NO. COA08-1059

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 07 CRS 57598
07 CRS 226720-22

RONNIE EUGENE SIMPSON

Appeal by defendant from judgment entered 24 April 2008 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 March 2009.

*Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State*.

*M. Alexander Charns, for defendant-appellant*.

CALABRIA, Judge.

Ronnie Eugene Simpson ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of felony possession of stolen goods, possession of a stolen vehicle, and possession of implements of housebreaking. We find no error.

On the morning of 13 June 2007, a 911 call was made to the Charlotte-Mecklenburg Police Department indicating a truck was parked on the side of the road with an occupant possibly in need of medical assistance. When officers arrived, they found a delivery truck parked facing the wrong way on the street, with the defendant asleep inside. Officers checked the license plate numbers on the

truck and determined it had been reported stolen the previous day. The defendant was awakened, removed from the truck, arrested, and placed in the back of a police car.

Officers then conducted a search of the truck. The search of the front of the truck produced a flashlight, a tire iron, a screwdriver, and a utility blade in the cab of the truck. In the enclosed rear of the truck, officers found digging augers and motors that were later determined to have been stolen the previous night from Champion Fence Builders, which was located nearby. The stolen vehicle was then returned to its owner, who indicated that none of the items discovered during the search belonged to him and that the items were not in the vehicle prior to when it was stolen.

One of the officers asked the defendant if he could talk to him, and defendant responded that he knew nothing about the stolen items and that talking to detectives typically got him in more trouble. The officer made no further attempts to interrogate or otherwise talk to the defendant after that initial exchange.

At defendant's trial in Mecklenburg County Superior Court on 22 April 2008, defendant made a motion to dismiss at the close of the State's evidence. The trial court denied the motion. The defendant did not present evidence. A jury returned guilty verdicts for the charges of felony possession of stolen goods, possession of a stolen vehicle, and possession of implements of housebreaking. The jury also returned verdicts of not guilty for the charges of felony larceny and injury to real property. Defendant admitted to attaining the status of a habitual felon and

was sentenced to two consecutive sentences of a minimum term of eighty months to a maximum term of 105 months in the North Carolina Department of Correction. Defendant appeals.

I. Variance in the Indictment

Defendant argues there was a fatal variance in the indictment for possession of stolen goods because the indictment alleged that the stolen goods were the property of a corporation, while the evidence presented only established that the stolen goods belonged to an individual business owner. We disagree.

Robert F. McGee testified that he was the business owner and vice-president of Champion Fence Builders. During his testimony, he identified the stolen property as both "our machine diggers," and "my machines," but never specifically testified that Champion Fence Builders was a corporation or that the property belonged to Champion Fence Builders, Inc., as alleged in the indictment.

The purpose of the indictment is to provide:

> (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court . . . to pronounce sentence according to the rights of the case.

*State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (citation omitted). Defendant argues that although he was found not guilty of larceny, the ownership identification requirements for an indictment for larceny should also apply to an indictment for the possession of stolen goods. "[A]n indictment for larceny must allege the owner or person in lawful possession of the stolen

property." *State v. Downing*, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985). An element of larceny is that the property was taken without the owner's consent. *State v. Weaver*, 359 N.C. 246, 255, 607 S.E.2d 599, 604 (2005). A larceny indictment that incorrectly alleges ownership creates a fatal variance between the allegations in the indictment and the evidence presented at trial. If a larceny indictment fails to state the correct owner, then the State would be unable to prove the owner did not provide consent. The evidence regarding an essential element of the crime would not match the indictment. Therefore, the defendant would not be properly informed of the charges and the evidence that would be presented against him. *Hunt*, at 267, 582 S.E.2d at 600. In this respect, an indictment for larceny can be distinguished from an indictment for other crimes, such as robbery, which "will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property." *State v. Spillars*, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1992); *see also State v. Jackson*, 306 N.C. 642, 650-51, 295 S.E.2d 383, 388 (1982) ("As long as the evidence shows the defendant was not taking his own property, ownership is irrelevant . . . A taking from one having the care, custody or possession of the property is sufficient.").

In the instant case, the defendant was convicted of possession of stolen property. The elements of this crime are: 1) possession of personal property; 2) valued at more than $1000; 3) which has been stolen; 4) the possessor knowing or having reasonable grounds

to believe the property to have been stolen; and 5) the possessor acting with a dishonest purpose. *State v. Martin*, 97 N.C. App. 19, 25, 387 S.E.2d 211, 214 (1990). As with robbery, the owner of the property is not an essential element that must be proven to establish the crime of possession of stolen goods. The State is only required to show that the property does not belong to the defendant.

In the instant case, the indictment sufficiently alleged the property did not belong to the defendant. There was no fatal variance. This assignment of error is overruled.

II. Motion to Dismiss

Defendant next argues that the court erred in denying his motion to dismiss the charges against him because no evidence was presented that the defendant stole the truck, was aware there was stolen property in the back of the truck, or aware the truck contained burglary tools.

> When considering a defendant's motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. Specifically, if a reasonable juror could draw an inference of defendant's guilt from the evidence before him, the evidence is sufficient to allow the jury to consider the issue even if the same evidence may also support an equally reasonable inference of the defendant's innocence.

*State v. Turner*, 168 N.C. App. 152, 155, 607 S.E.2d 19, 22 (2005) (internal quotations and citations omitted). We review the

decision of the trial court *de novo*. *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478, 617 S.E.2d 61, 64 (2005).

A defendant has possession of stolen property when he has both the power and intent to control its disposition or use. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "One who has the requisite power to control and intent to control access to and use of a vehicle or a house has also the possession of the known contents thereof." *State v. Eppley*, 282 N.C. 249, 254, 192 S.E.2d 441, 445 (1972) (citation omitted).

To prove possession of a stolen vehicle, the State must show that defendant knew or had reason to believe that the vehicle had been stolen or unlawfully taken. N.C. Gen. Stat. § 20-106 (2008). Where contraband is found on the premises under the control of a defendant, "this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Suitt*, 94 N.C. App. 571, 573, 380 S.E.2d 570, 571 (1989) (internal citation omitted).

To prove possession of implements of housebreaking, the State has to show that defendant had in his possession, without lawful excuse, "any picklock, key, bit, or other implement of housebreaking. . . ." N.C. Gen. Stat. § 14-55 (2008). Where contraband material, such as burglary tools, are under the control of a defendant, even though the defendant is the borrower of a vehicle, "this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case

to the jury." *State v. Glaze*, 24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974).

Whether defendant knew or had reasonable grounds to believe that the items were stolen must necessarily be proved through inferences drawn from the evidence. *State v. Allen*, 45 N.C. App. 417, 421, 263 S.E.2d 630, 633 (1980). "The intent may, and generally must, be proven by circumstantial evidence, for as a rule it is not susceptible of direct proof. It may be inferred from the time and manner at and in which the [crime] was [committed], or the conduct of the accused after the [crime], or both." *State v. Hawkins*, 155 N.C. 466, 472, 71 S.E. 326, 328 (1911).

In the instant case, defendant was found asleep in the driver's seat of a stolen truck less than a day after it was stolen. The keys to the truck were sitting on the seat next to the defendant, who was the vehicle's only occupant. The back of the truck contained augers and drill bits that had been stolen less than twelve hours prior from a company located only a few miles away. Burglary tools were found in the cab of the truck in plain view of the defendant. The evidence in the present case, viewed in the light most favorable to the State, was sufficient to present the case to the jury and the trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

III. Testimony of Defendant's Silence

Defendant argues that the testimony of the police officers regarding the pre-arrest silence of the defendant was fundamental

error. Defendant did not object at trial to the testimony of the police officers and therefore, we review this assignment of error under the plain error standard. *State v. Bass*, 190 N.C. App. 339, 345, 660 S.E.2d 123, 127 (2008).

> Plain error is a fundamental error, so lacking in its elements that justice cannot be done. Plain error amounts to a denial of a fundamental right of the accused such as denial of a fair trial or the error seriously impacted the fairness, integrity or public reputation of the judicial proceedings, or where it can fairly be said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

*Id.* at 345-46, 660 S.E.2d at 127-28 (internal citations and quotations omitted).

A defendant's proper invocation of the privilege against self-incrimination is protected from prosecutorial comment, or substantive use, no matter whether such invocation occurs before or after a defendant's arrest. *State v. Boston*, __ N.C. App. __, __, 663 S.E.2d 886, 895-96 (2008). The State may use pre-arrest silence to impeach the defendant, *see e.g., State v. Bishop*, 346 N.C. 365, 386, 488 S.E.2d 769, 780 (1997), but where, as here, the defendant chooses not to testify, and therefore cannot be impeached, the use of defendant's pre-arrest silence by the prosecution is a violation of defendant's constitutional rights. *Boston*, __ N.C. App. at __, 663 S.E.2d at 896.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2008). *Boston* provides the factors to

consider in determining whether use of defendant's pre-arrest silence is harmless beyond a reasonable doubt. These include:

> whether the State's other evidence of guilt was substantial; whether the State emphasized the fact of [defendant's] silence throughout the trial; whether the State attempted to capitalize on [defendant's] silence; whether the State commented on [defendant's] silence during closing argument; whether the reference to [defendant's] silence was merely benign or *de minimis*; and whether the State solicited the testimony at issue.

*Boston*, __ N.C. App. at __, 663 S.E.2d at 896-97.

Officer T. W. Davis ("Officer Davis") and Officer C. E. Quates ("Officer Quates") of the Charlotte-Mecklenburg Police Department testified regarding defendant's silence upon being awakened in the stolen vehicle. Officer Davis testified:

> Q: Do you remember if you asked him what was going on or put up a fight or argued or anything?
>
> A: No, he was pretty much in a sleepy state.
>
> Q: Did he say anything that you recall?
>
> A: No, he did not.

Officer Quates testified:

> Q: Do you remember if he said anything or acted like, you know, what are you all doing? Was he surprised or what?
>
> A: I don't really recall that, you know, he was like that. We just basically told him that, you know - he didn't say, you know, what's going on or something like that, you know. We basically said well, the vehicle's stolen and, you know, for the reason for handcuffing him and putting him in the patrol car.
>
> Q: But that was it?

A: Yes.

These are the only references to defendant's silence that were made by the State. There is no evidence in the record[1] that the State made any additional reference to defendant's silence at any other point in the trial, nor that the State made any effort to capitalize on defendant's silence. The references to defendant's silence were *de minimis*. Although the testimony about defendant's silence was solicited by the State, it was not for substantive purposes, but rather to establish the chronology of defendant's arrest. The evidence of defendant's guilt, as discussed above, was substantial. Even if the testimony about defendant's silence had been disallowed, the remaining evidence was sufficient to support defendant's conviction. The trial court's error, if any, was harmless beyond a reasonable doubt. This assignment of error is overruled.

## IV. Ineffective Assistance of Counsel

Defendant argues that trial counsel rendered ineffective assistance by failing to request recordation of jury selection and opening and closing arguments. To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct.

[1] We note that the record does not contain a transcript of the closing arguments, so we cannot determine if the State referenced the defendant's silence at that time.

2052, 2064 (1984). Only certain portions of a criminal trial require transcription under our statutes.

> The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except: (1) Selection of the jury in noncapital cases; (2) Opening statements and final arguments of counsel to the jury; and (3) Arguments of counsel on questions of law.

N.C. Gen. Stat. § 15A-1241(a) (2007). However, "[u]pon motion of any party or on the judge's own motion, proceedings excepted under subdivisions (1) and (2) of subsection (a) must be recorded." N.C. Gen. Stat. § 15A-1241(b) (2007). Defendant concedes that his trial counsel did not make a motion for complete recordation of his trial. Requiring complete recordation for all aspects of defendant's trial would require this Court to modify statutory law, which is a role reserved for the legislature. *See State v. Verrier*, 173 N.C. App. 123, 130, 617 S.E.2d 675, 680 (2005). Defendant correctly concedes that he cannot show prejudice from trial counsel's alleged ineffective assistance. This assignment of error is overruled.

Defendant has failed to bring forth any argument regarding his remaining assignment of error. As such, we deem this assignment of error abandoned pursuant to N.C.R. App. P. 28(b)(6) (2007).

No error.

Judges HUNTER, Robert C. and HUNTER, Jr., Robert N. concur.

Report per Rule 30(e).