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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-934

Filed: 6 October 2020

Caldwell County, No. 18 CRS 051130

STATE OF NORTH CAROLINA

v.

SHAWN BRANDON BANK

Appeal by defendant from judgment entered 13 March 2019 by Judge Lisa C. Bell in Caldwell County Superior Court. Heard in the Court of Appeals 11 August 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Paul M. Cox, for the State.*

*Shelly Bibb DeAdder for defendant-appellant.*

BRYANT, Judge.

Where the trial court erred by failing to instruct the jury on the lesser-included offense of misdemeanor possession of stolen goods, defendant Shawn Brandon Bank is entitled to a new trial.

On 6 August 2018, a Caldwell County grand jury indicted defendant on charges of felonious breaking and entering, felonious larceny, and felonious possession of

stolen goods. The matter came on for trial in Caldwell County Superior Court on 11 March 2019, the Honorable Lisa C. Bell, Judge presiding.

The evidence presented at trial tended to show that Natasha Leigh Matthews owned a store called “The Gaming Pad,” which was located at Fairway Shopping Center, in Hudson. The primary business of The Gaming Pad was to sell “Magic: The Gathering cards, run tournaments, and [sell] novelties.” Matthews kept track of her inventory by taking pictures of the game cards in her store and making lists. She did this every few days as she “did a lot of trading online to get new cards.” Matthews traded or purchased individual cards, boxed sets, or individual collections to add to her inventory. Matthews testified that the cards were displayed on shelves in her store. Box sets and packages were available, but most of the cards on display were individual cards. Behind her counter, Matthews kept some cards in a binder with a distinctive cover depicting “some strange-looking man with feathers on his head.” To protect the cards, she displayed in her case or in her binder, Matthews encased each in a sleeve. Some of her sleeves depicted a lady wearing a bikini and others showed “My Little Pony.” Matthews also carried cardboard containers for bulk storage of cards that were less valuable: one display shelf was full of boxes containing between 4,000 and 7,000 cards in each box. The cards were not individually valuable but were available for bulk purchases.

Among the cards on her display shelves were three cards from the series “Leyline of the Void,” which had been signed by the illustrator, Rob Alexander. On Saturday, 17 March 2018 before the break-in, Matthews purchased a collection that had been delivered to her store in blue Walmart shopping bags and a banana box. That same day, defendant entered Matthews’s store and spoke with her as she was going through her newly acquired collection. “I told him that there was some foreign black-bordered cards in that collection that I’d just bought, and he said-- I told him that there -- that was usually money. And he said, ‘Yeah, a lot of money.’” Defendant purchased two cards and then left.

The next day, Sunday, 18 March 2018, Matthews left her store around 11:00 p.m. She turned off the lights and locked the door. The next morning, it appeared that the front doors to The Gaming Pad had been pried open and all of the cards on Matthews display shelves and most of the cards she stored in white boxes were gone—all of her Magic cards. Matthews called the Hudson Police Department. Upon the arrival of a law enforcement officer, Matthews provided a partial inventory of things she knew were missing.

Chief Richard Blevins of the Hudson Police Department testified that during the course of his investigation, he called card shops in nearby Hickory that sold Magic: The Gathering cards (the closest location with stores that sold Magic game cards). No one reported being offered Magic game cards.

Conducting her own investigation, Matthews searched internet sites such as eBay and Craig's List to see if anyone was advertising Magic cards for sale within a fifteen-mile radius of her store. Two days after the break-in, Matthews found an advertisement for three Leyline of the Void cards signed by the artist.<sup>1</sup> Matthews provided this information to Chief Blevins. Upon Matthews's report, Chief Blevins located the online advertisement and compared the cards in the advertisement with Matthews's inventory photos. Chief Blevins determined that the autographed cards advertised online and the autographed cards photographed in Matthews's inventory were distinctly similar. The online advertisement for the autographed Leyline of the Void cards had commenced on 20 March 2018 (the day after The Gaming Pad breaking and entering had been reported). Chief Blevins accessed a police database to determine the identity of the online seller. Defendant was determined to be the online seller. Chief Blevins also discovered that defendant was conducting three other sales, all "Magic: The Gathering stuff."

Per DMV records, defendant lived in Hickory. Chief Blevins spoke with Matthews. "I asked her several questions about, how unique are these items? How rare is this? How uncommon is it to see this?" Chief Blevins determined that "it was a fairly unique or rare thing." Chief Blevins then applied for a search warrant for the

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<sup>1</sup> Matthews testified that Leyline of the Void cards were sold in sets of four. She originally had four Leyline of the Void cards signed by the artist, but she had removed one and placed it with her command deck. So, there had only been three cards on her display case at the time of the break-in. Each card had been signed with a black sharpie.

residence listed as defendant's home address in Hickory. During the execution of the search warrant, defendant was not at his residence, but his girlfriend, Brittany, with whom he lived, was at the residence and allowed the search. Pursuant to his search warrant, Chief Blevins was searching for the three Leyline of the Void game cards, but upon entry into the dining room, "I immediately noticed a card folder that matched the one that Ms. Matthews had provided as an example[,] a card folder with a white-haired, horned, masked man. Chief Blevins also saw two blue Walmart shopping bags with "a bunch of cards inside." In a back bedroom, Chief Blevins discovered white cardboard boxes containing cards, which were similar to the description of boxes used by Matthews. Chief Blevins testified that there were many cards: boxes stacked in a closet, in front of an armoire, in front of a TV. Chief Blevins "gathered everything that had anything to do with Magic: The Gathering." Three autographed Leyline of the Void cards were found in a desk in the dining room, in a pocket sleeve with "a bikini-clad woman" on the back.

At trial, Matthews was presented with numerous boxes, bags, and binders filled with cards. She identified several card containers as being card containers that she had in her store prior to the breaking and entering: a Walmart shopping bag with a stain on the bottom; a cloth tote with the words "Hyundai Car Care" inscribed; boxes with several "weird" stickers on them that her father had given her; a binder containing cards and a few pamphlets that were contained in the collection Matthews

acquired just before the breaking and entering; and cardboard boxes similar to those she kept in her store containing an assortment of Magic: The Gathering game cards. Matthews testified that she lost forty boxed sets of Magic: The Gathering game cards; each set came with sixty cards (similar to a deck of cards). She lost at least twenty cardboard boxes containing cards. With up to 7,000 cards in each box, there were potentially 140,000 cards missing. Matthews was presented with the cardboard boxes seized by law enforcement officers. She testified that they were the type of boxes that she used in her store, but she did not recognize the handwriting on some of the boxes or the contents of the boxes or the manner in which the cards in the boxes were arranged. Matthews did recognize the binder that she had kept behind her store counter: it pictured a “weird guy in the mask,” and a fold near the top of the binder. Matthews testified that in the binder, she stored Magic: The Gathering game cards that did not otherwise fit inside the cases that she had. At trial, the binder contained only two cards and empty sleeves depicting a woman wearing a bikini. Matthews identified the three autographed Leyline of the Void game cards as being from her shop. Each card was encased in a sleeve depicting a woman wearing a bikini.

Following the close of the State’s case-in-chief defendant presented his case.

Defendant’s son, Evan, then fifteen years old, testified that he remembered St. Patrick’s Day weekend (Saturday, 17 March 2018) of 2018, because defendant’s girlfriend, Brittany, had gone to her parent’s house for a St. Patrick’s Day party, while

Evan and defendant stayed at their residence. Brittany came back Sunday evening around 7:00 or 8:00 pm. Evan testified that he and defendant stayed up late watching movies together on Friday night and Saturday night, and with Brittany on Sunday night.

Defendant testified that “playing Magic” was his biggest hobby. Since the cards had been seized from his residence, “I’ve probably purchased another 20 or 30,000 cards since then. And then including the cards I have there, I’m probably sitting, you know, 40,000 cards or so.” Defendant testified that to trade or play cards, he frequented Timmy Mac’s, in Morganton, Time Tunnel, Dugout, and The Gaming Pad. Defendant testified that he also purchased and sold cards online.

In response to a question about the three autographed Leyline of the Void cards law enforcement officers seized from his residence, defendant testified that he purchased the three Leyline of the Void cards from a man named “Damon” at The Dugout card shop. Defendant testified that on Monday, 19 March 2018, he was in The Dugout, looking through cases, Damon approached him and said, “I have some good cards, if you’re interested in looking.” Defendant followed Damon to his vehicle, an older model Honda Accord, and looked through a binder with over 100 cards. Damon offered to sell the binder and its card content to defendant for \$200.00. At trial, defendant identified the binder that Damon sold him, which depicted an anime character known as Daigotsu from Legend of the Five Rings, as well as the three

autographed cards from Leyline of the Void. Defendant stated that he placed the cards for sale online because he didn't need them and he already had autographed Leyline of the Void cards.

Defendant testified that he did not purchase the binder from Damon in the parking lot but followed Damon to Damon's residence. Defendant described Damon's residence as a white house with red or maroon shutters, a tree on the left side of the front yard, and brick area in the rear. Damon showed defendant several cards, including some in two Walmart shopping bags. Damon sold defendant the collection for \$100.00. Defendant testified that he was unaware that The Gaming Pad had experienced a breaking and entering until law enforcement officers executed a search warrant at his residence. Defendant testified that he was not at The Gaming Pad on 18 March 2018; he was playing video games and watching the movie "Beetlejuice" with his son. When asked if he had ever been convicted of a crime, defendant responded that in 2012, he had pled guilty to two counts of felony possession of stolen goods.

In rebuttal testimony, Chief Blevins testified that he interviewed defendant on 18 April 2018. During his interview, defendant described Damon's residence and stated that it was located on Wesley Chapel Church Road. Chief Blevins testified that he drove along Wesley Chapel Church Road (a little over a mile long) three times, as well as the dead-end streets that intersected the roadway. It was "farm country,



sparsely populated.” He did not observe any buildings which matched defendant’s description. Chief Blevins also utilized a law enforcement database, CJLEADS, to determine if any older model Honda Accords were registered to anyone named Damon or to an address on Wesley Chapel Church Road. The search revealed no vehicles which matched defendant’s description. During the interview, defendant provided Chief Blevins with a picture of Damon as well as a picture of the collection purchased. On 20 April 2018, Chief Blevins showed the picture to a clerk and a gamer at The Dugout. Both the clerk and the gamer indicated that the individual pictured looked familiar, but neither knew his name.

Following the close of defendant’s case-in-chief as well as the State’s rebuttal, the trial court instructed the jury on the charges of felony possession of stolen goods, felony breaking and entering, and felony larceny after breaking and entering. The jury returned a guilty verdict against defendant only on the charge of felony possession of stolen goods. Defendant was found not guilty of felony breaking and entering and larceny after breaking and entering. The trial court entered judgment in accordance with the jury verdict on the charge of felony possession of stolen goods and sentenced defendant to an active term of 8 to 19 months. The court then suspended the sentence and placed defendant on supervised probation for a term of 36 months.

Defendant appeals.

On appeal, defendant raises five issues: whether the trial court erred by (I) denying defendant's motion to dismiss; (II) failing to instruct the jury on misdemeanor possession of stolen goods; (III) instructing the jury on the doctrine of recent possession; (IV) denying defendant's motion for judgment notwithstanding the verdict; and (V) ordering defendant to pay \$7,811.00 in restitution.

We address each of defendant's arguments.

*Doctrine of Recent Possession*

Defendant argues that the trial court committed plain error by instructing the jury on the doctrine of recent possession. Defendant contends that the game cards stolen from The Gaming Pad are of a type frequently traded, purchased, and sold in lawful channels. As such, it was improper for the trial court to instruct the jury on the doctrine of recent possession which conveys an inference of guilt based on the possession of stolen goods following a larceny where the goods are *not* of a type frequently traded, purchased, or sold in lawful channels. On this basis, defendant contends that he is entitled to a new trial. We disagree.

Our Supreme Court "has held that plain error analysis applies only to jury instructions and evidentiary matters . . . ." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002) (citations omitted).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.

*See* [*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)]. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error “had a probable impact on the jury’s finding that the defendant was guilty.” *See id.* (citations and quotation marks omitted) . . . . Moreover, because plain error is to be “applied cautiously and only in the exceptional case,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting [*United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)]).

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

[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. *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967); *State v. Allison*, 265 N.C. 512, 144 S.E.2d 578 (1965). The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in [the] defendant’s possession. *State v. Williams*, 219 N.C. 365, 13 S.E.2d 617 (1941). Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering. *State v. Lewis*, 281 N.C. 564, 189 S.E.2d 216, *cert. denied* 409 U.S. 1046, 34 L.Ed.2d 498, 93 S. Ct. 547 (1972). The presumption or inference arising from recent possession of stolen property “is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant’s guilt.” *State v. Baker*, 213 N.C. 524, 526, 196 S.E. 829, 830 (1938);

*accord*, *State v. Greene*, 289 N.C. 578, 223 S.E.2d 365 (1976).

Proof of a defendant's recent possession of stolen property, standing alone, does not shift the burden of proof to the defendant. That burden remains on the State to demonstrate [the] defendant's guilt beyond a reasonable doubt. *State v. Baker*, *supra*. In order to invoke the presumption that the possessor is the thief, the State must prove beyond a reasonable doubt each fact necessary to give rise to the inference or presumption. When the doctrine of recent possession applies in a particular case, it suffices to repel a motion for nonsuit and [the] defendant's guilt or innocence becomes a jury question.

*State v. Maines*, 301 N.C. 669, 673–74, 273 S.E.2d 289, 293 (1981); *see also State v. McDaniel*, 372 N.C. 594, 604, 831 S.E.2d 283, 290 (2019) (quoting *Maines* in its discussion of the doctrine of recent possession).

The purpose of the recency requirement is to determine whether the accused's possession of stolen property is sufficiently short under the circumstances of the case to rule out the possibility of a transfer of the stolen property from the thief to an innocent party. The possession must be so recent after the breaking or entering and larceny as to show that the possessor could not have reasonably come by it, except by stealing it himself or by his concurrence. *State v. Weinstein*, 224 N.C. 645, 31 S.E.2d 920 (1944), *cert. denied*, 324 U.S. 849, 89 L.Ed. 1410 (1945); *Gregory v. Richards*, 53 N.C. (8 Jones) 410 (1861). Annot. "What Is 'Recently' Stolen Property," 89 A.L.R.3d 1202, 1212 (1979). Although the passage of time between the theft and the discovery of the property in a person's possession is a prime consideration in establishing whether property has recently been stolen, our North Carolina Courts have also recognized that the nature of the property is a factor in determining whether the recency is sufficient to raise a presumption of guilt. Thus, if the stolen property is of a

type normally and frequently traded in lawful channels, a relatively brief time interval between the theft and the finding of an accused in possession is sufficient to preclude an inference of guilt from arising.

*State v. Hamlet*, 316 N.C. 41, 43–44, 340 S.E.2d 418, 420 (1986).

Here, the undisputed evidence reflects that between 11:00 pm on Sunday, 18 March 2018 and the time Matthews arrived at The Gaming Pad on Monday, 19 March 2018, a breaking and entering had occurred, and several thousand game cards, including Magic: The Gathering game cards, were taken. Among the cards taken were three autographed Leyline of the Void game cards encased in a plastic sleeve depicting a bikini-clad woman. Defendant testified that also on Monday, 19 March 2018, he acquired game cards, later determined to have been stolen from The Gaming Pad. The next day, 20 March 2018, defendant advertised online his offer to sell three autographed Leyline of the Void game cards from the collection he acquired 19 March 2018. Pursuant to a search of defendant's residence, law enforcement officers discovered several thousand game cards, including several containers later identified as having been taken from The Gaming Pad (e.g. Walmart shopping bags, a cloth tote, and binders). In particular, law enforcement officers recovered three autographed Leyline of the Void game cards encased in a plastic sleeve depicting a bikini-clad woman.

At trial, upon the close of the evidence, the court gave the jury the following instruction.

The defendant has been charged with felonious possession of goods stolen pursuant to a breaking or entering, which is possessing property which the defendant knew or had reasonable grounds to believe had been stolen pursuant to a breaking or entering.

. . . .

The State seeks to establish the defendant's guilt by the doctrine of recent possession. For this doctrine to apply, the State must prove three things beyond a reasonable doubt: First, that property was stolen. Second, that defendant had possession of this property. A person has possession of property when that person is aware of its presence and has, either alone or together with others, both the power and intent to control its disposition or use. And third, that *the defendant had possession of the property so soon after it was stolen and under such circumstances as to make it unlikely that the defendant obtained possession honestly.*

(emphasis added).

We acknowledge defendant's argument that the game cards were of a type frequently traded and sometimes traded in bulk. Such evidence—presented before the jury by both Matthews and defendant—described the circumstances which affected the strength or weakness of the presumption of guilt. The jury could properly consider the presumption of guilt as an evidential factor along with the other evidence in the case. *See Maines*, 301 N.C. at 674, 273 S.E.2d at 293. But given that less than twenty-four hours passed between the larceny of the game card inventory from The Gaming Pad and defendant's possession of multiple containers of game cards taken from The Gaming Pad, we uphold the trial court's instruction to the jury on the

doctrine of recent possession. *See Hamlet*, 316 N.C. at 43–44, 340 S.E.2d at 420 (discussing the recency requirement); *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (discussing plain error). On this issue, defendant’s argument is overruled.

*Motion to Dismiss*

Defendant argues that the trial court erred by denying his motion to dismiss the charge of felonious possession of stolen goods and property. Defendant contends that the State failed to present substantial evidence he knew or had reason to know the game cards he purchased had been stolen after a breaking and entering. On this basis, defendant contends he is entitled to have his conviction for felonious possession of stolen goods and property vacated. We disagree.

We consider a trial court’s ruling on a motion to dismiss de novo. *See State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

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.

If the evidence is sufficient only to raise 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 should be allowed.

*Id.* at 98, 261 S.E.2d at 117 (citations omitted). In challenges to the sufficiency of evidence, this Court reviews

the evidence in the light most favorable to the State. *E.g.*, *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies are for the factfinder to resolve. *Id.* at 544, 417 S.E.2d at 761. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial, or both. *E.g.*, *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). “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. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted). If “a reasonable inference of defendant’s guilt may be drawn from the circumstances,” then “it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.” *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (emphasis omitted) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)). “Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered.” *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted).

*McDaniel*, 372 N.C. at 603–04, 831 S.E.2d at 289–90 (alteration in original); *see also State v. Herring*, 55 N.C. App. 230, 232, 284 S.E.2d 764, 766 (1981) (“When passing upon a motion to dismiss in a criminal case, just as when passing upon a motion for nonsuit, all of the evidence favorable to the State . . . must be considered . . . .” (first alteration in original) (citation and quotations omitted)).

The essential elements of felonious possession of stolen property [pursuant to breaking and entering] are: (1) possession of personal property, (2) which was stolen pursuant to a breaking or entering, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a breaking or



entering, and (4) the possessor acting with a dishonest purpose.

*State v. McQueen*, 165 N.C. App. 454, 459, 598 S.E.2d 672, 676 (2004).

“When the doctrine of recent possession applies in a particular case, it suffices to repel a motion for nonsuit and [the] defendant’s guilt or innocence becomes a jury question.” *Maines*, 301 N.C. at 674, 273 S.E.2d at 293.

As discussed above, we hold the record supports the application of the doctrine of recent possession as an evidential factor. As the application of the doctrine of recent possession precludes a motion for nonsuit or a motion to dismiss, we hold the trial court properly denied defendant’s motion to dismiss the charge of felony possession of stolen goods and property. Accordingly, defendant’s argument is overruled.

*Misdemeanor possession of stolen goods*

Defendant argues that the trial court erred by failing to instruct the jury on misdemeanor possession of stolen goods. Defendant contends there is no evidence that he knew or had reason to know that the game cards he possessed were stolen or stolen pursuant to a breaking and entering. Moreover, there was no evidence presented as to the value of the cards stolen from The Gaming Pad for the jury to determine that the value of the cards taken equaled or exceeded \$1,000.00. On these grounds, defendant contends that he is entitled to a new trial. We agree.

“We review the trial court’s denial of the request for an instruction on the lesser included offense de novo.” *State v. Laurean*, 220 N.C. App. 342, 345, 724 S.E.2d 657, 660 (2012) (citations omitted).

“[A]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater.” *State v. Juarez*, 369 N.C. 351, 357, 794 S.E.2d 293, 299 (2016) (quoting *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002)).

The test is whether there “is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.” *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). Where the State’s evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).

*Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772.

We set out the elements of felonious possession of stolen goods in our discussion of Issue I above. “Misdemeanor possession or non-felonious possession of stolen goods is a lesser included offense of felonious possession of stolen goods.” *State v. Hargett*, 148 N.C. App. 688, 692, 559 S.E.2d 282, 285–86 (2002) (citation omitted). “Misdemeanor possession of stolen goods is ‘the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars.’” *State v.*

*Northington*, 230 N.C. App. 575, 578, 749 S.E.2d 925, 927 (2013) (quoting N.C. Gen. Stat. § 14–72(a) (2011)).

Defendant was indicted on the charge of felonious possession of stolen goods on the theory that he possessed the personal property of Matthews d/b/a The Gaming Pad having value in excess of \$1,000.00, “knowing and having reasonable grounds to believe the property to have been feloniously stolen and taken pursuant to the felonious breaking and entering [of the business, The Gaming Pad.]” The trial court instructed the jury that in order to be found guilty, the State had to prove “defendant knew or had reasonable grounds to believe [the goods] had been stolen pursuant to a breaking or entering.”

As discussed in the above sections *Doctrine of Recent Possession* and *Motion to Dismiss*, the record establishes that the State relied on the doctrine of recent possession for a presumption that defendant knew or had reason to know that the game cards he possessed had been feloniously stolen—stolen pursuant to a felonious breaking and entering. This allowed the State to survive defendant’s motion to dismiss the charge of felonious possession of stolen goods. However, at trial, defendant testified that he purchased the game cards stolen from The Gaming Pad on 19 March 2018 from a man named Damon.

As noted above, a lesser included offense instruction is necessary where the evidence would permit conviction of the lesser offense and acquittal of the greater

offense. *Juarez*, 369 N.C. at 357, 794 S.E.2d at 299. Here, the State's case relied heavily on the doctrine of recent possession, a theory of the case lending itself to rational jurors finding defendant guilty of misdemeanor possession of stolen goods while acquitting him of felony larceny after a breaking and entering. Put another way, the jury could have concluded defendant had reasonable grounds to believe that the cards had been stolen without knowing they had been feloniously stolen pursuant to a breaking and entering.

Further, "[e]vidence giving rise to a reasonable inference to dispute the State's contention" is sufficient to support an instruction on a lesser offense. *State v. McKinnon*, 306 N.C. 288, 301, 293 S.E.2d 118, 127 (1982). A jury could have found defendant guilty of non-felonious or misdemeanor possession of stolen goods and not guilty of felony larceny after a breaking and entering based on defendant's testimony of how he came to possess the cards in question. On materially indistinguishable circumstances as presented in the current case, this Court has held that an instruction on misdemeanor possession of stolen goods is appropriate. *See State v. Hargett*, 148 N.C. App. 688, 559 S.E.2d 282 (2002) (holding the defendant was entitled to a new trial based on the trial court's failure to instruct on misdemeanor possession of stolen goods where the defendant testified he received the stolen goods from a person named "Little Mama" but did not know the property was stolen).

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*Opinion of the Court*

Based on the evidence presented herein, and the reasoning of this Court's precedent in *Hargett*, we are compelled to hold that the trial court erred by failing to instruct the jury on the lesser-included offense of misdemeanor or non-felonious possession of stolen goods. *See id.* Accordingly, defendant is entitled to a new trial.

*JNOV*

Defendant argues that the trial court erred by denying his motion for judgment notwithstanding the verdict. As we have held that defendant is entitled to a new trial, we need not address this argument.

*Restitution*

Lastly, defendant argues that the trial court erred by ordering defendant to pay \$7,811.00 where there was no evidence in the record to support such an award.

As the circumstances which gave rise to this issue may be repeated in a new trial, we briefly address this argument.

The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing. *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995).

....

[A] restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution.

*State v. Mauer*, 202 N.C. App. 546, 551–52, 688 S.E.2d 774, 777–78 (2010) (citation omitted).

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*Opinion of the Court*

In its brief to this Court, the State concedes the trial court's order for restitution was unsupported.

NEW TRIAL.

Judges STROUD and BROOK concur.

Report per Rule 30(e).