NO. COA09-617

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v.

JEREMY LEE EBERSOLE,
Defendant.

Wilkes County
Nos. 07 CRS 50906
07 CRS 50932
07 CRS 50933
08 CRS 458
08 CRS 1850

Appeal by defendant from judgments entered 18 December 2008 by Judge Edgar B. Gregory in Wilkes County Superior Court. Heard in the Court of Appeals 4 November 2009.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Don Willey for defendant-appellant.

GEER, Judge.

Defendant Jeremy Lee Ebersole appeals from his convictions of three counts of breaking and entering, three counts of larceny, one count of possession of stolen property, and of being a habitual felon. On appeal, defendant contends that the trial court improperly permitted the State to rely upon the doctrine of recent possession because the time period between the commission of the crimes and the discovery of the stolen items in his possession — between 94 and 216 days — is too long to raise a presumption of guilt. Although we agree that this is a relatively long period of

time, we believe that the unique qualities and combination of the stolen goods, many of which were items not normally or frequently traded in lawful channels, are such that the doctrine of recent possession may still apply.

Facts

At trial, the State's evidence tended to show the following facts. On 24 June 2006, Bill Pelon, who owns property located at 5090 Brushy Mountain Road in Wilkes County, North Carolina, received a phone call from his employee, Randall Dillard, notifying him that someone had broken into Mr. Pelon's home. A television, a DVD player, a recliner, several lamps, and a plant had been stolen from the home, along with a leaf blower, a saw, a drill, a weed eater, and other miscellaneous tools. Mattresses, chairs, food, wine, liquor, pictures, a computer, a telescope, and a washer and dryer were also missing from the home. The total amount of property taken was "well in excess of $15,000."

In the early morning hours of 6 October 2006, Darrell Shepherd, who was at work at Wilkes Steel Company, went outside to pick up the newspaper. Wilkes Steel Company is located approximately 100 yards east from Wilkes Oil Company. As he retrieved the paper, Shepherd observed a figure come out from behind a brick building on the street corner, walk across the road, and break into a run in the direction of Wilkes Oil Company. Shepherd then saw a white van "come out from the same direction the person came from and proceed[] out by Wilkes Oil, with the brake

lights on, real slow." He watched the van turn the corner, speed up, and disappear down the road.

Later that day, Terry Lambert, the manager of Wilkes Oil Company, arrived at work to find that the locks to the business had been cut off and someone had broken into the office. That person had also broken into a fireproof safe and filing cabinet and rifled through their contents. In addition, several Monitor heaters, a number of tools, a time clock, two Motorola cell phones, 200 gallons of gasoline, and 250 gallons of kerosene had been stolen. The total value of items stolen was "a little over $6,500."

On 24 November 2006, someone broke into Lowe's Fur and Herb, owned by Arthur Lowe, in Wilkesboro. A 1,000 pound safe containing three or four guns, checkbooks, company records, stock certificates, personal tax statements, old Indian artifacts, and "a little bit of money" was taken, as well as some Carhartt clothing. The total value of items stolen was "around $10,000."

Before Christmas 2006, defendant brought a lot of Carhartt clothing into the residence he shared with his girlfriend Teresa Harris. They gave the clothing away as Christmas presents.

In January 2007, a search warrant was executed at Gene Haymond's residence in Wilkesboro. During the search of the Haymond residence, police officers recovered Carhartt clothing and the hinges of a safe that were later identified by Mr. Lowe as belonging to him. Several items of Mr. Pelon's property, including a television, saw, and weed eater, were also found at the Haymond

residence. None of the property stolen from Wilkes Oil was found at the Haymond residence.

According to Ms. Harris, in January 2007, Mr. Haymond called defendant to tell him that a search warrant had been executed at his house. Defendant became upset and concerned about trying to get property out of his own house. Officers executed a search warrant at defendant's residence on 26 February 2007.

During the search of defendant's residence, various items of property belonging to Mr. Lowe were recovered, including checks bearing the name of Lowe's Fur and Herb, cash, bank deposit bags, mailing envelopes, shipping tags and other shipping materials, charge receipts, a shotgun and bullets, and insurance papers made out in the name of Lowe's Fur and Herb. Pieces of Mr. Lowe's safe were also found on defendant's property. In addition, police recovered a pair of gloves, two cell phones, and a time clock belonging to Mr. Lambert, as well as some large drums appearing to contain gasoline or kerosene residue. Several of Mr. Dillard's tools were found in defendant's outbuilding. Mr. Pelon's washer and dryer, computer, television, and DVD player were also found on the property.

The outbuilding on defendant's property was set up like a store, with miscellaneous property, such as cash register drawers, pictures, food, cleaning supplies, and other goods with the price tags still on them, "everywhere." The goods were set out on shelves as one would find them in a store, and the building also contained appliances, some of which were still in their boxes, a

sink, kitchen ladders, a number of tools, a washer and dryer, and a grill. Also in the building was an atlas, later identified as belonging to defendant, containing the addresses of hardware and feed stores in the area and lists of the various police radio frequencies that would be programmed into a police scanner.

Defendant was subsequently indicted for three counts of felonious breaking and entering, three counts of larceny, one count of safecracking, three counts of felonious possession of stolen goods, and for being a habitual felon. The safecracking charge was dismissed before trial.

At trial, defendant's girlfriend Teresa Harris testified that Mr. Haymond and defendant were friends and frequently had conversations in the yard outside defendant's residence. They often went out in Mr. Haymond's van and returned early in the morning. Ms. Harris testified that defendant was very protective about his atlas, which had papers stuffed into it, and he carried it everywhere.

Defendant testified on his own behalf. Defendant admitted that he had been convicted three times for burglary and that he had just been released from prison on 23 June 2006, the day before the Pelon robbery. He met Mr. Haymond while in prison. According to defendant, he rented the large outbuilding on his property to Mr. Haymond to store household goods that belonged to Mr. Haymond and his girlfriend, who was going through a divorce and moving her belongings from her old house. He testified that Mr. Haymond padlocked the outbuilding after Thanksgiving and that defendant

then did not have access to it. Defendant said he had no reason to believe the property in the outbuilding was stolen. Defendant testified that he bought the computer identified as belonging to Mr. Pelon from Mr. Haymond and that he had used some of the other stolen items because Mr. Haymond had left them with him. Defendant admitted that the atlas containing the lists of stores and scanner codes was his. Defendant presented no other evidence.

The jury found defendant guilty of three counts of breaking and entering, three counts of larceny, three counts of possession of stolen goods, and of being a habitual felon. The trial court arrested judgment on two of the counts of possession of stolen goods. Defendant was sentenced to seven consecutive presumptive-range terms of 100 to 129 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant contends the trial court erred in denying his motion to dismiss the charges against him. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When 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." *Id.* "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d

277 (1980)). We view the evidence in the light most favorable to the State. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

The State relied on the doctrine of recent possession to show that defendant was the perpetrator. Under that doctrine, "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). "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." *Id.* at 673-74, 273 S.E.2d at 293. "[W]hen 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." *Id.* at 674, 273 S.E.2d at 293.

The State must show that "(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.* (internal citations omitted).

Defendant contends the State could not use the doctrine of recent possession because the time period between each larceny and the date the property was found in defendant's possession — a time frame ranging from 94 to 216 days — is too long to amount to "recent possession." This Court, however, in *State v. Patterson*, 194 N.C. App. 608, 619, 671 S.E.2d 357, 364 (quoting *State v. Holbrook*, 223 N.C. 622, 624, 27 S.E.2d 725, 726 (1943)), *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009), explained that "'[t]he term ["recent"] is a relative one and depends on the circumstances of the case.'" The Court emphasized that "there is no bright line rule concerning what is deemed 'recent possession.'" *Id.* Instead,

> "the nature of the property is a factor in determining whether the recency is sufficient to raise a presumption of guilt. Thus, if the stolen property is of a type normally and frequently traded in lawful channels, a relatively brief time interval between the theft and the finding of an accused in possession is sufficient to preclude an inference of guilt from arising. Conversely, when the article is of a type not normally or frequently traded in lawful channels, then the inference of guilt may arise after the passage of a longer period of time between the larceny of the goods and the finding of the goods in the accused's possession."

Id., 671 S.E.2d at 363 (quoting *State v. Hamlet*, 316 N.C. 41, 44, 340 S.E.2d 418, 420 (1986)).

In *Patterson*, *id.*, the defendant argued that a period of 21 days between the theft and the discovery of the property was too long to amount to recent possession. The thief had stolen a video camera and DVD player from a church. Officers found, in a camper

within the defendant's control, the video camera and DVD player, along with tools typically used in breaking and entering and personal documents and papers belonging to defendant. *Id.* at 612, 671 S.E.2d at 359. In holding that 21 days was not too long to apply the recent possession doctrine, the Court observed that even though the stolen property involved items frequently traded in commerce, "under the circumstances of this case, we find that there was a substantial probability that the stolen item could only have come into defendant's possession by his own act. Twenty-one days, while not a short amount of time, was not so long under the circumstances as to prevent an inference that defendant committed the breaking and entering." *Id.* at 620-21, 671 S.E.2d at 364.

The issue is whether the items in defendant's possession were such that despite the longer time frame in between the crimes and their discovery, there is "'a substantial probability that the stolen goods could only have come into the defendant's possession by his own act, to exclude the intervening agency of others between the theft and the defendant's possession, and to give reasonable assurance that possession could not have been obtained unless the defendant was the thief.'" *State v. Waller*, 11 N.C. App. 666, 669, 182 S.E.2d 196, 198 (quoting *State v. Blackmon*, 6 N.C. App. 66, 76-77, 169 S.E.2d 472, 479 (1969)), *cert. denied*, 279 N.C. 513, 183 S.E.2d 690 (1971).

In this case, police found checks made out to and from Lowe's Fur and Herb as well as many other items of personal property stamped or embossed with the name of Lowe's Fur and Herb, including

bank bags, invoices, mail, and insurance papers. These items were all stored in the Lowe's 1,000 pound safe, pieces of which were also found in defendant's possession. Police also found Carhartt clothing with the price tags from Lowe's on them. With respect to the Wilkes Oil robbery, police found the time clock and two Motorola cell phones (with distinguishing features) that had been stolen. Although the items taken from Mr. Pelon's house could be considered items normally traded in lawful channels, the fact that they were all found together in one location is unique: officers found a computer, electronics, a telescope, tools, and a washer and dryer matching the description of items stolen from Mr. Pelon's house.

The nature of some of the items — bank bags, receipts, mail, insurance papers, pieces of a safe, and a time clock — meant that they were unlikely to have been obtained by defendant by any means other than larceny. Although other items could have been obtained through lawful channels, their presence with items unlikely to have been obtained other than by larceny gives rise to a reasonable probability that defendant would have possession of these items only if he was the thief. Further, the volume of disparate items from one victim found all together also makes it probable that defendant's possession of them was the result of larceny and not the acts of a third party.

Defendant, however, compares this case to *Hamlet*, 316 N.C. at 46, 340 S.E.2d at 421, in which the Court held that 30 days was not sufficiently recent when the defendant was in possession of a

stolen television. The Court held that although the State had shown that the property was stolen and that it was found in the defendant's custody, the television was an article normally and frequently traded in lawful channels. *Id.* at 45, 340 S.E.2d at 421. The Court held that "under the circumstances of this case the State has failed to show that possession of the property by defendant was so recent as to support a presumption of guilt of breaking or entering and larceny." *Id.* at 46, 340 S.E.2d at 421. *See also State v. Parker*, 54 N.C. App. 522, 527-28, 284 S.E.2d 132, 135-36 (1981) (holding that 19 days was too long a time frame where stolen items were tapes and rifle, which State conceded were normally and frequently traded in lawful channels, and there was exculpatory evidence that explained defendant's possession).

Unlike *Hamlet* and *Parker*, in this case, not all of the stolen property was of the type normally and frequently traded in lawful channels. The fact that officers found defendant in possession of property stolen from a single owner that was a combination of both property that could not be obtained through lawful means and property that could have been obtained legally renders it probable that all of the property was stolen by defendant. In addition, neither *Hamlet* nor *Parker* involved a collection of property from three different robbery sites. All of these circumstances together render the time frame in this case, although longer than usual, appropriate for application of the doctrine of recent possession.

Even apart from that doctrine, however, the State presented other evidence tending to establish that defendant was the

perpetrator. *See Patterson*, 194 N.C. App. at 621, 671 S.E.2d at 364-65 (pointing out that in addition to stolen items, police also found tools for breaking and entering). The first robbery took place the day after defendant was released from prison. Defendant's girlfriend testified he often left late at night with Mr. Haymond in a van and returned early in the morning. Mr. Shepherd, who saw two men at Wilkes Oil early in the morning, testified that the van looked like a picture of the white van owned by Mr. Haymond. Defendant's girlfriend also testified that defendant carried everywhere with him an atlas containing the addresses of hardware and feed stores and a listing of the police scanner frequencies. Defendant acknowledged ownership of that atlas and admitted that both he and Mr. Haymond had police scanners in their vehicles.

Further, defendant did not claim, in his testimony, that he had obtained the property through lawful channels independent of Mr. Haymond, but rather testified that it came from Mr. Haymond, whom he had met in prison. In addition, defendant became upset when he learned that a search warrant had been executed at Mr. Haymond's house and was concerned about trying to remove property from his home. This evidence, combined with the possession of items not normally traded in lawful channels three to seven months after they were stolen, was sufficient circumstantial evidence to send the issue of defendant's guilt to the jury.

Defendant also contends the trial court improperly instructed on the doctrine of recent possession. This argument rests solely

on defendant's contention that the doctrine of recent possession was inapplicable. Since we have already concluded that the doctrine could be applied, we hold that the trial court did not err in instructing the jury on that doctrine.

No error.

Judges ROBERT C. HUNTER and CALABRIA concur.

Report per Rule 30(e).