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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-960

Filed: 1 December 2020

New Hanover County, Nos. 17 CRS 50468, 50474-75

STATE OF NORTH CAROLINA

v.

JAMES EDWARD HARGETT

Appeal by Defendant from Judgments entered 27 March 2019 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Kimberly P. Hoppin for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

James Edward Hargett (Defendant) appeals from Judgments entered 27 March 2019 upon jury verdicts finding him guilty of First-Degree Burglary, Larceny After Breaking or Entering, Breaking and Entering a Motor Vehicle, and two counts

of misdemeanor Larceny. The Record, including evidence presented at trial, tends to show the following:

Around 5:30 a.m. on the morning of 17 January 2017, Lynn Farrow (Farrow) was sitting on her apartment porch at the Gardens in New Hanover County, North Carolina. While outside, Farrow witnessed a person, who she described as a white male, entering various apartments in one of the other buildings. Farrow woke her boyfriend, who also witnessed the person continue to rifle through apartments, and then called law enforcement to report the suspected break-ins. Officers from the New Hanover County Sheriff's Office arrived and began investigating and securing the crime scene. Farrow spoke with Detective Brandon Harris and recounted the events she witnessed earlier that morning. Farrow described the person she witnessed entering apartments as wearing a "trenchcoat or a dark colored robe" and identified the apartment where the person had taken the allegedly stolen items as the one with "the blue crab on the wall."

Detective Jose Lugo also responded to the Gardens after the reported burglary. Farrow directed Detective Lugo and other officers to Defendant's apartment. Detective Lugo knocked on the apartment door but received no answer. As he began to walk away, he met Defendant's girlfriend Pamela Lee in the breezeway, and she allowed the officers inside the unit. Lee brought Defendant out of the bedroom, and Defendant and Lee gave the detectives permission to search the apartment. Inside

the apartment's bedroom, detectives found a dark blue robe. Inside the closet, detectives discovered two TVs, several bags, one of which included a wallet with Wendy Wadsworth's identification inside, mail, and other personal belongings and paperwork, including a bible. The mail was addressed to a Lawrence Caldwell, and the bible had Teshia Caldwell's name inside.

As a part of the investigation, Detective Harris also spoke with Wendy Wadsworth on the morning of 17 January. Wadsworth lived in the Gardens apartments and told Detective Harris she had woken up twice the night before, first around 3 a.m. and again at approximately 5:30 a.m. When Wadsworth awoke the second time, she walked around her apartment and noticed the TVs from her living room and spare bedroom were gone. Wadsworth checked for her wallet and discovered it was missing, as well as a \$20 bill that was sitting on her table. Wadsworth told Detective Harris she noticed a lantern and lighters in her guest bedroom that did not belong to her, and the items from the closet had all been taken out and strewn across the bed. It was at that point that Wadsworth said she called the police to report a break-in. Wadsworth described her missing items to the police, as well as those that did not belong to her, and she provided officers with the serial numbers of the stolen TVs.

Also on the morning of 17 January 2017, Sara Madden was getting ready to take her daughter to school and noticed police walking through and around the

Gardens apartments. Madden kept lighters and decorative lanterns on her outside porch. As Madden went to leave she “noticed [the lantern] missing as [she] went out[.]” At the same time, Madden also noticed “there was an officer standing on the porch[.]” Madden informed the officers of the missing items and they were ultimately returned to her.

Following the investigation, Defendant was arrested and taken into custody. On 8 May 2017, Defendant was indicted on charges of First-Degree Burglary, Larceny After Breaking or Entering, Financial Card Theft, Breaking or Entering a Motor Vehicle, and two counts of misdemeanor Larceny. Defendant’s case came on for trial on 25 March 2019. The State voluntarily dismissed the charge of Financial Card Theft prior to the start of Defendant’s trial. At trial, the State called each of the victims—Wadsworth, Madden, and Caldwell—to testify. Wadsworth, Madden, and Caldwell, respectively, identified for the jury their personal belongings. Wadsworth described her wallet and two Samsung TVs. She also testified to finding the lighters and a lantern on the floor in her guest bedroom. Madden described decorative candle lanterns and lighters she kept outside on her porch. Caldwell described her personal belongings, including her bible that she testified she kept in a duffel bag in her car—a Ford Explorer she parked outside of her apartment. Caldwell also identified mail addressed to her husband from their bank.

The State called Detectives Harris and Lugo to testify about their investigation on the morning of 17 January 2017. Detective Lugo recounted speaking with Farrow and directing officers to Defendant's apartment. Detective Lugo then described and identified the items recovered from Lee's closet, including the TVs, receipts and paperwork reflecting Lawrence and Teshia Caldwell's names, and a wallet with Wadsworth's identification. Detective Harris also described for the jury his investigation of Wadsworth's apartment. Detective Harris testified the serial numbers he obtained from Wadsworth's TVs's boxes were an exact match to the two TVs found in Lee's bedroom closet.

At the close of the State's evidence, Defendant moved to dismiss all charges against him; however, the trial court denied Defendant's Motion with respect to the charges of First-Degree Burglary, Larceny After Breaking or Entering, Breaking or Entering a Motor Vehicle, and two counts of misdemeanor Larceny.

Defendant presented evidence and testified in his defense. Defendant stated on the night of 16 January 2017, he had taken "a piece of a Xanax bar" and had a drink outside on Lee's porch. Defendant continued that he only remembered "little flashes of that night." However, Defendant did testify: "I remember carrying the TV. . . . It's not -- it's not real clear. But I do remember that. So I would assume I did other things also." During Defendant's cross examination, and over Defendant's objection, the State played a sixteen-second clip of a phone call between Defendant

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and Lee that was recorded while Defendant was incarcerated prior to his trial. In the recording, Defendant stated, in reference to credit cards: “But I did steal them.” Defendant confirmed he believed his voice was on the recording.

At the close of all the evidence, Defendant moved to dismiss all charges against him; again, the trial court denied Defendant’s Motion to Dismiss. The trial court proceeded, without objection, to instruct the jury:

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 the defendant had possession of this property. A person possesses 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 this property so soon after it was stolen and under such circumstances as to make it unlikely that the defendant obtained possession honestly.

If you find these things from the evidence beyond a reasonable doubt, you may consider them together with all other facts and circumstances in deciding whether or not the defendant is guilty of burglary, breaking or entering, or larceny.

The trial court then instructed the jury on the charges of First-Degree Burglary, Larceny After Breaking or Entering, Breaking a Motor Vehicle, and two counts of misdemeanor Larceny. The jury returned verdicts finding Defendant guilty of First-Degree Burglary and Larceny After Breaking or Entering with Wendy

Wadsworth as the alleged victim (17 CRS 50468), Breaking and Entering a Motor Vehicle and misdemeanor Larceny with Teshia Caldwell as the alleged victim (17 CRS 50474), and misdemeanor Larceny with Sara Madden as the alleged victim (17 CRS 50475). Defendant stipulated to having a prior record level of III for sentencing purposes, and the trial court sentenced Defendant to 70 to 96 months active sentence for the First-Degree Burglary conviction. The trial court consolidated the charges of Breaking and Entering a Motor Vehicle and misdemeanor Larceny in file no. 17 CRS 50474, with the charge of Larceny After Breaking or Entering and sentenced Defendant to 9 to 20 months active sentence to run consecutively. For Defendant's final charge of misdemeanor Larceny, the trial court sentenced Defendant to an active, consecutive sentence of 120 days.

Defendant, acting *pro se*, filed a handwritten Notice of Appeal on 10 April 2019.¹ Defendant's Notice of Appeal was addressed to New Hanover County Superior Court and identified the file number as 17 CRS 50475. The Notice of Appeal stated: "My trial concluded on March 28, 2019. I don't remember the Judge's name nor my case number. Since I don't recall my lawyers requesting an Appeal, I hereby respectfully request that a NOTICE TO APPEAL be FILED on my case" (emphasis in original). The trial court noted the appeal and appointed the Office of the Appellate Defender as counsel on 24 May 2019. Contemporaneous with the filing

¹ Defendant's *pro se* Notice of Appeal was dated 29 March 2019 but filed stamped 10 April 2019.

of his brief in this Court, Defendant's appellate counsel also filed a Petition for Writ of Certiorari on 4 March 2020.

Appellate Jurisdiction

At the outset, Defendant concedes his written Notice of Appeal did not fully identify the Judgments from which he intended to appeal and was not served on the State, both violations of Rule 4 of our Rules of Appellate Procedure. N.C.R. App. P. 4 (2020). However, Defendant has filed a Petition for Writ of Certiorari with this Court seeking review of the Judgments entered on 27 March 2019. Under Rule 21(a)(1) of our Appellate Rules, a "writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action" N.C.R. App. P. 21(a)(1) (2020).

This Court has issued a writ of certiorari in the past despite technical defects in a notice of appeal by a *pro se* defendant in a variety of circumstances. *See, e.g., State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) ("[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." (citations, quotation marks, and ellipses omitted)). Here, we can infer from Defendant's *pro se* Notice of Appeal the Judgments from which he intended to appeal. Furthermore, the State does not contend it was prejudiced by Defendant's faulty

Notice of Appeal. Therefore, in our discretion, we grant Defendant's Petition for Writ of Certiorari.

Issues

There are three issues on appeal: (I) Whether the trial court erred in denying Defendant's Motion to Dismiss the charge of misdemeanor Larceny (17 CRS 50475); (II) Whether the trial court erred in instructing the jury on the doctrine of recent possession with regard to misdemeanor Larceny (17 CRS 50475); and (III) Whether the trial court abused its discretion in allowing the State to play for the jury a portion of a pre-recorded phone call by Defendant.

Analysis

I. Motion to Dismiss

Defendant contends the trial court erred in denying his Motion to Dismiss 17 CRS 50475 arguing there was insufficient evidence to support the charge of misdemeanor Larceny.

A trial court, on a motion to dismiss for insufficient evidence, 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. Whether evidence presented constitutes substantial evidence is a question of law for the court and is reviewed *de novo*. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In reviewing the denial of a motion to dismiss for insufficiency 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. Any contradictions or

discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.

State v. Glisson, 251 N.C. App. 844, 847-48, 796 S.E.2d 124, 127-28 (2017) (citations and quotation marks omitted). Further, “ [t]he test of the sufficiency is the same whether the evidence is circumstantial or direct[.]’ ” *State v. Blake*, 319 N.C. 599, 605, 356 S.E.2d 352, 355 (1987) (quoting *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981)).

Defendant argues there was insufficient evidence to support misdemeanor Larceny because the lantern and lighters were recovered from Wadsworth’s apartment and not Lee’s. In denying Defendant’s Motion, however, the trial court explained: “The Madden is a different situation, where her property is found in Ms. Wadsworth’s apartment, and there’s the doctrine of recent possession that may tend to tie the defendant to Ms. Wadsworth’s apartment.”

As articulated by our Supreme Court, 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. 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 defendant’s possession. 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. Maines, 301 N.C. 669, 673-74, 273 S.E.2d 289, 293 (1981) (citations omitted).

To apply, the State must show, beyond a reasonable doubt, the following three elements:

(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.

Id. at 674, 273 S.E.2d at 293 (citations omitted).

Defendant's challenge hinges on the second element—that the items were in Defendant's "custody." *Id.* The State does not dispute the fact that Madden's lantern and lighters were found in Wadsworth's apartment and not in Lee's apartment with the other missing items. However, the State argued the evidence was sufficient to support submitting misdemeanor Larceny to the jury on the basis of Defendant's recent possession of the lantern and lighters. The State presented evidence demonstrating: Defendant was in Wadsworth's apartment between the hours of 3 a.m. and 5:30 a.m. on the morning of 17 January 2017. Wadsworth testified she found the lantern and lighters in her guest bedroom around 5:30 a.m. when she also noticed the TV in that room was missing. Wadsworth stated she did not allow anyone in her apartment, and she testified she did not know where the lantern and lighters had come from nor had she seen them before. Wadsworth also stated to the best of her

knowledge she locked her apartment door on the night in question. Detective Lugo testified Wadsworth's TVs were later found in Lee's bedroom closet with other items belonging to Wadsworth and where Defendant had been sleeping on the morning of 17 January 2017.

Furthermore, Defendant testified at trial "I remember carrying the TV. . . . So I would assume I did other things also." Therefore, Defendant's own testimony creates a strong inference Defendant was in Wadsworth's apartment between 3 a.m. and 5:30 a.m. on 17 January 2017, and, specifically, in her guest bedroom where the lantern and lighters were found. Farrow's testimony further supported this as she testified she witnessed an individual in a dark robe or trench coat rummaging around on the porches of several apartments on the morning of 17 January 2017; and where a dark robe was found in Lee's bedroom where Defendant was sleeping, and the lantern and lighters were taken from Madden's porch.

Despite Defendant's contention there was not substantial circumstantial evidence to support the inference he exercised "custody" over the lantern and lighters, we disagree. "[G]iving the State the benefit of all reasonable inferences[.]" as we must, *Glisson*, 251 N.C. App. at 848, 796 S.E.2d at 128 (citations and quotation marks omitted), we conclude the State presented substantial evidence for the charge of misdemeanor Larceny in 17 CRS 50475 to survive Defendant's Motion to Dismiss.

II. Jury Instructions

Similarly, Defendant next contends there was also insufficient evidence for the trial court to instruct the jury on the doctrine of recent possession for misdemeanor Larceny in 17 CRS 50475. Defendant, however, did not object to this jury instruction. When no objection is made, we review a challenge to the trial court's jury instructions for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) ("This Court has elected to review unpreserved issues for plain error when they involve . . . (1) errors in the judge's instructions to the jury[.]"). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). At the outset the trial court instructed the jury:

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 the defendant had possession of this property. A person possesses 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 this property so soon after it was stolen and under such circumstances as to make it unlikely that the defendant obtained possession honestly.

The trial court directed the jury that this instruction applied to all charges against Defendant. Defendant now contends this instruction was error with regard to the misdemeanor Larceny in 17 CRS 50475 because the items were recovered from Wadsworth's apartment and not Lee's. Defendant refers the Court to his argument contending the trial court erred in denying his Motion to Dismiss. However, as detailed in our discussion *supra*, the State presented substantial evidence for an instruction on the charge of misdemeanor Larceny as it relates to the lantern and lighters in 17 CRS 50475. Evidence supported the fact Defendant, wearing the dark robe found in Lee's apartment, was seen rummaging through porches, and the lantern and lighters were taken from Ms. Madden's porch, with those items then recovered from Wadsworth's apartment. Defendant all but admitted before the jury to being in Wadsworth's apartment on the morning of 17 January 2017, when he testified, "I remember carrying the TV." The Defendant's presence in Wadsworth's apartment is indeed a substantial feature of the case. The trial court did not err in instructing the jury on the doctrine of recent possession as it related to misdemeanor Larceny in 17 CRS 50475.

III. Recorded Conversation

Defendant next contends the trial court erred when it allowed, over his objection, the State to play a portion of a recorded phone call in which Defendant tells Lee "But I did steal them[]" in reference to credit cards. Defendant contends, first,

this evidence was not relevant, and second, even if it was relevant, its probative value was substantially outweighed by its potential for unfair prejudice.

“The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated.” *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation and quotation marks omitted). “[T]he appropriate standard of review for a trial court’s ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.” *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted). However, “such rulings are given great deference on appeal.” *Id.* (citations and quotation marks omitted).

Here, the State played for the jury a portion of a phone conversation where Defendant admitted stealing credit cards to Lee. The State argued the conversation was relevant because the charge of Larceny After Breaking and Entering in 17 CRS 50468 was predicated in part on Defendant allegedly stealing Wadsworth’s wallet, which contained credit cards. Defendant objected to the admission of the recording, and the trial court dismissed the jury to confer with counsel. Defense counsel explained his objection was based on the relevance of the conversation. The trial court ultimately overruled Defendant’s objection and allowed a sixteen-second portion of the call to be played for the jury where Defendant states: “But I did steal

them.” The trial court reasoned, “the statement about the credit cards and [Defendant] acknowledging in the phone call that he stole them, I think that would be relevant.”

Rule 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2019). Unless otherwise provided, “[a]ll relevant evidence is admissible[.]” *Id.* § 8C-1, Rule 402. Defendant first contends the recording was irrelevant and therefore not admissible evidence. We disagree. Defendant was charged with Larceny After Breaking and Entering for taking, in part, Wadsworth’s wallet. Defendant testified he remembered carrying Wadsworth’s TVs, but he remembered very little else. However, in the recorded conversation, he speaks with Lee about credit cards, and the two discuss that Defendant cannot be charged with credit card fraud because he did not use the credit cards. Defendant responds: “But I did steal them.” The conversation was admitted not to introduce to the jury the charges of credit card fraud but because it made the fact Defendant stole Wadsworth’s wallet—which contained credit cards—more probable.

Defendant contends it was not clear the recording referred to the theft of any of the items for which he was on trial. However, the State questioned Defendant, over his objection, about the conversation on cross examination: “[Do] you recollect

having a phone conversation . . . with [Lee] when you talked about whether you could be convicted of credit card theft, financial credit card theft, based on the credit cards that were in [Wadsworth's] wallet?" And Defendant ultimately responded, "Yeah." Thus, although the conversation referred to charges that had been dismissed, Defendant still acknowledged his previous conversation was about credit card's in Wadsworth's wallet. The trial court correctly determined the recorded conversation was relevant under Rule 401.

Defendant next contends even if the recording was relevant, its probative value is substantially outweighed by the unfair prejudice to Defendant, as prohibited by Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403. We review a trial court's decision to admit or exclude evidence under Rule 403 for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . and will be upset only upon a showing that [the decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Here, other than making generalized assertions, Defendant has not demonstrated the probative value of the recording was substantially outweighed by the danger of unfair prejudice. Defendant appears to primarily contend the evidence should have been excluded as it introduced evidence of the charges of financial fraud

that the State previously dismissed. However, as detailed *supra*, the recording was probative in that it tended to show Defendant had, in fact, committed the larceny of the wallet. We discern no abuse of discretion in the trial court's admission of this evidence. Moreover, even if the introduction of this evidence was erroneous, it would not rise to the level of prejudicial error. Consequently, there was no error in allowing the State to play the recording for the jury over Defendant's objection.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial. The trial court did not err in denying Defendant's Motion to Dismiss the charge of misdemeanor Larceny or in instructing the jury on the doctrine of recent possession in relation to misdemeanor Larceny in 17 CRS 50475. The trial court also did not abuse its discretion in allowing the portion of the recorded phone call to be played for the jury.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).