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NO. COA01-329

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v. Orange County
No. 99 CRS 53519

MICHAEL ALLEN LAYTON

Appeal by defendant from judgment entered 28 June 2000 by Judge A. Leon Stanback in Superior Court, Orange County. Heard in the Court of Appeals 23 January 2002.

*Attorney General Roy Cooper, by M. Lynne Weaver, Assistant Attorney General, for the State.*

*Osborn & Tyndall, P.L.L.C., by Amos Granger Tyndall, for defendant.*

McGEE, Judge.

Michael Allen Layton (defendant) was indicted on 20 March 2000 for felonious larceny and felonious possession of stolen goods.

The State's evidence at trial tended to show the following. John Henderson (Henderson), a sub-contractor, was working on construction of a townhouse in Southern Village in Chapel Hill on 14 November 1999. Henderson testified that he owned a ten-foot-long by six-foot-wide by eight-foot-tall Wells cargo trailer, in which he kept his tools. He left the job site around 5:00 or 5:30 p.m. that evening and said that he left the trailer at the site in "perfect" condition. He testified that to drive the trailer down

the road, he would need to hook it up to a truck to move it, "but if you were just going to move it . . . 20 or 25 feet, to pull it somewhere, it would be pretty easy to do" so. Henderson valued the trailer at $2,900, with $4,000 worth of tools inside. When he returned to work on 15 November, the trailer was gone. Henderson called Deputy Terrell Tripp (Deputy Tripp) of the Orange County Sheriff's Department to report the missing trailer. Henderson testified that the trailer was found by law enforcement and was returned to him that afternoon. Henderson stated that when the trailer was returned, it had "several big dents in it. The latches where the big locks were at were torn up and bent. They cut the electrical wiring so you couldn't plug it into your car to have lights."

Deputy Tripp testified that on the morning of 15 November 1999, he went to Southern Village in response to a larceny report. Henderson told Deputy Tripp that his trailer and all the tools in it were stolen the night before. Deputy Tripp put out a broadcast for law enforcement to be on the lookout for the trailer. He received information that his lieutenant had found the trailer on Smith Level Road. Deputy Tripp went to 719 Smith Level Road and found the trailer sitting out in the open at the end of the driveway next to the road. He learned that defendant lived at that address. The driveway serves several houses and the trailer was actually on the edge of property owned by Rebecca Hartman (Hartman) and Robert Fisher (Fisher). Deputy Tripp testified that the trailer "was empty . . . the locks were bent[,] and [i]t was

obvious that the trailer had been broken into."

Hartman testified that she lives at 715 Smith Level Road. She testified she thinks of the "driveway" next to her house as a road because there are six houses it serves. Around 10:00 p.m. on 14 November 1999, she saw defendant's old truck with a trailer attached to it and noticed that defendant and another man named Chris, were pushing both the truck and the trailer off the road into a graveled area. Chris was behind the wheel and defendant was pushing. Hartman testified that when she "looked out, they were pulling the trailer off the road, and traffic was backed up in both directions at that point[.]" She stated she "didn't think anything of it at the time" and she went out a little later to ask if they needed help. Defendant told Hartman that they found the trailer in the road and they were pulling it out of the road because they were afraid that someone coming down the road might hit it. She said Chris and defendant backed the trailer up into her yard. Defendant's truck was "struggling," and she "didn't actually hear the engine or not hear the engine" so she did not know if the truck died or not. Defendant told Hartman that he did not know where the trailer "came from," and Hartman said that "seemed reasonable."

Hartman talked with defendant about calling the sheriff. Defendant told her that "[m]aybe whoever lost [the trailer] would come and get it and maybe whoever left it in the road would realize and he'd come and get it. He said, [i]f it's still there we'll call in the morning[.]" Hartman testified that defendant's statement seemed reasonable to her, that perhaps someone had broken

a trailer hitch and lost their trailer. She stated she was not surprised to see defendant's truck broken down because it was an old, very loud truck. She testified that defendant did not look like he was trying to hide anything, that he was not nervous or upset, and that he left the trailer along the roadside, in a well-lighted area.

Fisher testified that around 10:30 p.m. on 14 November 1999 he was watching television, when a dog started barking. Hartman told him traffic was backed up on the road outside their house and defendant was pushing a trailer. Hartman's sister came in and told them that defendant's truck was stuck, and Fisher went out to see if defendant needed help. Fisher testified that Chris McGhee (McGhee) was with defendant. Fisher offered his assistance and defendant asked him to help pull his truck, which was not running. Fisher attached a tow strap from his Jeep to the truck, and towed the truck. He did not recall seeing any damage to the trailer. It also "seemed reasonable" to him not to call the sheriff that night. He offered to pull the trailer out of the road. He looked in the back of the trailer and it was empty. Fisher testified that he would not have offered to tow a trailer he thought might be stolen, "[n]ot if it were a suspicious occurrence, no." It did not seem suspicious to him. The next day when the officer arrived and found the trailer, it was in plain view beside the road.

Investigator Tim Horne (Investigator Horne), along with Investigator Chris Upchurch, of the Orange County Sheriff's Department went to defendant's home after talking with Hartman and

Fisher. Investigator Horne arrested McGhee and defendant at their work site. Investigator Horne testified that the tools were never found. The State asked him, over defendant's objection, if defendant ever made any statement to him. Investigator Horne answered that defendant refused to give any statement.

At the close of the State's evidence, defendant moved to dismiss the charges against him, which was denied by the trial court. Defendant did not present any evidence. Defendant renewed his motion to dismiss, which the trial court again denied.

The jury found defendant guilty of felonious possession of stolen goods and the trial court sentenced defendant to ten to twelve months in prison. The trial court suspended the sentence for thirty-six months, placing defendant on supervised probation with special conditions, including that defendant serve sixty days in jail. Defendant appeals from this judgment.

Defendant set forth five assignments of error in the record on appeal; however in his brief to our Court he only argues assignments of error one, three and five. Therefore, assignments of error two and four are deemed abandoned. N.C.R. App. P. 28(a); *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 593-94 (1975) ("[I]t is well recognized that assignments of error not set out in an appellant's brief, and in support of which no arguments are stated or authority cited, will be deemed abandoned.").

Defendant first contends that the trial court erred in denying his motion to dismiss the charge of felonious possession of stolen property because the evidence was insufficient to support every

element of the charge.

In considering a motion to dismiss, the trial court must determine whether substantial evidence exists as to each essential element of the crime charged and whether the defendant is the perpetrator. *State v. Osborne*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2002). Substantial evidence is evidence "which a reasonable mind would accept as sufficient to support a conclusion." *State v. Withers*, 111 N.C. App. 340, 348, 432 S.E.2d 692, 698, *disc. review denied*, 335 N.C. 180, 438 S.E.2d 207 (1993) (citing *State v. Brown*, 81 N.C. App. 622, 344 S.E.2d 817, *disc. review denied*, 318 N.C. 509, 349 S.E.2d 867 (1986)). The trial court must consider all evidence in a light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from that evidence. *State v. Davis*, 325 N.C. 693, 696, 386 S.E.2d 187, 189 (1989) (citing *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975)).

The essential elements of the crime of possession of stolen goods are: "(1) possession of personal property; (2) having a value in excess of [$1,000.00]; (3) which has been stolen; (4) the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) the possessor acting with a dishonest purpose." *State v. Martin*, 97 N.C. App. 19, 25, 387 S.E.2d 211, 214 (1990); N.C. Gen. Stat. §§ 14-71.1 and 14-72 (1999). Defendant concedes that Henderson's trailer, valued at more than $1,000, was stolen and that the State offered sufficient evidence of these first three elements of the crime charged. We therefore

limit our discussion to defendant's arguments that the State failed to produce sufficient evidence of the fourth element, that defendant knew or had reasonable grounds to believe the property had been stolen, and the fifth element, that defendant acted with a dishonest purpose.

Defendant first argues the State failed to present sufficient evidence that defendant knew or had reasonable grounds to believe the property was stolen. The State must present sufficient evidence to prove either defendant had actual knowledge that the property was stolen or, using a "reasonable man standard", that defendant had reasonable grounds to believe the property was stolen. *State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986).

In this case, defendant argues that the evidence presented by the State through the testimony of Hartman and Fisher contradicts the State's claim that defendant knew or had reason to believe the trailer was stolen. Further, defendant contends that the remaining evidence "does nothing more than raise a suspicion" that defendant knew the trailer was stolen. The State argues, however, that based upon the testimony of Henderson and Deputy Tripp, "a jury could have inferred that the defendant, had he encountered the trailer on Smith Level Road as he claimed, could 'obviously' see that the trailer had been stolen, or reasonably suspect that it had been stolen."

We disagree with the State and find that the trial court erred in denying defendant's motion to dismiss. Hartman testified that

defendant told her that he found the trailer blocking Smith Level Road earlier in the evening and was towing it in order to get it off the road. The State presented no evidence to contradict defendant's statement to Hartman. No one testified to seeing defendant earlier that evening with the trailer attached to his truck or to seeing or hearing his "very loud truck" in or near the Southern Village neighborhood. Although Henderson and Deputy Tripp both testified that upon viewing the trailer on 15 November 1999, they noticed it had been damaged, Hartman and Fisher testified that on the night of 14 November 1999, they had no reason to suspect the trailer had been stolen. Neither testified to any damage to the trailer and both testified that defendant was not acting suspicious. Neither Hartman nor Fisher saw any reason to call law enforcement that evening. In response to questioning as to whether he would have offered to tow a trailer if he thought it had been stolen, Fisher responded, "[n]ot if it were a suspicious occurrence, no." There is no evidence that the State's two witnesses who saw defendant with the trailer the night of 14 November had any reason to suspect the trailer was stolen; thus from the evidence presented, we cannot infer that defendant knew or had reason to suspect the trailer was stolen.

Viewing the evidence in a light most favorable to the State, the trial court erred in denying defendant's motion to dismiss on this issue because the State failed to produce sufficient evidence that defendant knew or had reason to believe the trailer was stolen.

Defendant also argues the State failed to present sufficient evidence that defendant was acting with a dishonest purpose. "Dishonest purpose is equivalent to felonious intent" which "can be proven by direct or circumstantial evidence." *Withers*, 111 N.C. App. at 348, 432 S.E.2d at 698 (citing *State v. Parker*, 316 N.C. 295, 341 S.E.2d 555 (1986) and *State v. Bell*, 285 N.C. 746, 208 S.E.2d 506 (1974)).

Defendant argues that in considering all the uncontradicted facts, his "actions were consistent with his stated honest purpose of removing a traffic hazard from the road." Further, defendant argues that "[m]ere possession of the trailer for a brief period of time in order to remove it from Smith Level Road does not show a dishonest purpose."

The State contends, however, that from the facts presented at trial, a jury could infer defendant was acting with a dishonest purpose because

> if the defendant had encountered the trailer in the road, he obviously would have had to have stopped his truck. Instead of simply pushing the trailer off the road, which would have been very easy to do, he attached the trailer to his truck and carried the trailer to his driveway, at which time, the defendant's engine stopped running, or, alternatively, he purposefully turned off the engine so that it would not be heard by his neighbors, who usually could hear his truck coming in and out.

We disagree with the State because the undisputed evidence presented at trial shows that defendant's actions were indeed consistent with removing a traffic hazard. As defendant argues, he "had every opportunity to conceal the trailer if his intentions

were dishonest." The trailer could have easily been moved a few feet by hand, as Henderson testified, if defendant wanted to conceal it. Hartman testified that defendant's truck was often unreliable and therefore she was not surprised that it was not running that night. Further, neither Hartman nor Fisher testified that defendant acted suspiciously or that he was trying to conceal the trailer in any way. In fact, defendant had the trailer moved into Fisher's yard, rather than having Fisher tow it to defendant's house where it would not be out in the open for the public to see. The State presented no evidence to dispute Hartman and Fisher's testimony.

We find the State failed to produce evidence on this issue which a reasonable mind would accept as sufficient to support the conclusion that defendant acted with a dishonest purpose.

Viewing the evidence in a light most favorable to the State, we find the evidence in the record does not satisfy the substantial evidence standard for denying defendant's motion to dismiss the charge of felonious possession of stolen property. Defendant's conviction must therefore be vacated for insufficient evidence.

Because we have determined that defendant's conviction for felonious possession of stolen goods must be vacated, we need not address defendant's remaining assignments of error.

Vacated.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).