IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-619

Filed: 2 July 2019

Durham County, No. 16 CRS 54432

STATE OF NORTH CAROLINA

v.

KHADIR ASAAD CHERRY

Appeal by defendant from judgment entered 14 November 2017 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 10 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alan D. McInnes, for the State.

Winifred H. Dillon for defendant-appellant.

ZACHARY, Judge.

Defendant Khadir Asaad Cherry appeals from a judgment entered upon his conviction for possession of a stolen motor vehicle. After careful consideration, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

Defendant was indicted on 20 February 2017 for possession of a stolen motor vehicle. On 13 November 2017, Defendant's case came on for trial in Durham County Superior Court before the Honorable Henry W. Hight, Jr. At trial, the State's evidence tended to show the following:

On 22 April 2016, Aasathe Garde woke up and discovered that her moped, which she had purchased a few months earlier for approximately $2,300.00, was stolen. Ms. Garde immediately called police and filed a report, giving the make, model, and vehicle identification number ("VIN") of the moped.

On 24 May 2016, Officer Scott Newton of the Durham Police Department was in his unmarked police car stopped at a stoplight at the intersection of Roxboro Road and Carver Street in Durham. Officer Newton observed two men on "scooters" heading east on Carver Street toward the intersection. The two men attempted to turn right at the intersection onto the southbound lanes of Roxboro Road. One man did so effectively; the other, the Defendant in this case, lost control of his moped and ran into the front of a Driver's Education car sitting in the right northbound lane of Roxboro Road, flipping over the front of the car in the process.

Allen Goodwin, the Driver's Education instructor whose car was hit, got out of the car and told Defendant to stay where he was. Defendant instead jumped up, grabbed the moped, said "I'm all right,[]" and accelerated from the scene southbound in between the vehicles stopped at the stoplight in the northbound lanes on Roxboro

Road. Meanwhile, the driver of the other moped had stopped about 50 to 100 yards past the intersection on Roxboro Road, turned back to Defendant, and was yelling at him to "[c]ome on, come on, come on."

Officer Newton activated his siren and went through the intersection in pursuit, cutting the moped off further down Roxboro Road. With his path blocked, Defendant ran out of room and tipped over into the grass beside the curb. Officer Newton got out of his vehicle, placed Defendant under arrest, and waited while backup arrived to complete the investigation.

Officer Robert Preston of the Durham Police Department responded to Officer Newton's request for backup. Officer Preston noted that the moped lacked a license plate, which it was required to have by law. While looking for the VIN on the moped, Officer Preston noted that the paint on the moped was new—it smelled of fresh paint and was tacky and still wet to the touch in places. When Officer Preston entered the VIN into a database, he learned that the moped had been reported stolen.

Both Mr. Goodwin, the Driver's Education instructor, and Ethan Minton, the student driver in the vehicle at the time of the accident, testified at trial. Mr. Goodwin and Mr. Minton had remained on the scene during the police investigation. Mr. Minton, who had gotten out of the car and examined the moped, stated that he could smell fresh spray paint, and the paint was still tacky to the touch approximately ten minutes after the accident. Mr. Goodwin stated that he had helped move the

moped after Defendant was detained and that he got wet black paint on his hand from doing so.

At the close of the State's evidence, defense counsel moved for dismissal, which the trial court denied. Defendant then presented evidence, and called his first cousin, Jahmon Cedeno, as his first witness. Mr. Cedeno testified that he and Defendant had discussed Defendant's desire to purchase a moped. Mr. Cedeno had suggested to Defendant that he look on Craigslist. Defendant found a used moped listed for sale for $800.00, and Mr. Cedeno drove Defendant to the Doghouse restaurant on Guess Road to meet the seller. Mr. Cedeno stayed in the car while Defendant went to meet the seller. About fifteen to twenty minutes later, Mr. Cedeno received a text message from Defendant telling him to go ahead and leave and that Defendant was going to a bank to get the money to purchase the moped.

Defendant testified that, since he lacked a license, he decided to purchase the moped to get back and forth to school. Mr. Cedeno drove him to the Doghouse to take a look at it. There were actually three mopeds available for sale. Defendant took the moped with the $800.00 asking price for a test ride, and he and the seller agreed on a $700.00 purchase price. Defendant was on the way to his house to get his wallet when the accident occurred. Defendant had never met the seller of the moped before and did not know him. Defendant did not notice wet paint on the moped and denied having any reason to know the moped was stolen.

Defense counsel renewed the motion to dismiss at the close of all evidence, which the trial court again denied. On 14 November 2017, the jury returned a guilty verdict on the charge of possession of a stolen vehicle. The trial court sentenced Defendant to 8 to 19 months in the custody of the North Carolina Division of Adult Correction. Defendant filed written notice of appeal on 17 November 2017.

Discussion

On appeal, Defendant contends that the trial court erred in denying his motions to dismiss because the State failed to present substantial evidence that Defendant knew or had reason to believe the moped was stolen. We disagree.

In order to survive a motion to dismiss based on the sufficiency of the evidence, the State must present substantial evidence of each essential element of the offense charged and of defendant's identity as the perpetrator. *State v. Bagley,* 183 N.C. App. 514, 522-23, 644 S.E.2d 615, 621 (2007). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (internal quotation marks and citation omitted). In reviewing challenges to the sufficiency of the evidence, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson,* 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

"[C]ontradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve." *Id.* (internal quotation marks and citation omitted). "Circumstantial 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. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (quotation marks and citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). In ruling on a motion to dismiss, "the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Id.* However, the court "must consider the defendant's evidence which explains or clarifies that offered by the State" and must also consider the evidence that "rebuts the inference of guilt when it is not inconsistent with the State's evidence." *State v. Bates*, 309 N.C. 528, 535, 308 S.E.2d 258, 262-63 (1983). "The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*[.]" *Bagley,* 183 N.C. App. at 523, 644 S.E.2d at 621 (citations omitted).

Defendant was charged with possession of a stolen motor vehicle under N.C. Gen. Stat. § 20-106 (2017). To prove Defendant's guilt under this statute, the State was required to present substantial evidence that Defendant: (1) possessed; (2) a stolen motor vehicle; (3) having knowledge or reasonable grounds to believe that the vehicle was stolen. *State v. Bailey*, 157 N.C. App. 80, 83-84, 577 S.E.2d 683, 686 (2003). Defendant challenges only the sufficiency of the evidence to support the third

element, that he knew or had reasonable grounds to believe the moped was stolen. Where a defendant does not concede that he knew the property was stolen, "[w]hether the defendant knew or had reasonable grounds to believe that the [property was] stolen must necessarily be proved through inferences drawn from the evidence." *State v. Brown*, 85 N.C. App. 583, 589, 355 S.E.2d 225, 229, *disc. review denied*, 320 N.C. 172, 358 S.E.2d 57 (1987). We find abundant circumstantial evidence in the record from which the jury could infer that Defendant knew or reasonably should have known the moped was stolen.

The State's evidence, coupled with Defendant's evidence of the agreed upon purchase price of the moped, constituted substantial evidence that Defendant had reasonable grounds to believe the moped was stolen. Defendant testified that he was in the process of purchasing the moped and that he did not know it was stolen. There was evidence that the moped, which was required to have a license plate, had no license plate when Defendant was operating it. There was also evidence that the appearance of the moped had been altered shortly before Defendant was operating it, as Officer Preston, Mr. Goodwin, and Mr. Minton all testified to smelling and/or feeling wet paint from the moped. *See State v. Cannon*, 216 N.C. App. 507, 511-13, 721 S.E.2d 691, 694-96 (2011) (discussing the extent to which evidence of cosmetic changes altering the appearance of stolen property can create an inference that the defendant knew or had reasonable grounds to believe that the property was stolen),

disc. review denied, 365 N.C. 551, 720 S.E.2d 395 (2012). Finally, there was evidence that, though the moped was purchased for approximately $2,300.00 just a few months prior, Defendant agreed to purchase the moped for $700.00. Defendant's professed preparedness to purchase the moped for an amount well below its market value is additional evidence supporting the knowledge element of the offense. *See State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986) (providing that "knowledge or reasonable belief [that property was stolen] can . . . be implied where a defendant-buyer buys property at a fraction of its actual cost"). When considered together, evidence that the moped's appearance had recently been altered, that it lacked a license plate, and that it was being sold at a fraction of its true cost was substantial evidence that Defendant had reasonable grounds to believe that the moped was stolen.

Additionally, there was evidence that, after Defendant collided with a vehicle and flipped over its hood, he attempted to flee the scene with the stolen moped. "While flight is not, in itself, an admission of guilt, it is a fact which, once established may be considered along with other circumstances in determining a defendant's guilt." *State v. Lofton*, 66 N.C. App. 79, 84, 310 S.E.2d 633, 636 (1984). Defendant correctly notes that, assuming he was attempting to flee, there are any number of reasons why he would choose to flee. However, Defendant is incorrect in his implicit argument that his attempt to flee from the scene of the accident cannot serve as

evidence of his knowledge that the moped was stolen if there is more than one reasonable inference to be drawn as to his motivation for fleeing.

The essential question remains whether one can reasonably infer from Defendant's actions that he knew the moped was stolen. Evidence that Defendant drove a stolen vehicle and fled the scene when that stolen vehicle was involved in an accident, viewed in the light most favorable to the State, undoubtedly permits a reasonable inference that Defendant fled because he knew the vehicle was stolen. This evidence of Defendant's attempted flight, viewed with evidence that the moped did not have a license plate and had been painted shortly before Defendant operated it, was substantial evidence permitting an inference that Defendant had actual knowledge that the moped was stolen. The trial court therefore did not err in denying Defendant's motion to dismiss.

Accordingly, we conclude that Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges STROUD and BERGER concur.

Report per Rule 30(e).