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NO. COA02-110

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 01 CRS52973-4

CLARENCE ANTONIO OWENS

Appeal by defendant from judgments entered 4 October 2001 by Judge William C. Gore in Cumberland County Superior Court. Heard in the Court of Appeals 15 October 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Jeffrey Evan Noecker for defendant-appellant.

MARTIN, Judge.

Defendant, Clarence Antonio Owens, appeals from judgments entered upon his conviction by a jury of felonious larceny of a motor vehicle, possession of a stolen vehicle, felonious breaking or entering, felonious larceny and felonious possession of stolen property, and upon his plea of guilty to habitual felon status. The State's evidence at trial tended to show that on the night of 20 February 2001, Sergeant Charles Kimble and Investigators Jerry Wayne Schrecker and Carl Wile of the Fayetteville Police Department set up a stake out at the Smokers' Depot store in Fayetteville in response to a pattern of burglaries of local businesses which sold tobacco products. Investigator Schrecker hid inside the Smokers' Depot store while the other two officers waited in a police vehicle

about a mile away and remained in radio contact with Schrecker.

In the early morning hours of 21 February, a white car passed through the parking lot of the shopping center in which Smokers' Depot is located. Soon thereafter, a blue 1989 Toyota Camry drove into the parking lot and stopped in front of the Smokers' Depot store. A black male emerged from the passenger side of the Camry, holding a large white bag. The man broke the glass in the front window of the Smokers' Depot, entered the store and began gathering cigarettes into the bag. When Schrecker made a movement, the man ran out of the store and jumped into the passenger side of the Camry. At that time, Kimble arrived at the scene in the police vehicle and activated his blue lights and siren. A low-speed chase ensued. The chase ended when the Camry stopped and two men ran from the passenger-side door.

The three officers captured Nathaniel Hill, the driver of the Camry and the second person to leave the car; the passenger escaped. Defendant was subsequently apprehended on 8 March 2001. At trial, Officers Kimble and Wile each identified defendant as the other person who had fled from the Camry. Wile testified that he had observed defendant as he passed through the headlights of Wile's police vehicle on the night of the Smokers' Depot break-in. Officer Schrecker testified that defendant had a similar body type to that of the man he had seen inside the Smokers' Depot.

The Camry driven by Nathaniel Hill on the night of the break-in was owned by Stephanie Berry. She had last seen the car earlier that evening at about 7:00 p.m., when she left it parked in her

yard. When the vehicle was recovered by police after the chase, it was found to have a piece of metal inserted into the ignition and the driver's side rear window broken out. When Berry left her car, neither the ignition nor any window had been tampered with.

The State also introduced evidence that defendant was involved in two previous Cumberland County burglaries perpetrated in the same way as the Smokers' Depot break-in. Each involved the theft of large quantities of cigarettes from a convenience store, to which the perpetrator had gained entrance by breaking a window. On 14 February 2000, the Economy Food Center was burglarized; the following day James Smith observed the defendant carrying a white bag filled with cartons of cigarettes. When Smith attempted to question him, defendant fled. During the early morning hours of 27 November 2000, deputy sheriff Myra Farmer responded to an alarm at a Thrifty Mart and saw defendant leaving the building carrying a large white bag. Defendant fled, dropping the bag which contained about forty cartons of cigarettes.

Defendant's motion to dismiss all of the charges at the close of the State's evidence was denied; defendant offered no evidence.

After the jury returned verdicts of guilty of felonious larceny of a motor vehicle, possession of a stolen vehicle, felonious breaking or entering, felonious larceny and felonious possession of stolen property, defendant entered a plea of guilty to habitual felon status. The trial court arrested judgment on the charges of possession of a stolen vehicle and possession of stolen property, and entered judgment sentencing defendant to consecutive active

terms of imprisonment on the remaining charges.

Defendant presents arguments in support of four of the twenty assignments of error contained in the record on appeal; the remaining sixteen assignments of error contained in the record on appeal are deemed abandoned. N.C.R. App. P. 28(a) and 28(b)(6). We find no error.

I.

Defendant first argues that the trial court erred by denying his motion to dismiss the charges of felonious larceny of the Camry and possession of a stolen vehicle¹ because there was insufficient evidence that he stole the Camry or was in possession of it. In the same argument, he also contends the trial court erred by instructing the jury on the principle of acting in concert.

In considering a motion to dismiss, a court must determine whether there is substantial evidence of each element of the charged offense. *State v. Jones*, 147 N.C. App. 527, 556 S.E.2d 644 (2001), *disc, review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "[A]ll of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference." *Id.*

¹ Because the trial court arrested judgment as to the charge of felonious possession of a stolen vehicle, we will not address defendant's argument with respect to that offense.

Conviction for larceny requires proof that the defendant carried away the personal property of another without the owner's consent, with intent to permanently deprive the owner of the property and convert it to the defendant's own use. *State v. Boykin*, 78 N.C. App. 572, 337 S.E.2d 678 (1985). A larceny becomes a felony when the value of the property taken is over \$1,000. N.C. Gen. Stat. § 14-72(a) (2002). Defendant concedes that the State has carried its burden of establishing all elements of felonious larceny of the Camry, except, he contends, the State failed to prove that it was he who committed the larceny.

To prove defendant's guilt of larceny of the Camry, the State relied upon the doctrine of possession of recently stolen goods. The doctrine raises a permissible inference that a person in possession of stolen property recently after the theft is the thief. *State v. Woods*, 77 N.C. App. 622, 625, 336 S.E.2d 1, 2 (1985), *affirmed*, 317 N.C. 143, 343 S.E.2d 538 (1986). "To invoke the doctrine of recently stolen goods, the State must prove beyond a reasonable doubt that (1) the property was stolen; (2) the stolen goods were found in defendant's custody and control, to the exclusion of others; and (3) the possession was recently after the commission of the larceny." *Id.* Defendant concedes that the State provided substantial evidence that the Camry was stolen and that he was found in the car "recently" following the theft. Thus, defendant challenges only the "possession" element of the doctrine of recent possession.

The "exclusive possession" element of the doctrine is not

absolute. "[E]xclusive possession may be joint possession if persons are shown to have acted in concert." *State v. Solomon*, 24 N.C. App. 527, 529, 211 S.E.2d 478, 480 (1975). Moreover, this court has recently held that actual possession of the stolen property is not required. "Rather, '[p]roof of nonexclusive, constructive possession is sufficient Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the [property].'" *State v. Osborne*, 149 N.C. App. 235, 239, 562 S.E.2d 528, 531 (2002) (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)), *affirmed*, ___ N.C. ___, ___ S.E.2d ___ (22 November 2002).

In support of his argument that he did not have requisite possession of the Camry, defendant cites *State v. Franklin*, 16 N.C. App. 537, 192 S.E.2d 626 (1972) and *State v. Frazier*, 268 N.C. 249, 150 S.E.2d 431 (1966). In *Franklin*, a police officer stopped a stolen car driven by defendant Franklin. Defendant Hughes was in the passenger seat. This Court refused to apply the doctrine of recent possession to Hughes because, it said, "[t]aking the evidence in the light most favorable to the State, all that is shown is that defendant Hughes was a passenger in a stolen vehicle There is no evidence that defendant Hughes was acting in concert with defendant Franklin or that they were *[p]articeps criminis*." *Franklin*, 16 N.C. App. at 540, 192 S.E.2d at 628. The Court based its decision on the fact that the defendants did not try to outrun the police officer in that car and that neither

defendant attempted to flee on foot once the car was stopped. *Id.* In this respect, the *Franklin* court distinguished *Frazier*. In *Frazier*, the North Carolina Supreme Court concluded that the driver and passenger of a stolen car were in joint possession, based upon evidence that each jumped from the car and ran when police approached them. *Frazier*, 268 N.C. at 252, 150 S.E.2d at 434. As a result, the passenger's conviction for the theft of the automobile under the doctrine of recent possession was affirmed.

Defendant attempts to distinguish *Frazier* by highlighting the fact the defendants in that case had no apparent reason to flee, apart from their possession of the stolen car. Defendant contends that he ran from the car only because of his apparent involvement in the Smokers' Depot break-in and that his flight does not support the inference that he acted in concert with Hill in the larceny of the Camry. His argument, however, ignores substantial evidence indicating his joint possession, with Hill, of the car. The State's evidence indicates that defendant not only fled the Smokers' Depot in the stolen Camry, but also that he arrived in it. Defendant thus used the car before, during and after the break-in. It is reasonable to infer from the facts that when defendant and Hill fled the car after being stopped, they did so not only because they had been seen at the Smokers' Depot, but also because they were using a stolen vehicle. Considered in the light most favorable to the State, and giving the State the benefit of every reasonable inference, the evidence supports the conclusion that defendant was in joint possession of the Camry. *See Frazier*,

supra. Hence, the possession element of the doctrine of recent possession is satisfied and the trial court did not err in denying defendant's motion to dismiss the charge of felonious larceny of the Camry.

II.

Defendant next argues the trial court erred by instructing the jury on the principle of acting in concert because there was insufficient evidence to support such a theory. Under North Carolina law, "[i]f the defendant is present with another and with a common purpose does some act which forms part of the offense charged, the judge must explain and apply the law of 'acting in concert'" *State v. Mitchell*, 24 N.C. App. 484, 486, 211 S.E.2d 645, 647 (1975). As demonstrated above, the evidence is sufficient to support the conclusion that defendant and Hill jointly possessed the stolen car. The jury's finding of joint possession, or concerted action, was necessary to support the State's theory of recent possession. Therefore, the trial court did not err in instructing the jury on the issue of acting in concert.

III.

In his third argument, defendant contends the trial court erred by admitting evidence of other crimes pursuant to North Carolina Rule of Evidence 404(b) and 403. While it prohibits admission of evidence of other crimes to prove character, Rule 404(b) permits such evidence for purposes of proving, *inter alia*; motive, opportunity, preparation, plan, and identity. N.C. Gen. Stat. § 8C-1, Rule 404(b). In the instant case, the trial court

properly admitted the challenged evidence for the purpose of proving identity and *modus operandi*.

Evidence admitted under Rule 404(b) is also subject to the requirements of Rule 403, which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (2002). The rule requires the court, when making a determination as to whether to admit challenged evidence, to balance the probative nature of the evidence versus its potential prejudice to the defendant. *State v. Wilson*, 345 N.C. 119, 478 S.E.2d 507 (1996). "[W]hether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, whose ruling may be reversed for abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *State v. Billings*, 104 N.C. App. 362, 371-72, 409 S.E.2d 707, 712-13 (1991).

Defendant argues that the State's evidence that two previous, substantially similar break-ins involving defendant is overly prejudicial and should have been excluded by the trial court. As defendant points out, the trial court deemed the evidence "highly prejudicial;" however, evidence which is probative of guilt is also necessarily prejudicial to the defendant. Thus, "the question . . . is one of degree." *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986). Relevant evidence need only be excluded under

Rule 403 if it would result in *unfair* prejudice to the defendant. *Wilson*, 345 N.C. at 127, 478 S.E.2d at 513. "'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis.'" *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (quoting G.S. § 8C-1 Rule 403 commentary (Supp. 1985)).

We hold that the State's evidence in this case of the previous two break-ins is not unfairly prejudicial. The evidence of such similar crimes and defendant's involvement in those crimes is certainly probative and, though also prejudicial, it is reasonable to conclude that such prejudicial effect is outweighed by the probative value of the evidence. The trial court did not abuse its discretion in allowing the challenged evidence.

IV.

Finally, defendant argues that the trial court committed plain error in failing to inform the defendant prior to his trial that he was being prosecuted as an habitual felon. We disagree. Defendant relies upon *State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977), in support of his argument that he is entitled to a new trial. *Allen* holds that an habitual felon hearing is necessarily ancillary to, and may not be held separate from, an underlying felony charge. *Allen*, 292 N.C. at 435-36, 233 S.E.2d at 588. The *Allen* decision also notes that a defendant must be put on notice that he is being prosecuted for a felony as a recidivist. *Id.* at 436, 233 S.E.2d at 588. In the instant case, the State complied with the holding in *Allen* by issuing separate indictments for the underlying felony

charges and the habitual felon status, but trying both in the same proceeding. By filing the habitual felon indictment and by referring to that indictment in pre-trial hearings, the State put defendant on notice of his prosecution as a recidivist. This assignment of error is overruled.

We hold defendant received a fair trial, free from prejudicial error.

No error.

Judges GREENE and BRYANT concur.

Report per Rule 30(e).