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NO. COA10-795
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 08 CRS 62288-89,
09 CRS 128

BRUCE LEE GRIFFIN

Appeal by Defendant from judgment entered on 17 February 2010 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 30 November 2010.

Attorney General Roy A. Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

William B. Gibson, for Defendant.

BEASLEY, Judge.

Bruce Lee Griffin (Defendant) appeals multiple convictions. We arrest judgment on one count of misdemeanor larceny. While we find no error as to Defendant's remaining issues, we remand for resentencing, as the convictions were consolidated.

At the 15 February 2010 Criminal Session of Buncombe County Superior Court, Defendant was tried on various offenses arising

from the break-ins of vehicles owned by Abby and Kenneth Gutch. Ms. Gutch was the record title owner of a Honda, and Mr. Gutch held title to a Volvo. On 20 September 2008, Mr. and Mrs. Gutch parked their cars in the driveway at their home in Asheville. Ms. Gutch had been driving the Volvo and left it unlocked with her wallet underneath the front seat. The next morning she found the Volvo door open and realized that her wallet, which contained several debit and credit cards, was missing. Ms. Gutch then noticed that a door to the Honda was also open and discovered that the stereo had been removed therefrom.

After Ms. Gutch contacted her banks and learned that one of her cards had been used to make ATM withdrawals and purchases at convenience stores and Wal-Mart, police obtained security camera photographs and surveillance video footage from the specified locations. This evidence, which was shown to the jury, depicted an individual using Ms. Gutch's cards in the early morning hours of 21 and 22 September 2008 at the same places identified by the banks, including Wal-Mart and ATMs at First Citizens Bank, Carolina First, and State Employees' Credit Union.

Defendant testified in his own behalf and admitted that he used Ms. Gutch's Visa check card for various merchandise and grocery purchases on 21 September 2008 and tried unsuccessfully

to use it several other times, including an attempted withdrawal at a Centura Bank ATM. He testified, however, that he believed the Visa card belonged to one of two men whom he accompanied to make cash withdrawals and purchases. Defendant also admitted that he was one of the persons depicted in the 21 and 22 September photographs taken at Carolina First and First Citizens Bank ATMs when attempts to use Ms. Gutch's debit and credit card were made.

Following all of the evidence, defense counsel did not renew his prior motion to dismiss that was denied at the close of the State's case. All of the charges were submitted to the jury, and Defendant was convicted of: breaking and entering the Volvo, larceny of Ms. Gutch's wallet, financial card/credit card theft, breaking and entering the Honda, larceny of Ms. Gutch's car stereo, felonious financial card/credit card fraud, and having attained habitual felon status. A consolidated 120 to 153-month sentence was imposed, and Defendant noted his appeal.

MOTION TO DISMISS

Defendant argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence. He acknowledges, however, his counsel failed to renew the motion

after Defendant testified in his own behalf. Thus, the motion to dismiss is not properly before us:

> If a defendant makes [a motion to dismiss] after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

N.C.R. App. P. 10(a)(3); *see also State v. Richardson*, 341 N.C. 658, 677, 462 S.E.2d 492, 504 (1995) ("Rule 10(b)(3) provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial."). This argument is therefore dismissed as not preserved for appellate review.

INEFFECTIVE ASSISTANCE OF COUNSEL

Alternatively, Defendant argues that his trial counsel's failure to renew the motion to dismiss and thereby preserve the sufficiency of the evidence argument violated his right to effective counsel, constituting reversible error.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v.*

Washington, 466 U.S. 668, 686, 80 L. Ed. 2d 674, __ (1984). To prove that his constitutional right to effective counsel was violated, Defendant must show (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *See State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (adopting the two-part *Strickland* test).

Under the first prong, Defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," relegating the representation he received to a level "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88, 80 L. Ed. 2d 674 at __. He must then prove prejudice by showing that his "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 80 L. Ed. 2d at __. This requires proof of a "reasonable probability," or "a probability sufficient to undermine confidence in the outcome," that "the result of the proceeding would have been different" if a renewed dismissal motion had been made. *Id.* at 694, 80 L. Ed. 2d at __. In making this determination, we must consider the totality of the evidence before the jury. *Id.* at 695, 80 L. Ed. 2d at __.

Our examination of the merits, as discussed *infra*, reveals no reasonable probability that the failure to move for dismissal as to most of the charges prejudiced the defense. *See Braswell*, 312 N.C. at 563, 324 S.E.2d at 249 (1985) (stating a reviewing court need not resolve the deficient performance question if it can determine at the outset that there is prejudice). However, the record does reflect a reasonable probability of a different result in the proceedings had Defendant's counsel renewed the motion as to one of the larceny charges. The State presented no evidence of larceny incidents to support two charges. As such, it is reasonably probable that a renewed motion to dismiss by counsel—supported by an argument that the items were taken in one continuous transaction and thus constituted one larceny offense—would have been granted the motion and Defendant would have been convicted of only one larceny instead of two. While this analysis is further developed below, we must now determine whether counsel's omission as to the larceny counts was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 80 L. Ed. 2d at __.

Recognizing that the burden to show deficient performance is a heavy one and that counsel enjoys wide latitude as to trial strategy, we are unable to discern any strategic motive here.

See Strickland, 466 U.S. at 689, 80 L. Ed. 2d at __ (noting the highly deferential nature of judicial scrutiny as to counsel's performance and the "strong presumption" that the challenged act is considered sound trial strategy under the circumstances). Our "ultimate focus" in adjudicating the "actual ineffectiveness of counsel" prong must be "the fundamental fairness of the proceeding whose result is being challenged," *id.* at 696, 80 L. Ed. 2d at __, and we believe Defendant's counsel should have made a motion to dismiss one of the larceny charges at the close of all the evidence; that his omission precluded preservation for appeal and barred Defendant from raising the issue; and that, under the circumstances detailed below, the failure to lodge a renewed motion to dismiss as to one larceny charge violated Defendant's right to effective assistance of counsel.

We now elaborate on the above-referenced conclusions pursuant to the well-established motion to dismiss standard:

> 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) (internal quotation marks and citations omitted). Defendant contends that the State's evidence as to each of the substantive offenses charged was insufficient to support his convictions thereof. While we agree as to the two separate larceny charges, we disagree as to the remaining offenses.

I. Breaking and Entering and Larceny

The State must prove five elements to obtain a conviction for breaking and entering a motor vehicle: (1) a breaking or entering; (2) without consent; (3) into any motor vehicle; (4) containing anything of value; (5) with the intent to commit a felony or larceny therein. *State v. Riggs*, 100 N.C. App. 149, 155, 394 S.E.2d 670, 673 (1990). As for larceny, it must be shown that the defendant "(1) took the property of another; (2) carried it away; (3) without the owner's consent, and (4) with the intent to deprive the owner of the property permanently." *State v. Rawlinson*, 198 N.C. App. 600, 606, 679 S.E.2d 878, 882 (2009) (internal quotation marks and citation omitted).

Defendant argues that no evidence showed that he broke into either car or stole the wallet or stereo, requiring dismissal of the charges. Indeed, the State did not present direct evidence that Defendant was the person who broke into and entered either

the Volvo or the Honda or that he was the person who took and carried away Ms. Gutch's property therefrom. However, the State relied on Defendant's possession of the property shortly after its taking to show that he perpetrated the offenses. We must thus resolve whether the doctrine of recent possession applies because, if so, it "suffices to repel a motion for nonsuit" on the grounds of insufficient evidence that Defendant perpetrated the breaking and entering or the larceny. *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981). In such a case, Defendant's guilt or innocence is a question for the jury. *Id.*

A. *The Doctrine of Recent Possession*[1]

The doctrine of recent possession is "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." *Id.* at 673, 273 S.E.2d at 293. Specifically, when the evidence shows that a building or vehicle was broken into and property was stolen thereby, possession of the stolen property recently thereafter raises presumptions that the possessor is guilty not only of the larceny, but also of the

[1] As we conclude below that the State satisfied the doctrine of recent possession, the evidence likewise supported the trial court's instruction that the jury could infer that Defendant committed the crimes charged therein based on his possession of the stolen goods. As such, our discussion here disposes of Defendant's separate argument that the court's recent possession instruction was plain error.

breaking and entering. *Id.* at 674, 273 S.E.2d at 293; *see also State v. McQueen*, 165 N.C. App. 454, 459-60, 598 S.E.2d 672, 676-77 (2004) ("[A] person in possession of recently stolen property [may be presumed] guilty of its wrongful taking and of the unlawful entry associated with that taking.").

> 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 the defendant's possession. The presumption or inference arising from recent possession of stolen property is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.

McQueen, 165 N.C. App. at 459-60, 598 S.E.2d at 676 (internal quotation marks and citations omitted).

The presumption, which is better described as a permissible inference, arises if the State proves that: (1) the property was stolen; (2) the defendant had possession of the stolen property to the exclusion of others, though not necessarily in his hands or on his person so long as he had the power and intent to control it; and (3) the possession was sufficiently recent after the larceny. *Maines*, 301 N.C. at 674, 273 S.E.2d at 293. Moreover, possession of part of the recently stolen property may

warrant an inference that the accused stole all of it, as "[t]he inference of guilt is not always repelled by the fact that only part of the recently stolen property is found in the possession of the accused." *Boomer*, 33 N.C. App. at 328, 235 S.E.2d at 287.

Defendant attempts to undermine the second prong of the doctrine by arguing that "it was abundantly clear that at least one other person was actively involved in the events that led to the charges" against him. He suggests that this evidence "that more than one person had possession of the stolen credit cards" renders the doctrine of recent possession inapplicable. Exclusive possession, however, "does not necessarily mean sole possession"; rather, it "means possession 'to the exclusion of all persons not party to the crime.'" *State v. Foster*, 149 N.C. App. 206, 209, 560 S.E.2d 848, 851 (2002) (quoting *Maines*, 301 N.C. at 675, 273 S.E.2d at 294). Contrary to Defendant's claim, the exclusive possession required to spawn an inference of guilt may be joint possession, as "a person [has possession] when he is aware of [its] presence and has, either by himself *or together with others*, both the power and intent to control its disposition or use." *State v. Barnes*, 345 N.C. 184, 240, 481 S.E.2d 44, 75 (1997) (emphasis added). "[W]here more than one

person has access to the property in question, the evidence must show the person accused of the theft had complete dominion, which might be shared with others, over the property or other evidence which sufficiently connects the accused person to the crime[.]" *Maines*, 301 N.C. at 675, 273 S.E.2d at 294.

(i) Ms. Gutch's wallet/Mr. Gutch's Volvo

Here, Ms. Gutch's wallet had clearly been stolen, and the nonconsensual use of cards that had been inside her missing wallet was documented by the banks recently after the larceny. Substantial evidence also showed that Defendant possessed the stolen property at that time, whether solely or jointly with other parties to the crime: he admitted that he was the person using one of Ms. Gutch's cards in the ATM and Wal-Mart photos; he admitted to using or attempting to use it several times on 21 and 22 September 2008; and thereby conceded that he had actual, physical possession of some of the stolen property, which is not even required. *See id.* at 675, 273 S.E.2d at 293–94 (noting constructive possession of recently stolen property satisfies this element). Under the circumstances, Defendant's possession of one or more cards contained in Ms. Gutch's wallet warrants the related inference that he also stole the wallet and its contents, even though he possessed only a portion thereof

recently after the wallet was taken.

An inference of Defendant's guilt is thus permitted not only as to the wrongful taking of Ms. Gutch's wallet, but also as to the unlawful entry associated therewith, namely the breaking and entering of the Volvo. The State gets the benefit of this inference and survives any motion to dismiss for a lack of direct evidence that Defendant committed these offenses.

(ii) Ms. Gutch's Honda and car stereo

While it is undisputed that the Honda was broken into and that the car stereo was stolen therefrom, there is no direct evidence that Defendant was the perpetrator of the unlawful entry or the larceny related thereto. Nor is there any evidence that he was ever found in possession of Ms. Gutch's car stereo.

We initially observe that *State v. Holland*, 318 N.C. 602, 350 S.E.2d 56 (1986) was overruled in pertinent part by *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). The defendant in *Holland* was convicted, *inter alia*, of the robbery of certain items allegedly missing from a murder victim's home. While he was found in possession of the victim's stolen vehicle the day after the murder, the allegedly stolen items were never found. *Holland*, 318 N.C. 602, 350 S.E.2d 56. The State urged "that defendant's possession of the [stolen vehicle] support[ed] the

inference that [he] also stole the watch, the ring, and the television." *Id.* at 609, 350 S.E.2d at 60. While the additional inference "would permit the State to survive the motion to dismiss," the Court deemed such inference "permissible only if evidence exist[ed] of the contemporaneous crimes" and noted that a "stacking of inferences on the basis of circumstantial evidence" would be required in order to conclude the defendant stole these items by virtue of his possession of the car. *Id.* Believing such "stacking" to be impermissible, the Court held that the State failed to prove the *corpus delicti* and vacated the robbery conviction. *Id.* The Supreme Court, however, overruled *Holland*'s holding "that in considering circumstantial evidence . . . an inference [may not be made from] an inference." *Childress*, 321 N.C. at 232, 362 S.E.2d at 267.

Moreover, the facts here are distinct. Where the evidence in *Holland* was far from certain as to when the missing items were last seen or whether they were even stolen, it is undisputed in the case *sub judice* that both the wallet and stereo were taken at some point after Mr. and Ms. Gutch parked their cars in their driveway on 20 September 2008 and before Ms. Gutch went to her car the next morning. We believe that these distinct facts, coupled with the overruling of *Holland*, permits

an inference that Defendant's recent possession of the stolen credit and debit cards in the case *sub judice*, is a circumstance tending to show that Defendant was present in the Gutch's driveway at the time of the breaking and entering into the Honda and theft of the stereo occurred. *See State v. Joyner*, 301 N.C. 18, 29, 269 S.E.2d 125, 132 (1980) (holding that when a "larceny, burglary and rape all occurred at or about the same time as part of one criminal enterprise committed by the same assailant," the possession of stolen property recently thereafter was evidence of the defendant's guilt, not only as to the larceny and related burglary, but also as to the rape); *see also State v. Poole*, 82 N.C. App. 117, 121, 345 S.E.2d 466, 469 (1986) ("When the evidence strongly suggests that 'all the crimes including the larceny occurred as a part of the same criminal enterprise' by the same assailant, a defendant's recent possession of stolen property is a relevant consideration in determining whether the defendant is guilty of all the crimes charged against him.").

Here, Defendant's own testimony tended to show that break-ins and larcenies were part of the same criminal enterprise. Defendant testified that after withdrawing $400.00 from a Centura Bank ATM with Ms. Gutch's debit card, he, along with

two other men, went to buy drugs from a drug dealer. When the men could not draw any more money out because of Ms. Gutch's $400 maximum daily withdrawal limit on her card, they used it to buy "some steaks and stuff from Ingles to trade for drugs." Finally, they went to Wal-Mart to buy merchandise to trade for more drugs, where several attempts were made with Ms. Gutch's debit card to purchase over $500.00 in electronics. Moreover, the inference that Defendant perpetrated the wallet and Volvo offenses is rather strong, based on the necessarily short amount of time between the larceny and his use of the cards. *McQueen*, 165 N.C. App. at 459, 598 S.E.2d at 676 ("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 the defendant's possession." (internal quotation marks omitted)).

Thus, it is reasonable for the jury to have inferred that the taking of Ms. Gutch's wallet and stereo from the respective vehicles was motivated by the same enterprise to obtain drugs by either cash purchase or trade. *See State v. Williams*, 90 N.C. App. 120, 122, 367 S.E.2d 345, 346 (1988) ("Where the State bases a portion of its case on circumstantial evidence, the sufficiency of [its] evidence may be determined by drawing

inferences from inferences."). Accordingly, the trial court properly submitted the charge of breaking and entering the Honda to the jury. One larceny charge, however, should have been dismissed because there was no evidence to suggest that anything other than a single larceny offense was committed.

B. *The Single Larceny Doctrine*

"[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." ***State v. Marr***, 342 N.C. 607, 613, 467 S.E.2d 236, 239 (1996). This is essential to uphold the constitutional guarantee against double jeopardy. ***State v. Froneberger***, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986). Thus, "[b]efore guilt can be inferred from the possession of recently stolen property, 'the State must show by positive or circumstantial evidence a ***prima facie*** larceny of the goods.'" ***Id.*** (internal quotation marks and citation omitted). The evidence in ***Froneberger*** was held insufficient to support four separate larceny convictions where the State showed only that the defendant, who had unlimited access to the victim's house, pawned numerous items of the victim's stolen silver on separate occasions. ***Id.*** at 399, 344 S.E.2d 344. Because it was "equally possible that he took all the silver at one time," rather than

four separate times, the jury could not reasonably infer the defendant's guilt—pursuant to the doctrine of recent possession—as to each count of larceny based his dominion or control over the items each time he pawned them. *Id.* at 402, 344 S.E.2d at 347.

Addressing the same issue in *Marr*, our Supreme Court held that the defendant could be convicted of only one larceny even though two buildings on the victim's premises were entered, tools and other items were stolen from both buildings, and two vehicles were taken. *Marr*, 342 N.C. at 610-11, 467 S.E.2d at 237. Although the defendant was convicted of two counts of felonious breaking and entering, the Court found the incident to be a single transaction for the purpose of larceny and arrested judgment on all but one larceny conviction. *See id.* at 613, 467 S.E.2d at 239 ("Although there was evidence of two enterings, the taking of the various items was all part of the same transaction."). This Court followed *Marr* in *State v. Hargett*, 157 N.C. App. 90, 577 S.E.2d 703 (2003), where the defendant was convicted of three counts of breaking and entering a motor vehicle and two counts of larceny of tools from two of the company vans on the victim's property. *Hargett*, 157 N.C. App. at 91, 577 S.E.2d at 704. Reasoning that the "vans were

parked . . . in close proximity" to each other and that "[t]he larcenies from the separate vans occurred within the same general time period," the Court held the unlawful takings "were part of a single continuous transaction" and arrested judgment on all but one larceny charge. *Id.* at 96, 577 S.E.2d at 707.

In this case, while the evidence does not pinpoint the exact time at which Ms. Gutch's wallet and stereo were stolen, it is clear that the items were stolen from the same victim "within the same general time period." *Id.* Although Defendant here, as in *Hargett*, "could not have physically taken [Ms. Gutch's wallet and car stereo] at the same time," as they were stolen from separate vehicles, *id.*, nothing suggests that the larcenies were distinct events rather than multiple series of one, continuous transaction. Moreover, the only indication that the larcenies were motivated by any certain impulse was Defendant's own testimony that the purpose of the withdrawals and purchases with Ms. Gutch's debit card was to get drugs. Where the State proposed no alternate objective for stealing the wallet and stereo, there is insufficient evidence that Defendant had a unique criminal purpose or intent as to each taking. Accordingly, we conclude that the takings were part of a single transaction, and one of the larceny charges would have been

dismissed upon a properly renewed motion at the close of the evidence. Submitting both counts of larceny clearly prejudiced the defense, as Defendant was convicted of both, and we arrest judgment on Count 2 of 08 CRS 62288, misdemeanor larceny of Ms. Gutch's car stereo. Because all of Defendant's convictions were consolidated into one judgment for sentencing purposes, the matter must be remanded for resentencing.

II. Financial Card Theft

N.C. Gen. Stat. § 14-113.9(a)(1) (2009) provides that a person is guilty of financial transaction card theft when he or she

> [t]akes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained or withheld, receives the financial transaction card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder.

Moreover, "the single taking rule does not apply to financial transaction card theft." *State v. Rawlins*, 166 N.C. App. 160, 165, 601 S.E.2d 267, 271 (2004).

The State presented the testimony of Ms. Gutch that her wallet and the cards contained within were taken from her "custody or control" and without her consent. Defendant

admitted that he was the person in the photographs using Ms. Gutch's card. Thus, there was sufficient evidence of financial card theft pursuant to N.C. Gen. Stat. § 14-113.9(a)(1).

III. Financial Card Fraud

Under N.C. Gen. Stat. § 14-113.13(a) (2009), a person intending "to defraud the issuer, a person or organization providing money, goods, services or anything else of value, or any other person" is guilty of financial transaction card fraud when he, ***inter alia***: "(1) [u]ses for the purpose of obtaining money, goods, services or anything else of value a financial card obtained or retained, or which was received with knowledge that it was obtained or retained, in violation of G.S. 14-113.9 or 14-113.11"; or "(2) [o]btains money, goods, services, or anything else of value by . . . [r]epresenting without the consent of the cardholder that he is the holder of a specified card[.]" N.C. Gen. Stat. § 14-113.13(a)(1)-(2) (2009).

The State presented Ms. Gutch's testimony that her cards were taken without her permission. Defendant admitted to using at least one of Ms. Gutch's cards to purchase goods. Thus, there was sufficient evidence of financial card fraud.

We conclude there was no error in Defendant's convictions for each of the two counts of breaking and entering and no error

as to his conviction for one of the two counts of larceny. We reverse Defendant's conviction and vacate his sentence for the remaining count of larceny in 08 CRS 62288. This matter is remanded for resentencing.

No error in part; Vacated in part; Remanded for resentencing.

Judge BRYANT concurs in result only.

Judge STROUD concurs.

Report per Rule 30(e).