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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-480

No. COA20-344

Filed 7 September 2021

Cabarrus County, No. 18 CRS 54382-84

STATE OF NORTH CAROLINA,

v.

STEVEN LAMONT NIVENS, Defendant.

Appeal by Defendant from judgment entered 21 February 2020 by Judge William A. Wood, II in Cabarrus County Superior Court. Heard in the Court of Appeals 13 April 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Matthew W. Bream, for the State*

*Benjamin J. Kull, for Defendant-Appellant.*

WOOD, Judge.

¶ 1 Defendant Steven Lamont Nivens (“Defendant”) appeals his February 21, 2020 convictions for possession of a stolen firearm and possession of a firearm by a felon. We reverse in part and find no error in part.

**I. Factual and Procedural Background**

¶ 2 On October 4, 2018, Defendant and his girlfriend at that time, Christine

Johnson (“Johnson”), were on their way to a camping trip in Johnson’s car. After Johnson made an illegal U-turn near the Concord Mills Mall, Officer Bradley Cook (“Officer Cook”) of the Concord Police Department initiated a traffic stop. When Officer Cook approached Johnson’s vehicle, he smelled the odor of marijuana coming from the car and proceeded to obtain identification from both Johnson and Defendant. While validating their identities, Officer Cook discovered Defendant had an outstanding arrest warrant for driving while his license was revoked.

¶ 3

Officer Cook arrested Defendant pursuant to the warrant and began searching Johnson’s car once additional law enforcement officers arrived on the scene. In the backseat of Johnson’s car, Officer Cook found a red satchel directly behind the passenger seat containing unspent .380-caliber ammunition, two straws, mirrored glass, two baggies of cocaine, and two baggies of marijuana. When Officer Cook asked whether the satchel and its contents belonged to Defendant, Defendant confirmed that the satchel, in addition to the marijuana and cocaine, was his. When asked about the ammunition in the satchel, Defendant responded, “it’s just been in there.” Another officer assisting in the search, Officer Brittany Simmons (“Officer Simmons”), found a loaded Sig Sauer P232 .380-caliber semiautomatic handgun in a holster under the passenger seat of Johnson’s car. Officer Cook ran the serial number of the handgun through the National Crime Information Center (NCIC), a database housing information related to stolen property, and learned the handgun was

reported stolen from a federal firearms licensed dealer in Fort Mill, South Carolina.

¶ 4 On October 22, 2020, the State indicted Defendant for the following: possession of a firearm by a felon; possession of a stolen firearm; felony possession with intent to sell or distribute cocaine; misdemeanor possession of marijuana up to one-half ounce; and misdemeanor possession of drug paraphernalia. At trial, the State introduced into evidence the ammunition from the satchel in a box along with the .380 handgun, a loaded magazine, and the holster in which the handgun was found. Defense counsel objected to the admission of the box and all its contents, but the trial court overruled the objection. Officer Cook testified he placed the seized handgun in the box, but did not detail how the ammunition, magazine, or holster came to be in the evidence box. Officer Cook further testified that the loose ammunition from the satchel had the same stamp, “RP .380 auto,” as the ammunition from the seized handgun. At the close of the State’s evidence, the trial court denied Defendant’s motion to dismiss.

¶ 5 Defendant testified the red satchel and the entirety of its contents belonged to him. Defendant also admitted to owning a .22 rifle but denied knowing about the .380 handgun found under the passenger seat of Johnson’s car. Additionally, Defendant conceded he had previously been convicted of other felonies. At the close of all the evidence, the trial court again denied Defendant’s motion to dismiss.

¶ 6 At the conclusion of the trial on April 27, 2020, the jury found Defendant guilty

of the following: possession of a firearm by a felon; possession of a stolen firearm; felony possession of cocaine; misdemeanor possession of marijuana up to one-half ounce; and misdemeanor possession of drug paraphernalia. The charges of possession of a firearm by a felon and possession of a stolen firearm were consolidated into one judgment, and Defendant was sentenced to twenty-two to thirty-six months in prison. The remaining charges were consolidated into another judgment, and Defendant was sentenced to nine to twenty-months in prison to run at the expiration of the prior sentence. Defendant entered his notice of appeal in open court.

## II. Analysis

¶ 7 Defendant raises two arguments on appeal. Each will be addressed in turn.

### A. Defendant's Motion to Dismiss

¶ 8 First, Defendant contends the trial court erred in denying his motion to dismiss the charge of possession of a stolen firearm because the State failed to present evidence Defendant “[knew or had] reasonable grounds to believe” the firearm had been stolen or that Defendant “act[ed] with a dishonest purpose.” *State v. Webb*, 192 N.C. App. 719, 722, 666 S.E.2d 212, 214 (2008) (citation omitted). We agree.

#### 1. Standard of Review

¶ 9 We review a trial court's denial of a motion to dismiss *de novo*. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citation omitted). “The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each

essential element of the offense charged and (2) that defendant is the perpetrator of the offense.” *Webb*, 192 N.C. App. at 721, 666 S.E.2d at 214 (quoting *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005)). This Court defines substantial evidence as “that which a reasonable fact finder might find sufficient to support a conclusion.” *State v. Fortney*, 201 N.C. App. 662, 667, 687 S.E.2d 518, 522-23 (2010) (citing *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987)). When a trial court reviews a motion to dismiss, it “must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence.” *Webb*, 192 N.C. App. at 721, 666 S.E.2d at 214 (quoting *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123). Furthermore, “[w]hen considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury.” *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). Therefore, to survive Defendant’s motion to dismiss in this case, the State must have presented substantial evidence of each element of felony possession of a stolen firearm and that Defendant was the perpetrator of the offense.

## ***2. Felony Possession of a Stolen Firearm***

¶ 10 For a defendant to be convicted of felony possession of a stolen firearm under N.C. Gen. Stat. § 14-71.1, the State must prove beyond a reasonable doubt each of the following elements: “(1) possession of personal property; (2) which has been stolen;

(3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose.” *Webb*, 192 N.C. App. at 722, 666 S.E.2d at 214 (quoting *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982)). Defendant’s motion to dismiss the charge of felony possession of a stolen firearm should be granted if evidence presented to support any of these four elements “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.” *State v. Wilson*, 203 N.C. App. 547, 553, 691 S.E.2d 734, 739 (2010) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)) (“*Wilson I*”).<sup>1</sup> Defendant contends the latter two elements are at issue and the State failed to provide enough evidence that a reasonable jury could accept as sufficient to support a conclusion.

*a. Guilty Knowledge*

¶ 11

Regarding the knowledge element of felony possession of stolen goods, this Court has concluded that “cases upholding convictions when knowledge was at issue have contained some evidence of incriminating behavior on the part of the accused,” *State v. Allen*, 79 N.C. App. 280, 285, 339 S.E.2d 76, 79, *aff’d per curiam*, 317 N.C. 329, 344 S.E.2d 789 (1986), and that a “[d]efendant’s guilty knowledge can be implied

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<sup>1</sup> As we reference two of our published decisions with the name “*State v. Wilson*,” we refer to *State v. Wilson*, 203 N.C. App. 547, 691 S.E.2d 734 (2010) as “*Wilson I*” and *State v. Wilson*, 106 N.C. App. 342, 416 S.E.2d 603 (1992) as “*Wilson II*” for clarity and ease of reading.

from the circumstances.” *State v. Wilson*, 106 N.C. App. 342, 347, 416 S.E.2d 603, 606 (1992) (citing *State v. Parker*, 316 N.C. 295, 303, 341 S.E.2d 555, 560 (1986)) (“*Wilson II*”). In *Allen*, two men placed a box containing a stolen VCR in the trunk of the defendant’s car after the defendant agreed to give the men a ride. *Allen*, 79 N.C. App. at 282, 339 S.E.2d at 78. The defendant offered undisputed testimony at trial suggesting he did not know the contents of the box, and the State only relied on circumstantial evidence of his proximity to the two men to establish the knowledge element of felony possession of stolen goods. *Id.* We held absent additional evidence of incriminating behavior, the State’s evidence of the defendant’s knowledge did not rise above conjecture, therefore failing to establish sufficient evidence from which a reasonable jury could draw an inference of guilt. *Id.* at 283-84, 339 S.E.2d at 78. Unlike in other cases where evidence of incriminating behavior aids in bridging the divide between suspicion and a reasonable inference of guilt, no such evidence was presented by the State in *Allen*. *Id.* at 284-85, 339 S.E.2d at 79.

¶ 12 This Court has determined through established precedent that evidence of incriminating behavior to support knowledge of stolen goods includes, but is not limited to: disposing of the stolen good while fleeing law enforcement after the perpetration of a crime, *Wilson II*, 106 N.C. App. at 348, 416 S.E.2d at 606; removing the stolen good from one’s coat and throwing it into bushes, *State v. Taylor*, 64 N.C. App. 165, 169, 307 S.E.2d 173, 176 (1983), *modified*, 311 N.C. 380, 317 S.E.2d 369

(1984); and scratching off the serial number of the stolen good to render it untraceable, *State v. Walker*, 86 N.C. App. 336, 341, 357 S.E.2d 384, 387 (1987).

¶ 13 Disposing of a pistol while fleeing law enforcement is sufficient evidence to support knowledge that the firearm was stolen. *Wilson*, 106 N.C. App. at 348, 416 S.E.2d at 606. In *Wilson II*, the defendant and his accomplices stole a pearl-handled pistol during the robbery of one of several homes. *Id.* at 344, 416 S.E.2d at 604. Later, when being chased by police, the defendant handed the gun to an accomplice for disposal, and the accomplice then threw the firearm out the window of the car. *Id.* at 348, 416 S.E.2d at 606. In that case, this Court held disposing of the firearm while fleeing law enforcement was sufficient evidence to establish the knowledge element of the felony possession of stolen goods charge. *Id.* Invoking precedent, we reasoned that in addition to the disposal of the firearm tending to establish knowledge that it was stolen, “an accused’s flight is evidence of consciousness of guilt and therefore of guilt itself.” *Id.* (quoting *Parker*, 316 N.C. at 304, 341 S.E.2d at 560).

¶ 14 Similarly, taking a firearm out of one’s coat and throwing it into nearby bushes is sufficient evidence to support that the defendant had knowledge or reason to believe that the firearm was stolen. *Taylor*, 64 N.C. App. at 169, 307 S.E.2d at 176. In *Taylor*, the defendant “removed the firearm from his coat, stooped near a car and attempted to surreptitiously hide or dispose of it by throwing it into nearby bushes.” *Id.* We held that such behavior was sufficiently incriminating so a reasonable juror

could infer the defendant knew or had reasonable grounds to believe the firearm was stolen. *Id.* Additionally, we reasoned the fact that the defendant threw the firearm into the bushes was the key evidence upon which the State relied to sufficiently establish the knowledge element of possession of stolen goods. *Id.*

¶ 15 Removing the serial number from a disc player is also sufficient to establish the defendant's knowledge that the disc player was stolen. *Walker*, 86 N.C. App. at 341, 357 S.E.2d at 387. In *Walker*, law enforcement observed the serial number of a disc player in the defendant's possession had been scratched off, though the defendant's accomplice claimed it belonged to him. *Id.* at 338, 357 S.E.2d at 385. The true owner of the disc player identified the item as the one that recently had been stolen from him, and the defendant was arrested. *Id.* Though the defendant's knowledge of the disc player being stolen was not at issue on appeal, this Court determined "the scratching off of the serial number is evidence that the disc player is contraband." *Id.* at 341, 357 S.E.2d at 387.

¶ 16 In the present case, Defendant did not attempt to flee from law enforcement upon Officer Cook initiating a traffic stop; Defendant did not toss the firearm from the vehicle; and since Officer Cook was able to read the serial number on the firearm to run it through the NCIC, it follows Defendant did not remove the serial number from the firearm. Outside of these examples, the State presented no other indication of incriminating behavior that could have been used to support that Defendant knew

or had reasonable grounds to believe the firearm was stolen.

¶ 17 Furthermore, this Court has held that hiding a stolen firearm that had just been used in the perpetration of a robbery and assault is insufficient incriminating evidence to support that the defendant knew or had reasonable grounds to believe that the firearm was stolen. *Wilson*, 203 N.C. App. at 555, 691 S.E.2d at 740. In *Wilson I*, the defendant hid a stolen shotgun at his codefendant's mother's residence that the two had just used in the perpetration of a robbery and assault. *Id.* at 549, 691 S.E.2d 736-37. At trial, the State failed to present any other evidence of incriminating behavior to suggest the defendant knew or had reasonable grounds to believe that the shotgun was stolen. *Id.* at 555, 691 S.E.2d at 740. We held the defendant disposing of the gun at his codefendant's mother's house did not, by itself, constitute incriminating behavior, reasoning that storing the gun at one's residence is not analogous to throwing it from a car as in *Wilson II*, or tossing it into the bushes as occurred in *Taylor*. *Id.*

¶ 18 Here, Defendant conceded he was previously convicted of felonies and that he owned a .22 rifle but denied knowing anything about the stolen firearm located under the passenger seat of Johnson's car. Employing the same reasoning asserted by the defendant in *Wilson I*, it is just as logical that assuming *arguendo* Defendant knew about and was in possession of the firearm, he hid it under his seat because he knew it was illegal to possess a weapon as a convicted felon. *See id.* at 554, 691 S.E.2d at

739. Though we pointed out in *Wilson I* that it is possible to hide stolen property in one's residence, we reiterate the mere fact a stolen good has been stored at a residence does not amount to incriminating behavior that could support a reasonable inference of the defendant's knowledge. *Id.* at 555, 691 S.E.2d at 740. In the present case, we analogize one's residence to one's personal vehicle. Since Defendant could have just as easily been hiding the firearm under the passenger seat to avoid being charged with possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1, it cannot reasonably be inferred Defendant was hiding the firearm under the seat because he knew it was stolen.

¶ 19 Following our holding in *Wilson I*, the act of hiding a firearm under the seat of a car is insufficient to constitute incriminating behavior that would suggest Defendant knew the firearm was stolen. Accordingly, we conclude the State failed to present additional evidence of incriminating behavior from which a reasonable juror, when viewing all evidence in the light most favorable to the State, could draw an inference of guilt.

*b. Dishonest Purpose*

¶ 20 The fourth element of felony possession of a stolen firearm requires that a defendant acted with a dishonest purpose. *Webb*, 192 N.C. App. at 722, 666 S.E.2d at 214 (quoting *Perry*, 305 N.C. at 233, 287 S.E.2d at 815). Here, however, after concluding the State failed to present sufficient evidence that Defendant knew or had

reasonable grounds to believe the firearm was stolen, our analysis need not reach the fourth element of the offense. Therefore, we conclude the trial court improperly denied Defendant's motion to dismiss.

## **B. Admitting the Ammunition into Evidence**

¶ 21 Next, Defendant contends the trial court abused its discretion by admitting ammunition into evidence over defense counsel's objection when no findings were made as to the ammunition's chain of custody. We disagree.

### **1. Standard of Review**

¶ 22 "We review a trial court's decision to admit real evidence over an objection, whether regarding the evidence's authenticity or the chain of custody, for abuse of discretion." *State v. Dawkins*, 269 N.C. App. 45, 49, 837 S.E.2d 138, 141 (2019) (citing *State v. Cobbins*, 66 N.C. App. 616, 621, 311 S.E.2d 653, 657 (1984)). Our Supreme Court has described abuse of discretion as occurring "when the trial court's ruling was 'so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* at 49, 837 S.E.2d at 142 (quoting *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985)).

### **2. Admission of Ammunition**

¶ 23 Rule 901 of our rules of evidence governs the admission of real evidence at trial. N.C. Gen. Stat. § 8C-1, Rule 901 (2020). It states in relevant part: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied

by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C. Gen. Stat. § 8C-1, Rule 901(a). The statute further illustrates various forms of authentication or identification that conform to the requirements of Rule 901(b). N.C. Gen. Stat. § 8C-1, Rule 901(b). Among those examples are the following:

(1) Testimony of Witness with Knowledge. – Testimony that a matter is what it is claimed to be . . . .

. . . .

(4) Distinctive Characteristics and the Like. – Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

*Id.*

¶ 24

Our Supreme Court discussed the chain of custody as it relates to admission of evidence in *State v. Campbell*, 311 N.C. 386, 317 S.E.2d 391 (1984) where it applied a two-prong test for admitting real evidence into the record. “The item offered must be [(1)] identified as being the same object involved in the incident and [(2)] it must be shown that the object has undergone no material change.” *Campbell*, 311 N.C. at 388, 317 S.E.2d at 392. In *Campbell*, the court also emphasized the trial court possesses “sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident” and has not been materially changed. *Id.* at 388-89, 317 S.E.2d at 392. Regarding the admissibility of evidence, “[a] detailed chain of custody need be established only when

the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered.” *Id.* at 389, 317 S.E.2d at 392. Further, our Supreme Court reiterated the long-held principle that “any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility.” *Id.*

¶ 25 Here, the State admitted the ammunition into evidence through Officer Cook’s direct examination. Officer Cook testified he placed the seized firearm in the evidence box presented at trial, and identified the ammunition, magazine, and holster in the same box. He further testified each of these exhibits were in the same or substantially similar condition at trial as when he found them on October 4, 2018, satisfying the two-prong test for admission of real evidence. *See id.* at 388, 317 S.E.2d at 392. When defense counsel objected to the admission of the ammunition into evidence, the trial court overruled the objection.

¶ 26 Defendant contends the ammunition was fungible and not readily identifiable, requiring the State to establish a chain of custody before admitting the ammunition into evidence. Defendant cites *State v. Owen*, 130 N.C. App. 505, 503 S.E.2d 426 (1998), arguing no chain of custody was established by the State in the present case. In *Owen*, seven spent bullets and three unspent cartridges were admitted into evidence after an FBI agent testified she analyzed them but failed to specify the exact individual who handled the ammunition before she obtained them. *Owen*, 130 N.C.

App. at 516, 503 S.E.2d at 433. We held the ammunition was properly admitted into evidence, reasoning the FBI agent established the bullets' chain of custody by testifying to the normal procedure of handling evidence and because she otherwise did not believe the evidence had been altered or tampered with. *Id.* at 516-17, 503 S.E.2d at 433.

¶ 27 In the present case, Officer Cook satisfied both prongs of the test for admission of real evidence at trial. Accordingly, the trial court was not required to explore the chain of custody. We held in *State v. Hart*, 66 N.C. App. 702, 704, 311 S.E.2d 630, 631 (1984) that “proving a complete chain of custody with no missing links is not always a prerequisite to the admissibility” of evidence seized by law enforcement. We further held proving a continuous chain of custody is unnecessary when “articles objected to have been identified as being the same objects seized and in somewhat the same condition.” *Id.* Here, the ammunition was unspent and had the words “RP .380 auto” stamped on the top of each round’s casing. Officer Cook testified both the ammunition found in the satchel and the ammunition loaded in the firearm were consistent, meaning all rounds exhibited the headstamp, and they were in the same or substantially similar condition as the day law enforcement seized them. In concluding the ammunition was readily identifiable and not susceptible to alteration, we find the State is not required to establish a chain of custody for the ammunition.

¶ 28 The absence of explicit documentation of the ammunition’s chain of custody

speaks only to the weight of the evidence and not to its admissibility. *See Campbell*, 311 N.C. at 388-89, 317 S.E.2d at 392. Therefore, we conclude that the trial court properly admitted the ammunition into evidence.

### **III. Conclusion**

¶ 29 After careful review, we conclude the trial court erred in denying Defendant's motion to dismiss the charge of felony possession of a stolen firearm. We further conclude the trial court did not abuse its discretion in admitting the ammunition into evidence. Accordingly, we reverse Defendant's conviction for possession of a stolen firearm, and we find no error in Defendant's conviction on all other charges. Because the trial court consolidated Defendant's conviction for possession of a stolen firearm with his conviction for possession of firearm by a felon in one judgment, we remand to the trial court for a new sentencing hearing on the possession of a firearm by a felon charge.

REVERSED AND REMANDED IN PART; NO ERROR IN PART.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).