NO. COA06-379

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v. Lenoir County
No. 05 CRS 050931

CLAYTON FERNANDO CLARK, JR.

Appeal by defendant from judgment entered 1 November 2005 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 2 October 2006.

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

Terry F. Rose, for defendant-appellant.

TYSON, Judge.

Clayton Fernando Clark, Jr. ("defendant") appeals from judgment entered after a jury found him to be guilty of possession of a stolen motor vehicle. We find no error.

I. Background

The State's evidence tended to show that on 24 January 2005 Kinston Police Officer James Gwartney ("Officer Gwartney") received information from a confidential informant that defendant was in possession of a stolen vehicle. Officer Gwartney listened as the informant called defendant over a speaker phone to discuss purchasing the stolen vehicle. During the conversation, the

informant called defendant "Clay" and defendant stated that he had a GMC Yukon. Defendant and the informant negotiated a sale price of $1,500.00 for the vehicle and agreed to meet at the Friendly Grocery Store to complete the transaction. Defendant arrived at the location in a blue GMC Yukon and was paid $1,500.00 for the vehicle. Subsequently, officers determined that the vehicle had in fact been stolen.

Mike Mozingo, owner of Triple M Auto Sales, testified that his used car dealership was the owner of the stolen vehicle, and had reported the vehicle stolen on 5 November 2004.

On 13 July 2005, defendant was indicted on charges of possession of a stolen motor vehicle and possession of stolen goods. The indictments alleged that the vehicle was the property of "Triple M Motors." At the close of the State's evidence, the State moved to correct the indictment to reflect that the owner of the vehicle was "Triple M Auto Sales." The motion was allowed.

A jury found defendant to be guilty of possession of a stolen motor vehicle. The trial court sentenced him to an active term of eight to ten months imprisonment. Defendant appeals.

II. Issues

Defendant argues that the trial court erred by: (1) allowing the State's motion to amend the indictment and (2) allowing an audio recording of the conversation between him and the informant into evidence.

III. Amendment of Indictment

Defendant asserts that the amendment was a substantial

alteration and should not have been allowed pursuant to N.C. Gen. Stat. § 15A-923(e). N.C. Gen. Stat. § 15A-923(e) (2005) states, "[a] bill of indictment may not be amended." However, N.C. Gen. Stat. § 15A-923(e) "has been construed to mean only that an indictment may not be amended in a way which 'would substantially alter the *charge* set forth in the indictment.'" *State v. May*, 159 N.C. App. 159, 162, 583 S.E.2d 302, 304 (2003) (quoting *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475, *disc. rev. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)). The trial court's allowance of an amendment of an indictment would not constitute reversible error unless the item amended was an essential element of the offense. *Id*; *see also State v. Brady*, 147 N.C. App. 755, 759, 557 S.E.2d 148, 151 (2001) (No error where the indictment was amended, changing the controlled substance named from "Xanax" to "Percocet," because the change "did not substantially alter the charge against the defendant.").

IV. Possession of Stolen Vehicle

Defendant was charged with possession of a stolen motor vehicle.

> A defendant charged with possession of stolen property under G.S. 14-71.1 or possession of a stolen vehicle under G.S. 20-106 may be convicted if the State produces sufficient evidence that defendant possessed stolen property (i.e., a vehicle), which he *knew or had reason to believe* had been stolen or taken.

State v. Bailey, 157 N.C. App. 80, 83-84, 577 S.E.2d 683, 686 (2003) (citing *State v. Lofton*, 66 N.C. App. 79, 83, 310 S.E.2d 633, 635-36 (1984)). Here, the indictment was solely changed from

"Triple M Motors" to "Triple M Auto Sales," the name of the owner of the vehicle.

The name of the owner of the vehicle from whom it was stolen is not an essential element of the offense. A variance between the indictment's allegation of ownership of the vehicle and the proof of ownership is not fatal. *See State v. Jones*, 151 N.C. App. 317, 327, 566 S.E.2d 112, 119, *cert. denied*, 540 U.S. 842, 157 L. Ed. 2d 76 (2002); *State v. Medlin*, 86 N.C. App. 114, 124, 357 S.E.2d 174, 180 (1987); *see also* N.C. Gen. Stat § 14-71.1 (2005); N.C. Gen. Stat. § 20-106 (2005). We hold the change in the indictment to reflect the owner of the vehicle from "Triple M Motors" to "Triple M Auto Sales" did not substantially alter the indictment against defendant. This assignment of error is overruled.

V. Admission of Audio Recording

Defendant next argues the trial court erred by allowing an audio recording of the conversation between defendant and the informant into evidence. Defendant contends the admission of the recording violated his right to confront and cross-examine the informant, who was not present at trial. *See generally*, *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

Defendant failed to preserve this argument on appeal or to raise this argument at trial. Defendant objected to the admission of the evidence based on N.C. Gen. Stat. § 15A-287, which prohibits the interception and disclosure of wire, oral or electronic communications without the consent of at least one party to the communication.

> Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts . . . The defendant may not change his position from that taken at trial to obtain a steadier mount on appeal.

State v. Holliman, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (quotations omitted); *see State v. Monk*, 132 N.C. App. 248, 254, 511 S.E.2d 332, 336, *disc. rev. denied*, 350 N.C. 845, 539 S.E.2d 1 (1999) ("'In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the *specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context.'" (quoting N.C.R. App. P. 10(b)(1))). Defendant did not raise this argument at trial and cannot assert this argument for the first time on appeal. This assignment of error is dismissed.

VI. Conclusion

The trial court properly allowed the State to substitute the actual name of the owner of the stolen vehicle in the indictment. This change did not alter the charges against defendant. Defendant received a fair trial free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).