite direction up the road, she did not see defendant again until he was sitting in the back of the patrol vehicle.

Following this testimony, the State introduced a written statement made by Maready on the date of the incident. Defendant objected to the statement's admission on hearsay grounds; however, the trial court overruled the objection, and the statement was admitted and read by Maready to the jury. The statement read as follows:

April 19th, 11:00 a.m. I, Maria Maready, saw two guys walking back and forth. One of them walked over to the white trailer. He there [sic] for about five minutes. He started going up the road. I was watching him for [sic] the front door. He saw that I saw him with the two items. He dropped the items off my bank next to the road. The other guy dropped the weed eater I walked to [Crisp's] house to tell him. Then I had the building guys, Jerry and Tom, bring up the stuff from the bank. I called the sheriff after that. The older guy carrying the weed eater, younger guy had the black Kobalt box under the jacket and carrying the green chainsaw.

After reading the statement, Maready testified that the statement was accurate and that "[e]verything [was] correct on th[e] page." In another out-of-court statement defendant objected to on hearsay and corroboration grounds, Sheriff Crisp testified

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that Maready told him on the day of the incident “that one of them had the weed eater and the other one had the Kobalt toolbox” and that when “they looked and saw [Maready] standing there watching them . . . they threw the stuff in the ditch and headed up the road.” Defendant’s objection was overruled.

At close of the State’s evidence, while moving to dismiss all charges for lack of evidence, defendant’s counsel stated, “I know the State has tried to get [Maready’s] written statement in that is at severe odds with her sworn testimony today, but that statement was not sworn and it must yield to her sworn testimony from that [witness stand] today.” The trial court found that there was sufficient evidence for the matter to reach the jury and denied the motion. During the charge conference, the trial court, referring to Maready’s written statement, instructed the jury that

Evidence ha[d] been received tending to show that at an earlier time [Maready] made a statement which may conflict or be consistent with the testimony of [Maready] at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.

If you believe the earlier statement was made and that it conflicts or is consistent with the testimony of the witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness’s truthfulness in deciding whether you will believe or disbelieve the witness’s testimony.

The trial court also instructed the jury twice on the charges as they related to “acting in concert.” Specifically, the trial court stated:

For a defendant to be guilty of a crime, it is not necessary

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that the defendant do all of an act necessary to constitute a crime. If two or more persons join in a common purpose to commit breaking or entering, larceny pursuant to breaking or entering and/or possession of stolen goods pursuant to breaking or entering, 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.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, April 19, 2021, that the defendant acting either by himself or acting together with [Joseph] Bryan Pressley, committed the offenses, it would be your duty to return a verdict of guilty[.]

The jury found defendant guilty of (1) felony conspiring to breaking and entering and felony larceny, (2) felony breaking and entering, (3) felony larceny after breaking and entering, and (4) felony possession of stolen goods. The jury also convicted defendant of attaining habitual felony status.

During sentencing, the trial court arrested judgment on the possession of stolen goods charge; however, on the trial court's written judgment, the trial court included this charge. Defendant tendered his notice of appeal in open court.

II. Discussion

On appeal, defendant argues that the trial court erred in denying defendant's

motion to dismiss the charges because there was insufficient evidence defendant committed the alleged crimes, acted in concert, or conspired with Pressley. We disagree.

A. Standard of Review

“When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator.” *State v. Laws*, 345 N.C. 585, 592 (1997) (citation omitted). “If substantial evidence of each element is presented, the motion for dismissal is properly denied.” *Id.* “Whether evidence presented constitutes substantial evidence is a question of law” and reviewed by this Court de novo. *State v. Vause*, 328 N.C. 231, 236 (1991) (citation omitted). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Laws*, 345 N.C. at 592 (quoting *State v. Olson*, 330 N.C. 557, 564 (1992)).

In reviewing a trial court’s ruling on a motion to dismiss, this Court evaluates “all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *Id.* (citing *State v. McCullers*, 341 N.C. 19, 28–29 (1995)). “The ultimate question is ‘whether a reasonable inference of the defendant’s guilt may be drawn from the circumstances.’” *State v. Myers*, 181 N.C. App. 310, 313 (2007) (quoting *State v. Lee*, 348 N.C. 474, 488 (1998)). “As long as the evidence

supports a reasonable inference of defendant's guilt, it is up to the jury to decide whether there is proof beyond a reasonable doubt." *Id.* (citing *State v. Trull*, 349 N.C. 428, 447 (1998)).

"However, if the evidence is 'sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.'" *Id.* (citing *State v. Malloy*, 309 N.C. 176, 179 (1983)). "This is true even though the suspicion aroused by the evidence is strong." *Id.* (citation omitted). Moreover, "the rules regarding a determination of sufficiency of the evidence are easier to state than to apply and require a case-by-case analysis." *Id.* (citations omitted).

B. Inconsistent Statements

Defendant first argues that the trial court erred in denying his motion because it could not have considered Maready's prior written statement and Sheriff Crisp's testimony regarding what Maready told him that day. Specifically, defendant contends these statements are prior inconsistent statements inadmissible for substantive purposes, and without them, there was insufficient evidence of the charges. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2023). While hearsay is generally inadmissible, prior, out-of-court statements that are inconsistent with a witness's

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testimony at trial can be admitted into evidence solely for the purposes of impeaching the witness. *See State v. Banks*, 210 N.C. App. 30, 39 (2011) (“Under N.C.R. Evid. 607, these prior inconsistent statements are admissible for the purpose of shedding light on a witness’s credibility.”); N.C.G.S. § 8C-1, Rule 607 (2023). Thus, prior inconsistent statements may not be considered as substantive evidence of the matters asserted therein. *State v. Hall*, 187 N.C. App. 308, 320 (2007) (citation omitted).

However, “[i]t is well settled that exception to the admission of evidence will not be sustained when evidence of like import has theretofore been, or is thereafter, introduced without objection.” *State v. Featherson*, 145 N.C. App. 134, 137–38 (2001) (quoting *Gaddy v. Bank*, 25 N.C. App. 169, 173 (1975)). In *Featherson*, the defendant’s counsel objected to the admission of a witness’s prior written statement, but the court held that the defendant waived his objection to the admission of the statement by later failing to object to the same evidence. *Id.* Although the trial court later instructed the jury to consider the evidence only for impeachment purposes, the *Featherson* Court held that because the evidence was entered during trial “without any limitation[,]” it could be considered as substantive evidence. *Id.*

The present case is similar to *Featherson*. Here, defendant’s counsel objected to Maready’s written statement and Sheriff Crisp’s testimony of what Maready told officers on hearsay grounds. However, defendant’s counsel failed to object to Maready’s prior testimony that she “saw two guys walking back and forth trying to hide objects underneath the jacket. And then [she] saw them throw everything down

into the ditch, and then they took off.” This testimony contains similar evidence to the prior, out-of-court statements defendant objected to—the statements all placed defendant at the scene with tools in his possession. Because defendant’s counsel failed to object to Maready’s earlier testimony, the trial court admitted the out-of-court statements into evidence without any limitation. Thus, the prior statements could be considered for their substance.

Even assuming *arguendo* that the evidence was incompetent, this Court must consider “all of the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *Laws*, 345 N.C. at 592 (citation omitted). For the foregoing reasons, the contradictions in Maready’s testimony and prior, out-of-court statements resolved in favor of the State require this Court to affirm the judgment below.

C. Acting in Concert

Defendant contends there was insufficient evidence he acted in concert with Pressley and thus the trial court erred in denying defendant’s motion to dismiss the charges of (1) felony breaking and entering, (2) felony larceny, and (3) felony possession of stolen goods. We disagree.

“The doctrine of acting in concert provides that when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of the common plan or purpose.” *State v.*

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Melvin, 364 N.C. 589, 592 (2010) (citation and internal quotations marks omitted). To prove a defendant acted in concert, it is not necessary for the defendant to do any particular act constituting an element of the crime. *State v. Guy*, 262 N.C. App. 313, 320 (2018) (citation omitted). Rather, under the concerted action principle, the defendant can be convicted if they are present at the crime scene and there is sufficient evidence to show they “act[ed] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” *Id.* (citation omitted).

“The presence required for acting in concert can be either actual or constructive.” *State v. Wallace*, 104 N.C. App. 498, 504 (1991) (citations omitted). “While actual distance from the crime scene is not always controlling in determining constructive presence, the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime.” *State v. Buie*, 26 N.C. App. 151, 153 (1975) (citations omitted).

For example, in *State v. Pryor*, this Court explained that “[a] guard who has been posted to give warning or the driver of a ‘get-away’ car, may be constructively present at the scene of a crime although stationed a convenient distance away.” 59 N.C. App. 1, 9 (1982) (citations and internal quotation marks omitted). Conversely, in *State v. Buie*, this Court held defendant was not constructively present because “[a]t the time of the perpetration of the crimes the defendant was in his home about a quarter of a mile away”—a distance not close enough to render assistance or

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encourage perpetration. 26 N.C. App. at 153.

Here, when viewed in the light most favorable to the State and resolving any contradictions in the State’s favor, the evidence shows that defendant was constructively present with Pressley and acted in concert with him to perpetrate the crimes on Crisp’s property. Specifically, in addition to being observed loitering with Pressley on the road in between her and Crisp’s property for an hour, defendant was observed in close proximity to Maready just before Pressley went onto Crisp’s property. Thus, as discussed in *Pryor*, defendant could conceivably have been acting as a lookout for Pressley. Further, unlike in *Buie*, defendant was close enough to render assistance in that he was seen “carrying the weed eater[.]” This shows that defendant assisted Pressley—at least briefly—in handling and carrying the stolen goods away from Crisp’s property.

In sum, with Maready’s prior statements allowed in, the evidence tends to show defendant was constructively present at the time Pressley committed the crimes. Accordingly, the trial court did not err in denying defendant’s motion to dismiss on the basis of insufficient evidence with respect to the first three charges.

D. Conspiracy

Additionally, the State presented sufficient evidence to support that defendant conspired to commit breaking and entering. 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. Cox*, 375 N.C. 165, 169 (2020) (citation omitted).

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“A conspiracy may be shown by circumstantial evidence, or by a defendant’s behavior.” *State v. Jenkins*, 167 N.C. App. 696, 699–700 (2005) (citation omitted). Conspiracy “‘cannot be established by a mere suspicion, nor does a mere relationship between the parties or association show a conspiracy.’” *State v. Benardello*, 164 N.C. App. 708, 711 (2004) (quoting *State v. Massey*, 76 N.C. App. 660, 662 (1985)). “If the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy.” *State v. Choppy*, 141 N.C. App. 32, 39 (2000) (citation and internal quotation marks omitted).

Here, the evidence taken in the light most favorable to the State points to the existence of a conspiracy. Maready testified that she saw defendant and Pressley walking back and forth for about an hour on her street. She saw Pressley enter the property and stay for approximately 15 minutes. According to her testimony and prior statements, Maready saw both defendant and Pressley holding various tools, and she saw them drop the tools in the ditch next to her house and walk up the road. The inferences drawn from defendant’s actions—walking with Pressley for an hour before Pressley entered the property, holding and attempting to conceal the tools, and throwing the tools—point unerringly to the existence of a conspiracy. Thus, the trial court did not err in denying defendant’s motion to dismiss with respect to the conspiracy charge. Accordingly, we affirm the trial court’s judgment.

E. Clerical Errors

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Defendant also argues that the trial court committed clerical errors on the judgment by (1) including felony possession of stolen goods on the judgment after arresting judgment on the charge and (2) mislabeling the class of the felonies with the punishment levels. We remand to the trial court to remove the felony possession charge from the judgment and correct the felony classifications.

During sentencing, the trial court acknowledged that it could not enter judgment on both the larceny and possession of stolen goods charges. *See State v. Perry*, 305 N.C. 225, 236–37 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394 (2010). The trial court then arrested judgment on the possession charges. Because the judgment lists both the larceny and possession charges, we remand to the trial court to remove the felony possession charge from the judgment.

The judgment also contains incorrect felony classifications with the punishment levels left blank. Pursuant to our habitual felon statute, defendant's felony breaking and entering and larceny charges should have been listed as class H felonies with a punishment level of class D, and the conspiracy charge should have been listed as a class I felony with a punishment level of class E. *See N.C.G.S. § 14-7.6*. Accordingly, we remand for correction of these clerical errors.

III. Conclusion

For the foregoing reasons, the trial court's judgment of conviction on all counts is affirmed, and we remand for corrections to the judgment consistent with this opinion.

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AFFIRMED IN PART AND REMANDED FOR CORRECTION TO THE
JUDGMENT.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).