|  |  |  |
| --- | --- | --- |
| NO. 23-468 |  |  DISTRICT 19B |

 NORTH CAROLINA COURT OF APPEALS

 \*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

|  |  |  |
| --- | --- | --- |
| STATE OF NORTH CAROLINA v.BRETT ANDREW ANTHONY LINK  |  | ))))) From Randolph County)) |

 \*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

 DEFENDANT APPELLANT’S BRIEF

 \*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

 *-i-*

 INDEX

TABLE OF CASES AND AUTHORITIES *iii*

ISSUE PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF GROUNDS

FOR APPELLATE REVIEW 2

STATEMENT OF FACTS 3

ARGUMENT 10

I. THE TRIAL COURT ERRED BY DENYING MR. LINK’S MOTION TO DISMISS FOR INSUFFICIENCY OF THE EVIDENCE 10

 A. *Standard of Review* 10

 B. *Preservation of issue* 10

 C. *Argument* 10

 1. *The elements of habitual larceny* 12

 2. *Acting in Concert* 12

 3. *Proof of felonious intent* 13

 4. *The problem of asportation and felonious intent in proving allegations of retail store theft* 13

 5. *Our appellate courts have required sufficient evidence to show a common purpose to sustain a conviction based upon the theory a defendant acted in*

 *-ii-*

 *concert with another person to commit a crime* 14

 6. *The State’s evidence was insufficient to show Mr. Link shared a common purpose for Mr. Baker to leave Walmart without paying for the items in his shopping*

 *cart* 17

CONCLUSION 21

CERTIFICATE OF FILING AND SERVICE 21

CERTIFICATE OF COMPLIANCE 22

APPENDIX: 23

 *-iii-*

 TABLE OF CASES AND AUTHORITIES

 CASE LAW AUTHORITY

*In re J.D.*, 376 N.C. 148,

852 S.E.2d 36 (2020) 16

*State v. Barnes*, 345 N.C. 184,

481 S.E.2d 44 (1997) 12

*State v. Booker*, 250 N.C. 272,

108 S.E.2d 426 (1959) 13

*State v. Brice*, 370 N.C. 244,

806 S.E.2d 32 (2017) 12

*State v. Campbell*, 373 N.C. 216,

835 S.E.2d 844 (2019) 20

*State v. Edgerton*, 266 N.C. App. 521,

832 S.E.2d 249 (2019) 12

*State v. Glidewell*, 255 N.C. App. 110,

804 S.E.2d 228 (2017) 16

*State v. Golder*, 374 N.C. 238,

839 S.E.2d 782 (2020) 10

*State v. Hales*, 256 N.C. 27,

122 S.E.2d 768 (1961) 14

*State v. Joyner*, 297 N.C. 349,

255 S.E.2d 390 (1979) 12

*State v. Sanders*, 288 N.C. 285,

218 S.E.2d 352 (1975) 13

*State v. Sisk*, 285 N.C. App. 637,

878 S.E.2d 183 (2022) 13

 *-iv-*

*State v. Walters*, 276 N.C. App. 267,

854 S.E.2d 607 (2021) 10

*State v. Washington*, 17 N.C. App. 569,

195 S.E.2d 1 (1973) 15

 STATUTORY AUTHORITY

N.C. Gen. Stat. § 14-72 12

|  |  |  |
| --- | --- | --- |
| NO. 23-468 |  |  DISTRICT 19B |

 NORTH CAROLINA COURT OF APPEALS

 \*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

|  |  |  |
| --- | --- | --- |
| STATE OF NORTH CAROLINA v.BRETT ANDREW ANTHONY LINK |  | ))))) From Randolph County)) |

 \*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

 DEFENDANT APPELLANT'S BRIEF

 \*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

 ISSUE PRESENTED

I. DID THE TRIAL COURT ERR BY DENYING MR. LINK’S MOTION TO DISMISS FOR INSUFFICIENCY OF THE EVIDENCE?

 STATEMENT OF THE CASE

 Mr. Link was charged by indictment with habitual larceny under N.C.G.S. § 14-72(b)(6). The indictment alleges that the offense occurred on 11 April 2017. (R p 4).

 On 12 September 2022, Mr. Link was tried before the Honorable Lee Gavin, Judge of Superior Court, and a jury. (T Vol. 1 p 1). The jury returned a guilty verdict on 13 September 2022. (T Vol. 2 pp 145–47; R p 13). Judge Gavin sentenced Mr. Link to imprisonment for a minimum of 20 months and a maximum of 33 months. (T Vol. 2 pp 152–53; R p 18).

 On 23 September 2022, Mr. Link’s attorney filed a handwritten notice of appeal. (R p 20). On 3 October 2022, Mr. Link, through his attorney, gave oral notice of appeal in open court. (October T p 2).

 STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

 Defendant appeals from a final judgment of the Superior Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) and N.C. Gen. Stat. § 15A-1444(a). The 23 September 2022 handwritten notice of appeal filed by Mr. Link’s attorney does not show service upon the State. His oral notice of appeal given in open court on 3 October 2022 was not timely. Mr. Link has filed a Petition for Writ of Certiorari seeking review of his conviction. He also requests that the Court suspend the Rules pursuant to Rule 2 of the Rules of Appellate Procedure and review his conviction to prevent manifest injustice.

 STATEMENT OF FACTS

 On 21 April 2017, Officer J.C. Clark of the Randleman Police Department received a report from Will Waddell, the “loss prevention representative” at the Randleman Walmart, alleging that a larceny had occurred there on 11 April 2017. (T Vol. 2 p 112). Officer Clark went to the store, met with Mr. Waddell, and obtained a receipt from him “showing the amount of the property that had been taken from the store.” (T Vol. 2 p 114). The receipt, State’s Exhibit 3, was a “training receipt” used by Walmart to show the value of items as recorded in the store’s record system. (T Vol. 2 pp 124–25; R p 38 – State’s Exhibit 3).

 Officer Clark also watched and obtained a copy of video clips from the store’s video cameras and still photographs extracted from the video. Based upon his acquaintance with Mr. Link and information received from another officer, he identified the persons shown in the video as Mr. Link and Philip Baker. (T Vol. 2 pp 115–18, 123–24).

 On 30 April 2017, Officer Clark obtained a warrant for the arrest of Mr. Link, charging him with felony habitual larceny and alleging that he stole a pressure washer and car battery from Walmart on 11 April 2017. (T Vol. 2 p 121, R pp 2–3). Officer Clark also obtained a warrant charging Mr. Baker with misdemeanor larceny and possession of stolen property. (T Vol. 2 pp 121–22).

 In July 2018, the State obtained an indictment charging Mr. Link with habitual larceny. (R p 4). The matter came on for trial in September 2022.Walmart no longer employed Mr. Waddell. The State offered the testimony of Officer Clark and JoVana Cortan, who became employed at the Randleman Walmart in 2019 and became the “asset operations protection coach” there in 2020. (T Vol. 2 pp 77–80).

 Ms. Cortan testified that her knowledge of the charge against Mr. Link came from reviewing a digital file created by Mr. Waddell and maintained by Walmart at its offsite storage facility. Ms. Cortan reviewed the file the week before trial. (T Vol. 2 pp 77–83). A report printed from the digital file, an “ASSET PROTECTION CASE RECORD,” redacted to exclude handwritten notes by Ms. Cortan and a narrative by Mr. Waddell, were admitted as State’s Exhibit 2. The report, created on 19 April 2017, showed that Mr. Link was the “Suspect/Offender” in a “NON-ASSOCIATE THEFT” event on 11 April 2017 involving a car battery and a 3100PSI pressure washer valued at $446.76. (T Vol. 2 pp 90–91; R pp 33–37).

 Ms. Cortan testified that the digital file showed a “loss” from Walmart on 11 April 2017 of a car battery and a 3100 PSI pressure washer. (T Vol. 2 p 91). She testified that she had “never been made aware of any payments made toward the items that were lost.” (T Vol. 2 p 111).

 Ms. Cortan identified State’s Exhibit 1 as a CD “burned” by Walmart and given to the Randleman Police Department. The CD contained video clips from Walmart security cameras and notes made by Mr. Waddell related to the video clips. Following a voir dire, the court admitted the video clips without Mr. Waddell’s notes about the clips. (T Vol. 2 pp 36-39, 63–64, 94, 105). Ms. Cortan testified that each video clip on the CD had a date and time stamp, and if two clips showed the same time, it was because the clips showed the same event at the same time but from a different angle. (T Vol. 2 p 110).

 Ms. Cortan testified that at the time of the incident the Randleman Walmart was open 24 hours per day. She testified that under Walmart policy, the store staffed only one checkout station after midnight in the main part of the store on the grocery side of the self-checkouts. (T Vol. 2 pp 107–09). Officer Clark testified that in 2017 at four a.m., the only way to exit the Walmart store would be through the doors on the grocery side of the store. (T Vol. 2 pp 118–20).

 Following a colloquy between the court and the parties, State’s Exhibit 1 was published to the jury without narration or commentary by a witness. (T Vol. 2 pp 98–106). The video published to the jury showed:[[1]](#footnote-1)

**Clip\_1 4:13:38 a.m. – 4:14:44 a.m.** Mr. Link appears in view of a camera labeled “Automotive Batteries.” He enters the battery area alone. Mr. Baker enters the area moments later on a mobility cart. Mr. Link takes a battery from the shelf and places it on Mr. Baker’s mobility cart. Mr. Link and Mr. Baker both leave the area.

**Clip\_10 4:06:05 a.m. – 4:09:14 a.m.** The Walmart parking lot is shown with several cars parked in the lot. A car enters the scene from the right. A person gets out of the car and walks toward the store. A yellow car comes into the scene from the left and stops in the handicapped parking area. Mr. Link gets out of the car and walks toward the store. Mr. Baker gets out of the car's passenger side and remains by the door. Mr. Link returns to the car and approaches Mr. Baker. Mr. Link and Mr. Baker disappear from the scene. Moments later, what appears to be the basket of a mobility cart appears at the lower right of the video.

**Clip\_11 4:07:15 a.m. – 4:09:14 a.m.** A person is shown sweeping the floor. A person in a dark coat walks by going into the store. Mr. Link appears, walking across the entry area from the left. He disappears on the right. Moments later, he reappears, driving a mobility cart toward the exit and disappearing from the clip. He appears again, walking toward the store entry and disappearing from view. A few moments later, Mr. Baker enters the store, driving a mobility cart.

**Clip\_12 4:10:11 a.m. – 4:10:33 a.m.** Mr. Baker appears alone, driving the mobility cart by the cosmetics aisle camera.

**Clip\_13 4:10:16 a.m. – 4:11:17 a.m.** Mr. Baker drives by the wet shave aisle camera on his mobility cart. Several seconds later, Mr. Link walks by the camera.

**Clip\_14 4:10:24 a.m. – 4:11:35 a.m.** Mr. Baker passes by the diabetic aisle camera on his mobility cart. Several seconds later, Mr. Link passes by the same camera.

**Clip\_15 4:17:14 a.m. – 4:18:11 a.m.** Mr. Baker appears on the mobility cart driving toward automatic doors which open. He drives through the doors and out of camera view.

**Clip\_2 4:13:41 a.m. – 4:17:31 a.m.** Mr. Link appears on a camera labeled “Action Alley Auto.” Mr. Link places a box from a shelf on Mr. Baker’s mobility cart. They go down the aisle a short distance and turn down an aisle out of camera view. Several seconds later, a person that could be Mr. Link appears farther down the aisle and walks down the aisle alone until he disappears.

**Clip\_3 4:16:43 a.m. – 4:17:05 a.m.** Mr. Baker and Mr. Link appear on the “”FISHING\_EVPM\_1” camera. Mr. Baker continues straight forward past the aisle disappears. Mr. Link turns and proceeds down the aisle toward the camera until he disappears.

**Clip\_4 4:16:34 a.m. – 4:17:40 a.m.** Mr. Link and Mr. Baker appear together on the “Action Alley Pets” camera. Mr. Baker turns right down an aisle out of camera view. Mr. Baker continues forward up the aisle toward the camera until he disappears.

**Clip\_5 4:11:17 a.m. – 4:12:10 a.m.** Mr. Link appears alone on the “Garden Center Entrance” camera. He walks toward a fence, pauses there for a few moments, and then walks back toward the camera until he disappears.

**Clip\_6 4:17:63 a.m. – 4:21:03 a.m.** Mr. Baker appears alone on the “Garden Center Entrance” camera driving his mobility cart. He stops briefly, looks back, and seems to speak to someone. He then drives forward to the fence, gets off the cart, and hops a few steps ahead. He returns to the cart, backs it up, and again gets off and hops a few steps toward the gate. He gets back on his cart, turns around, and drives back toward the camera until he disappears.

**Clip\_7 4:20:14 a.m. – 4:21:03 a.m.** Mr. Baker appears alone on the “Customer Entrance Jam GC 01" camera. He drives toward the camera until he disappears.

**Clip\_8 4:20:23 a.m. –4:21:03 a.m.** In a view from the “Customer Entrance Jam GC 02” camera, a person whose image is unclear appears outside the fence. Mr. Baker appears, driving his cart down the aisle toward the fence. As Mr. Baker drives toward the fence, a gate swings open at the left edge of the camera’s view. Mr. Baker continues forward and disappears.

**Clip\_9 4:18:55 a.m. – 4:19:21** A yellow car passes by the view of the “Exterior Row 2/3” camera.

 Before the presentation of evidence began, Mr. Link stipulated to the existence of his prior larceny convictions alleged in the indictment. (T Vol. 2 pp 21–23). He offered no evidence at trial and moved to dismiss for insufficiency of the evidence at the close of the State’s evidence and again at the close of all the evidence. His motions were denied. (T Vol. 2 pp 27–29).

 Judge Gavin instructed the jury that Mr. Link could be convicted on the theory of acting in concert. (T Vol. 2 p 136–37).

 ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING MR. LINK’S MOTION TO DISMISS FOR INSUFFICIENCY OF THE EVIDENCE.

 A. *Standard of Review*.

 The trial court’s denial of a defendant’s motion to dismiss is reviewed de novo. Under a de novo standard of review, the motion is considered anew, and this Court freely substitutes its own judgment for that of the trial court. In doing so, the evidence is considered in the light most favorable to the State, drawing all reasonable inferences in the State's favor. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. A motion to dismiss should be granted when the evidence raises no more than a suspicion of guilt. *State v. Walters*, 276 N.C. App. 267, 270–71, 854 S.E.2d 607, 610 (2021) (citations omitted).

 B. *Preservation of issue*.

 A motion to dismiss at the close of the State’s evidence preserves all issues related to the sufficiency of the evidence for appellate review. *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020).

 C. *Argument*.

 A motion to dismiss for insufficiency of the evidence requires determining whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. A motion to dismiss should be granted when the evidence raises no more than a suspicion of guilt. *State v. Walters*, 276 N.C. App. 267, 270–71, 854 S.E.2d 607, 610 (2021) (citations omitted).

 The evidence at trial showed that Mr. Link did not take any goods from Walmart without payment. The State relied exclusively upon the theory that Mr. Baker took the items from the store without paying for them and that Mr. Link acted in concert with him.

 The State’s evidence showed that Mr. Link assisted Mr. Baker, a disabled person, by transporting him to Walmart and by placing items on his mobility cart. However, the State’s evidence did not show that Mr. Link had any common purpose or plan for Mr. Baker to leave the store without paying for the items. The evidence did not show Mr. Link knew Mr. Baker did not pay for the items. Whether Mr. Link had a common plan with Mr. Baker or any knowledge that he did not pay for the items rests in speculation and conjecture. Speculation, conjecture, and suspicion are not sufficient to support a conviction.

 1. *The elements of habitual larceny*.

 Proof beyond a reasonable doubt of habitual larceny under N.C.G.S. § 14-72(b)(6) requires evidence to show:

 (1) that the defendant took the property of another and;

 (2) carried it away

 (3) without the owner’s consent and;

 (4) with the intent to deprive the owner of the property permanently, and;

 (5) after having been previously convicted of an eligible count of larceny on four prior occasions.

N.C. Gen. Stat. § 14-72(b)(6); *State v. Brice*, 370 N.C. 244, 248–49, 806 S.E.2d 32, 35–36 (2017); *State v. Edgerton*, 266 N.C. App. 521, 527, 832 S.E.2d 249, 254 (2019).

 2. *Acting in Concert*.

 If two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is guilty as a principal if the other commits that crime. *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (citation omitted). “To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose.” *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). Thus, “[t]he mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense.” *State v. Sanders*, 288 N.C. 285, 290, 218 S.E.2d 352, 357 (1975).

 3. *Proof of felonious intent*.

To be guilty of larceny, the taking must be accompanied by a felonious intent, that is, an intent to convert to her own use, thereby depriving the owner of the use and possession of his chattels. This intent must exist at the moment the property is taken.

*State v. Booker*, 250 N.C. 272, 274, 108 S.E.2d 426, 428 (1959), *overruled in part on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989).

 Intent is a mental state determined from the statements and conduct of the party who wrongfully takes the property. *Id.*

 4. *The problem of asportation and felonious intent in proving allegations of retail store theft*.

 The “asportation” or “taking” element required to prove larceny has long presented difficulty in the context of larceny from retail stores. Proof of the asportation element does not require the property be removed from the store. *State v. Sisk*, 2022-NCCOA-657, ¶ 17, 285 N.C. App. 637, 641, 878 S.E.2d 183, 186–87 (2022) (citing *State v. Walker*, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969)). The bare removal of the property from the place it is found is sufficient if the requisite felonious intent is present. *Id*. (citing and quoting *State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978).

 However, retail stores such as Walmart encourage people to take items from shelves, place them in carts or baskets, and move them about and eventually out of the store. Indeed, the more items loaded onto a cart, the happier Walmart should be — as long as the items are paid for before the shopper leaves with them.

 Thus, customers’ actions in a retail store of taking items from shelves, placing them in carts or baskets and moving them from place to place within the store are everyday, invited occurrences that, standing alone, say nothing about the customer’s intent. Our shoplifting statute was enacted because of the difficulty of proving larceny in the retail context. *See*

*State v. Hales*, 256 N.C. 27, 31, 122 S.E.2d 768, 771 (1961) (holding N.C.G.S. § 14-72.1 constitutional).

 5. *Our appellate courts have required sufficient evidence to show a common purpose to sustain a conviction based upon the theory a defendant acted in concert with another person to commit a crime*.

 In *State v. Washington*, Defendants Washington, Oakely, and a companion entered a very small jewelry store with a customer area of only five feet by five feet. Oakley asked to be shown two or three rings that were in

the showcase but did not seem very interested in them. Washington then asked to be shown watches in a wall case. Oakely remained near the showcase within two feet of a tray of diamonds. As the shopkeeper went to assist Washington, he turned and saw Oakley approach the showcase. Oakley stepped back when the shopkeeper looked at him. The shopkeeper tried to keep an eye on Oakley, but Washington distracted him three times by asking to see another watch. Washington selected a watch, and they agreed on a price. Washington said he had to go to his car to get money to pay for the watch. He, Oakley, and their companion left the store. The shopkeeper immediately noticed the tray of diamonds was missing. Washinton and Oakely never returned to the store. *State v. Washington*, 17 N.C. App. 569, 570–71, 195 S.E.2d 1, 1–2 (1973).

 On appeal, the defendants, relying on *State v. Gaines*,[[2]](#footnote-2) asserted the evidence was insufficient to convict. This Court held the evidence sufficient to permit a reasonable inference that “defendant Oakley removed the tray of jewelry from the showcase while defendant Washington, by word and deed, deliberately distracted Hayes' attention.” *Id*. at 571–72, 195 S.E.2d at 3.

 In *State v. Glidewell,* this Court found the evidence sufficient to support an acting in concert instruction where the evidence showed more than mere presence because the defendants came to the store in the same car, entered the store together, looked over merchandise in the same section of clothing, were seen on surveillance video returning to the same area behind a clothing rack and stuffing shirts in their pants, left the store within seconds of each other and left the parking lot in the same vehicle. *State v. Glidewell*, 255 N.C. App. 110, 117–18, 804 S.E.2d 228, 234–35 (2017).

 *In re J.D.*, while not a larceny case, nonetheless illustrates the need for some evidence of a common purpose to support a conviction under the acting in concert theory. In *J.D*., the State sought to adjudicate Jeremy delinquent based on sexual exploitation of a minor under the theory that he acted in concert with Dan, who made a video recording of Jeremy allegedly committing a sexual act upon Zane. Dan stated that nobody told him to make the recording. Jeremy was heard on the recording telling Dan not to record the act. The evidence showed that Jeremy made a motion that could be interpreted as a “thumbs up” to Dan at some point during the act. *In re J.D.*, 376 N.C. 148, 150, 852 S.E.2d 36, 39–40 (2020).

 On appeal, our Supreme Court held the evidence insufficient to support the theory of acting in concert because the State’s evidence was insufficient to show a common plan or purpose to record the incident. The court said the evidence did “not show any statements, actions, or conduct by Dan or Jeremy prior to this incident which could be considered evidence of a common plan or scheme.” *Id*. at 156, 852 S.E.2d at 43 (2020). Due to the poor quality and length of the video, the court noted that it was unclear whether Jeremy gave a “thumbs up” or was simply forming a fist. The court said, “Even if Jeremy did give a thumbs up in the video, acting in concert requires more than mere approval.” *Id*. (citation omitted).

 6. *The State’s evidence was insufficient to show Mr. Link shared a common purpose for Mr. Baker to leave Walmart without paying for the items in his shopping cart*.

 JoVana Cortan testified that Walmart sustained a “loss” of a battery and pressure washer on 11 April 2017. She was unaware of any payment made for the items. Her testimony, the video evidence, and the Walmart loss report were sufficient to permit a jury to find that Mr. Baker left Walmart without paying for the battery and pressure washer.

 Mr. Link did not remove the battery and pressure washer from Walmart. To convict Mr. Link of larceny, the State had to prove he acted in concert with Mr. Baker. The State had to produce evidence of some statement, act, or conduct by Mr. Link sufficient to show he had a common plan with Mr. Baker to take the battery and pressure washer without paying for them. Merely proving that Mr. Link assisted Mr. Baker in shopping proves no more than mere presence and engaging in acts virtually all Walmart customers engage in. It is insufficient to prove he was part of a plan for Mr. Baker to leave the store without paying for the items in his cart. The State’s sole evidence attempting to prove a common plan was the video clips published to the jury. The State showed the jury seconds of multiple camera views in a random sequence.[[3]](#footnote-3)

 The jury’s concern with the video clips seemed not to be whether they showed actions demonstrating a common purpose between Mr. Link and Mr. Baker, but merely whether Mr. Link was one of the people in the video. The jury began deliberations at 4:24 p.m. Fourteen minutes later, at 4:28 p.m. it sent a request to the court for “clear shots” of Mr. Link, any video of tattoos, “mugshots” of Mr. Link, and an opportunity to view his arms. (T Vol. 2 pp 139–42).

 The court responded to the jury’s requests by permitting the jurors to view portions of the video clips in the courtroom and to take State’s Exhibit 4, a still image of Mr. Link, back to the jury room. (T Vol. 2 pp 143–45). The jury retired again to deliberate at 4:54 p.m. and returned with a verdict just ten minutes later at 5:04 p.m.

 We must assume that the jury could understand the chronological sequence of events in its twenty-four minutes of deliberation and without access to the video clips. However, the video clips did not show any statements, acts, or conduct by Mr. Link sufficient to permit the jury to find that he shared a common purpose and plan with Mr. Baker for Mr. Baker to leave without paying for the items on his cart.

 The video evidence shows only that Mr. Link provided transportation for Mr. Baker and assisted him in shopping by removing items from shelves and placing them on his cart. These are ordinary “shopping” actions invited and consented to by Walmart. Such ordinary shopping actions cannot give rise to a reasonable inference that Mr. Link had a common plan for Mr. Baker to leave without paying for the items on his cart. This is especially so where the State’s evidence shows that Mr. Baker was disabled and required assistance.

 Mr. Link was last seen on video with Mr. Baker in Walmart at 4:16:49 a.m. when he and Mr. Baker entered the view of the “Action Alley Pets” camera. Mr. Link turns down a different aisle out of camera view at 4:16:52 a.m. while Mr. Baker continues down the aisle in camera view.

 Mr. Link was last seen on video with Mr. Baker in Walmart at 4:16:49 a.m. when he and Mr. Baker entered the view of the “Action Alley Pets” camera. Mr. Link turns down a different aisle out of camera view 4:16:52 a.m. while Mr. Baker continues down the aisle in camera view. Mr. Baker was not seen again in the store. However, Mr. Baker remained in the store.

 After Mr. Link was no longer with Mr. Baker, Mr. Baker was seen on video at 4:17:44 a.m. when he appeared going through the automatic doors shown on Clip 15. He then drove around the Garden Center area, appeared to speak to someone in the area, drove toward and then away from a fence, later returned, and eventually exited at 4:20:50 a.m., several minutes after Mr. Link was no longer with him in the store. There is nothing in the evidence showing that Mr. Link had any knowledge that Mr. Baker did not pay for the items in his cart or that he knew that Mr. Baker was not going to pay for the items. Any finding that Mr. Link shared in a plan for Mr. Baker to leave without paying for the items rests solely in speculation and conjecture.

 To survive a defendant’s motion to dismiss the State’s evidence must do more than “raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it.” *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019) (citation omitted). Showing “mere opportunity” to commit the crime is not enough. *Id*.

 While the evidence permits one to suspect, speculate, or guess that Mr. Link had a common purpose with Mr. Baker, it does no more, and that is not enough. The trial court erred by denying his motion to dismiss for insufficiency of the evidence.

 CONCLUSION

 Mr. Link’s conviction must be vacated because the evidence was insufficient to show he was acting in concert with Mr. Baker to commit larceny.

 Respectfully submitted this 23rd day of May 2023.

 Electronically Filed

 W. Michael Spivey

 Attorney for Appellant

 State Bar Number: 8991

 PO Box 1159

 Rocky Mount, NC 27802

 Telephone: 252.972.2711

 Email: mspivey@earthlink.net

 CERTIFICATE OF FILING AND SERVICE

 I hereby certify that the original of Defendant-Appellant’s Brief has been filed on the date shown below pursuant to Appellate Rule 26(a)(2) by utilizing the Courts’ electronic filing site.

 I further hereby certify that on the date shown below I served the Defendant-Appellant’s New Brief upon Special Deputy Attorney General Daniel P. O’Brien at his current email address dobrien@ncdoj.gov.

 This the 23rd day of May 2023.

 Electronically Filed

 W. Michael Spivey

 Attorney for Appellant

 CERTIFICATE OF COMPLIANCE

 Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, and this certificate of compliance). The Appendix is part of Appellant’s Argument and is included in the word court as reported by the word-processing software.

 This the 23rd day of May 2023.

 Electronically Filed

 W. Michael Spivey

 Attorney for Appellant

 APPENDIX

 VIDEO RECORDED EVENTS IN CHRONOLOGICAL ORDER

1. The video clips on the DVD published to the jury are not in chronological sequence. Appellant describes them in the sequence published to the jury. The clips were recorded on 11 April 2017. The times and camera labels stated are from the clips. Appellant submitted a copy of State's Exhibit 1 to this Court.

 Appellant analyzes the clips chronologically in his Argument and the Appendix.

 Note: The DVD copy provided to Appellant’s counsel by the Randolph County Clerk and transmitted to this Court shows camera labels and Mr. Waddell’s redacted notes. When the DVD is copied to a computer drive, the camera labels and redacted notes no longer appear. [↑](#footnote-ref-1)
2. The relevant portion of *Gaines* addressed the sufficiency of evidence to convict of larceny under a theory or aiding and abetting. *State v. Gaines*, 260 N.C. 228, 231, 132 S.E.2d 485, 487 (1963). [↑](#footnote-ref-2)
3. Appellant provides a detailed analysis of the video clips in chronological order in the Appendix. [↑](#footnote-ref-3)