

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-402

Filed: 17 March 2020

Cleveland County, Nos. 16 CRS 216, 51419-20

STATE OF NORTH CAROLINA

v.

DOMINIQUE ERVIN ODEMS

Appeal by defendant from judgment entered 3 October 2018 by Judge Lori I. Hamilton in Cleveland County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James Bernier, Jr., for the State.

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

TYSON, Judge.

Dominique Ervin Odems (“Defendant”) appeals from judgment entered upon his conviction by jury verdicts of guilty of felonious larceny and obtaining property by false pretenses. We find no error in part, vacate in part, and remand.

I. Background

STATE V. ODEMS

Opinion of the Court

Defendant falsely represented himself as a vehicle's owner and sold a 2001 Chrysler Concord automobile owned by Dewanta Parks to a scrap yard for \$273.60 on 8 September 2015. Defendant's trial began 1 October 2018. The jury returned guilty verdicts of felonious larceny and obtaining property by false pretenses. In a separate verdict under N.C. Gen. Stat. § 14-7.5 (2019), the jury found Defendant guilty of being a habitual felon.

Defendant stipulated to prior convictions resulting in a prior record level III. The trial court consolidated his convictions for judgment and sentenced him at the lowest level of the mitigated range to an active prison term of 51 to 74 months. *See* N.C. Gen. Stat. § 15A-1340.17(c), (e) (2019). Defendant gave notice of appeal in open court.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issue

In his sole argument on appeal, Defendant asserts the trial court erred in denying his motion to dismiss the charge of felonious larceny. He argues no evidence tends to show the value of the vehicle stolen from Mr. Parks exceeded \$1,000.00 to raise the offense from a misdemeanor to a felony. *See* N.C. Gen. Stat. § 14-72(a) (2019).

IV. Standard of Review

This Court “reviews the denial of a motion to dismiss for insufficient evidence *de novo*.” *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008).

V. Analysis

The State concedes Defendant’s conviction for felonious larceny “should be vacated” but argues the evidence and the jury’s verdict support the entry of judgment against Defendant for misdemeanor larceny. While this Court is not bound by the State’s concession, we agree. *State v. Phifer*, 297 N.C. 216, 226, 254 S.E.2d 586, 591 (1979).

“A motion to dismiss is properly denied if ‘there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.’” *State v. Barbour*, 153 N.C. App. 500, 501, 570 S.E.2d 126, 127 (2002) (citation omitted). “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). In making our determination, we must view “the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State.” *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002).

If the evidence supports only “a suspicion or conjecture as to either the commission of the offense, or the identity of the defendant as the perpetrator of it, the

motion for nonsuit [to dismiss] should be allowed. This is true even though the suspicion so aroused by the evidence is strong.” *In re Vinson*, 298 N.C. 640, 656-57, 260 S.E. 2d 591, 602 (1979) (citations omitted).

This Court has stated: “The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner’s consent; and (4) with the intent to permanently deprive the owner of the property.” *Barbour*, 153 N.C. App. at 502, 570 S.E.2d at 127. Under the statutes, “[l]arceny of goods of the value of more than one thousand dollars (\$1,000) is a Class H felony.” N.C. Gen. Stat. § 14-72(a). Unless otherwise provided by statute, “larceny of property . . . where the value of the property or goods is not more than one thousand dollars (\$1,000), is a Class 1 misdemeanor.” *Id.*

Defendant does not challenge the sufficiency of the State’s evidence that he committed all of the essential elements of larceny of the subject automobile. He challenges whether the value of the automobile exceeded \$1,000.00. “[T]o convict of the *felony* of larceny, it is incumbent *upon the State* to prove beyond a reasonable doubt that the value of the stolen property was more than [one thousand] dollars.” *State v. Jones*, 275 N.C. 432, 436, 168 S.E.2d 380, 383 (1969) (emphasis original).

For purposes of subsection 14-72(a), “value” denotes “the price which the subject of the larceny would bring in open market—its ‘market value’ or its ‘reasonable selling price,’ at the time and place of the theft, and in the condition in

STATE V. ODEMS

Opinion of the Court

which it was when” stolen. *State v. Dees*, 14 N.C. App. 110, 112, 187 S.E.2d 433, 435 (1972) (citation omitted).

In order to withstand a motion to dismiss, “[t]he State is not required to produce direct evidence of value to support the conclusion that the stolen property was worth over \$1,000.00, provided that the jury is not left to speculate as to the value of the item.” *State v. Rahaman*, 202 N.C. App. 36, 47, 688 S.E.2d 58, 66 (alteration, citation and quotation marks omitted), *disc. review denied*, 364 N.C. 246, 699 S.E.2d 642 (2010), *abrogated in part by State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010).

This Court has held that a “witness’s testimony as to his opinion of the ‘value’ of the stolen automobile was properly admitted and was sufficient to require submission to the jury of an issue as to defendant’s guilt of felonious larceny under G.S. 14-72.” *State v. Coleman*, 24 N.C. App. 530, 532, 211 S.E.2d 542, 543 (1975). “Where a merchant has established a retail price which he is willing to accept as the worth of merchandise offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss.” *State v. Odom*, 99 N.C. App. 265, 272-73, 393 S.E.2d 146, 151, *disc. review denied*, 327 N.C. 640, 399 S.E.2d 232 (1990). “[W]here stolen property is not commonly traded and has no ascertainable market value, a jury may infer the market value of the stolen property from evidence of the replacement cost.” *State v. Helms*, 107 N.C. App. 237, 240, 418 S.E.2d 832, 833 (1992).

STATE V. ODEMS

Opinion of the Court

We conclude the State's evidence fails to support a reasonable inference that the value of the 2001 Chrysler Concord exceeded \$1,000.00 when it was stolen by Defendant in September of 2015. Mr. Parks testified he had purchased the vehicle from his uncle for \$600.00 in February of 2015. Mr. Parks estimated the vehicle had "maybe over a hundred thousand miles" on it at the time of the purchase and described its overall condition as "great" and the condition of the interior as "fair." After "purchas[ing] four brand new tires" for the vehicle, Mr. Parks drove the vehicle to and from work every day for an additional 7,000 miles. The vehicle "broke down" as Parks was driving to South Carolina. Mr. Parks left the vehicle in someone's yard, where it remained for "two and a half, maybe three weeks" before being taken by Defendant.

Patricia Rollins Seagle of Auto Parts U Pull & Scrap Metal of Shelby testified Defendant was paid \$273.60 for the vehicle on 8 September 2015, less a \$40.00 towing fee. Defendant gave a recorded statement to Sergeant Christy Clark of the Cleveland County Sheriff's Office on 9 October 2015 and claimed "a guy had sold him that car approximately five months ago for \$450."

In *State v. Holland*, our Supreme Court vacated a Defendant's conviction for felonious possession of stolen property because the State had failed to prove the stolen car's value exceeded the then-existing felony threshold of \$400.00. *State v. Holland*, 318 N.C. 602, 610, 350 S.E.2d 56, 61 (1986) (applying N.C. Gen. Stat. § 14-72 (1981)),

overruled in non-pertinent part by State v. Childress, 321 N.C. 226, 362 S.E.2d 263

(1987). In *Holland*,

[a]lthough the State offered no direct evidence of the Cordoba's value, there [was] in the record evidence tending to show that the victim owned two automobiles and that the 1975 Chrysler Cordoba was his favorite one of which he took especially good care, always keeping it parked under a shed, and that a picture of this automobile was exhibited to the jury[.]

Id. Rejecting the State's argument that the evidence was sufficient to submit the issue to the jury, the Court emphasized that "[t]he jury may not speculate as to the value" of stolen property. *Id.*; accord *In re J.H.*, 177 N.C. App. 776, 778-79, 630 S.E.2d 457, 459 (2006) (reaching same result with regard to a stolen 2000 Ford Focus).

Here, although the State did present some evidence of the value of Mr. Parks' vehicle, none of this evidence tends to show any value exceeding \$1,000.00. The only direct evidence of the vehicle's market value was the \$600.00 purchase price paid by Mr. Parks to his uncle in February 2015 and the \$273.60 Defendant received for the vehicle from the scrapyard in September 2015. *Cf. State v. Davis*, 198 N.C. App. 146, 152-53, 678 S.E.2d 709, 714 (2009) (finding sufficient evidence that value of DVD player exceeded \$1,000.00 where victim originally paid "over \$1,300.00" for it and testified it was in "like-new" condition when stolen).

No witness offered an opinion of the vehicle's value, much less that the value exceeded \$1,000.00. This lack of evidence contrasts this case from other precedents.

State v. Cotten, 2 N.C. App. 305, 311, 163 S.E.2d 100, 104 (1968) (holding victim's testimony, "I think on a trade-in I could get a thousand dollars for it[,] sufficient to submit the issue of value to the jury); *State v. Clark*, 208 N.C. App. 388, 396, 702 S.E.2d 324, 329 (2010) (deeming sufficient three witnesses' testimony that "they believed the pickup truck was worth more than \$1000[.00]"), *disc. review denied*, 365 N.C. 84, 706 S.E.2d 244; *Rahaman*, 202 N.C. App. at 47-48, 688 S.E.2d at 66-67 (finding \$1,000.00 threshold in N.C. Gen. Stat. § 14-72(a) satisfied by evidence that victim "received \$1,700.00 from the insurance company" for the loss of the stolen vehicle and by officer's "opinion that the car was valued at approximately \$3,000[.00] at the time of the theft").

Although Mr. Parks testified he had replaced the vehicle's tires, the State adduced no evidence of the value of the new tires. Parks also testified he had driven the vehicle over 7,000 miles since purchasing the new tires. The jury was left to speculate whether the value of property stolen by Defendant exceeded \$1,000.00. The trial court erred in denying Defendant's motion to dismiss the felonious larceny charge. *See Holland*, 318 N.C. at 610, 350 S.E.2d at 61.

VI. Conclusion

We vacate Defendant's conviction for felonious larceny as is conceded by the State, and remand with instructions to the trial court to enter judgment on the lesser-included offense of misdemeanor larceny. *See id.* at 611, 350 S.E.2d at 62. In this

STATE V. ODEMS

Opinion of the Court

circumstance, this Court typically vacates Defendant's sentence and remands for a new sentencing hearing. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (stating "the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated"). We find no error in Defendant's remaining convictions of obtaining property by false pretenses and attaining habitual felon status. We remand for a new sentencing hearing. *It is so ordered.*

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE and Judge YOUNG concur.

Report per Rule 30(e).