NO. COA12-586
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

STATE OF NORTH CAROLINA

v. Guilford County
No. 11 CRS 84274

HEATHER RENEE HARDY

Appeal by Defendant from judgment dated 12 January 2012 by Judge Lindsay R. Davis, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 23 October 2012.

Attorney General Roy Cooper, by Assistant Attorney General Torrey D. Dixon, for the State.

James W. Carter for Defendant.

McGEE, Judge.

Jerry Lee Rumley (Mr. Rumley) returned home from work between 9:00 p.m. and 9:30 p.m. on 1 August 2011 and discovered that someone had broken into his home and that his forty-seven inch Panasonic flat screen television was missing. Mr. Rumley called law enforcement and Deputy Donald Proper (Deputy Proper) responded. Deputy Proper found a window that had been pried open and determined that the window was the apparent point of

entry into Mr. Rumley's house. Deputy Proper found a piece of paper lying beneath the window. The piece of paper was from a doctor's office and had the name of Heather Renee Hardy (Defendant) on it.

The next day, Deputy Mathew Huckabee (Deputy Huckabee) investigated the name Heather Renee Hardy and located an address for her at 1701-B Alexander Road in Greensboro. The following day, Deputy Huckabee and Detective George Moore (Detective Moore) (collectively, the officers) went to the address at 1701-B Alexander Road. The officers spoke to a next door neighbor who stated a girl named "Heather" had previously lived at 1701-B, but that she had moved several months earlier to an apartment off Yanceyville Road.

The officers visited Turnbridge Apartments off Yanceyville Road on 3 August 2011 and spoke with the property's assistant manager, Kay Redd (Ms. Redd). The officers told Ms. Redd they were investigating a breaking and entering that possibly involved Defendant. Ms. Redd asked the officers if a flat screen television had been stolen, because she "had seen two guys" taking a television, approximately forty-six inches, into Defendant's apartment on 1 August 2011. Ms. Redd stated she was approximately fifteen yards from the two men who were carrying

the television but she could only identify them as two white males wearing orange construction vests.

The officers then went to Defendant's apartment. Ryan Lamb, one of Defendant's roommates, let the officers into Defendant's apartment. Upon entering Defendant's apartment, the officers noticed a large flat screen television. The officers spoke with Defendant and explained they were investigating a breaking and entering. They told Defendant a piece of paper from a doctor's office, with Defendant's name on it, had been found at the scene near the point of entry.

Defendant stated she had been home all day on 1 August 2011 and that her boyfriend, Jamie Kirkman, was with her except for about an hour when he left with another man to go to the phone store. Defendant further stated the television Ms. Redd had seen being carried into Defendant's apartment was "like a 26[inch]." Defendant stated she had since sold that television and removed it from her apartment. Defendant further stated she had paid fifty dollars for the larger flat screen television about one year earlier, which would have been around July or August 2010. Manufacturing numbers on the back of the television indicated the television had been made in November 2010, some three or four months after the date Defendant claimed she had purchased it. Officer Huckabee asked Defendant how she

could have purchased the television before it had been manufactured. Defendant did not respond. The officers seized the television as evidence. Mr. Rumley provided the serial number for his stolen television, and it matched the number found on the television removed from Defendant's apartment.

Warrants for Defendant's arrest were issued, and Defendant turned herself in at the Greensboro jail. Defendant provided Deputy Huckabee with the name and telephone number of Brandon Moore (Mr. Moore), who Defendant stated had sold her the television. Deputy Huckabee made several attempts to call the number provided by Defendant, but the calls were always directed to voice mail. Deputy Huckabee did not locate any information regarding the telephone number in the records of the Sheriff's Department.

At trial, Defendant testified she initially lied to the officers about when she got the television and how she had obtained it because she had never been in trouble before and she was scared. Defendant testified that Jamie Kirkman, along with her two roommates, some friends, and some relatives were with her and that she was at home all day on 1 August 2011.

Defendant further testified that Mr. Moore had come by her apartment around lunch time on 1 August 2011 saying that he had a television he wanted to sell and that he had been told by

"Randy" that Defendant might be interested in buying the television. Defendant stated that Randy was a friend of Jamie Kirkman. Defendant testified that, after Mr. Moore told her the television would be two hundred dollars and that he would go get it, she went back into her bedroom. The television was in her living room when she returned.

Defendant testified she did not know the television she purchased from Mr. Moore was stolen until the officers came to her house on 3 August 2011. Joy Lamb, another of Defendant's roommates, testified she was home all day on 1 August 2011 and that Defendant did not leave the apartment on that day. Ryan Lamb testified that he answered the door for a man on 1 August 2011 who introduced himself as "Brandon" and asked to speak to Defendant. Ryan Lamb also testified that he saw Mr. Moore place the television on the stand and "plug[] it up[.]"

A jury found Defendant not guilty of felonious breaking or entering and felonious larceny after breaking or entering, but did find Defendant guilty of felonious possession of stolen goods or property. Defendant was given a suspended sentence of five to six months, and placed on supervised probation. Defendant appeals.

I.

Defendant makes two arguments on appeal: (1) whether the trial court erred in denying her motions to dismiss the charge of felonious possession of stolen goods, and (2) whether the trial court erred in denying her request for an instruction on misdemeanor possession of stolen goods.

II.

"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) (citation omitted).

> "Upon defendant's motion for dismissal, the 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. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the

> court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, ***taken singly or in combination***, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted).

In order for the State to convict Defendant of felonious possession of stolen property on the theory presented at trial it had to prove: "(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. N.C. Gen. Stat. § 14-72(c) (1999)[.]" *State v. Hargett*, 148 N.C. App. 688, 691, 559 S.E.2d 282, 285 (2002) (citation omitted).

We hold that the State presented sufficient evidence of Defendant's guilt to survive Defendant's motions to dismiss. Defendant's argument on appeal is that the State failed to present sufficient evidence of the third element: that Defendant knew or had reasonable grounds to believe the television had been stolen pursuant to a breaking or entering. Mr. Rumley's

house was broken into, and his flat screen television was stolen. A piece of paper from a doctor's office, with Defendant's name on it, was found at Mr. Rumley's house lying beneath a window that was the point of entry. Defendant testified she received the television from Mr. Moore, who is African-American, on 1 August 2011. Ms. Redd testified she saw two white men carrying a large flat screen television into Defendant's apartment on 1 August 2011. Defendant lied to the officers about when, and from whom, she had acquired the television. Defendant changed her story only after she was told the television had not yet been manufactured when Defendant said she had purchased it. The serial number on the television was the same as the one on the television stolen from Mr. Rumley's house.

We hold this evidence was sufficient to send the charge of felony possession of stolen property to the jury. This argument is without merit.

III.

Defendant next argues that the trial court erred by refusing to instruct the jury on the lesser included offense of misdemeanor possession of stolen goods. We agree.

> "A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and

> the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." However, a trial court must submit a lesser-included offense to the jury "when, and only when, there is evidence from which the jury can find that [the] defendant committed the lesser-included offense." "[W]hen all the evidence tends to show that defendant committed the crime charged in the bill of indictment and there is no evidence of the lesser-included offense, the court should refuse to charge on the lesser-included offense."

State v. Liggons, 194 N.C. App. 734, 742, 670 S.E.2d 333, 339 (2009) (citations omitted).

In the present case, if the jury found that Defendant possessed a stolen television knowing, or having reasonable grounds to believe, that it was stolen, and that Defendant was acting with a dishonest purpose, the jury could have convicted Defendant of misdemeanor possession of stolen goods. N.C. Gen. Stat. § 14-72(a) (2011); *State v. Brown*, 81 N.C. App. 622, 627, 344 S.E.2d 817, 820 (1986). If the jury found, in addition, that the television had been stolen pursuant to a breaking and entering, and that Defendant knew or had reasonable grounds to believe it had been stolen pursuant to a breaking and entering, the jury could have convicted Defendant of felony possession of stolen property. N.C.G.S. § 14-72(c); *Hargett*, 148 N.C. App. at 691, 559 S.E.2d at 285.

Though we have held that the evidence was sufficient to survive Defendant's motion to dismiss the charge of felonious possession, it does not automatically hold that instructing on the lesser included offense was unnecessary. *Liggons*, 194 N.C. App. at 742, 670 S.E.2d at 339. The evidence that Defendant knew or reasonably believed the television had been stolen was greater than the evidence that Defendant knew or reasonably believed that it had been stolen during a breaking or entering. We hold that the jury could have reasonably determined from the evidence presented at trial that Defendant knew or reasonably believed the television had been stolen, but that Defendant did not know, nor should have reasonably believed, that it had been stolen during a breaking or entering. The trial court should have instructed the jury on the lesser included offense of misdemeanor possession of stolen property, and this error requires reversal and remand for a new trial on the possession charge. *Id.*

New trial.

Judges BRYANT and THIGPEN concur.

Report per Rule 30(e).