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NO. COA13-133
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 11 CRS 218296

MARTIN LUKOWITSCH

Appeal by defendant from judgment entered 31 May 2012 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General G. Mark Teague, for the State.

Mark Hayes for defendant-appellant.

BRYANT, Judge.

Defendant Martin Lukowitsch appeals from a judgment entered upon a jury verdict finding him guilty of felonious larceny of a motor vehicle. Defendant's sole argument on appeal is that the trial court erred in excluding from evidence the content of text messages allegedly sent by the victim, Jason Longoria, to defendant's wife, Christine Lukowitsch. Because defendant never

properly authenticated the text messages he attempted to admit into evidence, we find no error.

At trial, the State's evidence tended to show that Longoria and defendant were former friends who used to play music at Longoria's house on Park Avenue in Charlotte, North Carolina. Longoria owned a 1979 Volkswagen Karmann Ghia, which he valued at \$13,000 and kept parked in his backyard. In March of 2011, Longoria and his family relocated to Florida, but left the car in the backyard and gave instructions to their mechanic to take it in for service when time permitted. However, when the mechanic went to retrieve the car, it was not there. Other than his mechanic, Longoria had not given anyone permission to move the car.

Longoria returned to North Carolina, reported the missing car to the police, and spoke with his neighbors about the car. Rhonda Glover, one of Longoria's neighbors, informed him that she had recently seen defendant parked in front of Longoria's house in a blue pickup truck, and that shortly thereafter she saw defendant and two other men push Longoria's car out of the backyard and haul it away on another truck. Rhonda Glover's mother, Thomasena, also saw defendant pushing Longoria's car onto a truck, but did not see him take the car away. Both

Rhonda and Thomasena testified that they knew it was defendant they saw moving Longoria's car because they remembered his blue pickup truck had a personalized license plate that read "ZOOM" and both saw that truck at Longoria's house when the car was being taken. The car was subsequently found under a tarp in the backyard of defendant's house on Dougherty Drive. Defendant's neighbor, Louise Scott, testified that she saw defendant in his backyard when some men towed Longoria's car to the backyard and left it there.

Defendant presented evidence at trial that he could not have been involved with the theft of the car because at the time the car was taken, he was suffering from a foot injury and often required crutches to walk. Defendant and his wife also testified that he had owned a blue pickup truck with a personalized license plate that read "ZOOM IN[,]" but in January of 2011 defendant had sold the truck to a contractor who had worked on their damaged house.

The Lukowitschs both testified that Longoria believed they owed him money because he had let them stay at a house he leased on South Bend Street. The Lukowitschs had moved out of their home on Daugherty Drive in July of 2010, after it had been damaged in a fire. They stayed at Longoria's house on South

Bend Street for a few weeks, then briefly at a condo, before they finally moved into a rental house on Merriman Avenue. At the time Longoria's car was taken and placed in the backyard of defendant's home on Dougherty Drive, the Lukowitschs were still residing on Merriman Avenue because their home on Dougherty Drive was uninhabitable.

Mrs. Lukowitsch further testified that Longoria repeatedly called defendant about the alleged debt owed him for their brief stay in his house, and that she eventually sent Longoria a text message asking him to stop calling. Longoria responded to Mrs. Lukowitsch's message and they exchanged additional text messages. Defendant's trial counsel attempted to introduce a printout of the alleged text messages, in which Longoria stated he would not stop calling defendant until the Lukowitschs paid him the "rent and bill money." The text messages from Longoria stated that "this isn't over[,] " that the Lukowitschs would pay Longoria, and that he would see them in court and was "coming [their] way[.]"

Upon the State's objection, the trial court excluded the transcript of the text messages, explaining:

I'm not going to allow those text messages to be presented as a printout or as a piece of evidence. . . . The fact that they had a dispute is fine. What was actually said in

those things, unless you have some way of establishing it via some telephone company that can show the full chain, I'm not going to allow it.

. . .

. . . I just communicated I will allow for information to indicate there was a dispute between the parties, but unless you have the ability to proffer that to be entered that can be verified that's actually coming from his cell phone from the other cell phones, the cell phone records that are documented by someone who -- either AT&T, Verizon, or other carrier, I am not going to allow it to be presented. You've established that there was a dispute.

Defendant's counsel then inquired if he could ask Mrs. Lukowitsch any further questions about the text message conversation, and the court replied:

Specifically of what he said? I think it's been exhausted as to its relevance in this matter. It does not land squarely on any of the elements of the crime before this court. It is strictly in an issue to impeach or persuade that basically there was a dispute. That's been established by the testimony of the witness. Anything else, I think, would be creating undue prejudice on one or the other. That's the Court's ruling.

On appeal, defendant argues the trial court erred in excluding the content of the text messages because they were relevant to the issue of whether Longoria was a credible witness. Defendant argues that the content of the text messages

Longoria sent defendant's wife impact Longoria's credibility and would provide evidence of Longoria's animosity towards defendant. Defendant states that Longoria sought retribution against defendant for his failure to repay a debt incurred when defendant stayed at Longoria's house while defendant's house was being repaired. In his brief submitted to this Court, defendant argues that the admission of the text messages would have provided support for his theory that Longoria orchestrated the theft of his own vehicle in order to frame defendant and that the trial court thus erred in concluding the messages were not relevant to the issues at hand. Defendant's argument is misplaced.

Here, the trial court properly excluded the content of the text messages because defendant failed to present any evidence to authenticate the text messages as having been sent by Longoria. *Cf. State v. Taylor*, 178 N.C. App. 395, 412-15, 632 S.E.2d 218, 230-31 (2006) (affirming the trial court's denial of the defendant's motion *in limine* to exclude text messages allegedly sent by the victim where witnesses testified as to the process employed in sending, receiving, and retrieving the text messages and where the content of the messages indicated the victim was the sender). Defendant does not challenge the trial

court's ruling to exclude the text messages because he failed to authenticate them, and has thus abandoned review of this issue. N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Moreover, because defendant failed to authenticate the text messages, Mrs. Lukowitsch could not testify as to their contents. *Hedgecock Builders Supply Co. v. White*, 92 N.C. App. 535, 539-541, 375 S.E.2d 164, 167-69 (1989) (holding that where a party sought to introduce a document that was not authenticated, the document was not admissible, and the witness could not testify about its content pursuant to the best evidence rule). Accordingly, regardless of their relevancy to an issue in this case, the trial court correctly excluded any evidence regarding the content of the unauthenticated text messages, whether in the form of a transcript of the messages or through Mrs. Lukowitch's testimony.

No error.

Judges HUNTER, Robert C., and McCULLOUGH concur.

Report per Rule 30(e).