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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1039

Filed: 19 May 2020

Harnett County, No. 16 CRS 53766

STATE OF NORTH CAROLINA

v.

JAMES EDSAL BAKER.

Appeal by defendant from judgment entered 26 June 2019 by Judge Claire Hill in Harnett County Superior Court. Heard in the Court of Appeals 29 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Grace Linthicum, for the State.

Law Office of Sandra Payne Hagood, by Sandra P. Haygood, for defendant-appellant.

BERGER, Judge.

On June 26, 2019, a Harnett County jury convicted James Edsal Baker (“Defendant”) of felony possession of stolen goods. Defendant appeals, alleging the trial court erred when it (1) denied his motion to dismiss for insufficient evidence; (2) admitted evidence relating to itemized purchase prices of the stolen goods over his objection; and (3) failed to give an *Allen* charge.

Factual and Procedural Background

In April 2016, Brian Norris (“Norris”) stole chain saws, weed eaters, backpack blowers, power tools, and hedge cutters from the Town of Holly Springs Parks and Recreation Department. Norris sold the items to Defendant. Each of the stolen tools had a sticker labeled “Town of Holly Springs,” along with a barcode that corresponded with the Town of Holly Springs asset marking system.

Detective James Reagan (“Det. Reagan”) of the Harnett County Sherriff’s Office received a phone call from Detective Michael MacDonald of the Fuquay-Varina Police Department. According to Det. Reagan, he recently conducted an interview with Norris, and indicated that Defendant’s home may contain stolen property. When investigators went to Defendant’s home, he consented to the search. While searching for the stolen property, investigators found, among other things, tools labeled “Town of Holly Springs.”

Jim Cannata (“Cannata”) with Town of Holly Springs created an itemized list of tools stolen from the city, along with the approximate purchase price of each item. To determine which tools were missing, Cannata compared the equipment in the Town of Holly Springs’ garage with a logbook of all equipment owned by the Town of Holly Springs. Cannata then obtained invoices for the purchase of the missing tools and recorded the ID number and the purchase price for each item.

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On April 1, 2019, Defendant was indicted on charges of felony possession of stolen goods and possession of a stolen motor vehicle. Defendant's case came on for trial on June 24, 2019.

During deliberations, the jury informed the trial court that it was unable to reach a unanimous verdict at 2:27 p.m. In response, the trial court provided the *Allen* charge without objection by either party. The jury resumed deliberations at 2:30 p.m. and informed the court it had a unanimous verdict at 2:48 p.m. Upon the return of a guilty verdict on the charge of felony possession of stolen goods, Defendant requested the jury be polled. During polling, a single juror disavowed the verdict. At 2:54 p.m., the court instructed the jury that it did not have a unanimous verdict and they were to go back to the jury room to continue deliberating. Once the jury left the courtroom, Defendant moved for a mistrial, arguing that the jury was deadlocked. The trial court denied Defendant's motion stating that it wanted to "hear from the jury that they [were] deadlocked on [the charge of felony possession of stolen goods] so that [the court could] place that on the record." At 3:00 p.m., the jury again instructed the court that it had a unanimous verdict.

The jury found Defendant guilty of felony possession of stolen goods. Defendant appeals, alleging the trial court erred when it (1) denied his motion to dismiss for insufficient evidence; (2) admitted evidence relating to itemized purchase

prices of the stolen goods over his objection; and (3) failed to give an *Allen* charge. We disagree.

Analysis

I. Motion to Dismiss

Defendant argues that the trial court erred when it denied his motion to dismiss because the State's evidence was insufficient to support his conviction for felony possession of stolen goods. We disagree.

"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) (citation omitted).

When ruling on a motion to dismiss

the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. Under this standard, we affirm the denial of a motion to dismiss for insufficient evidence if the record discloses substantial evidence of each essential element constituting the offense for which the accused was tried.

State v. Davis, 198 N.C. App. 146, 150-151, 678 S.E.2d 709, 713 (2009) (*purgandum*).

"In making its determination, the trial court must consider all evidence admitted,

whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

A defendant may be found guilty of felon[y] possession of stolen property where the State proves (1) defendant was in possession of personal property, (2) valued at greater than \$ 1,000.00, (3) which has been stolen, (4) with the possessor knowing or having reasonable grounds to believe the property was stolen, and (5) with the possessor acting with dishonesty.

State v. Parker, 146 N.C. App. 715, 717, 555 S.E.2d 609, 610 (2001) (*purgandum*).

Defendant argues that the State failed to present substantial evidence that the stolen goods found in Defendant’s possession were valued at more than \$1,000.00 at the time they were stolen. Defendant does not challenge the State’s evidence of the other elements of the crime. Thus, we examine only whether the State’s evidence, both competent and incompetent, viewed in the light most favorable to the State, could support the inference that the stolen goods Defendant possessed were valued at more than \$1,000.00.

The fair market value of stolen property at the time of the theft must exceed the sum of \$ 1,000.00 for the possession to be felon[y]. Stolen property’s fair market value is the item’s reasonable selling price at the time and place of the theft, and in the condition in which it was when stolen. *The State is not required to produce direct evidence of value to support the conclusion that the stolen property*

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was worth over \$ 1,000.00, provided that the jury is not left to speculate as to the value of the item.

Davis, 198 N.C. App. at 151-52, 678 S.E.2d at 714 (emphasis added) (*purgandum*).

The State's evidence included the itemized list prepared by Cannata which was supported by invoices for a STIHL trimmer and STIHL backpack blower which cost a total of \$663.91, a Shindaiwa weed eater costing \$379.95, and a Shindaiwa backpack blower costing \$499.95. Accordingly, the State presented evidence that the purchase price of these items was more than \$1,000.00.

In addition, the State presented evidence of the replacement costs of a Shindaiwa gas trimmer valued at \$239.96; a Shindaiwa edger valued at \$279.96; a Shindaiwa pole trimmer valued at \$529.96; a Shindaiwa chain saw valued at \$495.96; and a Honda 3000-watt generator valued at \$1,863.66. For the reasons stated herein, even if this was incompetent evidence, the trial court may properly consider it on a motion to dismiss.

It is well settled that testimony merely establishing the price the owner paid for the property at the time of purchase is not by itself sufficient to show the value of the property on the date of the crime because "[i]t is a matter of common knowledge that the market value of items and articles of personal property can appreciate and depreciate rapidly depending upon a myriad of circumstances." *State v. Shaw*, 26 N.C. App. 154, 158, 215 S.E.2d 390, 393 (1975). Thus, the State must offer additional evidence that would allow the jurors to "exercise their own reason, common sense and

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knowledge” in making a determination as to the value of the property at the time of the crime. *State v. Edmondson*, 70 N.C. App. 426, 430, 320 S.E.2d 315, 318 (1984).

Here, in addition to the purchase price of the items, the State presented evidence that the items were less than a year old and presented photographs to the jury of the condition of the stolen items once they were recovered. The photographs introduced allowed the jury to determine whether or not the recovered items were in good condition and provided the jury with substantial evidence by which they could have inferred, considering all of the evidence, that the fair market value of the tools was over \$1,000.00 when they were stolen. *See State v. Morris*, 318 N.C. 643, 646, 350 S.E.2d 91, 93 (1986) (holding that “the jury could have inferred from [the] evidence that the fair market value of the tools was less than their replacement cost, and also that it might well have concluded that this value was not more than” the required amount for felony larceny).

In this case, the role of the trial court was to determine if there was substantial evidence of each essential element of the offense charged from which a reasonable mind could conclude that the fair market value of the stolen items possessed by Defendant was more than \$1,000.00 when they were stolen, “consider[ing] all evidence admitted, whether competent or incompetent, in the light most favorable to the State[.]” *Rose*, 339 N.C. at 192, 451 S.E.2d at 223. “[E]xamin[ing] the evidence in the light most favorable to the State” a reasonable juror could have inferred that

the fair market value of the stolen items was more than \$1,000.00 at the time they were stolen. *Davis*, 198 N.C. App. at 151, 678 S.E.2d at 713. Moreover, “[e]ven assuming that this case can be characterized as a close one, we have held that in borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury.” *State v. Coley*, ___ N.C. App. ___, ___, 810 S.E.2d 359, 365 (2018) (*purgandum*). Thus, the trial court did not err when it denied Defendant’s motion to dismiss.

II. Hearsay

Defendant next argues that the trial court erred when it admitted the itemized list of stolen goods into evidence. Specifically, Defendant contends that both the rule against hearsay and the best evidence rule preclude admission. We disagree.

“This Court reviews a trial court’s ruling on the admission of evidence over a party’s hearsay objection *de novo*. A trial court’s determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.” *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (citations and quotation marks omitted).

“ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). Hearsay may be admitted,

however, if the statement falls into an exception to the rule against hearsay. *See* N.C.

Gen. Stat. § 8C-1, Rules 802-804 (2019). Rule 803(6) provides that a

memorandum, report, record, or data compilation, in any form, of acts [or] events . . . made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness

may be admitted as an exception to rule against hearsay. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2019).

The itemized list of stolen goods that Cannata provided to law enforcement was admitted under the business records exception to the rule against hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 803. However, the itemized list did not qualify as a business record because there was no evidence that the procedure used in this case was the typical procedure used by Cannata or the Town of Holly Springs for cataloguing stolen goods. Thus, it was not a record kept in the course of a regularly conducted business activity and does not qualify under the business records exception.

Defendant correctly asserts that the best evidence rule requires that the invoices produced by the State be the original invoices. However, Defendant's assertion that even the original invoices produced did not satisfy the best evidence

rule because they contradicted the itemized list of stolen goods propounded by the State is without merit.

“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” N.C. Gen. Stat. § 8C-1, Rule 1002 (2019). The State produced original invoices supporting, at minimum, two trimmers and two backpack blowers, totaling \$1,534.81 when purchased. With Cannata’s itemized list being deemed inadmissible hearsay there was no evidence for the original invoices to contradict. Moreover, even without the itemized list to establish the supposed purchase price of the stolen goods, the jury was still able to consider: the original invoices, Cannata’s testimony regarding which items were stolen, and the evidence presented regarding the items’ age and condition upon return.

“The erroneous admission of hearsay testimony is not always so prejudicial as to require a new trial[.]” *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997) (citation omitted). Rather, the burden is on Defendant to establish there is a “reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]” N.C. Gen. Stat. § 15A-1443(a) (2019).

Defendant asserts that he was prejudiced by the erroneous admission of the list. However, the State presented other sufficient evidence concerning the stolen

goods and their respective original purchase price which the jury could then properly consider. Therefore, Defendant's argument is without merit.

III. Allen Charge

Defendant also contends that the trial court committed plain error when it did not provide a proper *Allen* charge upon sending the jury to continue deliberating after one of the jurors disavowed the verdict.

"Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal[.]" N.C. Gen. Stat. § 15A-1446(b) (2019). Here, Defendant did not object to the court's instruction to the jury upon sending them back to deliberate. Defendant's motion for a mistrial was not based upon the failure of the trial court to give an *Allen* charge. Rather, Defendant's motion was based upon the jury's non-unanimous verdict. As such, Defendant failed to preserve this matter for appeal.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). Our Courts have "elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury[.]" *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted).

Thus, we review the trial court's failure to give a second *Allen* charge for plain error.

See *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Under plain error review, a defendant “must demonstrate that a fundamental error occurred at trial.” *Id.* at 518, 723 S.E.2d at 334. This rule

is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is . . . something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (*purgandum*).

N.C. Gen. Stat. Section 15A-1235(c) provides that

[i]f it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

N.C. Gen. Stat. § 15A-1235(c) (2019). Our courts have consistently held that “it is clearly within the sound discretion of the trial judge as to whether to give an instruction pursuant to N.C.G.S. § 15A-1235(c).” *State v. Cheek*, 351 N.C. 48, 88, 520 S.E.2d 545, 568 (1999) (citations and quotation marks omitted). “A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision. We determine

whether a trial court abused its discretion by looking at the totality of the circumstances.” *State v. Ross*, 207 N.C. App. 379, 389, 700 S.E.2d 412, 419 (2010) (*purgandum*).

Here, the jury informed the trial court that it was unable to reach a unanimous verdict at 2:27 p.m. In response, the trial court provided the *Allen* charge without objection by either party. The jury resumed deliberations at 2:30 p.m. and informed the court it had a unanimous verdict at 2:48 p.m. Upon the return of a guilty verdict on the charge of felony possession of stolen goods, Defendant requested the jury be polled. During polling, a single juror disavowed the verdict. At 2:54 p.m., the court instructed the jury that it did not have a unanimous verdict, and they were to go back to the jury room to continue deliberating. At 3:00 p.m., the jury again instructed the court that it had a unanimous verdict.

In *Ross*, this Court affirmed the trial court’s decision not to give a second *Allen* charge because

[i]t [was] difficult to see how another *Allen* [charge] approximately 45 minutes after the first would have been necessary or helpful to the jury or that it would have had any impact on the outcome of the case. Also, the trial court made no additional comments to the jury that an *Allen* [charge] would be helpful in clarifying.

Id. at 389, 700 S.E.2d at 419. As in *Ross*, here, the jury received an *Allen* charge informing them that they should reach a unanimous verdict, and the time between the first *Allen* charge and the alleged erroneous omission was less than an hour.

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Upon polling the jury, each juror was aware that Juror 12 disagreed with the announced verdict, and thus, they were no longer unanimous. At that point, the trial court returned the jury to the jury room with instruction to continue deliberating. No additional instructions were necessary to clarify why they were returned to the jury room. *Id.* at 389, 700 S.E.2d at 419. Thus, “we cannot say that the trial court abused its discretion by not giving a second *Allen* [charge], and if this was not error, it cannot be plain error.” *Id.* at 389, 700 S.E.2d at 419 (citation omitted).

Conclusion

For the foregoing reasons, Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).