NO. COA01-1088

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v. Rockingham County
Nos. 00 CRS 9435
00 CRS 11574

JOHN EDWARD WADDELL

Appeal by defendant from judgment entered 15 March 2001 by Judge Lindsay Davis in Rockingham County Superior Court. Heard in the Court of Appeals 16 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Aaron Edward Carlos, and Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

CAMPBELL, Judge.

John Edward Waddell ("defendant") was indicted for felony larceny in violation of N.C. Gen. Stat. § 14-72 and possession of a stolen vehicle in violation of N.C. Gen. Stat. § 20-106. Defendant was also indicted for being an habitual felon in violation of N.C. Gen. Stat. § 14-7.1. The felony larceny and possession of a stolen vehicle charges were tried at the 14 March 2001 Criminal Session of Rockingham County Superior Court.

The evidence tended to show that defendant did not go to work on 11 August 2000, but instead spent the day drinking, driving to the liquor store, and pitching horseshoes with friends. By approximately 11:00 p.m. that night, defendant had drunk more than a fifth of liquor and four, twenty-four ounce beers. At about that time, defendant reported to the highway patrol that his car, a red four-door 1991 Chevrolet Corsica, had been involved in an accident. Shortly thereafter, defendant was arrested at his residence for driving while intoxicated, hit and run, and driving without a license. Defendant asserted that he had loaned his car to Kenny McCaster ("Kenny") earlier that day in exchange for crack cocaine and that Kenny, not defendant, was driving the car when it was involved in the accident.

Following his arrest, defendant's car was impounded and defendant was taken to the County Government Center where he was asked to submit to a breathalyzer test. Defendant refused the breathalyzer and was taken to the magistrate's office where he was formally charged with driving while intoxicated. Defendant was then released by the magistrate on an unsecured bond. Defendant testified that he was still drunk when the magistrate released him from custody.

Defendant asked the arresting patrolman to give him a ride home but the patrolman responded that he could not. Defendant then used the telephone in the magistrate's office to call his cousin, who told defendant that she would try to send someone to pick him up. Defendant left the magistrate's office and walked to the

sheriff's office to wait for a ride. While waiting at the sheriff's office, defendant noticed a red car pull up in the Government Center parking lot. Defendant testified that the car "kinda looked like my car, but it wasn't." The car, a red four-door 1989 Ford Tempo, was owned and driven by Officer Richard Johnson ("Officer Johnson"). Defendant asked Officer Johnson for a ride home but Officer Johnson was unable to provide one. Officer Johnson testified that he detected an odor of alcohol coming from defendant when defendant asked him for the ride home. Defendant then asked another officer for a ride home and was again refused.

Defendant testified that he then talked to some people outside the sheriff's office for approximately five minutes before going back inside the office. Approximately 2:30 a.m., defendant, tired of waiting for a ride, left the office and walked to Officer Johnson's car. Defendant opened the door, sat in the car, and noticed that there were keys lying on the car seat. Defendant used one of the keys to start the car and then drove it from the Government Center to his residence. When asked at trial why he had driven Officer Johnson's car home, defendant responded, "I kind of made a mistake." When asked to elaborate, defendant responded, "I took the car thinking it was mine . . . [b]ecause they had took my car the same night and brought it here."

Defendant further testified that he realized the car was not his when he arrived at his residence. Defendant then went inside and drank a couple of beers. Kenny, to whom defendant had been loaning his car all week in exchange for crack cocaine, arrived at

defendant's residence and asked him about the car. Defendant made it clear to Kenny that the car was not his. Defendant then told Kenny that he could have the car in exchange for more crack cocaine. Defendant traded Officer Johnson's car for one rock of crack cocaine and Kenny drove the car away.

Following the presentation of evidence, defendant was found guilty of felony larceny and possession of a stolen vehicle. Defendant then pled guilty to being an habitual felon. On 15 March 2001, the trial court arrested judgment on the felony larceny conviction, entered judgment on the possession of a stolen vehicle conviction, and sentenced defendant as an habitual felon to a prison term of 133 to 169 months. Defendant appeals.

On 14 December 2001, the State filed a motion to dismiss defendant's appeal, arguing that defendant's notice of appeal was untimely filed. Defendant responded by filing a petition for writ of certiorari. We grant the State's motion to dismiss defendant's appeal. However, we likewise grant defendant's petition for writ of certiorari in order to address the merits of defendant's case. N.C. R. App. P. 21(a)(1) (2001).

Turning to defendant's assignments of error, we initially note that several are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) for defendant's failure to argue them in his brief. We address only those assignments of error properly set forth and argued in defendant's brief.

Defendant first contends that he is entitled to a new trial on the possession of stolen vehicle charge because the trial court

erred in refusing to instruct the jury on the defense theory of mistake of fact.

The theory of mistake of fact was set forth by this Court in *State v. Lamson,* 75 N.C. App. 132, 330 S.E.2d 68 (1985) as follows:

> Ordinarily, a crime consists in the concurrence of prohibited conduct and culpable mental state. 1 Wharton's Criminal Law § 27 (14th ed. 1978). A crime is not committed if the mind of the person doing the act is innocent. *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950). If there is evidence from which an inference can be drawn that the defendant committed the act without a criminal intent, then the law with respect to intent should be explained and applied by the court to the evidence. *State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

Id. at 136, 330 S.E.2d at 70.

In *State v. Walker*, 35 N.C. App. 182, 241 S.E.2d 89 (1978), this Court applied the mistake in fact theory in a child abduction case. In *Walker*, the defendant, who was charged with abducting a child, testified that when he took the child from the school bus he believed she was his granddaughter, and as soon as he discovered his mistake he returned her to the school. This court held that the evidence permitted the inference that the defendant was laboring under a mistake as to the identity of the little girl which could negate any criminal intent, and the trial judge erred in failing to instruct the jury on the defense of mistake of fact. *Id.* at 186-87, 241 S.E.2d at 92.

In the instant case, defendant contends that he was entitled to an instruction on mistake of fact because his testimony permitted the inference that he took Officer Johnson's car from the

Government Center under the mistaken belief that it was in fact his own vehicle. Defendant maintains that this mistake of fact negates two of the essential elements of the crime of possession of a stolen vehicle--(1) that defendant knew or had reason to know that the vehicle had been stolen or unlawfully taken, and (2) that the vehicle had in fact been stolen or unlawfully taken. While we agree with defendant that the evidence presented at trial does permit the inference that defendant took the car under the mistaken belief that it was his own, we disagree with defendant's contention that he was entitled to an instruction on mistake of fact as to the possession of stolen vehicle charge.

Defendant was charged and convicted of possession of a stolen vehicle in violation of N.C. Gen. Stat. § 20-106. The statute reads:

> Any person who . . . has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken, and who is not an officer of the law engaged at the time in the performance of his duty as such officer shall be punished as a Class I felon.

N.C. Gen. Stat. § 20-106 (2001). The purpose of this statute being to discourage the possession of stolen or unlawfully taken vehicles, the State need only prove that the defendant had possession of a stolen or unlawfully taken vehicle and that the defendant knew or had reason to know that the vehicle had been stolen or unlawfully taken. *See* N.C.G.S. § 20-106; *State v. Suitt*, 94 N.C. App. 571, 573, 380 S.E.2d 570, 571 (1989); *State v. Craver*, 70 N.C. App. 555, 559, 320 S.E.2d 431, 434 (1984); *State v. Lofton*,

66 N.C. App. 79, 83, 310 S.E.2d 633, 635-36 (1984); *State v. Baker*, 65 N.C. App. 430, 436, 310 S.E.2d 101, 107 (1983); *State v. Rook*, 26 N.C. App. 33, 35, 215 S.E.2d 159, 161 (1975). The State is not required to prove felonious intent on the part of the defendant. *Baker*, 65 N.C. App. at 436, 310 S.E.2d at 107 (citing *State v. Murchinson*, 39 N.C. App. 163, 168, 249 S.E.2d 871, 875 (1978) *overruled on other grounds*, 45 N.C. App. 510, 263 S.E.2d 298 (1980)). Further, a defendant may be convicted under this statute even if the State does not have sufficient evidence to prove the underlying larceny or unlawful taking. *Lofton*, 66 N.C. App. at 83, 310 S.E.2d at 636 (citing *State v. Kelly*, 39 N.C. App. 246, 249 S.E.2d 832 (1978)); *see also State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982) (holding that possession of stolen property under N.C.G.S. § 14-71.1 and larceny are two separate and distinct offenses).

In the instant case, defendant testified that he realized the car that he had driven from the Government Center to his house was not his own at the moment he arrived at his house and got out of the car. At that point, defendant was in possession of a vehicle which he knew did not belong to him. Defendant also knew that he had taken the vehicle from the Government Center parking lot without the express or implied consent of the vehicle's rightful owner, Officer Johnson. Although defendant's taking of Officer Johnson's car may not have risen to the level of a felony larceny, due to defendant's belief that the car was in fact his when he started it up and drove it from the Government Center to his house,

the taking was clearly an unauthorized use of a motor vehicle, and thus an unlawful taking, because there is no evidence that defendant had, or was under the mistaken belief that he had, the express or implied consent of Officer Johnson to be driving the car. *See* N.C. Gen. Stat. § 14-72.2(a) (2001); *State v. McCullough*, 76 N.C. App. 516, 333 S.E.2d 537 (1985).

Faced with the knowledge that he had in his possession a vehicle that was not his and had been unlawfully taken from the Government Center parking lot, defendant had two options. Defendant could either contact law enforcement or otherwise attempt to return the car to its rightful owner, Officer Johnson, or defendant could act in a manner that was inconsistent with Officer Johnson's ownership interest in the car and indicative of defendant's intent to deprive Officer Johnson of that ownership interest. Faced with these two options, defendant chose the latter. Defendant testified that, after realizing the car was not his, he went inside his house and drank two beers. Shortly thereafter, Kenny, who had been borrowing defendant's car all week in exchange for crack cocaine, came to defendant's house and inquired about Officer Johnson's car. After making it clear to Kenny that the car did not belong to him, defendant exchanged Officer Johnson's car for one rock of crack cocaine. By acting in a manner inconsistent with the ownership rights of the rightful owner of the car, we conclude that defendant negated any mistake of fact defense to which he may have been entitled on the possession of a stolen vehicle charge. Accordingly, we hold that the trial

court did not err in failing to instruct the jury on mistake of fact as to the possession of a stolen vehicle charge.

Defendant next contends that he is entitled to a new trial on the possession of a stolen vehicle charge because the trial court erred in failing to instruct the jury on two essential elements of the charged offense--(1) that the car was *in fact* stolen or unlawfully taken, and (2) that defendant acted with a dishonest purpose. In support of his contention, defendant argues that our Supreme Court has held that these two elements are essential elements of the crime of possession of stolen property under N.C. Gen. Stat. § 14-71.1, this State's general statute prohibiting the possession of stolen goods. *See Perry*, 305 N.C. at 233, 287 S.E.2d at 815.

We begin by noting that this Court has consistently held that the two essential elements of a violation of N.C.G.S. § 20-106 are (1) possession of a stolen or unlawfully taken vehicle (2) knowing or having reason to know that the vehicle was stolen or unlawfully taken. *Suitt*, 94 N.C. App. at 573, 380 S.E.2d at 571; *Craver*, 70 N.C. App. at 559, 320 S.E.2d at 434; *Lofton*, 66 N.C. App. at 83, 310 S.E.2d at 635-36; *Baker*, 65 N.C. App. at 436, 310 S.E.2d at 107. Here, the trial court instructed the jury on these two essential elements.

Further, we conclude that the two elements on which defendant contends the trial court erroneously failed to instruct, are contained by implication within the two elements on which the trial court did instruct. The fact that the State must prove that the

vehicle was in fact stolen or unlawfully taken is implicit in the first element of the offense--that the defendant possess a stolen or unlawfully taken vehicle. The dishonest purpose element is likewise implicit in the second element of possession of a stolen vehicle--that the defendant know or have reason to know that the vehicle was stolen or unlawfully taken. Possession of a vehicle which the possessor knows or has reason to know has been stolen or unlawfully taken is, as a matter of law, conduct committed with a dishonest purpose. Thus, defendant's second argument is overruled.

By his next two arguments, defendant contends that he is entitled to a new trial on the possession of a stolen vehicle charge due to errors allegedly committed in relation to the felony larceny charge. However, the trial court arrested judgment on the felony larceny charge, as it was required to do under *State v. Perry*. In *Perry*, the Supreme Court held that a defendant cannot be punished for both larceny of property and possession of the same property which the defendant stole. *Perry*, 305 N.C. at 236, 287 S.E.2d at 817. Accordingly, any error as to the felony larceny charge was rendered harmless by arresting judgment on that charge. Further, we disagree with defendant's contention that the alleged errors as to the felony larceny charge prejudiced defendant's conviction for possession of a stolen vehicle.

Defendant's final argument concerns the proper action to be taken were this Court to find prejudicial error on the possession of a stolen vehicle charge. Having found no error on the possession charge, we do not address this final contention.

In conclusion, we hold that defendant was not entitled to an instruction on mistake of fact on the possession of stolen vehicle charge and that the trial court correctly instructed the jury on the essential elements of possession of a stolen vehicle.

No error.

Judges MARTIN and TIMMONS-GOODSON concur.

Report per Rule 30(e).