NO. COA09-1632

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Surry County
No. 07 CRS 53756-57

JACKIE PUCKETT

Appeal by defendant from judgment entered 12 August 2009 by Judge A. Moses Massey in Surry County Superior Court. Heard in the Court of Appeals 7 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General Creecy C. Johnson, for the State.

Gilda C. Rodriguez for defendant.

BRYANT, Judge.

At the 10 August 2009 criminal session of Surry County Superior Court, a jury convicted defendant Jackie Lee Puckett of breaking and entering, larceny, possession of stolen goods, and obtaining property by false pretenses. The trial court arrested judgment on the possession of stolen goods charge and sentenced defendant to two consecutive terms of eleven to fourteen months imprisonment and supervised probation of sixty months at the conclusion of his active sentences. Defendant appeals. For the reasons discussed below, we find no error.

Facts

On Friday afternoon, 24 August 2007, Jerry Fore locked up his business, Jerry Fore Enterprises, Inc., and left for the weekend. On Monday, 27 August 2007, Fore arrived at the business to find that the cable he kept stretched across the driveway had been cut. Upon further investigation, Fore discovered the door of his storage shed had been forced open and some items removed, including numerous copper fittings and a gas dryer. Knowing the value of copper, Fore suspected that the person who stole his fittings had sold them for cash. He called local businesses which bought copper fittings and located those stolen from him at Tarheel Converter and Core, LLC.

Scott Wilson, who worked at Tarheel, told Fore that about 5:00 p.m. on the afternoon of Friday 24 August 2007, defendant and Frankie Heath had arrived at Tarheel with a minivan full of copper to sell. Local law enforcement had asked Wilson to call them if he saw Heath, who was known to sell stolen copper. Wilson called the sheriff's office, which sent an officer to Tarheel. Wilson told the officer that he had bought the copper from defendant, whom he referred to as "Jackie Pardue," and Heath. Detective Jeremy Luffman of the Surry County Sheriff's Department went to Heath's last known address and saw defendant enter the home. When Detective Luffman knocked on the door, Annette Mabe, defendant's girlfriend and Heath's sister, answered. She told Detective Luffman that Heath no longer lived at the home where she resided with defendant. Mabe gave permission for a search of the home, and Detective Luffman found numerous items which Fore had reported

stolen. Mabe and defendant first said all items in the home belonged to them, but later stated that Heath had brought some of the items to the home. Defendant admitted that he and Heath had sold copper to Tarheel on 24 August 2007.

Weeks later, Fore was at a flea market looking for other items which had been stolen from him. Fore saw his stolen electric sheet metal shears at a stand operated by defendant. When Fore asked defendant whether he had stolen them, defendant stated that he had not been part of the break-in at Fore's business and that Heath had told defendant that Heath had gotten the items after a woman asked him to clean out a building.

Defendant's theory of the case was that Heath was solely responsible for the break-in and theft of Fore's property, and that defendant had simply been in the wrong place at the wrong time. At trial, defendant presented two alibi witnesses. Billy Walls, Jr., testified that defendant had been doing a roofing job with him on 24 August 2007 and that Walls dropped defendant off at home at 4:30 p.m. Mabe testified that Heath had borrowed her van at 11:00 a.m. on 24 August. He had arrived back at her home around 4:45 p.m. with the van full of metal, including copper, and picked up defendant to go to Tarheel. Defendant took a small amount of his own copper to sell. Defendant moved to dismiss the charges against him for insufficiency of the evidence at the close of the State's evidence and again at the close of all evidence. The trial court denied both motions.

On appeal, defendant argues the trial court erred in: (I) giving an instruction on acting in concert *ex mero motu*; (II) ordering him to pay restitution in an amount not supported by competent evidence; and (III) denying his motion to dismiss for insufficiency of the evidence. We find no error.

I

Defendant first argues the trial court erred in giving an instruction on acting in concert *ex mero motu*, contending that it amounted to an improper expression of opinion in violation of N.C. Gen. Stat. §§ 15A-1222, 1232. We disagree.

Defendant did not object to the trial court's acting in concert instruction. However, because

> [t]he statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S. § 15A-1222 and N.C.G.S. § 15A-1232 are mandatory. . . . [a] defendant's failure to object to alleged expressions of opinion in violation of those statutes does not preclude his raising the issue on appeal.

State v. Young, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989).

"[A] defendant has a right to trial before an impartial judge, and any expression or intimation of an opinion by the judge which prejudices the jury against defendant is grounds for a new trial." *State v. Lofton*, 66 N.C. App. 79, 84, 310 S.E.2d 633, 636 (1984). Specifically, under our General Statutes, "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (2009). Further, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact

has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C.G.S. § 15A-1232 (2009).

In evaluating whether a judge has expressed an impermissible opinion, a totality of the circumstances test is used. *State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732 (1999), *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). "The charge . . . must be viewed contextually, and whether a defendant was unduly prejudiced by the trial judge's remarks is determined by the probable effect on the jury in light of all the attendant circumstances, the burden being on defendant to show prejudice." *Lofton*, 66 N.C. App. at 84-5, 310 S.E.2d at 636.

At trial, the State presented evidence from Jerry Fore that one of the items stolen from his business was a gas dryer which had been stored on a high shelf. On direct examination, Fore stated that it had been a struggle for two people to get the dryer onto the shelf and that at least two people would have been needed to get it down and remove it. This testimony suggested that both Heath and defendant were physically present during the breaking and entering and larceny. Defendant did not testify but presented two witnesses on his behalf in an attempt to establish an alibi for the apparent time Fore's property was taken.

At the charge conference, neither the State nor defendant requested an instruction on acting in concert and the trial court did not originally give one. During its deliberations, the jury

presented a written question to the trial court, which the judge read aloud, outside the presence of the jury:

> [Court]: I received a note from the jury that read to say: "For the definition of larceny, the first qualification says that the defendant, quote, quote marks, that the defendant took property belonging to another person, end quote. Does, quote, took, end quote, in this context refer to physically removing the property from the victim's residence, or accepting, slash, transferring property someone else may have stolen?

The trial court then told counsel, "I think the answer to their question as to larceny is that the defendant-is that for a person to commit larceny they must either acting alone or in concert with another take the property, physically take the property." After bringing the jurors in, the trial court told them:

> [Court]: Members of the jury, . . .[the court read back their question]. For the offense of larceny, to commit that offense the first element is that the defendant either acting alone or together with some other person or persons takes property belonging to another person. So the answer to your question-that's an alternate answer to your question, is that, to commit the offense of felonious larceny the defendant either acting by himself or together with others must take, physically take property.

The jurors were then sent to lunch and when they returned, they sent another note to the trial court seeking further clarification:

> [Court]: Sheriff has handed me a note from the jury that says: Quote took, end quote, or quote, physically take, end quote, means, blank square, accepted or, blank square, stole. Check one.

The trial court brought the jury back again and began explaining the elements of felonious larceny. The jury foreperson, still confused, had the following exchange with the trial court:

> [Foreperson]: Okay. The first way we're wondering if the word "took" is supposed to mean, does it mean that the defendant took property from the victim's shed and took it away to the, to the scrap metal place? Or the second sense, could it mean that he took stolen property from [Heath]? Does it mean took property from [Heath], meaning accepting it and took it to sell?
>
> [Court]: For purposes of considering the charge of felonious larceny, the answer would be, to your question would be that the defendant either took by himself or acting together with another or others property, physically took property from the premises of the victim.

As an initial matter, we do not believe the trial court's statement that "[f]or the offense of larceny, to commit that offense the first element is that the defendant either acting alone or together with some other person or persons takes property belonging to another person" is an expression of opinion as to any question of fact or evidence in defendant's case. *See* N.C.G.S. § 15A-1222 ("The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury."); N.C.G.S. § 15A-1232 ("In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence."). Rather than an expression of opinion, the court's comment was an accurate

statement of the law, in that a larceny can be committed by one or more persons. The jury's original note first raised the involvement of a second person in the alleged larceny, inquiring about "accepting, slash, transferring property someone else may have stolen," and the trial court was simply attempting to respond. Here, the trial court's statement was an incomplete version of the pattern jury instruction on acting in concert. However, while use of pattern jury instructions is encouraged, their use is not required. *State v. Garcell*, 363 N.C. 10, 49, 678 S.E.2d 618, 642-43 (2009).

Even if we viewed the trial court's statement as an expression of opinion, defendant does not carry his burden of showing he was prejudiced by it. *Lofton*, 66 N.C. App. at 84-5, 310 S.E.2d at 636. In his brief, defendant contends that the trial court's statement was "very suggestive" and "directed the jury to a theory upon which to convict," namely that defendant could be convicted of larceny if defendant had "just been involved in the receipt of stolen goods." Defendant also notes that the trial court omitted the portion of the pattern jury instruction on acting in concert which mentions that a person may be guilty of a crime if he is either actually or constructively present. Defendant contends that this omission prejudiced him. We disagree with these assertions.

The exchanges and notes quoted *supra* reflect that the jury was confused about whether defendant could be found guilty of larceny if he did not physically take property from Fore's storage shed, but did later receive some of the stolen property from Heath. It

appears that the trial court did not necessarily understand the jury's point of confusion, since it attempted to explain acting in concert rather than distinguishing larceny from receipt of stolen property. The jury continued to seek clarification and the trial court continued to talk about acting in concert, finally stating that the State had to prove that "defendant either took by himself or acting together with another or others property, *physically took property from the premises of the victim*." (Emphasis added). The jury was apparently satisfied by this final comment as it asked no further questions on this point. Although still couched in the language of acting in concert, the trial court's final comment suggested that defendant could *not* be convicted unless he was part of the physical theft of items from Fore's property. Thus, the jury understood that defendant could not be convicted if he had only received the stolen property at some point following the theft.

Far from prejudicing defendant, the trial court's comments could only have benefitted him. As defendant correctly notes in his brief, under a theory of acting in concert, one does *not* have to be physically present to be convicted of larceny; constructive presence is sufficient. *State v. Abraham*, 338 N.C. 315, 328-29, 451 S.E.2d 131, 137 (1994) ("Under the doctrine of acting in concert, if two or more persons act together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan."). The trial court's statements

wrongly suggested that defendant must have been physically present under an acting in concert theory to be convicted, raising the State's burden. If the jury had believed his alibi witnesses' testimony that he could not have been physically present at Fore's business when the property was taken, they would have had to acquit him. Presumably, the jury did not find defendant's alibi witnesses credible, believed that he was in fact present during the theft and, therefore, convicted him of breaking and entering and larceny in addition to the other related property crimes. Thus, to the extent the jury was misled by the trial court's comments, the result was to raise the State's burden, not to prejudice defendant. This argument is overruled.

II

Defendant also argues the trial court erred in ordering him to pay restitution in an amount not supported by competent evidence. We disagree.

Defendant did not object to the award of restitution at trial. However, this issue is preserved for appellate review by statute. *See State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) ("While defendant did not specifically object to the trial court's entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18))."

"The amount of restitution ordered by the trial court must be supported by the evidence." *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005). However, "when . . . there is some

evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986). Testimony from victims about the value of their stolen property, even without receipts or documentation, has been held sufficient to support an order of restitution. *See State v. Cousart*, 182 N.C. App. 150, 154-55, 641 S.E.2d 372, 375 (2007); *Hunt, supra*. In *Davis*, we upheld a restitution award where testimony about the money stolen was conflicting and the trial court simply awarded the average of the two amounts as restitution. *Davis*, 167 N.C. App. at 776, 607 S.E.2d at 10.

Here, the restitution worksheet listed $928.00 to be paid to Tarheel and $14,231.00 to be paid to Fore. Wilson testified that he paid defendant approximately $800.00 to $900.00 on behalf of Tarheel for the copper fittings. Fore testified that approximately $16,000.00 worth of property was stolen from him and about $4,000.00 worth was recovered. Fore also submitted a detailed and itemized list which showed a total of $18,369.90 worth of stolen property with $4,138.90 worth of property recovered. The difference between these amounts, $14,231.00, is the amount ordered as restitution. Thus, the restitution worksheet, supported by Wilson's testimony and by Fore's testimony and itemized list, was sufficient to support the order of restitution. There being "some evidence as to the appropriate amount of restitution," we decline to overrule the trial court's recommendations on appeal.

III

Defendant next argues the trial court erred in denying his motion to dismiss the larceny, breaking and entering, and obtaining property by false pretenses charges against him for insufficiency of the evidence. We disagree.

It is well-established that:

> [w]hen ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982); N.C. Gen. Stat. § 15A-1227 (2005). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *affirmed*, 301 N.C. 374, 271 S.E.2d 277 (1980). This Court reviews the trial court's denial of a motion to dismiss de novo. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).

State v. Smith, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

"To support a conviction for felonious breaking and entering under [N.C. Gen. Stat.] § 14-54(a), there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Walton*, 90 N.C. App. 532, 533, 369 S.E.2d 101, 103 (1988). "[T]he essential elements of larceny are: (1) taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Cathey*, 162 N.C. App. 350, 353, 590 S.E.2d 408, 410 (2004).

As to the larceny and breaking and entering charges, defendant contends there was no direct evidence of breaking, entering or taking. Thus, he cites *State v. Maines*, 301 N.C. 669, 273 S.E.2d 289 (1981), for the proposition that the State was forced to rely on the doctrine of recent possession to establish the elements of those offenses. In *Maines*, the Supreme Court held:

> 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. The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in defendant's possession. Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering. The presumption or inference arising from recent possession of stolen property is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the state has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt.

Id. at 673-74, 273 S.E.2d at 293 (internal citations and quotation marks omitted). The presumption arises when the State shows beyond a reasonable doubt that: (1) the property described in the indictment was stolen; (2) the stolen property was found in defendant's custody and control; and (3) the possession occurred soon after the larceny. *Id.* at 674, 273 S.E.2d at 293. "When 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, defendant contends that the State failed to prove the property listed in the indictments was stolen or that the property recovered from defendant's home and from Tarheel was the stolen property. Defendant bases this claim on the fact that Fore failed to produce detailed descriptions of his stolen property or receipts showing that he had actually possessed the stolen property.

Defendant's arguments are without merit. We begin by noting that there *was* direct evidence of breaking, entering and taking; namely, Fore testified regarding his storage shed being broken into and numerous items being removed sometime after he left his business on Friday afternoon, 24 August 2007. In addition, the State presented evidence of each of the three criteria needed to raise a presumption of defendant's guilt under the doctrine of recent possession. First, Fore provided a list of stolen property in the incident report which lists, among other items "copper tubing," "copper wire," and "copper line sets." Defendant cites no authority for his assertion that this description is insufficient to identify Fore's stolen property. Further, Wilson testified that defendant and Heath arrived at Tarheel around 5:00 p.m. on Friday August 24 to resell a van load of copper, copper which was later identified as that stolen from Fore. The State having shown that defendant was in possession of stolen property shortly after it was taken, the doctrine of recent possession applied and the trial court properly denied defendant's motion to dismiss and allowed the larceny and breaking and entering charges to go to the jury.

The elements of obtaining property by false pretenses are: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). Defendant contends that there was no evidence that he made a representation with the intention to deceive. We disagree. Fore testified about his conversation with defendant at the flea market when Fore identified the stolen electric sheet metal sheers defendant was attempting to sell. When Fore asked defendant why he sold the copper to Tarheel under the false name "Jackie Pardue," defendant admitted he gave the false name because he "knowed [sic] something was up." In addition, Wilson identified defendant as the man who called himself "Jackie Pardue" and signed that name on paperwork after selling the copper. This evidence of defendant's false representation was substantial, and the trial court did not err in denying defendant's motion to dismiss the charge of obtaining property by false pretenses. Defendant's arguments are overruled.

No error.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).