NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-1162**
VERSUS	*	**COURT OF APPEAL**
CARL HALL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 335-051, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and Judge Terri F. Love)

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CONVICTION AND SENTENCE VACATED. VERDICT OF GUILTY OF ILLEGAL POSSESSION OF STOLEN GOODS VALUED UNDER $100 ENTERED. CASE REMANDED FOR RESENTENCING.

STATEMENT OF CASE

On 8 June 1989, the defendant was charged by bill of information with one count of theft of goods valued over $500 to which he pled not guilty. On 23 June 1989 the State amended the bill to add a second count, charging the defendant with illegal possession of the same property described in count one. There is no indication in the record that he was arraigned on this second count. On 10 July 1989, a jury found him not guilty of theft and guilty of illegal possession of stolen property valued over $500. The court sentenced him on 22 September 1989 to four years at hard labor, suspended, and placed him on three years active probation with various conditions. The defendant was advised at that time of his right to appeal, and the minute entry of that date indicates he waived this right. However, the transcript does not support the minute entry. In any event, no appeal was taken at that time. The court revoked his probation on 30

October 1991.

The defendant was subsequently convicted of manslaughter in an unrelated case. The State charged him as a second offender, using the conviction in this case as the predicate offense. The court found him to be a second offender and sentenced him accordingly. On appeal of his manslaughter conviction, he contended the trial court erred by finding him to be a second offender because the predicate offense charged was not a felony. In an unpublished opinion, this court affirmed his manslaughter conviction but vacated the multiple bill adjudication and sentence and remanded for resentencing. State v. Hall, 94-0125 (La. App. 4 Cir. 12/15/94), 646 So.2d 535. On application for supervisory writs, the Louisiana supreme court reinstated the multiple offender adjudication and sentence, finding that the evidence presented at the multiple bill hearing "establish[ed] circumstantially" that the prior conviction was a felony and that the defendant failed to raise the issue at the multiple bill hearing. The Court further stated: "The defendant must return to the district court in which he was convicted to press any collateral attack on the validity of that prior judgment, and the defendant will have the burden of proof in that attack." State v. Hall, 94-3147 (La. 6/2/95), 654 So.2d 1085.

In 1998 and 1999 the defendant filed *pro se* applications for

supervisory writs in this Court seeking an amendment of his commitment form to include credit for time served. The defendant then retained counsel and in 2002 filed a motion for an out-of-time appeal, noting that he had never waived his right to appeal this case. This Court granted the motion on 8 March 2002.

STATEMENT OF FACTS

On the afternoon of 22 May 1989, police officers received a call concerning a theft in progress at the corner of Gen. Pershing and LaSalle Streets. According to the report, two men were placing aluminum from a house at 2401 Gen. Pershing into a van. Officer Sam Palumbo, one of the officers responding to the call, testified that when he and his partner, Officer Lovell, arrived at that location they saw a van parked in the wrong direction on LaSalle Street with its back door open, and they could see two men placing strips of aluminum into the back of the van. Officer Palumbo testified the house appeared to be partially burned, and the aluminum had been taken from an awning that had been installed on the front of the house. The officers approached the two men, one of whom was later identified as the defendant, advised them they were under investigation for theft of the aluminum, and advised them of their rights. In response, the defendant

stated that the owner of the house had given them the aluminum. Officer Palumbo testified he contacted the homeowner, who insisted she never gave anyone permission to remove the awning. The officers then arrested both men. Officer Palumbo positively identified the defendant as one of the men who was placing the aluminum inside the van.

Leonard Augustine testified that he lived across and down the street from the house. He stated that he was retired and was the block captain for neighborhood watch purposes. He testified that he knew the owner of the house at 2401 Gen. Pershing, who did not live in the house at that time, and he kept an eye on that house as well as the other houses in the neighborhood. At approximately noon on 22 May he was sitting on the porch with his son when he noticed two men tearing down the awning at 2401 Gen. Pershing. He testified that he knew the owner had had contractors at the house recently in connection with repairs due to the earlier house fire, and he initially thought the men had permission to work on the house. While Mr. Augustine was sitting on his porch, a neighbor came by and told him that she had seen three juveniles trying to break into the back of a house. He decided to investigate this report, and as he walked past the front of the house at 2401 Gen. Pershing, he greeted the two men. One of them immediately responded, “We’re the contractors.” Mr. Augustine testified that he then

asked them where the owner was, and one of them replied that she had to leave for a few minutes but would be back. Mr. Augustine testified he continued around the block to check on the report of the youths trying to break into the house. He testified that he could see no one, however, and he walked back around the block, past the house, and onto his porch.

Mr. Augustine testified he sat on his porch for a little while longer, and then he realized the owner had not returned. He stated that generally the owner would contact him whenever she came to the neighborhood to check on the house. He became suspicious, and called the owner to ask her about the workers. He testified that she told him she had not given anyone permission to work on the house, and that she was on her way to the house. At that point, he called the police. He stated that the men working on the house were still there when the police arrived. He testified that when the officers arrived, he went with them over to the house and saw the aluminum from the awning sticking out of the back of the van. He testified that when he walked over to the van, he heard the men telling the officers that he (Mr. Augustine) had given them permission to take the aluminum, which he hotly denied. Mr. Augustine could not identify the defendant at trial.

Maxine Young testified that she was the co-owner of the house at 2401 Gen. Pershing Street. She testified the house had previously belonged

to her sister and brother-in-law, who had lived in the house for over twenty years. After her sister died, Ms. Young purchased a part interest in the house from another nephew. She stated the house had been vacant for a year and a half, and at some point the house had suffered a small fire. She testified that at the time of the theft of the awning, she had begun contacting contractors to renovate the house. On the day of the theft, Mr. Augustine called her to ask if she had authorized anyone to take down the awning on the house. She said she told him she had not done so, and she called the police. She testified she went to the house and found the police already there. She testified that the police had detained two men, and she saw a van at the scene filled with aluminum that had come from the awning. She testified that her sister had installed the awning about twelve years prior to the theft. The trial court sustained the defense objection to the question of how much her sister told her it cost to buy and install the awning. She stated she told the officers how much her sister paid for the awning. She testified she had not obtained any estimates on how much it would cost to replace the awning. She stated she did not know Hall and had never given him or anyone else permission to remove the awning. She testified she had visited the house a few days prior to the theft, and at that time the awning was intact.

REVIEW FOR ERRORS PATENT

A review of the record reveals one error, raised in the defendant's assignments of error. Another error patent arises from the lack of arraignment on count two of the bill of information. Count two was added on 23 June 1989, and there is no indication the court ever arraigned the defendant or that he ever pled not guilty to the charge. However, this omission, if indeed it did occur, is harmless error since the defendant went to trial without having objected to the failure to arraign him on the second count of the bill of information. La.C.Cr.P. art. 555.

There are no other errors patent.

SECOND ASSIGNMENT OF ERROR: The State presented insufficient evidence to support defendant's conviction.

Although this error is alleged in the second assignment, we will address it first in accordance with the Louisiana supreme court's ruling in State v. Hearold, 603 So. 2d 731, 734 (La. 1992).

The jury found the defendant guilty of illegal possession of stolen goods valued at over $500. The defendant argues the evidence was insufficient because the State failed to prove the value of the aluminum

found in the back of the van. The defendant was convicted of illegal possession of stolen goods valued over $500 in violation of La. R.S. 14:69, the elements of which are: (1) the property was stolen; (2) the property was worth more than five hundred dollars; (3) the defendant knew or should have known that the property was stolen; and (4) the defendant intentionally received the property.

Here, the State conclusively proved the aluminum was stolen from the home's awning, that the defendant knew it was stolen because he was one of the two men who took the awning from the house, and that the owner had not given him permission to possess the aluminum. The defendant argues, however, that the State failed to prove the value of the aluminum was over $500, or indeed that it had any value other than scrap, thus presenting evidence of only illegal possession of stolen goods valued under $100, a misdemeanor offense.

In support, he cites State v. Williams, 610 So. 2d 129 (La. 1992). In that case, the victim testified that she had purchased her car for $25,000 ten years before it was stolen. She also testified the car had maintenance problems at the time it was stolen and that she had intended to replace it. The defendant, who was found with the car, was convicted of illegal possession of stolen property valued over $500. On appeal, he argued the

State failed to prove the value of the car at the time the defendant was found in possession of it. This Court agreed and reversed the defendant's conviction and sentence, entering a verdict of acquittal. State v. Williams, 598 So. 2d 1265 (La. App. 4 Cir. 1992). On application for supervisory writs, the supreme court found that the acquittal was erroneous, found that the car had some value, entered a verdict of guilty of illegal possession of stolen property valued less than $100 and remanded for resentencing.

Here, there was no direct testimony establishing the value of the aluminum found in the van. Because Ms. Young could testify only as to what her sister told her she paid for the awning twelve years earlier, the court properly sustained the defendant's hearsay objection. The only evidence of the value of this awning was contained in the police report which was introduced into evidence by defense counsel in an attempt to show how much time elapsed between the time Mr. Augustine first observed the men taking down the awnings and the time of the arrest. According to the prosecutor's closing argument, the police report indicated Ms. Young stated the awning was worth $1500.

It is unclear upon what Ms. Young based this $1500 estimation, but it appears this valuation was based upon what Ms. Young's sister paid for the awning twelve years earlier. The defendant correctly notes that this

valuation, if it could be admitted, was for the awning's value at the time it was new. By the time the defendant was in possession of the aluminum, twelve years had passed, and the house had suffered some fire damage and had lain dormant for at least eighteen months. As such, the situation here is akin to that in Williams. The State failed to prove the value of the aluminum from the awning was over $500, but there was evidence to support a finding that the aluminum had some value for scrap. As such, it appears the State proved only that the defendant illegally possessed stolen goods valued under $100. This claim has merit.

FIRST ASSIGNMENT OF ERROR: The jury returned a verdict for a grade of offense greater than that charged in the bill of information.

In light of our disposition of defendant's second assignment of error, this assignment is moot.

CONCLUSION AND DECREE

Accordingly, because there was no evidence as to the value of the aluminum from the awning at the time the defendant possessed it, we vacate the defendant's conviction and sentence, we enter a verdict of guilty of illegal possession of stolen goods valued under $100 and remand the case

for resentencing.

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