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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-373

Filed: 5 November 2019

Cleveland County, No. 16 CRS 53528, 17 CRS 844

STATE OF NORTH CAROLINA

v.

CHRISTOPHER CHAD FRANK, Defendant.

Appeal by defendant from judgment entered 23 February 2018 by Judge Karen Eady-Williams in Cleveland County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

YOUNG, Judge.

This appeal arises out of a conviction for felonious breaking and entering, felonious larceny, and felonious possession of stolen goods, as well as habitual felon status. The trial court did not err in denying Defendant's motions to dismiss, nor did

the trial court err by allowing the State to amend the habitual felon indictment. Therefore, we find no error.

I. Factual and Procedural History

On 25 July 2016, Patricia Seagle ("Seagle"), an employee at Auto Parts U Pull and Scrap Metal ("U Pull") discovered that someone had broken into the business and stolen several items. Deputy Regina Brooks ("Deputy Brooks") with the Cleveland County Sheriff's Office responded to the call. Deputy Christy Clark ("Deputy Clark") arrived on the scene shortly thereafter. Deputy Brooks, Deputy Clark, and Seagle watched the surveillance camera videos and saw a person take the lottery tickets out of the holder and put them in a trash bag from an office trashcan. The person was identified as a white male, young, medium height and slender build. Seagle contacted the North Carolina Lottery Commission about the stolen tickets so they could track them. The Lottery Commission estimated that $1,800 in lottery tickets were stolen. Tickets from U Pull's inventory were cashed at two businesses, Fast Stop Market and Southern Stores on 24 and 25 July 2016.

At trial, the manager at Fast Stop identified the man who cashed in the lottery tickets as Christopher Chad Frank ("Defendant"), and testified that Defendant was accompanied by another man, later identified as Stanley Heath Ledford ("Ledford"). Defendant was not identified as either of two men who cashed the tickets at Southern Stores; a witness instead identified the sellers as Brian Davis ("Davis") and Kristen

Terry ("Terry"). Deputy Clark went to a motel close to Southern Stores looking for Defendant. She spoke with the clerk on duty and showed him a picture of Defendant. The clerk confirmed Defendant stayed at the motel from 24 July 2016 to 25 July 2016. While Deputy Clark was at the motel, Defendant called the front desk and asked the clerk if there was a room available that night. Defendant also asked to be connected to room 129, which was currently occupied by Terry.

Deputy Clark forwarded the investigation to Deputy Brooks and Detective Sergeant Amy Stroupe ("Detective Stroupe"). As a part of the investigation, Detective Stroupe and Detective Derek Shaffer ("Shaffer") interviewed Defendant. The interview was recorded and the jury listened to part of the recording. During the interview, the police officers seized $349.00 from Defendant. Defendant claimed to have gotten the lottery tickets from other people. He consented to the search of his motel room and car, which was also recorded. In the car, Detectives found lottery tickets, clothes, shoes, tools, a knife, a box cutter, and a BB pellet gun. In the motel room, Detectives found lottery tickets, clothing, coins, cash, some rings, and electronics. The clothing included a pair of Terry's jeans in a trash bag. Some coins were located in Terry's purse, and other coins were found in a Crown Royal bag. Defendant indicated that the coins belonged to him. A total of 142 lottery tickets were found, all of which had been scratched. These tickets were not winners and would not have been scanned and tracked by the Lottery Commission. Detectives

confirmed with photographs that the types of lottery tickets found in Defendant's car and hotel room were the same type sold at U Pull. The rings in Terry's purse belonged to Seagle, the U Pull employee. Defendant claimed that Brandon Humpries ("Humpries") broke into the U Pull store, took the lottery tickets, then brought the lottery tickets to the motel. Detective Stroupe explained to Defendant that the person in the U Pull surveillance was wearing a watch and clothing similar to that of Defendant's, and that the shoes found in his car were similar to the shoe print found at U Pull. Based on this information, Humpries was never interviewed.

On 10 October 2016 Defendant was indicted on felony counts of breaking and entering, larceny, and possession of stolen goods. On 17 July 2017, the Grand Jury returned an additional indictment for the status of Habitual Felon. Prior to trial, the State moved to amend the habitual felon indictment as it incorrectly stated that one of the convictions the indictment was based on occurred in superior court rather than district court. Defense counsel objected, arguing district court may not have had jurisdiction to accept Defendant's plea. The trial court allowed the State's motion to amend. On 23 February 2018, the jury found Defendant guilty of felonious larceny, felonious possession of stolen goods, and felonious breaking and entering. Defendant entered a guilty plea for the habitual felon offense. Based on a prior record level V, the trial court sentenced Defendant, as an habitual felon, to incarceration for 111 to

146 months. The trial court also ordered restitution in the amount of $2,651.00. Defendant filed a Notice of Appeal in open court.

II. Motions to Dismiss

a. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "In ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference which can be drawn from the evidence." *State v. Hall*, 85 N.C. App. 447, 452, 355 S.E.2d 250, 253 (1987). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

b. Analysis

Defendant contends that the trial court erred by denying Defendant's motions to dismiss the breaking and entering and larceny charges where the State failed to

present sufficient evidence that: (1) the stolen property was found in Defendant's exclusive possession; and (2) the lottery tickets found in Defendant's possession were positively identified as being stolen. We disagree.

Our courts have recognized that "[t]he doctrine of recent possession is '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.' " *State v. Brown*, 221 N.C. App. 383, 388, 732 S.E.2d 584, 588 (2012) (quoting *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981)). To apply the doctrine of recent possession, the State must show, beyond a reasonable doubt:

> (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

Maines, 301 N.C. at 674, 273 S.E.2d at 293 (citations omitted). Here, Defendant argues that the State did not meet its burden with regard to the first and second elements of the doctrine. However, the evidence supports that the property was stolen and the property was in Defendant's possession; thus, the doctrine of recent possession was applicable to this case and the matter was appropriately submitted to the jury.

To prove that property is stolen, the State may present either direct or

circumstantial evidence. *State v. Lee,* 213 N.C. App. 392, 396, 713 S.E.2d 174, 177 (2011). "[C]ircumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant.' " *Id.* (quoting *State v. Adcock*, 310 N.C. 1, 26, 310 S.E.2d 587, 607-08 (1984)). Here, the State produced sufficient evidence to show that the property at issue in this case was stolen. A witness testified that her personal jewelry, money, and lottery tickets were stolen from U Pull. The surveillance video showed that the person who broke in took lottery tickets out of the holder and put them in a trash bag that had been removed from an office trashcan. Defendant was identified as one of the people who cashed in lottery tickets from U Pull. Furthermore, a search of Defendant's hotel room resulted in the discovery of another 142 lottery tickets, gold coins, fifty-cent pieces, other odd coins, and jewelry. Seagle confirmed that the coins were the kind that she saved in her desk at U Pull, and identified the jewelry as her own. The combination of property—coins, jewelry, and lottery tickets—stolen from U Pull was exactly what was recovered from Defendant's car and motel room. Therefore, the State presented sufficient evidence that the property was identified as stolen as required to apply the doctrine of recent possession.

Defendant further argues that he was not in exclusive possession of the lottery tickets. However, the evidence shows Defendant had actual and constructive possession of the items stolen from U Pull. For the doctrine of recent possession to

be applicable, actual physical possession of the property is not required. *State v. Osborne*, 149 N.C. App. 235, 238, 562 S.E.2d 528, 531 (2002). Rather, possession may be actual or constructive. *Id.* Actual possession exists when the defendant has physical possession of the property. *Id.* "Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the [property]." *Id.* Defendant had actual possession of 142 lottery tickets found in his car and hotel room. The lottery tickets were the types stolen from U Pull. The evidence shows that Defendant had constructive possession, the ability to maintain dominion and control, of lottery tickets stolen from U Pull that he gave to other people to cash on his behalf. Therefore, there was sufficient evidence to determine that the stolen lottery tickets were in Defendant's possession as required by the doctrine of recent possession.

III. Habitual Felon Indictment

a. Standard of Review

Sufficiency of an indictment is reviewed using a *de novo* standard of review. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

b. Analysis

Defendant further contends that the trial court erred by allowing the State to amend its habitual felon indictment when the original indictment named the wrong court. We disagree.

Pursuant to the Habitual Felons Act, an habitual felon indictment is sufficient if it notifies the defendant that he is being tried as a recidivist. *State v. Williams*, 99 N.C. App. 333, 335, 393 S.E.2d 156, 157 (1990). In addition to providing such notice, the purpose of the indictment is "to enable [the defendant] to prepare an adequate defense to that charge." It is not the purpose of the habitual felon indictment "to provide the defendant with an opportunity to defend himself against the underlying felonies." *State v. Briggs*, 137 N.C. App. 125, 130, 526 S.E.2d 678, 681 (2000). The fact that another felony was committed is what is essential to an habitual felon indictment. *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994).

Our courts have allowed changes to habitual felon indictments when the changes do not substantially alter the charged offense. *See State v. Silas*, 360 N.C. 377, 378, 627 S.E.2d 604, 606 (2006); *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). Changes to the indictment are allowed "where the variance was inadvertent and [the] defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735 (1999).

In *State v. Lewis*, the habitual felon indictment incorrectly stated the date and county of a prior conviction. The trial court allowed the State to amend the indictment and this Court found no error. *State v. Lewis*, 162 N.C. App. 277, 285, 590 S.E.2d 318, 324 (2004). Furthermore, in *State v. Coltrane*, the indictment incorrectly

stated that one of the underlying felony convictions had taken place in a different county than where it actually occurred. This Court noted that " '[e]ven where a statute requires a particular allegation, the omission of such an allegation from an indictment is not necessarily fatal to jurisdiction.' " *State v. Coltrane*, 188 N.C. App. 498, 501, 656 S.E.2d 322, 325 (2008).

Here, there was a misstatement of the court in which one of Defendant's convictions occurred. The indictment correctly identified the county, but incorrectly identified superior court rather than district court. The type of offense, and the offense and conviction dates were correctly stated. The State informed the trial court that the list of convictions had been available to Defendant since September 2017, which Defendant's counsel confirms gave Defendant more than four months of notice.

Defendant argues that the district court might not have had jurisdiction for the particular felony conviction at issue. The conviction in question occurred in May 2005, over twelve years prior to the habitual felon indictment. The purpose of an habitual felon indictment, however, is not to allow a defendant to defend himself against the convictions listed on that indictment, or to bring up a jurisdictional argument for twelve-year-old convictions. *Briggs*, 137 N.C. App at 130, 526 S.E.2d at 681. Rather, the purpose is to allow the defendant to prepare an adequate defense to the current habitual felon charge. *Id.*

Defendant received sufficient notice about the prior convictions that would be used to support his habitual felon indictment, and Defendant was not misled or surprised as to the nature of the charges. *Campbell*, 133 N.C. App. at 535-36, 515 S.E.2d at 735; *Lewis*, 162 N.C. App. at 284-85, 590 S.E.2d at 324; *Coltrane*, 188 N.C. App. at 503, 656 S.E.2d at 326. The amendment was proper and the trial court did not err in granting the Motion to Amend the habitual felon indictment. Therefore, we find no error.

NO ERROR.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).