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NO. COA10-1596
NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2011

STATE OF NORTH CAROLINA

v. Cleveland County
Nos. 08 CRS 58455
JASON MARVIN AYERS 08 CRS 3959

Appeal by defendant from judgments entered 17 June 2010 by Judge Calvin E. Murphy in Cleveland County Superior Court. Heard in the Court of Appeals 12 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

William D. Auman, for defendant-appellant.

CALABRIA, Judge.

Jason Marvin Ayers ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of felony larceny, felony possession of stolen goods, and attaining the status of an habitual felon. We find no error.

I. Background

On 19 August 2008, Adria Bell ("Ms. Bell") returned to her home in Shelby, North Carolina after being away for

approximately one month. When she entered the home, Ms. Bell noticed that several items were missing, including, *inter alia*, a jug which contained approximately \$900 in change, additional cash, two televisions, a DVD player, thirty DVDs, jewelry and towels. Ms. Bell discovered that a window in her home had been opened and that her back door had been unlocked. She then contacted law enforcement.

Officer Doug Myers ("Officer Myers") of the Shelby City Police Department ("SPD") went to Ms. Bell's home to investigate. Officer Myers interviewed Ms. Bell about the break-in, and then attempted to interview her neighbors to determine if other break-ins had occurred in the neighborhood.

Ricky Ayers ("Mr. Ayers") was one of the neighbors interviewed by Officer Myers. Mr. Ayers, who is the father of defendant, was able to locate some of the stolen items in a storage shed adjacent to a camper he owned. Mr. Ayers had been allowing defendant to live in the camper, which was adjacent to Ms. Bell's home. The storage shed was located approximately ten feet from the camper.

On 21 August 2008, police informant Jeremiah Judd ("Judd") contacted Detective Gabe McKinney ("Det. McKinney") of the SPD and informed him that defendant was willing to sell Judd some

stolen checks. Judd met with defendant, who allowed Judd to take a checkbook to show to a potential buyer. At this meeting, defendant also attempted to burn a check that had been filled out. Judd recovered this partially burned check from a toilet. Later, Judd provided defendant with \$120 for the checkbook. The checkbook and partially burned check were subsequently identified as belonging to Ms. Bell.

Defendant was arrested and indicted for the offenses of felony breaking and entering, felony larceny, felony possession of stolen goods, and attaining the status of an habitual felon. Beginning 15 June 2010, defendant was tried by a jury in Cleveland County Superior Court. Prior to trial, defendant requested that the trial court dismiss his attorney and allow him to return to his cell since defendant did not want to go to trial. The trial court conducted a colloquy with defendant and determined that defendant was competent to stand trial.

At trial, Ms. Bell testified that she had previously met defendant one time, when he showed up at her door at night, without a shirt, asking to use the phone. In addition, Mr. Ayers testified that defendant stayed in his camper "when he's out of jail." At the close of the State's evidence, defendant

moved to dismiss all charges, and the motion was denied by the trial court. Defendant did not present any evidence.

On 16 June 2010, the jury returned verdicts finding defendant guilty of felony larceny and felony possession of stolen goods. The jury also returned a verdict finding defendant not guilty of felony breaking and entering. After an habitual felon hearing, the jury found defendant guilty of attaining the status of an habitual felon. For the felony possession of stolen goods conviction, the trial court sentenced defendant to a minimum term of 107 months to a maximum term of 138 months in the North Carolina Department of Correction. The trial court arrested judgment in connection with the conviction for felony larceny. Defendant appeals.

II. Competency

Defendant argues that the trial court erred by insufficiently inquiring into defendant's capacity to stand trial. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1001(a),

[n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a) (2009). The trial court "has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 559 (2000) (internal quotations and citations omitted). "In other words, a trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654-55 (2005).

Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide* doubt inquiry. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Id. at 678-79, 616 S.E.2d at 655 (internal quotations and citations omitted). "If the trial court's findings of fact are supported by competent evidence, they are deemed conclusive on appeal. Furthermore, the trial court's decision that defendant was competent to stand trial will not be overturned, absent a

showing that the trial judge abused his discretion." *State v. McClain*, 169 N.C. App. 657, 663, 610 S.E.2d 783, 787 (2005).

In the instant case, the trial court took the appropriate steps to determine that defendant was competent to stand trial. Defendant's colloquy with the trial court indicated, and the trial court found as fact, that defendant understood the nature and the object of the proceedings against him, that he was able to comprehend his own situation in reference to the proceedings, and that he was able to assist in his defense in a reasonable manner. Moreover, the record indicates that defendant's demeanor at trial was appropriate. Indeed, at sentencing, defendant's counsel informed the trial court that defendant did a "good job" of assisting him throughout the trial, and "the court gives significant weight to defense counsel's representation that a client is competent, since counsel is usually in the best position to determine if his client is able to understand the proceedings and assist in his defense." *Staten*, 172 N.C. App. at 678, 616 S.E.2d at 654 (internal quotations and citations omitted). Thus, we find no abuse of discretion in the trial court's determination of defendant's competency. This argument is overruled.

III. Motion to Dismiss

Defendant argues that the trial court erred by denying his motion to dismiss the charges of felony larceny and felony possession of stolen goods. We disagree.

This Court reviews a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine 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. Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]

State v. McNeil, ___ N.C. App. ___, ___, 707 S.E.2d 674, 679 (2011) (internal quotations and citations omitted).

The State relied upon the doctrine of recent possession in order to establish defendant's guilt. The doctrine of recent possession "is simply 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).

[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 recent 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. Defendant does not dispute that Ms. Bell's property was stolen. However, defendant contends that the State failed to present substantial evidence to support the second and third elements of recent possession, and thus, the doctrine was inapplicable.

A. Possession

"[P]ossession [of stolen goods] . . . may be either actual or constructive. Constructive possession exists when the defendant, while not having actual possession [of the goods], . . . has the intent and capability to maintain control and dominion over the[m]." *State v. Phillips*, 172 N.C. App. 143, 146, 615 S.E.2d 880, 882-83 (2005) (internal quotations and citations omitted). "Where, however, the defendant's possession of the premises is nonexclusive, constructive possession may not be inferred in the absence of other incriminating circumstances." *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988). "[C]onstructive possession depends on

the totality of circumstances in each case." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986).

In the instant case, the State presented testimony that defendant actually possessed Ms. Bell's checkbook and sold it to Judd. In addition, the remaining stolen property was found in a shed directly adjacent to the camper in which defendant lived. Mr. Ayers testified that he owned the shed and that only he and defendant had legitimate access to the shed. Mr. Ayers also testified that he had been in defendant's storage shed approximately "one to two weeks" prior to his discovery of the stolen items, and that the items were not in the shed at that time. Thus, taking the evidence in the light most favorable to the State, the stolen property was placed within the shed during a period of time when defendant had exclusive access to it. Consequently, the State presented substantial evidence that defendant had either actual or constructive possession of the property that was stolen from Ms. Bell.

B. Recency of Possession

"[T]here is no bright line rule concerning what is deemed 'recent possession.' 'The term ["recent"] is a relative one and depends on the circumstances of the case.'" *State v. Patterson*,

194 N.C. App. 608, 619, 671 S.E.2d 357, 364 (2009) (quoting *State v. Holbrook*, 223 N.C. 622, 624, 27 S.E.2d 725, 726 (1943)).

[T]he 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.

State v. Hamlet, 316 N.C. 41, 44, 340 S.E.2d 418, 420 (1986).

In *Hamlet*, our Supreme Court held that 30 days was not sufficiently recent to establish guilt under the theory of recent possession when the defendant was in possession of a stolen television, because the television was an article normally and frequently traded in lawful channels. *Id.* at 45, 340 S.E.2d at 421. The *Hamlet* Court stated 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.

In the instant case, unlike *Hamlet*, some of the stolen property at issue, specifically Ms. Bell's checkbook, was not of the type normally and frequently traded in lawful channels. Defendant's possession of property that was stolen from a single owner and was a combination of both property that could not be obtained through lawful means and property that could have been obtained legally creates an inference that all of the property was stolen by defendant. Moreover, the length of time at issue is much shorter than in *Hamlet*. Based upon Mr. Ayers' testimony, defendant had only obtained the stolen property in the previous one to two weeks before it was discovered. Ultimately, the State's evidence was sufficient circumstantial evidence to apply the doctrine of recent possession to the instant case and send the issue of defendant's guilt to the jury. This argument is overruled.

IV. Ms. Bell's Testimony

Defendant argues that the trial court erred by allowing Ms. Bell to testify that defendant had previously knocked on her door, late at night, without a shirt, and asked to use the phone. We disagree.

Initially, we note that defendant's objection to this testimony at trial was specifically a relevance objection.

Therefore, we are limited to reviewing the relevance of Ms. Bell's testimony on appeal. See *State v. Tellez*, ___ N.C. App. ___, ___, 684 S.E.2d 733, 736 (2009). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009). "We have interpreted Rule 401 broadly and have explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). "Although we review a trial court's ruling on the relevance of evidence *de novo*, we give a trial court's relevancy rulings great deference on appeal." *State v. Capers*, ___ N.C. App. ___, ___, 704 S.E.2d 39, 45 (2010) (internal quotations and citations omitted).

In the instant case, Ms. Bell testified as follows:

Q. Who was it that knocked on your door late at night?

A. It was Jason Ayers.

Q. How did he look at that time -

[Defendant's counsel]: Objection as to the relevance of this, Your Honor.

The Court: Overruled.

Q. How did he look at that time?

A. The same. He didn't have a shirt on.

Ms. Bell went on to testify that she had had no other contact with defendant and that she had never provided defendant with one of her checks. In this context, Ms. Bell's testimony was relevant to establish that she knew who defendant was and that defendant was not in lawful possession of her checks. This argument is overruled.

V. Mr. Ayers' Testimony

Defendant argues that the trial court erred by overruling defendant's objection to Mr. Ayers' testimony that defendant lived in the camper adjacent to Ms. Bell's property "when he's not in jail." We disagree.

Although defendant objected to Mr. Ayers' answer to the State's question, he made no motion to strike.

Where inadmissibility of testimony is not indicated by the question, but appears only in the witness' response, the proper form of objection is a motion to strike the answer, or the objectionable part of it, made as soon as the inadmissibility is evident. This procedure is not a technical formality, but a means to ensure that the jury attach no improper significance to the testimony.

State v. Goss, 293 N.C. 147, 155, 235 S.E.2d 844, 850 (1977) (internal citations omitted); *see also State v. Curry*, ___ N.C. App. ___, ___, 692 S.E.2d 129, 138 (2010) (when "defendant's counsel objected *after* the witness had answered the question, and . . . failed to make a motion to strike, . . . defendant waived [his] objection."). Therefore, defendant has failed to preserve this issue for appellate review. Moreover, in light of the other evidence presented by the State, defendant cannot demonstrate prejudice, as Mr. Ayers' statement did not create "a reasonable possibility that . . . a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2009). This argument is overruled.

VI. Conclusion

The trial court conducted an adequate inquiry into defendant's competency prior to trial. The State presented sufficient evidence, when taken in the light most favorable to the State, to establish defendant's guilt pursuant to the doctrine of recent possession. Testimony by Ms. Bell at trial was properly admitted as relevant. Defendant failed to preserve his objection to Mr. Ayers' statement. Defendant received a fair trial, free from prejudicial error.

No error.

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Judges ERVIN and THIGPEN concur.

Report per Rule 30(e).