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NO. COA09-1626

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v. — Moore County, Nos. 08 CRS 6583, 54799

ROBERT ANTWON SMITH

Appeal by defendant from judgment entered 17 May 2009 by Judge R. Stuart Albright in Moore County Superior Court. Heard in the Court of Appeals 24 May 2010.

Attorney General Roy Cooper, by Assistant Attorney Generals June S. Ferrell and Joseph E. Elder, for the State.

Daniel F. Read for defendant-appellant.

BRYANT, Judge.

Defendant Robert Antwon Smith appeals to this Court after a jury convicted him of felony possession of stolen goods and attaining habitual felon status. For the reasons stated herein, we find no error.

On the evening of 11 September 2009, at midnight, a 9-1-1 call was received by the Aberdeen and Pinehurst Fire Department reporting that a mobile home on Linden Road outside of Aberdeen was on fire. The Moore County Sheriff's Department received the call and Deputy Jesse Stubbs responded to the scene. Deputy Stubbs arrived before the residents of the mobile home, Kyle Hemlock and

Ryan Thompson, who arrived separately. Hemlock had last been in the residence at 1:30 p.m. and Thompson left the residence at 3:35 p.m. After the fire was suppressed, Hemlock and Thompson entered the residence and assessed the damage, noting that several items appeared to be missing: game consoles for a Play Station 2 and a GameCube, as well as the game controllers, video games, several DVDs, Hemlock's old cell phone, an original set of Power Rangers, two laptop computers, and an external hard drive. Because of problems Thompson had had with defendant Robert Smith, defendant was developed as a suspect and later arrested for arson and burglary among other charges.

At trial, Thompson testified that he was an assistant manager at Dominos Pizza in Southern Pines and prior to defendant's termination, had been defendant's supervisor. On 20 July 2008, defendant was terminated by another manager. Within two days, defendant returned to the store requesting a statement of the reasons for his termination. Thompson provided defendant with the written statement but informed defendant that he could not leave with it. Because defendant attempted to leave the store with the paper after being specifically told he could not do so, Thompson called the police. Before defendant left the store, he stated, "I'm going to take down every one of you m-----f------."

Hemlock was also an assistant manager at Dominos. Hemlock testified that although defendant had never been to his home, Hemlock knew defendant was acquainted with Domino's Pizza delivery

driver, Laportia Wooten. Wooten had delivered pizzas to Hemlock at his Linden Road residence in the past.

Detective Robert Langford, with the Moore County Sheriff's Department was the main investigator on the case. He learned that Smith had pawned items at Cumberland Pawn & Loan in Fayetteville on 12 September 2008 at 1:39 p.m. Det. Langford drove to Cumberland Pawn and spoke with assistant manager Warren Butler. Det. Langford verified the information he had retrieved from LeadsOnLine regarding defendant. Butler showed Det. Langford the items that defendant had pawned. Det. Langford found an Nintendo Game System, four video game console controllers, forty-one video games, and ninety-seven DVDs. The video game controllers and the more obscure DVDs and games matched Hemlock's description of the items missing from his residence. Det. Langford seized the items, and when he presented them to Hemlock, Hemlock immediately stated, "These are mine."

Butler testified that on 12 September 2008, two men came in to his pawn shop and brought two duffel bags with DVDs, games, and a video game console. One of the men provided an identification card. Butler testified that the software used in his pawn shop recorded all information on the I.D. and the information the shopkeepers took from the individual, as well as a list of the items pawned. From there, the shop software sends the information to a program called LeadsOnLine, which Butler described as a "national-wide [sic] law enforcement program, to check for stolen

merchanise." Butler identified defendant as the man who presented his identification card.

On 15 September, Hemlock informed Det. Langford that he had received numerous phone calls from the number assigned to his old cell phone, which had been stolen from his residence during the 11 September burglary. Upon a thorough investigation, Det. Langford found a call addressed to a residence in Southern Pines. At the residence, Det. Langford spoke with Felicia Smith, who lived there. Det. Langford showed Felicia a picture of defendant and asked did she recognize the person. Ms. Smith identified defendant as the boyfriend of Laportia Wooten, a relative of Ms. Smith's.

Defendant was arrested and indicted on charges of second degree burglary, felony larceny, felony possession of stolen goods, second degree arson and attaining habitual felon status. At the close of the State's evidence, defendant made a motion to dismiss the charges. The trial court granted the motion with respect to the charge of second degree arson but denied the motion as to the remaining charges. Defendant presented two witnesses. After the close of all of the evidence, the jury returned a verdict of guilty on the charge of felonious possession of stolen goods and not guilty on the charge of second degree burglary. Immediately following the jury verdict, the jury was notified that defendant was also charged with being an habitual felon. The jury found defendant guilty of attaining habitual felon status, and defendant was sentenced as a class C felon with a prior record level of IV.

Defendant was sentenced to 133 to 169 months in the custody of the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant raises the following eight issues: Did the trial court (I) err by admitting evidence that defendant stated he would "take down" the people working at Dominos Pizza; (II) commit plain error by admitting evidence that Hemlock received calls from the number assigned to his old cell phone; (III) err by denying defendant's motion to dismiss; (IV) commit plain error when instructing the jury; (V & VI) err by failing to dismiss the habitual felon indictment; (VII) err in sentencing defendant; and (VIII) violate defendant's Eighth Amendment Rights against cruel and unusual punishment.

I

Defendant argues that the trial court erred in failing to sustain his objection to the introduction of statements that he was going to "take down" the people in the Dominos Pizza. Defendant argues that this evidence was irrelevant and unduly prejudicial. We disagree.

"Class threats are defined in *State v. Casey*, 201 N.C. 185, 159 S.E. 337, as threats made by a defendant against a general class of persons to which the [victim] belonged. Such threats are prima facie referable to the [victim], although the [victim]'s name is not mentioned." *State v. Franklin*, 327 N.C. 162, 176, 393 S.E.2d 781, 790 (1990) (citation omitted).

According to Thompson, defendant returned to the store within two days of his termination. Following is an except of Thompson's testimony:

> State: Did the defendant say anything to you or to any other employees in you presence?
>
> Thompson: At some point he did address the — the store. He said — and I'm quoting the best way that I can. I'll say it two different ways, quote, "I'm going to take down every one of you m------f------," unquote, or the other one was, "I'm going to take down every one of you m-----f------ one by one," unquote.

We hold that the trial court properly admitted evidence of defendant's statement made to those within the store from which defendant had been recently terminated, as the statements indicated defendant's expression of intent to harm members of the class to which Thompson and Hemlock belonged. Accordingly, we overrule defendant's argument.

II

Next, defendant argues that the trial court erred in admitting evidence that Hemlock received calls from the phone number assigned to his missing cell phone, particularly a call received on the same day as the burglary. Defendant argues that the suspicious calls swayed the jury by evoking in them sympathy for the victims of the theft. We disagree.

Because defendant failed to object to the contested testimony, we review this for plain error.

> The plain error rule . . . is always to be applied cautiously and only in the exceptional

> case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to the appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings . . . .

State v. Cummings, 346 N.C. 291, 314, 488 S.E.2d 550, 563-64 (1997) (citation and internal quotations omitted).

Upon review of the record evidence, we note that Hemlock's testimony regarding the phone call he received from his missing cell phone on the evening that his home had been burglarized and set afire was relevant in establishing the approximate date and time the crimes occurred. Further, Hemlock's testimony corroborates Det. Langford's testimony regarding certain aspects of his investigation. Therefore, we hold that the trial court did not err in allowing the evidence. Accordingly, we overrule this assignment of error.

III

Defendant argues that the trial court erred in failing to dismiss the charges against him for insufficiency of the evidence. Defendant argues that there was insufficient evidence that defendant was aware he possessed stolen property. We disagree.

At the close of the State's evidence, defendant made a motion to dismiss the charges of second-degree burglary, felonious possession of stolen goods, felonious larceny, and second-degree

arson. The trial court granted the motion with respect to the charge of second-degree arson but denied the motion as to the remaining charges. After the close of all of the evidence, the jury found defendant not guilty on the charges of second-degree burglary and felonious larceny. The jury found defendant guilty only on the charge of felonious possession of stolen goods. Therefore, we address only whether the trial court erred in failing to dismiss the charge of felonious possession of stolen goods.

To establish felonious possession of stolen goods, the State must show the following: "(1) possession of personal property, (2) which was stolen pursuant to a breaking and entering, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a breaking and entering, and (4) the possessor acting with a dishonest purpose." *State v. Hargett*, 148 N.C. App. 688, 691, 559 S.E.2d 282, 285 (2002) (citations omitted).

The doctrine of recent possession is a rule of law that "upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property." *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981) (citations omitted).

> [T]he presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control

> the goods; and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

Id. at 674, 273 S.E.2d at 293 (internal citations omitted). However, "[w]hen the doctrine of recent possession applies in a particular case, it suffices to repel a motion for nonsuit and defendant's guilt or innocence becomes a jury question." *Id.*

Here, on 11 September 2008, Hemlock and Thompson arrived at home to discover the mobile home in which they lived was on fire. When the fire was suppressed, Hemlock and Thompson were allowed to enter their residence, and each reported missing items: game consoles for a Play Station 2 and a GameCube, as well as the game controllers which had previously been broken or cracked, video games, several DVDs including DVDs of a television series produced in Germany, Hemlock's old cell phone, an original set of Power Rangers, two laptop computers and an external hard drive. On 12 September 2008, Detective Langford asked both men if they had any suspects. Thompson gave Det. Langford defendant's name. Det. Langford ran defendant's name through LeadsOnLine and received information that defendant had pawned items at Cumberland Pawn & Loan in Fayetteville on 12 September 2008 at 1:39 p.m. Det. Langford traveled to Cumberland Pawn & Loan and spoke with Assistant Manager Warren Butler. Det. Langford compared his information with information Butler collected from defendant before he pawned the merchandise. Butler then retrieved the items pawned: an Nintendo Game System, four video game console controllers, forty-one video games, and ninety-seven DVDs. The video game

controllers and the more obscure DVDs and games matched Hemlock's description of the items missing from his residence. And, when Det. Langford presented these items to Hemlock, Hemlock immediately stated, "These are mine."

We hold that the doctrine of recent possession gives rise to a presumption that defendant committed the larceny and had knowledge that the goods were stolen sufficient to overcome defendant's motion to dismiss the charge of felonious possession of stolen goods. Accordingly, we overrule this assignment of error.

IV

Defendant argues that the trial court committed plain error by instructing the jury that "converting it to his own use by pawning the property would be a dishonest purpose." We disagree.

After the close of the evidence, the trial court instructed the jury on the charge of felonious possession of stolen goods.

> Court: The defendant has also been charged with felonious possession of stolen goods pursuant to a burglary or breaking or entering, which is possessing property which the defendant knew or had reasonable grounds to believe had been stolen pursuant to a burglary or breaking or entering.
>
> Now for you to find the defendant guilty of this offense, the State must prove five things beyond a reasonable doubt.
>
> First, that the Nintendo GameCube, four controllers, 41 games, or 97 DVDs were stolen.
>
> . . .

> Second, that this property was stolen pursuant to a burglary or breaking or entering.
>
> . . .
>
> Third, that the defendant possessed the property.
>
> . . .
>
> Fourth, that the defendant knew or had reasonable grounds to believe that the property had been stolen and that it had been stolen pursuant to a burglary or breaking or entering.
>
> And, fifth, that the defendant possessed it with a dishonest purpose.
>
> Converting the property to his own use by pawning the property would be a dishonest purpose.

The trial court's instruction, including the statement that "[c]onverting the property to his own use by pawning the property would be a dishonest purpose[,]" did not remove from the jury the requirement that, in order to find defendant guilty of felonious possession of stolen property, it find that defendant possessed the property with a dishonest purpose. *See State v. Taylor*, 362 N.C. 514, 544, 669 S.E.2d 239, 264 (2008) (holding that where the instruction did not remove from the jury the requirement that it find each element or aggravating circumstance, the instruction was not plain error). Therefore, we hold that the trial court's instruction did not amount to plain error. Accordingly, we overrule defendant's assignment of error.

V

Next, defendant argues that the trial court erred in denying defendant's motion to dismiss the habitual felon indictment. Defendant contends the indictment was fatally defective.

Defendant references a motion made to dismiss the habitual felon indictment filed with the trial court. In said motion, defendant argues that his habitual felon indictment stated an offense date different from the date listed for the substantive felony, the indictment referenced an incorrect statute defining the substantive felony, and the indictment failed to establish that defendant committed the substantive felony offense after attaining habitual felon status.

Defendant acknowledges that precedent established in this Court and in our Supreme Court is contrary to his position and raises the argument primarily for preservation purposes. We note that our Supreme Court has held that mention of the predicate substantive felony is not required in the indictment. *See State v. Cheek*, 339 N.C. 725, 727, 453 S.E.2d 862, 863 (1995). And, as to the contention that the indictment listed an incorrect date for the date of offense for the substantive felony, we note that the trial court became aware of the discrepancy during a hearing on a pretrial motion for joinder of the offenses for trial and with the consent of defendant amended the habitual felon indictment to indicate the date of the offense as the same date stated in the indictment for the substantive felony.

> The Court: I mean the defense is on notice that he has been indicted as an habitual felon for the offenses. Is that correct?

[Defense]:	We are on notice that the habitual felon indictment attends to the charges in 08 CRS 54799 and 54800.
The Court:	Well, then I'm going to treat that as a motion — To the extent the offense date then — There's no notice issue here. Thank you, [defense]. I'm going to — I understand the offense date is when he was indicted, but I'm going to allow the State to correct and clarify — to the extent it needs to, to simply allow that offense date to read 9/11/2008. Any objection from the defendant?
[Defense]:	No, your honor.

For the aforementioned reasons we overrule defendant's argument.

VI

Next, defendant argues that the trial court erred by denying his motion to dismiss the habitual felon charge. Defendant argues there was insufficient evidence to submit to the jury that defendant was the person named in the earlier convictions. We disagree.

"This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*." *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008) (citation omitted). "[T]he question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002)

(citation omitted). "[W]e must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences . . . The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Id.* at 596, 573 S.E.2d at 869 (citation omitted).

Here, the habitual felon indictment and the evidence presented at trial to determine defendant's habitual felon status indicated that Robert A. Smith committed the felony offense of larceny on 19 November 2000 in Hoke County and was convicted 19 April 2001; Robert A. Smith committed the offense of felony breaking and/or entering on 9 June 2003 in Richmond County and was convicted under the alias Robert Lee McNeill, Jr., on 8 September 2003; and, Robert A. Smith committed felony possession of stolen goods on 4 November 2003 in Moore County and was convicted on 15 July 2004. In addition, Det. Langford testified that when he arrested defendant he took defendant's fingerprints and electronically transmitted them to the State Bureau of Investigation where they are stored in a computer database. When Det. Langford ran defendant's criminal history, the criminal history included defendant's fingerprint classification which matched defendant's fingerprints to the fingerprints of the person convicted of the prior crimes. We hold that in the light most favorable to the State, the evidence presented was sufficient to establish that defendant was the perpetrator of the previous crimes. Accordingly, defendant's argument is overruled.

VII

Next, defendant argues that the trial court erred by sentencing defendant at the top of the presumptive range. We disagree.

Under North Carolina General Statutes, section 15A-1340.17(c)(2), "if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in [a presumptive range of minimum durations] is permitted . . . ." N.C. Gen. Stat. § 15A-1340.17(c)(2) (2009). Therefore, we overrule defendant's argument.

VIII

Last, defendant argues that the trial court committed cruel and unusual punishment in violation of defendant's Eighth Amendment rights under the Constitution of the United States by sentencing defendant as a habitual felon to at least 139 months in prison for a crime involving $241.00 worth of property. However, defendant did not raise this issue at trial.

Constitutional arguments raised for the first time on appeal are deemed waived. *See State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 514 (1998) ("we note that defendant's arguments of constitutional error were not raised at trial and, thus, are deemed waived on appeal." (citing N.C. R. App. P. 10(b)(1))). Accordingly, defendant's argument is dismissed.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).