NO. COA11-155
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v. Moore County
No. 09 CRS 54556

OMAR RASHAD DUNN

Appeal by defendant from judgment entered 29 September 2010 by Judge William R. Pittman in Moore County Superior Court. Heard in the Court of Appeals 29 August 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliot Walker, for defendant-appellant.

CALABRIA, Judge.

Omar Rashad Dunn ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felonious larceny and the habitual felon conviction attached to the felonious larceny. We find no error.

I. Background

On 22 September 2009, at around 8:30 p.m., Lindsay Kocsis ("Kocsis") drove her 2000 Jeep Grand Cherokee to rent a movie from a RedBox located outside a Kangaroo Express gas station. She parked in front of the Redbox and got out of her Jeep, but left the engine running. While renting a movie, Kocsis noticed a man on a pay phone who appeared to be watching her. The man walked away from the phone, then went back and picked up the phone as if he were speaking to someone, but Kocsis noticed he wasn't saying anything. Then she saw him walk away from the pay phone in the direction of her Jeep. When he opened the door, Kocsis ran to her Jeep as the man jumped in her vehicle. Kocsis struggled with the door, attempting to open it, but the man managed to close the door and drive away. Her textbooks, notebook, CD case and purse containing her checks, sunglasses, camera, blackberry, and IPOD were still in the Jeep. Later, when Kocsis retrieved her Jeep, her purse, cell phone, IPOD, sunglasses, camera and notebook were missing from the Jeep. Her textbooks and CDs were still in the Jeep.

The gas station attendant contacted law enforcement. When law enforcement arrived, Kocsis attempted to give them a description. Although she remembered the type of clothing the man was wearing, she could not remember facial features. She

only had a peripheral view while he was on the phone and once he was in the Jeep, she could not see him through the tinted windows.

On 23 September 2009, Detective Melissa Goodwin ("Detective Goodwin"), an investigator with the Southern Pines Police Department, learned that Kocsis's vehicle had been recovered in Raleigh. The suspects in the vehicle, Charles Baker and an unidentified sixteen-year-old male, were arrested. The next day, Detective Goodwin went to Raleigh to process the vehicle by taking photographs and collecting fingerprints. However, only two of the fingerprints collected were usable prints. The prints could not be identified as belonging to defendant or anyone else.

During the course of the investigation, Kocsis viewed three photographic lineups. From the first lineup, Kocsis picked out, with 10% certainty, a man other than defendant. Defendant's picture was not included in the first or second lineup, but was in the third lineup. A photograph of Charles Baker was included in the second lineup. Kocsis did not identify anyone in the second or third lineups nor could she identify defendant in the courtroom. Although the Kangaroo station had a security system,

defendant could not be positively identified from a 22 September 2009 surveillance videotape.

Sharitta Wilson ("Wilson"), who was in a relationship with defendant at the time of the theft, gave a written statement to Detective Goodwin on 11 August 2010. While unsure of the exact date, Wilson recalled an evening when defendant accompanied her and her grandmother to a Wal-Mart about four blocks from the Kangaroo where the incident took place. While in Wal-Mart, Wilson spoke with a former classmate and this angered defendant. When they returned to Wilson's vehicle to leave, he became "real hostile" and "rampaging" and jumped out of the car. Since he refused to reenter the vehicle, Wilson drove home. About an hour later, defendant knocked on Wilson's door and asked her to come outside. Subsequently, defendant drove up to her house in a vehicle and said "stole this"—"stole this bitch car over there." He then had Wilson follow him to enable him to hide the vehicle for the night. Wilson described the vehicle as a "gray" "truck" and "jeep-like."

The next morning, defendant told Wilson that he took the Jeep from a girl at the Kangaroo. Wilson noticed a cell phone, a digital camera, and textbooks in the vehicle. Defendant and Wilson drove separately to Raleigh; Wilson went to work and

defendant said he was going to take the vehicle to a chop shop. While they were driving, Wilson saw defendant toss a notebook out the window.

Defendant was subsequently arrested and charged with larceny of motor vehicle, possession of stolen goods and attaining the status of an habitual felon. The trial court instructed the jury on possession of a stolen vehicle, larceny and the doctrine of recent possession. Although defendant objected to several jury instructions, none of the objections were made about the inclusion of the doctrine of recent possession. The jury returned guilty verdicts for both the larceny and possession of a stolen vehicle charges. Defendant pled guilty to attaining the status of an habitual felon. The trial court arrested judgment on the possession of a stolen motor vehicle charge. Defendant was sentenced to a minimum of 107 and a maximum of 138 months in the North Carolina Department of Correction. Defendant appeals.

II. Motion to Dismiss

Defendant alleges the trial court erred by denying defendant's motion to dismiss at the close of the evidence. Defendant claims the State failed to prove that the doctrine of

recent possession applied and therefore the evidence was insufficient. We disagree.

Upon a defendant's Motion to Dismiss "the trial court must determine 'whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.'" *State v. Carter*, 122 N.C. App. 332, 336, 470 S.E.2d 74, 77 (1996) (citing *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). The evidence is viewed in the light most favorable to the State. *Id.* (citations omitted). The test for sufficiency of the evidence is the same whether evidence is direct or circumstantial. *Id.*

To prove larceny, the State must show 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. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983). When the defendant has been indicted for larceny, "possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property." *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981) (citation omitted). The strength of "[t]he presumption or inference is to be considered by the jury along with other evidence in determining the defendant's guilt."

State v. Eppley, 282 N.C. 249, 254, 192 S.E.2d 441, 444-45 (1972). To apply the doctrine of recent possession the State must prove: "[f]irst that the property was stolen; second that the defendant had possession of this same property.... Third, that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly." *State v. Pickard*, 143 N.C. App. 485, 487-88, 547 S.E.2d 102, 104 (2001) (citation omitted).

In the instant case, there is sufficient evidence to show that the essential elements of larceny were present and that defendant was the perpetrator of the crime. In the light most favorable to the State, the evidence tends to show that defendant took Kocsis's Jeep, drove it to Wilson's home, without Kocsis's consent, and intended to permanently deprive Kocsis of the Jeep.

Wilson's description of the events provides a reasonable inference that defendant had stolen Kocsis's Jeep. On the night defendant jumped out of Wilson's car, Wilson left defendant four blocks away from the Kangaroo gas station without a mode of transportation. An hour later, defendant showed up at Wilson's house with a "gray" "truck" that was "jeep-like" and defendant

told her he "stole that" – "stole this bitch car over there." The next morning defendant told Wilson where he got the vehicle:

> He said that the girl was at the – where you purchase them DVDs for a dollar outside of Kangaroo. And he walked up and he seen the girl. And he went and got in the car. The girl came running, and she was pulling the door and he was pulling the door. And she was saying, "help me, help me." And he end up get away.

Furthermore, Wilson confirmed that the items in the vehicle were the ones Kocsis left in the Jeep and that defendant destroyed some items that were missing when the vehicle was returned to Kocsis. When defendant went to Raleigh to dispose of the vehicle, he had no intention of returning the Jeep to Kocsis.

Defendant contends that the State failed to prove the third element of the doctrine of recent possession: that defendant possessed the Jeep so soon after it was stolen to infer he stole the vehicle. According to the State's evidence, the Jeep was stolen around 8:30 p.m. on 22 September 2009. Defendant hid a Jeep near Wilson's house overnight. The next morning, defendant drove the Jeep to Raleigh to take it to a chop shop. Kocsis's Jeep was recovered in Raleigh on 23 September 2009, only one day after it was stolen. It appears that no one else possessed the Jeep between the time it was taken from Kocsis and the time defendant drove the vehicle to Wilson's home. In fact, Wilson

stated that defendant told her twice that he was the one who had stolen the vehicle.

Defendant relies on the fact that Wilson could not specify the date or time the incident took place. The theft occurred on 22 September 2009. Wilson's statement was taken on 11 August 2010, almost a full year after the event. Wilson's testimony clearly aligns with the events surrounding the theft and provides a reasonable inference that defendant had stolen the Jeep. Wilson's inability to provide a precise date is not fatal.

Defendant contends that the State failed to prove that the Jeep was in defendant's possession at all pertinent times. For the doctrine of recent possession to apply, the item must have come into the defendant's possession close enough to make it "unlikely that the possessor could have acquired the property honestly." *State v. Jackson*, 274 N.C. 594, 597, 164 S.E.2d 369, 370 (1968) (citations omitted). The facts provide enough evidence that defendant did not acquire the property honestly: he was without transportation, he showed up at Wilson's house in a Jeep and he stated to Wilson that he stole the Jeep. In addition, his account of the theft was similar to the victim's account. Furthermore, defendant drove the Jeep to Raleigh to

dispose of it the day after the theft and the vehicle was discovered in Raleigh the day after it was stolen.

The State presented substantial evidence to submit both the larceny charge and the doctrine of recent possession to the jury. The trial court properly denied defendant's motion to dismiss. This argument has no merit.

III. Doctrine of Recent Possession of Stolen Goods

Defendant alleges plain error occurred when the trial court included the doctrine of recent possession in the jury instructions and the State's evidence was insufficient to support the instruction. We disagree.

Generally, when a party fails to make a timely objection to a jury instruction at trial, the objection is lost and cannot be raised on appeal. *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983). Absent an objection, the court must determine whether plain error occurred. *State v. Cartwright*, 177 N.C. App. 531, 537-38, 629 S.E.2d 318, 323 (2006). Plain error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Odom* at 660, 300 S.E.2d at 378 (citation omitted). Plain error occurs when "the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79.

In the instant case, defendant failed to object to the inclusion of the jury instruction on the doctrine of recent possession. In fact, defendant indicated that the instruction on the doctrine of recent possession was warranted: "since there is evidence that...somebody had possession of this vehicle within 24 hours or less, that is certainly within the window for a recent [possession] inference." However, defendant did request that the trial court *amend* the instruction by changing the word "defendant" to "person or persons" because there was evidence that two other individuals had possessed the stolen vehicle within 24 hours of the theft. The trial court did not change the instruction. Defendant's failure to object to the inclusion of the doctrine of recent possession bars defendant from raising the issue on appeal.

As stated above, there was substantial evidence to instruct the jury on the doctrine of recent possession of stolen property. Defendant was not prejudiced when the trial court instructed the jury in this manner. This assignment of error is without merit.

IV. Conclusion

The trial court did not err in denying defendant's motion to dismiss at the close of evidence, nor was it plain error when

instructing the jury on the doctrine of recent possession. The State presented sufficient evidence to support an instruction of the doctrine of recent possession. We find no error.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).