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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-541

Filed 4 June 2024

Pitt County, Nos. 20 CRS 55803; 21 CRS 15, 53836

STATE OF NORTH CAROLINA

v.

ADEDUS LEAVEIL MCNAIR

Appeal by defendant from judgments entered 11 March 2022 by Judge Cy A. Grant, Sr., in Pitt County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

ZACHARY, Judge.

Defendant Adedus Leaveil McNair appeals from the trial court's judgments entered upon a jury's verdict finding him guilty of second-degree burglary and his

Alford pleas to robbery with a dangerous weapon and attaining habitual felon status.¹ After careful review, we conclude that Defendant received a fair trial, free from error. However, we vacate the trial court's restitution order and remand for further proceedings.

BACKGROUND

On 30 September 2020, Debora Tavasso and her husband Kim Tavasso left their home in Winterville, headed to the beach. Before departing, Mrs. Tavasso "locked all the doors[,]” secured the gate to the back yard, and turned on the home-security system. The home-security system is a camera on the front porch that begins recording when it detects motion.

At approximately 11:30 p.m. the next evening, Mrs. Tavasso received a phone notification and a video from the home-security system. The camera had recorded two men standing near their front door: the first, a bearded man in a white jacket on the front porch who approached the front door, looked in the direction of the surveillance camera, and then turned and walked away; and the second, a man who stood back from the door. The two men then walked along "the side of the [Tavasso] house" in the direction of the back yard gate. Mr. Tavasso immediately called their next-door neighbor, James Brown. Mr. Brown turned on his floodlights, lighting up the back

¹ An *Alford* plea is a guilty plea in which the defendant does not admit his guilt of the criminal act, but admits that there is sufficient evidence to convince a trier of fact that he is guilty. *See North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970).

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corner of the Tavassos' back yard. In addition, Mr. Brown called another neighbor and his son, who was a Winterville Police officer.

About that same time, the Tavassos' back yard neighbor, Curtis James, received a security camera alert on his phone; the camera had recorded "two guys walking across [his] back[]yard in . . . Covid masks." Mr. James "heard them jump over the fence . . . and . . . [they] went to the front street[.]" walking away from the Tavasso home.

Mr. Brown's son arrived approximately one minute later, and the two men canvassed the Tavasso property. They found that the back gate was open, the back storm door was open, and the wooden "back door had been kicked in[.]" leaving the door frame "shattered and some of the internal molding . . . pushed away from the wall[.]" The debris was inside the house. Mr. Brown saw footprints going toward and away from the back deck, and he and his son also located a shoe print on the backdoor. Mr. Brown called 9-1-1, and his son cleared the home to ensure that no one was inside.

The Tavassos immediately returned to Winterville. When they arrived, they could not tell whether any of their belongings had been taken. The Tavassos did not know Defendant and he did not have their consent to be at their home. In addition, the Tavassos' security camera did not alert at any other time the evening of the break-in.

Pitt County Sheriff's Officer Troy Scheller responded to the Tavasso home shortly after midnight on 2 October 2020. Officer Scheller reviewed the Tavassos' and

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Mr. James's security footage and took screenshots, which he emailed to all members of the Sheriff's Office.

At about two o'clock in the morning, Winterville Police Department Officer Jonathan Harrell observed Defendant roughly two miles from the Tavasso home, driving "at a slow roll[,] pulling in front of [his] patrol vehicle" and then stopping. Officer Harrell found Defendant and another "male passenger both passed out" in the vehicle. Officer Harrell arrested Defendant for driving while impaired. Defendant "was wearing a white-in-color Adidas . . . sweat jacket [with] . . . blue stripes on the shoulders, and he had blue jeans, black shoes on[.]"

While at the detention center, "jail staff alerted [Officer Harrell] to come back there and look at [the] couple of photos that [had been] sent out through e-mail" regarding the Tavasso burglary. Officers Harrell and Scheller compared Defendant's booking photographs and the surveillance footage and determined that "it was the same person[.]" Officer Scheller then saw Defendant and identified him as the man visible on the front porch in the surveillance footage.

On 11 January 2021, a Pitt County grand jury indicted Defendant for second-degree burglary and attaining habitual felon status. On 25 October 2021, the grand jury indicted Defendant for robbery with a dangerous weapon.

On 7 March 2022, this matter came on for trial. On 8 March 2022, the jury found Defendant guilty of second-degree burglary, and on 11 March 2022, Defendant entered *Alford* pleas to the charges of robbery with a dangerous weapon and attaining

habitual felon status. On 11 March 2022, the trial court entered judgment on the conviction of second-degree burglary and the *Alford* plea to attaining habitual felon status, and sentenced Defendant to 146 to 188 months in the custody of the North Carolina Division of Adult Correction. The trial court entered a second judgment on the *Alford* plea to robbery with a dangerous weapon, and sentenced Defendant to 128 to 166 months in the custody of the North Carolina Division of Adult Correction. The trial court also ordered Defendant to pay \$775.00 in restitution.

Defendant timely appealed.

DISCUSSION

Defendant argues that the trial court erred when it denied his motion to dismiss the charge of second-degree burglary because the State failed to establish that he “personally committed a breaking and also failed to establish [that he] personally committed an entry.” Defendant further argues that the trial court erred in ordering Defendant to pay \$775.00 in restitution “because the amount of restitution ordered was unsupported” by the evidence.

Standards of Review

This Court reviews de novo a trial court’s denial of a motion to dismiss. *State v. Hobson*, 261 N.C. App. 60, 70, 819 S.E.2d 397, 404 (citation omitted), *disc. review denied*, 371 N.C. 793, 821 S.E.2d 173 (2018). “When ruling on a defendant’s motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the

perpetrator of the offense.” *Id.* (citation omitted). “Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion.” *State v. Osborne*, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (citation omitted). “[T]he evidence must be considered in the light most favorable to the State [and] the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.” *Id.* (citation omitted). “[I]f the record developed before the trial court contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *Id.* (citations omitted).

It is the jury’s “role to weigh the evidence; . . . if more than a scintilla of competent evidence supports the allegations against a defendant, then the trial court’s denial of a defendant’s motion to dismiss must be upheld.” *State v. Rogers*, 255 N.C. App. 413, 415, 805 S.E.2d 172, 174 (2017) (cleaned up). “Once the court decides that a reasonable inference of the defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.” *State v. Parker*, 274 N.C. App. 464, 468, 852 S.E.2d 638, 644 (2020) (cleaned up).

“Whether [an] amount of restitution . . . is supported by competent evidence adduced at trial or sentencing is reviewed by an appellate court *de novo*.” *State v. Hillard*, 258 N.C. App. 94, 97, 811 S.E.2d 702, 704 (2018).

Motion to Dismiss

N.C. Gen. Stat. § 14-51 establishes the crime of second-degree burglary “as defined at the common law.” N.C. Gen. Stat. § 14-51 (2023). The elements of second-degree burglary are: (1) “the breaking”; (2) “and entering”; (3) “during the nighttime”; (4) “of [a] . . . dwelling house or sleeping apartment of another”; (5) “with intent to commit a felony therein.” *State v. Jolly*, 297 N.C. 121, 127, 254 S.E.2d 1, 5 (1979).

Defendant contends that the State “failed to establish [that Defendant] personally committed a breaking and also failed to establish [that he] personally committed an entry.” Defendant does not challenge the sufficiency of the evidence of the other elements of second-degree burglary, or his presence at the Tavasso property on the evening of 1 October 2020.

As regards the element of breaking, “[i]t is well established that the mere pushing or pulling open of [even] an unlocked door constitutes a breaking.” *State v. Sweezy*, 291 N.C. 366, 383, 230 S.E.2d 524, 535 (1976). Here, there was ample evidence of a breaking: the Tavassos’ open back yard gate, open storm door, kicked-in back door, and broken door frame. *See id.*

The element of entry is well defined; an “entry is the act of going into the place after a breach has been effected[.]” *State v. Watkins*, 218 N.C. App. 94, 100, 720 S.E.2d 844, 848 (cleaned up), *disc. review denied*, 365 N.C. 553, 724 S.E.2d 509 (2012). The element of entry “has a broad significance in the law of burglary, for it is not confined to the intrusion of the whole body[.]” *Id.* (cleaned up). It is accomplished with “the

least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony[.]” *Id.* (cleaned up). Substantial evidence supports this element if the evidence shows or allows for a reasonable inference that the perpetrator inserted “into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony[.]” *Id.* (emphasis omitted) (citation omitted); *Osborne*, 372 N.C. at 626, 831 S.E.2d at 333.

In this case, the State presented substantial evidence to support a jury’s finding of a breached boundary or the inference of “the least entry” with “any part of the body” or “instrument[.]” *Watkins*, 218 N.C. App. at 100, 720 S.E.2d at 848 (citation omitted). The secured storm door would have to be opened to kick in the wooden door. Also, debris from the broken door frame was found on the floor inside of the house, as well as the bell that had once hung on the inside handle of the kicked-in door. Viewed in the light most favorable to the State, a jury could reasonably infer that, at minimum, the foot of the person who kicked in the door breached the threshold, and thus entered the premises.

The question before us, however, is whether the State presented sufficient evidence that Defendant committed the breaking and the entry of the premises; that is, whether there was sufficient evidence that Defendant was the perpetrator of the offense.

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Our Supreme Court has explained that “[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.” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). It is well established that the evidence is insufficient “where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to [the] defendant’s guilt.” *Id.* Nonetheless, to submit a charge to the jury, “[t]he evidence need only give rise to a reasonable inference of guilt[.]” *Id.* In considering such motions, the trial court is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971).

Defendant’s assertion that the State’s evidence raises no more than a suspicion that he was the perpetrator is not persuasive. Neither is Defendant’s argument that “there was no evidence [that Defendant], and not the other guy, committed any breaking.” The facts and circumstances, when taken together, give rise to a reasonable inference that Defendant committed the breaking and entering in this instance, sufficient to submit the case to the jury.

The evidence was sufficient to establish that Defendant was the man shown on the Tavasso porch in the surveillance footage from the scene, which was shown to the jury, together with photographs. The footage also showed Defendant and the man accompanying him headed toward the back gate, to the rear of the Tavasso home. Mr.

Brown turned on his floodlights, lighting up the back corner of the Tavassos' back yard, and Mr. James received a security camera alert on his phone; the camera had recorded two men walking across his back yard away from the back of the Tavasso home and jumping a fence. The images of these men captured on Mr. James's security camera recording were the same men seen in the Tavasso footage. Mr. James also saw "wet footprints" walking away from the Tavasso back yard and "across [his] backyard to [his] carport" toward "the main street." Mr. Brown similarly testified that he "saw footprints going toward [the Tavasso] deck and then footprints going away from their deck." Finally, officers subsequently arrested Defendant for driving while intoxicated approximately two miles from the Tavasso home, wearing what the jury could infer to be the same clothes as the individual pictured in the surveillance footage.

"In borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury" *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (cleaned up), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986). Viewing the evidence as a whole, and in the light most favorable to the State, the State presented substantial circumstantial evidence from which a jury could reasonably infer Defendant's guilt. It was for the jurors, then, "to decide whether the facts, taken singly or in combination, satisf[ie]d them beyond a reasonable doubt that [Defendant was] actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965). Therefore, the trial court did not err in denying

Defendant's motion to dismiss. Defendant's argument is overruled.

Restitution

Finally, Defendant argues that we must vacate the trial court's order awarding \$775.00 in restitution because the State did not present competent evidence to support that amount. Specifically, Defendant complains that the only evidence supporting this amount was testimony that it cost "several hundred dollars" to repair the Tavassos' back door following the incident.

The State tendered a restitution worksheet, to which Defendant did not stipulate, requesting restitution in the amount of \$775.00. The State instead presented only the following testimony that supported an award of restitution:

Q. And at some point did you have to have that door frame or door replaced or repaired?

A. Oh, yes.

Q. How much did that cost you?

A. I don't have the exact figure off the top of my head, but it—several hundred dollars by the time I paid a carpenter to install it and repair the wood, replace the door.

Absent "an agreement or stipulation between [a] defendant and the State, evidence must be presented in support of an award of restitution." *State v. Wright*, 212 N.C. App. 640, 646, 711 S.E.2d 797, 801 (citation omitted), *disc. review denied*, 365 N.C. 351, 717 S.E.2d 743 (2011). "A trial court's award of restitution must be supported by competent evidence in the record." *Hillard*, 258 N.C. App. at 96, 811

S.E.2d at 704 (citation omitted). “[T]he quantum of evidence needed to support the award is not high[,]” but there must be “some evidence that the amount awarded is appropriate[.]” *Id.* at 97, 811 S.E.2d at 704. “The amount of restitution must be limited to that supported by the record.” *Wright*, 212 N.C. App. at 645, 711 S.E.2d at 801 (cleaned up).

Here, Defendant did not stipulate to the amount claimed in the State’s restitution worksheet, and the only evidence in the record to support the restitution award was testimony that the Tavassos paid “several hundred dollars” to repair the damage to their back door. This testimony is not sufficiently specific to support the restitution award. Thus, the \$775.00 restitution award is unsupported by competent evidence.

Accordingly, we vacate the trial court’s restitution order and “remand to the trial court for a new hearing to determine the appropriate amount of restitution.” *State v. Moore*, 365 N.C. 283, 286, 715 S.E.2d 847, 850 (2011).

CONCLUSION

Defendant received a fair trial, free from error. We vacate that portion of the trial court’s judgment in 20 CRS 55803 and 21 CRS 15 ordering \$775.00 in restitution and remand for further proceedings consistent with the reasons stated herein.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).