NO. COA01-971

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. Washington County
No. 00 CRS 69

KENNY ROOSEVELT HOLLEY,
Defendant.

Appeal by defendant from judgment entered 23 January 2001 by Judge G.K. Butterfield in Washington County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General P. Bly Hall, for the State.

R. Andrew Womble, for the defendant.

HUDSON, Judge.

Defendant was convicted of felonious larceny and the trial court sentenced him to a presumptive term of ten to twelve months imprisonment. Defendant appeals.

The State's evidence tended to show that at about 10:18 p.m. on 2 February 2000, in response to a report of a suspicious vehicle in the area, Washington County Sheriff's Deputy Janice Spruill traveled to Arnold's Car Sales, a used car lot located in the Pea Ridge Community of Washington County, North Carolina. When Deputy Spruill arrived at the scene, she found defendant's blue van parked

with the motor running and defendant occupying the driver's seat. The side door of the van was open. Deputy Spruill heard suspicious sounds of people running emanating from the back of the building. The deputy subsequently placed defendant in her car, where she began to question him. She also drove her police car to the rear of the auto lot to further investigate the earlier sounds. There, she found the back door of the business open, and had the dispatcher call the owner, Mr. Bill Arnold.

When Mr. Arnold arrived, he noticed a red Honda four-wheeler on the lot, that he knew belonged to his neighbors Richard and Barbara Ochoa. Ms. Ochoa testified that she had last seen the vehicle parked on their property at about 9:00 p.m., and no one had been given permission to remove it. The vehicle's value was estimated to be about $3,500.

Defendant told Deputy Spruill that he had pulled over to take a nap after traveling from Edenton, North Carolina. Initially, defendant stated that he did not have any other passengers in the van, but subsequently changed his story and said that he was with some friends of family members who had probably left the van door open. Defendant contended that he did not know their names or their current location. Later, defendant told Deputy Spruill that he was with a fifteen or sixteen-year-old nephew, Dee Basnight, but did not know where he was and did not seem concerned about Basnight's disappearance.

Another Washington County Deputy Sheriff, Chris Frye, also responded to the scene. Deputy Frye found Anthony Stallings hiding

underneath a boat on the car lot. He and other law enforcement officers also found a dark green toboggan hanging on a limb about ten or fifteen feet into the woods behind the location where Stallings was found.

Stallings testified that he was riding with defendant and three of defendant's friends when defendant randomly pulled the van into the car lot. Then, the three friends jumped out and attempted to steal the four-wheeler. Stallings denied any involvement in the crime, insisting that he was merely riding along to see a friend. He stated that one of the other men in the van wore a green toboggan that evening, and that defendant never went to sleep when the van stopped. Defendant also called Deputy Spruill, who testified in conformity with her testimony already given for the State's case-in-chief. Defendant appeared *pro se* at trial and did not testify.

We note the State contends that defendant's appeal is subject to dismissal for failure to include a copy of his written notice of appeal from the superior court's judgment on 31 January 2001, in violation of N.C. R. App. Proc. 9(a)(3)(h) (1999). However, in accordance with Rule 9(a)(3)(h), defendant has included a copy of his appellate entries entered by the superior court on 31 January 2001. This is well within the ten-day period in which a defendant may timely appeal a conviction or sentence. Accordingly, we will not dismiss this appeal on this basis.

However, we conclude that defendant has not properly preserved for review the issue of the sufficiency of the evidence. At trial,

defendant did not move for dismissal at the close of the State's evidence or at the close of all of the evidence. It is well-settled that "[a] defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial." N.C. R. App. Proc. 10(b)(3) (1999). Moreover, while defendant contends that his failure to properly preserve this issue should be excused because he proceeded without counsel at trial, our Supreme Court has previously been unwilling to excuse defendant's deficient performance after he has elected to represent himself at trial. *See State v. Rich*, 346 N.C. 50, 62, 484 S.E.2d 394, 402 ("[A]lthough [a defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the life-blood of the law." (internal citations and quotations omitted)), *cert. denied*, 522 U.S. 1002, 139 L. Ed. 2d 412 (1997). Hence, having made the decision to represent himself, defendant will not now be heard to complain of that decision.

Even if the issue of the sufficiency of the evidence were properly before the Court, we conclude that taking the evidence in the light most favorable to the State, there was indeed substantial evidence, from which a reasonable fact finder could conclude that defendant (and his accomplices) took and carried away the Honda four-wheeler of Richard Ochoa, without the consent of Ochoa, and with the intent to permanently deprive Ochoa of the four-wheeler. *See State v. Ervin*, 43 N.C. App. 561, 564, 259 S.E.2d 406, 407

(1979) (finding sufficient evidence to convict defendants found in proximity to obvious larceny). Accordingly, this assignment of error is overruled.

No error.

Judges GREENE and TYSON concur.

Report per Rule 30(e).