NO. COA08-1565

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

STATE OF NORTH CAROLINA

v. Caswell County
Nos. 08 CRS 327-330

WILLIAM LEE WALKER

Appeal by defendant from judgment entered 27 August 2008 by Judge Ronald Stephens in Superior Court, Caswell County. Heard in the Court of Appeals 7 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Steven A. Armstrong, for the State.

Winifred H. Dillon, for defendant-appellant.

WYNN, Judge.

"[T]hough a defendant may be indicted and tried on charges of larceny, receiving and possession of the same property, he may be convicted of only one of those offenses."[1] Here, Defendant William Lee Walker argues, and the State concedes, that the trial court erred by entering judgment on charges of felonious larceny and possession of the same property. Accordingly, we vacate the conviction for possession of stolen goods. Because Defendant's

[1] *State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982) (citations omitted).

judicial admission was insufficient to support his habitual felon conviction, we also reverse that judgment and remand for a new habitual felon hearing and re-sentencing.

The State's evidence tended to show that in late 2007, Steve Sharpe owned a 1992 white GMC Rodeo fifteen-passenger van that he kept parked behind his place of business. Mr. Sharpe no longer drove the van even though it still ran, but he intended to sell its parts. He estimated the value of the van to be about $1,700 to $1,800. Mr. Sharpe recalled seeing the van parked behind his place of business on Friday, 21 December 2007. Although he drove by his business on Saturday at least twice to and from his house, he did not notice that the van was missing. However, he did notice unusual tire tracks and a clump of grass at the end of the driveway that Saturday. Mr. Sharpe noticed the van was missing the next morning, on Sunday, 23 December 2007. He called the Sheriff's Department, and Sergeant Michael Adkins responded.

Sergeant Adkins testified that when he responded on 23 December 2007, he observed the tire tracks leading away from where the van was reportedly parked. Mr. Sharpe provided the van's general description and its vehicle identification number (VIN).

Sergeant Adkins found the van at Hayes Iron and Metals, a scrap metal dealer, on 27 December 2007. While there, Sergeant Adkins obtained a receipt dated 22 December 2007. The receipt was signed by William Walker, and it indicated that Hayes Iron

and Metals had paid $393.70 for a car. Based on this information, Sergeant Adkins went to an address he had for Defendant to ask whether he had been to Hayes Iron and Metals. Defendant denied going there, but agreed to provide a signature for comparison.

Mary Ann Price, who works for Hayes Iron and Metals, testified that around 10:00 AM on 22 December 2007, Defendant and Donnie Walker offered a white van for sale as scrap. Defendant came into the shop to complete the sale. Ms. Price stated that she wrote a receipt for the van based on its weight, paid Defendant its value in cash, and had Defendant sign the receipt.

Defendant's witnesses presented a potential explanation for how the Walkers came into possession of the van. Donnie Walker, Defendant's son, stated that he and his wife, Tiffany Walker, share a residence with Defendant and his girlfriend, Teresa Pleasant. A sign in their yard advertises that they "pull cars, sell cars and buy cars." On 22 December 2007, a man Donnie Walker did not know offered to sell the Walkers a white van. Defendant's girlfriend allegedly gave Donnie Walker $100 cash to purchase the van. Donnie Walker presented a receipt, on which the man signed "John." According to Donnie Walker's testimony, Defendant was not home when he purchased the van, but they later took it to Hayes Iron and Metals and sold it for cash. Donnie Walker's account of these events was generally corroborated by Tiffany Walker's and Teresa Pleasant's trial testimony. Donnie

Walker acknowledged that he later pleaded guilty to possession of stolen property.

The trial court denied Defendant's motions to dismiss at the close of the State's evidence and at the close of all the evidence. After deliberations, the jury returned verdicts of guilty of felonious larceny, possession of stolen goods, and obtaining property by false pretenses. When asked if he admitted or denied habitual felon status, defense counsel stated, "We admit that." The trial court consolidated the offenses for judgment and sentenced Defendant as an habitual felon to one active term in the mitigated range of 96 to 125 months imprisonment.

On appeal, Defendant argues the trial court erred by: (I) demonstrating partiality to the State through its substantial questioning of witnesses; (II) entering judgment for felonious larceny and possession of stolen goods; and (III) sentencing him as an habitual felon because his judicial admission to attaining habitual felon status was insufficient to support that conviction.

I.

Defendant first argues the trial judge failed to maintain impartiality when he repeatedly questioned witnesses throughout the trial. He contends the trial judge showed bias by undercutting defense counsel's cross-examination of the State's witnesses and by intervening in the questioning of defense

witnesses such that the court's questions cast doubt on Defendant's theory of the case. We do not agree.

The court may question a witness for the purpose of clarifying his or her testimony. *State v. Smarr*, 146 N.C. App. 44, 49, 551 S.E.2d 881, 884 (2001), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002). "Such questions are only prejudicial if 'by their tenor, frequency, or persistence, the trial judge expresses an opinion.'" *Id.* (quoting *State v. Rinck*, 303 N.C. 551, 562, 280 S.E.2d 912, 921 (1981)). This Court utilizes a totality of the circumstances test to determine whether a judge's comments constitute impermissible opinion. *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995).

Defendant particularly points to the trial court's questioning of defense witness Donnie Walker at the end of the State's cross examination:

> THE COURT: Let me ask you when you were talking to the judge when he took your plea, did you tell the judge or did he ask you about this story that you told us with regard to the man that showed up, John, and this payment of a hundred dollars?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: All of that come out?
>
> THE WITNESS: Yes, sir. I told him I purchased the vehicle.
>
> THE COURT: Did you tell him what the circumstances were about the purchase?

> THE WITNESS: Yes, sir. Yeah. I did tell him because I remember I told him I gave a hundred dollars for it.
>
> THE COURT: I'm just asking whether or not you told the judge you purchased a vehicle for a hundred dollars or did you tell him about this guy coming up in the yard leaving the van and all this other stuff you told us?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: You told him that?
>
> THE WITNESS: Yes, sir. Yes, sir.
>
> THE COURT: All right.
>
> [PROSECUTOR]: I do have something.
>
> THE COURT: Wait a minute. Um, well, did you ever tell law enforcement that? Did you ever make a statement to law enforcement and tell him about John?
>
> THE WITNESS: No, sir.
>
> THE COURT: You never told him about John?
>
> THE WITNESS: No, I ain'[t]. I didn't talk to no officer.
>
> THE COURT: So, the first time you told that story, at least publicly, was to the judge?
>
> THE WITNESS: Yes, sir.

Defendant contends the trial judge's prolonged questioning and use of the phrases "that story" and "all this ... stuff" conveyed an opinion to the jury that he found Donnie Walker's testimony to be unbelievable.

Likewise, Defendant asserts that the trial court interjected itself too much into the questioning of defense witness Teresa

Pleasant. In particular, Defendant takes issue with this exchange that took place after the prosecutor concluded cross-examination:

> THE COURT: Okay. Let me make sure I'm straight. So, you never saw John? You never saw this guy John; is that right? John on your receipt; did you ever actually see John?
>
> THE WITNESS: No.
>
> THE COURT: Okay. You never went outside? Never saw John?
>
> THE WITNESS: Only Donnie. Donnie was the only one out there with him. I don't know.

Here, our review of the entire transcript persuades us that the trial court did not demonstrate impartiality. The judge questioned witnesses for the State and Defendant, and the questions were directed at clarifying witness testimony. Moreover, the judge gave a cautionary instruction regarding his involvement in the proceedings, by instructing the jury "not to draw any inferences from . . . any question that I may have asked a witness or anything else that I may have said or done in the matter."

Although the trial judge's questions to defense witnesses Donnie Walker and Teresa Pleasant were pointed, they still were aimed at clarifying testimony already given and do not rise to the level of an opinion regarding the credibility of the witnesses. In considering the totality of the circumstances, and the judge's relatively consistent conduct throughout the trial,

we do not find error in the judge's questioning of the witnesses. Accordingly, we reject this argument.

II.

Defendant next argues, and the State concedes, that the trial court erred in entering convictions for both larceny and possession of the same stolen goods in violation of *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982). We agree.

In *Perry*, our Supreme Court held that a defendant may be indicted and tried on charges of both larceny and possession of the same property; however, he may be convicted of and sentenced for only one of those offenses. *Perry*, 305 N.C. at 237, 287 S.E.2d at 817. Although they are separate and distinct offenses, the "[l]egislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole." *Id.* at 235, 287 S.E.2d at 816. The fact that the charges were consolidated into one judgment for purposes of sentencing does not cure the error. *State v. Owens*, 160 N.C. App. 494, 499, 586 S.E.2d 519, 523 (2003). Because Defendant was convicted on both the larceny and possession charges, we vacate the judgment entered on the possession of stolen goods conviction.

III.

By his last argument, Defendant contends the trial court erred in sentencing him as an habitual felon where the issue was

not submitted to the jury and Defendant did not plead guilty to habitual felon status. We agree.

In *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001), this Court held that a defendant's stipulation to habitual felon status "in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea." *Id.* at 471, 542 S.E.2d at 699. This Court noted that the trial court failed to address the defendant personally and to conduct an inquiry required by N.C. Gen. Stat. § 15A-1022(a) to establish a record of a guilty plea and, therefore, reversed and remanded the habitual felon conviction. *Id.* Like *Gilmore*, the trial court in this case failed to establish a record that Defendant's admission was a guilty plea. Accordingly, we must reverse Defendant's conviction for being an habitual felon and remand for a new habitual felon hearing.

In sum, we vacate Defendant's conviction for possession of stolen goods, reverse his conviction for attaining habitual felon status, and find no error as to Defendant's convictions for felonious larceny of a motor vehicle and obtaining property by false pretenses.

Vacated in part; no error in part; and remanded for a new habitual felon hearing and resentencing.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).