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NO. COA10-317

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

EDWARD EARL DEVONE

Johnston County
Nos. 08 CRS 58802; 09 CRS
1193, 1198

Appeal by defendant from judgment entered 12 August 2009 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 13 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Mary S. Mercer, for the State.

Thomas R. Sallenger, for Defendant-Appellant.

ERVIN, Judge.

Defendant Edward Earl Devone appeals from a judgment entered on 12 August 2009 sentencing him to a minimum term of 101 months and a maximum term of 131 months imprisonment in the custody of the North Carolina Department of Correction based on his conviction for possession of a stolen motor vehicle. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant's conviction and resulting sentence should not be disturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On 16 September 2008, Carolyn Butler¹ drove her 1991 Lexus to a Dollar General store near her residence. After reaching the store, Ms. Butler parked her car. However, she accidentally left the keys in her vehicle when she entered the Dollar General. After a ten minute visit to the Dollar General store, Ms. Butler returned to the parking lot and discovered that her car was gone. Initially, Ms. Butler thought that her vehicle might have been taken as part of a practical joke, so she waited in the parking lot for some period of time in the hope that it would be returned. Approximately twenty minutes after discovering that her car was missing and after being advised by her counselor to seek law enforcement assistance, Ms. Butler called the Four Oaks Police Department and reported that her vehicle had been stolen.

Lieutenant Holly Bennett of the Four Oaks Police Department came to the Dollar General, where she interviewed Ms. Butler. Lieutenant Bennett described Ms. Butler as "extremely upset," "agitated," and "crying" at the time of her arrival. According to Lieutenant Bennett, Ms. Butler "call[ed] the [1991 Lexus] her baby [and said] that somebody had taken her baby." Lieutenant Bennett believed that Ms. Butler was "legitimately upset" about the theft of her vehicle.

¹ While she was married, Ms. Butler was known as Carolyn Kelly. After her divorce, she resumed using her maiden name and now refers to herself as Carolyn Butler. As a result, we will refer to the alleged victim as Carolyn Butler throughout the remainder of this opinion.

For the remainder of 16 September 2008 and throughout the next several days, Ms. Butler drove around the area looking for her Lexus. In addition, Ms. Butler remained in regular contact with Lieutenant Bennett during this time. According to Lieutenant Bennett, Ms. Butler was in "detective mode" in the period after 16 September 2008. Lieutenant Bennett testified that "[t]his [was] probably only the third time in my 13 years [that I have seen a citizen] go out and take the steps to go look for their vehicle."

On 10 November 2008, Detective Matt Behe of the Smithfield Police Department observed a black Lexus with a 30-day temporary license plate driving directly in front of his patrol vehicle. The temporary license plate on the Lexus was partially obstructed by a black cover, so that some of the information required to be displayed by law could not be seen. As a result, Detective Behe stopped the Lexus and asked to view the documentation associated with the temporary license plate. Defendant, who was a passenger in the vehicle, could not locate the requested documentation and eventually told Detective Behe that these documents were at his home. Although Defendant claimed to be the owner of the vehicle, he did not produce any documentation tending to verify that assertion.

Detective Behe attempted to locate a vehicle identification number on the temporary license plate. However, he failed in that effort because "it was an old 30-day tag that was bleached out . . . [with] white-out on it." A search performed using the vehicle

identification number listed on the Lexus' insurance documentation² did not result in any matches. A second vehicle identification number, which matched the one listed on the insurance documentation, was discovered on the front dash of the vehicle. The second vehicle identification number was crooked, bent, and appeared to have been tampered with. A search performed using the second vehicle identification number did not produce any matches either. The remnants of a third vehicle identification number, which also appeared to have been tampered with, were found on the vehicle's door. In Detective Behe's opinion, several digits associated with this vehicle identification number had been intentionally "scratched off." A fourth and fifth vehicle identification number, both of which had been tampered with, were discovered on the engine and radiator of the Lexus. A sixth vehicle identification number, which had not been tampered with, was found on the frame of the left side of the vehicle. A database search utilizing this vehicle identification number revealed that it was associated with the vehicle stolen from Ms. Butler on 16 September 2008. Upon obtaining this information, Detective Behe arrested Defendant for possessing a stolen motor vehicle.

After his arrest, Defendant made a statement to Detective Behe in which he claimed to have purchased the Lexus from "Carolyn Butler" in "August sometime," that he knew Ms. Butler slightly, and

² Detective Behe did not recall whether Defendant or the passenger handed him the documentation. However, Detective Behe testified at trial that Defendant subsequently "acknowledged" the insurance documentation.

that he had seen Ms. Butler quite often since purchasing the vehicle. Ms. Butler, on the other hand, denied knowing Defendant personally, although she acknowledged that she recognized him as a man "from the neighborhood" known as "Head." Ms. Butler knew that Defendant sold tires, thought that her son might have purchased tires from Defendant, and stated that she had "probably spoke[n] to [Defendant] one or two times" in passing. According to Ms. Butler, there were "papers from New York" bearing the name "Carolyn Butler" in the Lexus at the time it was stolen. Ms. Butler denied having ever altered or defaced the vehicle identification numbers on her Lexus.

2. Defendant's Evidence

Ms. Butler's son, Michael McDonald, testified that he recognized Defendant as a used tire salesman, that he had picked his mother up at the Dollar General while driving his black Expedition, and that Ms. Butler never told him anything about selling her Lexus to Defendant. DeAngelo McCoy, the son of Defendant's girlfriend, testified that he had gotten into an accident while driving the allegedly stolen Lexus, resulting in the issuance of a citation, and that the Lexus had not been hidden from view. According to Willie Snead, who had known Defendant since he was quite young, Defendant purchased the Lexus from "the lady" and her son and that Defendant had been removing the speakers and other items from the Lexus and placing them in an Expedition.

B. Procedural Facts

On 11 November 2009, a warrant for arrest was issued charging Defendant with possession of a stolen motor vehicle. On 2 March 2009, the Johnston County grand jury returned bills of indictment charging Defendant with possession of a stolen motor vehicle, felonious larceny, and having attained the status of an habitual felon. The charges against Defendant came on for trial before the trial court and a jury at the 10 August 2009 Criminal Session of the Johnston County Superior Court. On 12 August 2009, the jury returned verdicts convicting Defendant of possessing a stolen motor vehicle and felonious larceny. Following the acceptance of the jury's verdict, Defendant pled guilty to having attained the status of an habitual felon.³ At the sentencing hearing, the trial court determined that Defendant had accumulated 23 prior record points and should be sentenced as a Level VI offender; found that Defendant "has accepted responsibility for [his] criminal conduct," that Defendant "has a support system in the community," and that Defendant "has a positive employment history or is gainfully employed;" and concluded that "the factors in mitigation outweigh the factors in aggravation and that a mitigated sentence is justified." As a result, the trial court sentenced Defendant to a minimum term of 101 months and a maximum term of 131 months imprisonment in the custody of the North Carolina Department of Correction based on his conviction for possession of a stolen motor

³ In return for his guilty plea to the habitual felon allegation, the State agreed to dismiss a charge that Defendant had willfully defaced, destroyed, removed, covered, or altered "the manufacturer's serial number, transmission number, or engine number" in violation of N.C. Gen. Stat. § 20-109(b) (1).

vehicle and arrested judgment in the case in which Defendant had been convicted of felonious larceny. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Sufficiency of the Evidence

In his first challenge to the trial court's judgment, Defendant contends that the trial court erred by denying his motion to dismiss the charge of possession of a stolen motor vehicle at the close of all evidence on the grounds of evidentiary insufficiency. We do not find Defendant's argument persuasive.

"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." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). Substantial evidence is such evidence as is "necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citing *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459, 121 S. Ct. 487 (2000)), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403, 123 S. Ct. 495 (2002). In determining whether sufficient evidence exists to support the submission of the issue of a defendant's guilt to the jury, the trial court must consider all the evidence in the light most favorable to the State and draw all reasonable inferences from such evidence in the State's favor. *Id.* (citing *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001), *overruled on other grounds*, 359 N.C. 425, 615 S.E.2d 256 (2005)). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant

dismissal.'" *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (quoting *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996)). "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986), *see also*, *State v. Parker*, 268 N.C. 258, 260, 150 S.E.2d 428, 429 (1966) (stating that the extent to which the evidence at issue is direct or circumstantial is immaterial) (quoting *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956)).

N.C. Gen. Stat. § 20-106 provides, in pertinent part, that "[a]ny person . . . who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken" is guilty of a Class H felony. In order to obtain a conviction for the offense made punishable by N.C. Gen. Stat. § 20-106, the State must prove that a defendant (1) possessed a vehicle while (2) knowing or having reason to believe that the vehicle has been stolen or unlawfully taken. *State v. Bailey*, 157 N.C. App. 80, 83-84, 577 S.E.2d 683, 686 (2003) (quoting *State v. Lofton*, 66 N.C. App. 79, 83, 310 S.E.2d 633, 635-36 (1984)). Although Defendant concedes that he possessed Ms. Butler's Lexus, he argues that the State "produced absolutely no evidence [tending to show] that [he] knew or had reason to know that the vehicle had been stolen."

In advancing this argument, Defendant relies primarily on *State v. Leonard*, 34 N.C. App. 131, 237 S.E.2d 347 (1977), in which this Court held that the record evidence was insufficient to prove that the defendant knew or had reason to know that the vehicle he possessed was stolen. According to Defendant, "[t]he facts as set forth in *Leonard*[] apply equally to the circumstances of the present case . . . [because] the State's own evidence established that this Defendant believed that he had purchased the 1991 Lexus automobile from [Ms. Butler]." Defendant's reliance on *Leonard* is misplaced.

In *Leonard*, a vehicle owned by Frank Chandler was stolen from a public parking lot on 24 January 1976. Approximately one month later, the stolen vehicle was found in the defendant's possession. Defendant claimed to have purchased the vehicle from Arthur E. Williams and produced a certificate of title evidencing such a transaction dated 30 January 1976. On appeal, we concluded that "the defendant's possession [of the stolen vehicle] under the circumstances [was] not sufficient to raise the inference that defendant was the thief or that he knew or had reason to believe that the automobile was stolen." *Id.* at 133, 237 S.E.2d at 349. Although the presence of evidence, including a certificate of title, tending to show that the defendant purchased the allegedly stolen vehicle at issue in *Leonard* was clearly critical to our decision in that case, there is no such evidence here. Defendant does not claim to have purchased the vehicle from a non-testifying third party; instead, he claims to have purchased the vehicle from

Ms. Butler, who denied having sold it to him. Thus, in this case, unlike *Leonard*, Defendant's possession of stolen property recently after the theft, under circumstances "*excluding the intervening agency of others*, affords presumptive evidence that the person in possession is himself the thief.'" *Id.* (quoting *State v. Cotten*, 2 N.C. App. 305, 310, 163 S.E.2d 100, 103 (1968)).

As a result, the testimony of Ms. Butler coupled with the extensive evidence that various vehicle identification numbers situated at various locations on the Lexus had been altered provided ample basis for a rational juror to conclude that Defendant knew or had reason to know that the vehicle he possessed was stolen. Assuming that Ms. Butler's testimony was accepted as credible, it establishes that she did not sell the Lexus to Defendant and that it was stolen from the Dollar General parking lot on 16 September 2008. In addition, a decision to accept Ms. Butler's testimony as credible establishes that Defendant did not accurately describe the circumstances under which he acquired the Lexus in his conversations with investigating officers, a fact which permits an inference that Defendant came into possession of Ms. Butler's vehicle unlawfully. Finally, the fact that there appeared to have been an extensive effort to tamper with or obscure vehicle identification numbers associated with the Lexus provided additional evidence tending to show the required guilty knowledge. According to well-established North Carolina law, when there is "evidence tending to prove the fact in issue . . . the case should be submitted to the jury." *State v. Johnson*, 199 N.C. 429, 431,

154 S.E. 730, 731 (1930), *see also*, *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 435 (1997) (stating that, if a reasonable inference of a defendant's guilt can be drawn from the evidence, "it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty") (quoting *State v. Murphy*, 342 N.C. 813, 819, 467 S.E.2d 428, 432 (1996)). When viewed in the light most favorable to the State, the record evidence is sufficient to permit a rational juror to conclude that Defendant knew or had reason to know that the vehicle he possessed on 16 September 2008 was stolen. As a result, the trial court properly denied Defendant's motion to dismiss the possession of a stolen motor vehicle charge.

B. Doctrine of Recent Possession

In his second and third arguments on appeal, Defendant contends that the State inappropriately relied on the doctrine of recent possession of stolen property in seeking to have him convicted of felonious larceny. More specifically, Defendant argues that the trial court erred by instructing the jury concerning the doctrine of recent possession of stolen property in connection with the issue of his guilt of felonious larceny and by denying his motion to dismiss the felonious larceny charge because the evidence did not suffice to establish the applicability of the doctrine of recent possession of stolen property in this case. We disagree.

The doctrine of recent possession of stolen property is applicable when the record contains evidence tending to show (1)

that the property in question was stolen, (2) that the defendant possessed the stolen property, and (3) that defendant's possession of the stolen property occurred so soon after the theft and under such circumstances as to render it is unlikely that he obtained possession honestly. *State v. Reid*, 151 N.C. App. 379, 382, 565 S.E.2d 747, 750 (citing *State v. Pickard*, 143 N.C. App. 485, 487-88, 547 S.E.2d 102, 104, *disc. review denied*, 354 N.C. 73, 553 S.E.2d 210 (2001)), *disc. review denied*, 356 N.C. 622, 575 S.E.2d 522 (2002). In the event that the record contains evidence tending to show the existence of each of these three elements, the jury is allowed to infer that the possessor of stolen property stole it. *Id.* (citing *Pickard*, 143 N.C. App. at 487-88, 547 S.E.2d at 104), *see also*, *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981) (stating that "[the doctrine of recent possession] is simply a rule of law 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") (citing *State v. Bell*, 270 N.C. 25, 30, 153 S.E.2d 741, 745 (1967), *State v. Allison*, 265 N.C. 512, 516, 144 S.E.2d 578, 580 (1965)).

In instructing the jury with respect to the felonious larceny charge, the trial court stated that:

The State seeks to establish the defendant's guilt of larceny by the doctrine of recent possession. For this doctrine to apply, the State must prove three things beyond a reasonable doubt.

First, that the property was stolen.

Second, that the defendant had possession of this property

And third, that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that the defendant obtained possession honestly.

If you find these things from the evidence beyond a reasonable doubt, then you may consider them, together with all other facts and circumstances, in determining whether or not the defendant is guilty of larceny.

On appeal, Defendant challenges the sufficiency of the evidence to support a finding that Defendant possessed the stolen Lexus "so soon after it was stolen and under such circumstances as to make it unlikely that [Defendant] obtained possession honestly." *Reid*, 151 N.C. App. at 382, 565 S.E.2d at 750 (citing *Pickard*, 143 N.C. App. at 487-88, 547 S.E.2d at 104).

The determination of "[w]hether the time elapsed between the theft and the moment when the defendant is found in possession of the stolen goods is too great for the doctrine to apply depends upon the facts and circumstances of each case" and "is ordinarily a question of fact for the jury." *State v. Blackmon*, 6 N.C. App. 66, 76-77, 169 S.E.2d 472, 479 (1969). Assuming that the evidence that the amount of time between the date upon which the property was stolen and the date upon which it appeared in Defendant's possession is sufficiently short to support a recent possession instruction, the jury is free to conclude that the "inference of guilt arising from the unexplained possession of recently stolen property is strong, or weak, or [non-existent], on the basis of the time interval between the theft and the possession." *State v. Jackson*, 274 N.C. 594, 597, 164 S.E.2d 369, 370 (1968). Although

Defendant contends that the interval between 16 September 2008 and 10 November 2008 "easily exceeded any reasonable claim by the State regarding a recent possession," the record contains evidence tending to show that Defendant possessed the vehicle a mere two days after it was reported stolen.⁴ As a result of the fact that Defendant's possession of the Lexus within two days of the date upon which it was stolen clearly permitted an inference that he had it in his possession within such a short interval after the date of the theft as to support an inference that he had stolen it, *State v. Osborne*, 149 N.C. App. 235, 239-41, 562 S.E.2d 528, 532-33 (2002) (holding that the trial court properly instructed the jury concerning the doctrine of recent possession where items were

⁴ At trial, Detective Behe testified that Defendant claimed to own the vehicle; that he was provided with documentation indicating that the Lexus was insured in the name of Thelma McKoy on 18 September 2008; and stated that the vehicle was insured in Ms. McKoy's name, despite the fact that Defendant had owned it since August, for the sole reason that his costs of procuring insurance were greater than those of Ms. McKoy. Assuming that the jury decided to credit this information, it tends to show that the relevant time interval for purposes of the doctrine of recent possession is the time between 16 September 2008 and 18 September 2008 rather than the interval between 16 September 2008 and 10 November 2008. Although Defendant contends that the insurance in question was procured on 22 September 2008 rather than 16 September 2008, that argument goes to the weight to be given the inference to be drawn from the recency of Defendant's possession rather than whether the evidence supported the State's reliance on the doctrine of recent possession given that the record contains evidence that tends to support the two day period cited in the text and given that six days is not too long, given the facts and circumstances present here, to support reliance upon the doctrine of recent possession. See, *State v. Patterson*, 194 N.C. App. 608, 617-21, 671 S.E.2d 357, 362-65 (holding that the trial court did not err by denying the defendant's dismissal motion in reliance on the doctrine of recent possession despite the passage of a twenty-one day period between the theft of various items of stolen property and their discovery in the defendant's possession), *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009).

initially stolen from the victim's apartment on Friday, additional items were stolen from the victim's apartment on Saturday, and various stolen items were found in the defendant's possession on Monday), , *aff'd*, 356 N.C. 424, 571 S.E.2d 584 (2002) we conclude that trial court correctly instructed the jury concerning the doctrine of recent possession in this case. For the same reason, the trial court did not err by denying Defendant's motion to dismiss the felonious larceny charge.

III. Conclusion

As a result, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. Thus, since Defendant received a fair trial free from prejudicial error, the trial court's judgment should remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).