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NO. COA01-512

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v.

Cumberland County
Nos. 99 CRS 66106-09

WARDELL SMITH

Appeal by defendant from judgment dated 1 November 2000 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amar Majmundar, for the State.

The Rogers Firm, P.A., by Sherry E. Miller, for defendant-appellant.

GREENE, Judge.

Wardell Smith (Defendant) appeals a judgment dated 1 November 2000 entered consistent with a jury verdict finding him guilty of four counts of larceny of a motor vehicle and four counts of possession of a stolen vehicle. The trial court consolidated judgment and sentenced Defendant to a minimum term of 135 months and a maximum term of 171 months.

The State's evidence tended to show that on Sunday afternoon, 31 August 1999, Rita Ann Callahan (Mrs. Callahan) abandoned her disabled 1989 Ford Tempo on the side of Business 95/301 in Cumberland County. Mrs. Callahan and her husband Jeffrey Scott

Callahan (Mr. Callahan) passed by her disabled vehicle between 6:00 a.m. and 6:30 a.m. the following Tuesday. When Mrs. Callahan passed the same location later that morning between 10:15 a.m. and 10:30 a.m., the vehicle was no longer there. Neither she nor Mr. Callahan had authorized the removal of the vehicle. Mr. Callahan reported the missing vehicle to the Cumberland County Sheriff's Department and also filed a stolen vehicle report. Neither of the Callhans received any telephone calls from any person stating their vehicle had been towed. Seven-to-ten days later, Mrs. Callahan received a telephone call from the Cumberland County Sheriff's Department informing her that her vehicle had been recovered. Mr. Callahan later retrieved the vehicle with its proper registration and tags at Cole's Auto Body Shop.

On 3 September 1999, Shirely Ann Simmons (Simmons) abandoned her 1991 Cutlass Supreme on the side of the All American Freeway in Fayetteville after a blowout of her left front tire. Forty-five minutes after parking her vehicle, Simmons returned with her husband to the place she had parked her vehicle and discovered it was gone. Neither she nor her husband had authorized anyone to remove the vehicle. Mr. and Mrs. Simmons contacted the Fayetteville Police Department, the Cumberland County Sheriff's Department, and the North Carolina Highway Patrol to determine whether these agencies had information regarding the removal of their vehicle. Upon discovering those agencies did not have any information, Simmons and her husband filed a stolen vehicle report. One week later, Simmons received a telephone call from the

Fayetteville Police Department advising that her vehicle had been recovered. Simmons' husband retrieved the vehicle. Other than the telephone call from the Fayetteville Police Department, Simmons never received a telephone call from a person indicating he had possession of her vehicle.

On or about the second or third day of September 1999, Kathy Eeve (Evee) parked her 1992 Pontiac Grand Am on the shoulder of the All American Freeway in Fayetteville following a flat tire at approximately 6:00 p.m. to 6:30 p.m. After Eeve's stepfather unsuccessfully attempted to replace the tire that evening, he returned the next morning at approximately 10:30 a.m., but the vehicle was no longer there. Because Eeve had not authorized anyone to remove the vehicle, she telephoned the Fayetteville Police Department to report the incident and also filed a stolen vehicle report. Approximately a week later, Eeve received a telephone call from the Fayetteville Police Department stating her vehicle had been recovered. She retrieved the vehicle from Cole's Auto Body Shop. She never received a telephone call from anyone concerning removal of her vehicle.

On 8 September 1999, Alan Dean King's (King) 1987 Mazda truck broke down on U.S. 301 near the Black and Decker factory where he worked. King moved the vehicle to the shoulder of the road and returned to his workplace seeking tools to repair the vehicle. When King returned to his vehicle approximately ten to fifteen minutes later, he saw a wrecker backed up to the front of his vehicle preparing to remove it. King immediately ran to the

wrecker and asked the driver, whom he identified as Defendant, what he was doing. Defendant responded that the police had instructed him to remove the vehicle because it had been sitting there for approximately two days. After King disputed the latter assertion, Defendant unhooked the vehicle and drove away in his wrecker.

As Defendant drove away from King's vehicle, Sergeant Larry Page (Sergeant Page) of the Cumberland County Sheriff's Department approached King. After learning King had not authorized the towing of his vehicle, Sergeant Page pursued and stopped the wrecker. Sergeant Page asked Defendant to state his authority for attempting to tow the Mazda truck. Defendant responded he had received a telephone call from a "Mr. Johnson" to pick up the vehicle. Approximately one week earlier, Sergeant Page had seen a wrecker bearing the same words "Smitty & Sons" backed up to an older model blue Ford Tempo on U.S. 301; a Ford Tempo was later reported missing from the shoulder of U.S. 301.

Sergeant Page radioed for Sergeant Ronald Sykes (Sergeant Sykes) of the Cumberland County Sheriff's Department to come to the location of the stop. Sergeant Sykes, a detective assigned to the Cumberland County Sheriff's auto theft section, reported to the location of the stop. Sergeant Sykes transported Defendant to the law-enforcement center, where Defendant gave a statement that he had received a call from "Robert Johnson" to pick up his truck which had broken down in front of Black & Decker and that he had towed a Ford Tempo after receiving a call from "Jennifer Johnson" requesting him to pick up her Ford Tempo. Defendant took Sergeant

Sykes to Defendant's daughter's house near Vander, where a number of towed vehicles were kept. Defendant also indicated he towed vehicles to Cole's Auto Body Shop.

Law-enforcement authorities recovered the Callahan, Eevee, and Simmons vehicles either at Cole's Auto Body Shop or Defendant's daughter's residence.

At the close of the State's evidence, Defendant moved to dismiss the charges against him arguing there was no evidence of "permanent deprivation." The trial court denied Defendant's motion to dismiss. Defendant then presented evidence. After the close of all the evidence, Defendant moved to dismiss the charges against him. The trial court denied Defendant's motion.

The issues are whether: (I) the State presented substantial evidence of Defendant's intent to permanently deprive the rightful owner of the property; and (II) Defendant can be properly convicted and punished for both possession of stolen goods and larceny of those same goods.

I

Defendant argues the State did not present substantial evidence he had the intent to permanently deprive the rightful owner of the property. We disagree.

A motion to dismiss requires the trial court to determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) of the identify the accused as a perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117

(1980). The trial court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The trial court must disregard contradictions and discrepancies in the evidence, leaving them for jury resolution. *Id.* The test is the same whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982). If the evidence supports a reasonable inference of guilt, the trial court must deny the motion and allow the jurors to determine whether the evidence satisfies them beyond a reasonable doubt of the defendant's guilt. *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981).

The essential elements of larceny are that the defendant (1) took and carried away the property of another (2) without the owner's permission or consent and (3) with the intent to deprive the owner of his property permanently. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). With respect to the third element, "[i]ntent is a mental attitude seldom provable by direct evidence" but must "ordinarily be proved by circumstances from which [intent] may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974). Such circumstances from which intent to deprive an owner of his property may be inferred include the taking of another's property under conditions rendering it unlikely an owner will ever recover the property or the failure to return the property prior to apprehension by the police. *State v. Smith*,

268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966).

In this case, viewing the evidence in the light most favorable to the State, the evidence shows Defendant towed and possessed multiple disabled vehicles without lawful authority during a seven-day period. In some instances, Defendant possessed the vehicles for as many as seven days without ever contacting the owners of the vehicles to notify them of his possession of their vehicles and of their location. The owners recovered their vehicles only after Defendant was apprehended and arrested. This evidence is such substantial evidence to permit a jury to find Defendant took and carried away the vehicles with the intent to deprive the owners of their vehicles permanently. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charges against him.

II

Although the parties have not raised any other issues before this Court, we find error appearing on the face of the record. The indictments reflect that Defendant was charged both with possession of automobiles he allegedly stole and with larceny of those same automobiles. While a defendant may be charged both with possession of stolen goods and with larceny of those same goods, he can be convicted for only one of those offenses. *State v. Barnett*, 113 N.C. App. 69, 78, 437 S.E.2d 711, 717 (1993). Consolidation of the convictions for judgment does not cure this error. *Id.* Accordingly, the trial court erred in failing to arrest judgment for Defendant's four convictions of possession of stolen

automobiles. See *id.* We therefore remand for entry of judgment and sentencing on the remaining convictions of larceny. See *id.* at 79, 437 S.E.2d at 717.

Possession of stolen goods: judgment arrested.

Felonious larceny: remanded for resentencing.

Judges Hudson and Tyson concur.

Report per Rule 30(e).