NO. COA09-1511-2
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Orange County
No. 08CRS055883
NAKIA NICKERSON, 09CRS006360
Defendant.

Appeal by defendant from judgment entered on or about 8 July 2009 by Judge Orlando F. Hudson in Superior Court, Orange County. Heard in the Court of Appeals 14 April 2010. Reversed by the Supreme Court on 7 October 2011 and remanded to this Court for consideration of defendant's remaining issues on appeal.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Ann W. Matthews, for the State.

Ryan McKaig, for defendant-appellant.

STROUD, Judge.

On remand from the Supreme Court, this Court addresses defendant’s appeal regarding the trial court’s denial of his motion to dismiss the charge of felonious possession of stolen goods. For the following reasons, we find no error.

I. Background

On 16 November 2010, this Court determined in *State v. Nickerson*, ___ N.C. App. ___, 701 S.E.2d 685 (2010) ("*Nickerson I*"), that the trial court committed error by failing to instruct the jury on unauthorized use of a motor vehicle, a lesser included offense of possession of stolen goods. *See Nickerson I*, ___ N.C. App. ___, 701 S.E.2d 685. The Supreme Court in *State v. Nickerson*, ___ N.C. ___, ___ S.E.2d ___ (Oct. 7, 2010) (No. 458PA10) ("*Nickerson II*"), determined that unauthorized use of a motor vehicle is not a lesser included offense of possession of stolen goods. *See Nickerson II*, ___ N.C. ___, ___ S.E.2d ___. The Court reasoned:

> Unauthorized use of a motor vehicle has an essential element the taking or operating of "an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance." N.C.G.S. § 14-72.2(a) (2009). Both offenses concern personal property. However, the specific definitional requirement that the property be a "motor-propelled conveyance" is an essential element unique to the offense of unauthorized use of a motor vehicle. For the offense of possession of stolen goods, the State need not prove that defendant had a "motor-propelled conveyance" but rather that the property in defendant's possession is any type of personal property. As such, unauthorized use of a motor vehicle has an essential element not found in the definition of possession of stolen goods.

Nickerson II at ___, ___ S.E.2d at ___. The Supreme Court then reversed this case and remanded it to this Court "for consideration of defendant's remaining issues on appeal." *Nickerson II* at ___, 707 S.E.2d at ___. The pertinent facts for this opinion are provided in *Nickerson II* as follows:

> Early on 20 November 2008, Darrel Haller awoke to discover that someone had entered his house, stolen his car keys, and taken his vehicle, a 1997 gold Chrysler Sebring convertible with a black top. Mr. Haller reported the break-in and the stolen vehicle to the police. Around 3:30 p.m. that afternoon, Sergeant Lehew of the Chapel Hill Police Department saw a gold Sebring with a black top while on patrol. When Sergeant Lehew checked the vehicle's license plate number, he discovered that the tag actually belonged to a Chevrolet Lumina. Thinking the vehicle was likely stolen, Sergeant Lehew stopped the vehicle, which was being driven by defendant. Defendant claimed that he borrowed the vehicle from a friend to attend a funeral in the area. According to defendant, his friend was too intoxicated to drive, and defendant had dropped him off at a nearby park. When police looked for defendant's friend, they could not locate him.

Nickerson II at ___, ___ S.E.2d at ___. Defendant was charged and convicted of felonious possession of stolen property. *See Nickerson II* at ___, ___ S.E.2d at ___.

II. Motion to Dismiss

Defendant argues that "the trial court erred in denying the

defendant's motion to dismiss at the close of the State's evidence and the close of all evidence on the ground that there was insufficient evidence that the defendant knew or should have known that the car was stolen." (Original in all caps.)

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

> A defendant may be found guilty of felonious possession of stolen property where the State proves (1) defendant was in possession of personal property, (2) valued at greater than $1,000.00, (3) which has been stolen, (4) with the possessor knowing or having reasonable grounds to believe the property was stolen, and (5) with the possessor acting with dishonesty.

State v. Parker, 146 N.C. App. 715, 717, 555 S.E.2d 609, 610 (2001) (citations, quotation marks, and brackets omitted).

Defendant concedes in his brief that

> there was sufficient evidence that he

> possessed the car, that its value exceeded $1000, and that the car was stolen. However, he contends that there was insufficient evidence that he knew or should have known that the car was stolen, or that he acted with a dishonest person.

The State directs this Court's attention to *State v. Bailey*, 157 N.C. App. 80, 577 S.E.2d 683 (2003). In *Bailey*,

> [o]n the morning of 2 April 2002, Tony Crain ("Crain") drove his company's vehicle, a black 2000 Chevrolet Suburban ("the Suburban") with a vanity tag that read " '1 ALLIED,'" to meet with a customer at a construction site in Raleigh, North Carolina. Upon arriving at the site, Crain parked the Suburban and left his keyring in the driver's seat. . . . . As Crain walked back towards the Suburban approximately fifteen minutes later, he saw the vehicle being driven away. He had not given anyone permission to drive the Suburban. . . .
>
> . . . Crain immediately called OnStar and reported the vehicle had been stolen. . . .
>
> By that afternoon, the Suburban was spotted in Goldsboro, North Carolina, by Officer Dorothy Ardes ("Officer Ardes"). She and several other Goldsboro police officers pulled the Suburban over without incident. As Officer Ardes approached the vehicle, she saw defendant in the driver's seat and two other passengers in the Suburban. Defendant informed the officer that he had gotten the Suburban from a friend (whose name he would not give) and that he was in Goldsboro visiting his child.

Bailey at 82, 577 S.E.2d at 685. The defendant was charged and convicted of felonious possession of stolen goods. *Id.* at 82-

83, 577 S.E.2d at 685-86. On appeal, the defendant argued that the trial court erred in failing to dismiss the charge of possession of stolen goods due to the insufficiency of the evidence. *Id.* at 82-83, 577 S.E.2d at 686.

This Court found no error on the part of the trial court in denying defendant's motion to dismiss stating,

> The evidence offered in the case at bar consisted of the following: (1) Defendant was found driving the Suburban several hours after it was stolen; (2) defendant claimed the vehicle belonged to a "friend," but would not give that friend's name; (3) Crain testified that he had not given anyone permission to drive the Suburban on the day in question; and (4) defendant was found with Crain's group of keys in his possession. This evidence establishing defendant's knowledge or reasonable belief that the Suburban was stolen was circumstantial at best because Crain could not identify defendant as the bicyclist whom he believed stole his vehicle. Nevertheless, the rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both. Regardless of the circumstantial nature of the evidence in this case, a strong inference can be deduced that defendant knew or had reasonable grounds to believe the vehicle was stolen. Therefore, the trial court did not err in denying defendant's motion to dismiss and submitting the case to the jury.

Id. at 84, 577 S.E.2d at 686-87 (citation and quotation marks omitted).

Here, the evidence shows that "(1) Defendant was found driving the [Sebring] several hours after it was stolen; (2) defendant claimed the vehicle belonged to a 'friend,' but would not give that friend's [full] name; (3) [Haller] testified that he had not given anyone permission to drive the" Sebring; and (4) defendant was found with a key "[t]hat belonged to the vehicle" "in the ignition." *Id.* at 84, 577 S.E.2d at 686. As the facts in this case are so similar to the facts in *Bailey*, we necessarily also reach the same conclusion:

> This evidence establishing defendant's knowledge or reasonable belief that the [Sebring] was stolen was circumstantial at best . . . Nevertheless, the rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both. Regardless of the circumstantial nature of the evidence in this case, a strong inference can be deduced that defendant knew or had reasonable grounds to believe the vehicle was stolen. Therefore, the trial court did not err in denying defendant's motion to dismiss and submitting the case to the jury.

Id. at 84, 577 S.E.2d at 686-87. Accordingly, this argument is overruled.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges MCGEE and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).