NO. COA13-366
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 11 CRS 230140

QUENTIN DARRELL DYE

Appeal by Defendant from judgment entered 9 November 2012 by Judge Kenneth F. Crow in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Thomas J. Campbell, for the State.

Irving Joyner, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant moved to dismiss a charge of felonious possession of stolen property at the close of the State's evidence and at the close of all the evidence. Both motions

were denied. A jury subsequently found defendant guilty of felonious possession of stolen property. Defendant appeals the denial of his motions. We find no error.

I. Facts & Procedural History

An arrest warrant was issued on 30 June 2011 for the arrest of Quentin Darrell Dye ("Defendant"). Defendant was indicted on 23 January 2012 by a grand jury for felony possession of stolen property pursuant to N.C. Gen. Stat. § 14-71.1 (2011). Defendant stood trial on one count of felonious possession of stolen property in Mecklenburg County Superior Court on 5 November 2012. During trial, Defendant moved to dismiss the case against him at the conclusion of the State's evidence and again at the conclusion of all evidence. Both motions were denied by the trial court. The jury returned a guilty verdict and Defendant was sentenced to a suspended term of nine to eleven months in prison. Defendant entered his oral Notice of Appeal on 5 November 2012. The testimony presented at trial tended to show the following facts.

On 6 June 2011 Officer Erin Courtney Navratil ("Officer Navratil") was patrolling Green Heron Court in the Charlotte area. Officer Navratil's patrols were justified by reports of numerous break-ins which had recently occurred in the area. At 10:15 a.m., Officer Navratil drove by 10405 Green Heron Court ("Green Heron"), a vacant home under construction. Officer Navratil testified that on her first patrol she

noticed this home at Green Heron had an empty driveway, a closed gate, and a no trespassing sign affixed to the gate.

Forty-five minutes later, Officer Navratil responded to a 911 call about suspicious activity at this address. When Officer Navratil arrived at the home she found the driveway gate open, the no trespassing sign removed, and Defendant in the driver's seat of his white minivan parked in the driveway. Defendant was sitting in the minivan with two other occupants.

Officer Navratil testified that she approached the van and noticed two air conditioning units located in the rear of the van, one with "fresh green shrubbery" attached to it. Officer Navratil testified Defendant said he owned the van, which contained two other occupants. Officer Navratil identified a photograph of the shrubbery adorned air conditioner in court. Officer Navratil averred that she also found a dolly in the van and what appeared to be the previously affixed no trespassing sign under the van's front seat. Officer Navratil further testified that Defendant was wearing a pair of muddy boots and that she observed muddy footprints leading from the Defendant's van into the residence at Green Heron. Officer Navratil stated the footprints appeared fresh and to match Defendant's footwear.

Officer Navratil followed the muddy footprints into the home's garage. Officer Navratil testified the home's entry door from the garage was "kicked in." Officer

Navratil testified she next followed the tracks past the damaged door to the air conditioning units inside the house. The units in the residence at Green Heron were intact. From these observations, Officer Navratil concluded that the air conditioners in the minivan did not come from the residence at Green Heron.

After searching the van, Officer Navratil phoned Detective A.C. Kelly ("Detective Kelly") to request assistance in the investigation. Defendant was read his Miranda rights and thereafter Detective Kelly questioned him. Defendant told Detective Kelly he was in the process of purchasing the van, and that the two air conditioners in the van were purchased as part of the deal to gain title to the van. When Detective Kelly asked Defendant for a proof of purchase, Detective Kelly said Defendant provided a "faded" bill of sale for the van and told Detective Kelly it was sold to him by "some man named Warren" off of Mount Holly Road in Charlotte. Detective Kelly stated the bill of sale listed a Mt. Holly Road address, a phone number, and the name of a business akin to "something & J towing[.]" When Detective Kelly asked what Defendant was doing at this property during the day, Detective Kelly testified Defendant stated he was "scrapping," or looking for metal to sell at a scrapyard.

Detective Kelly later drove to the address listed on the bill of sale, finding a vacant lot. Detective Kelly also said the phone number listed on the bill of sale was disconnected. It was later discovered that the 30-day tag located on the van was

registered to H & E Auto at 3141 Beatty's Ford Road. Detective Kelly also said the 30-day tag was written with a "magic marker."

Defendant was released after questioning on 6 June 2011. Detective Kelly said he noted the serial numbers on the air conditioning units and thereafter sought out the units' owner. Detective Kelly's investigation tended to show the units came from a home located at 6725 Rock Island Drive in Charlotte ("Rock Island"). The residence at Rock Island was owned by Christopher Darrell Graham ("Mr. Graham") and was vacant for around one and a half years before 6 June 2011. Mr. Graham testified that foreclosure proceedings were scheduled to begin in December 2010, but did not actually commence until December 2011. The two air conditioners at issue were Trane air conditioning systems installed between 1999 and 2000. At trial, a receipt admitted into evidence showed that at the time of installation, the two air conditioners had a retail value of $3,500. As of 6 June 2011, Mr. Graham had not visited Rock Island for about six weeks.

Once contacted by the police about the possible theft, Mr. Graham drove by the home at Rock Island and confirmed that the units were removed at some point, although Mr. Graham could not identify a specific timeframe when the units were likely removed. Mr. Graham proceeded to the police station and identified several images of his home before and after the theft, as well as photographs of the air conditioning units.

Mr. Graham also identified pictures of the residence at Rock Island tending to show power lines and HVAC lines were cut to remove the air conditioning units. Mr. Graham told police that he did not permit any person to remove the units from his property nor did he recognize or know Defendant.

The State rested after presenting the testimony of Mr. Graham, Officer Navratil, and Detective Kelly. Defendant moved to dismiss at the end of the State's evidence. Defendant's counsel argued that the Defendant did not have reasonable grounds to know the units were taken at both the close of the State's evidence and at the close of all evidence. The trial court denied Defendant's motion to dismiss. Defendant did not testify at trial, but did present six illustrative photograph exhibits for the jury to consider. Defendant renewed his motion to dismiss at the close of the case, which the trial court denied. The jury convicted Defendant on the charge of felonious possession of stolen property. Defendant was sentenced to a suspended term of nine to eleven months in prison.

II. Jurisdiction & Standard of Review

Defendant failed to include a statement of jurisdiction in his brief. Under Rule 28(b)(4) of our Rules of Appellate Procedure, an Appellant's brief is required to include the grounds for appellate review. "[R]ules of procedure are necessary . . . in order to enable the courts properly to discharge their duties." *Pruitt v. Wood*, 199 N.C. 788, 790,

156 S.E. 126, 127 (1930). However, "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

"Whether and how a court may excuse noncompliance with the rules depends on the nature of the default." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). Although Defendant's brief failed to provide a jurisdiction statement, we will consider this appeal under Appellate Rule 2. N.C. R. App. P. 2. We "remind defendant that these rules are mandatory, and caution him that his continued failure to adhere to these rules subjects him to possible sanctions, including dismissal of his appeal." *State v. Sullivan*, 201 N.C. App. 540, 544, 687 S.E.2d 504, 507–08 (2009).

Defendant argues the trial court erred in denying Defendant's motions to dismiss at the close of the State's evidence and at the end of the trial. Under our Rules of Appellate Procedure, when a defendant moves to dismiss at the conclusion of evidence at trial and the motion is denied, the defendant has a right of appeal to this Court. N.C. R. App. P. 10(a)(3); *compare State v. Armstrong*, 203 N.C. App. 399, 408, 691 S.E.2d 433, 440 (2010) (finding when "[d]efendant did not move at trial for a dismissal" the defendant "therefore failed to preserve this issue for appellate review").

"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). "'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. Fitsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Ethridge*, 168 N.C. App. 359, 362, 607 S.E.2d 325, 327 (2005) (quotation marks and citation omitted).

III. Analysis

Defendant argues that the trial court improperly denied his motions to dismiss the charge of possession of stolen property. We disagree.

The State must prove five elements for a charge of felonious possession of stolen property: (i) defendant possessed personal property; (ii) the personal property was stolen; (iii) the possessor knew or had reasonable grounds to believe the property was stolen; (iv) the property's value was greater than $1,000; and (v) the possessor acted with dishonesty. *State v. Parker*, 146 N.C. App. 715, 717, 555 S.E.2d 609, 610 (2001) (citing *State v. Brantley*, 129 N.C. App. 725, 729, 501 S.E.2d 676, 679 (1998)). Defendant

contests only the second, third, and fourth elements of this test, although we also consider whether Defendant possessed the air conditioners at issue.

First, Defendant must have possessed the property in question. Possession is not "a single, specific act occurring at a specific time[;]" rather, "possession . . . is a continuing offense beginning at the time of receipt and continuing until divestment." *State v. Davis*, 302 N.C. 370, 374, 275 S.E.2d 491, 494 (1981). Furthermore, "[p]ossession [of stolen goods] . . . may be either actual or constructive." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996). "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. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)); *Matter of Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985) ("One has possession of stolen property when one has both the power and intent to control its disposition or use.").

Presence at a premises where contraband is located does not, in and of itself, establish constructive possession unless there is a "'close juxtaposition to the contraband as to raise a reasonable inference of control.'" *State v. Privette*, ___ N.C. App. ___, ___, 721 S.E.2d 299, 309 (2012) *review denied*, ___ N.C. ___, 724 S.E.2d 532

(2012) (quoting *State v. Minor*, 290 N.C. 68, 74, 224 S.E.2d 180, 185 (1976)) (alterations omitted).

Here, Defendant, as a person in the driver's seat of a van containing the air conditioners, had possession of the air conditioning units. The State's evidence tends to show Defendant claimed ownership of the van carrying the units. Defendant also provided a bill of sale for the air conditioning units which allegedly led to a vacant lot. By controlling the van carrying the two air conditioners, as well as providing documentation allegedly establishing ownership, there is substantial evidence that Defendant had the capability and intent to control the property. *Cf. id.* at ___, 721 S.E.2d at 309–10 ("At most, the State has established that Privette 'had been in an area where he could have committed the crimes charged.'"(quoting *Minor*, 290 N.C. at 75, 224 S.E.2d at 185)).

Second, Defendant argues the State failed to demonstrate that the two air conditioners in question were stolen, arguing that the air conditioners were abandoned property. If property is deemed abandoned, the abandoned property may not be the subject of a larceny charge. *See State v. Hathaway*, 150 N.C. 798, 799, 63 S.E. 892, 892 (1909) (holding defendant was not guilty of larceny when fishing in an area abandoned by its owner). To assert the affirmative defense of abandonment, Defendant "must affirmatively show by clear, unequivocal and decisive evidence the intent of the owner

to permanently terminate his ownership of the disputed property." *State v. Hall*, 57 N.C. App 544, 546, 291 S.E.2d 873, 875 (1982). "Abandonment must be made by the owner *without being pressed by any duty, necessity or utility to himself, but simply because he desires no longer to possess a thing*; and further, it must be made without a desire that any other person shall acquire the same[.]" *State v. West*, 293 N.C. 18, 30, 235 S.E.2d 150, 157 (1977) (quotation marks and citation omitted) (emphasis added).

Here, Defendant failed to prove the owner intended to unequivocally and permanently terminate his ownership of the air conditioners. The owner, Mr. Graham, testified in open court that he had not provided anyone permission to remove the property and that he drove by his residence to check on the premises. Mr. Graham actually still owned the home when Defendant was taken into custody and only learned of his continued ownership thereafter. Based on the foregoing facts, taken in the light most favorable to the state, we hold Mr. Graham did not intend to permanently terminate his ownership in the air conditioners.

Defendant further argues the property was "abandoned" because Mr. Graham abandoned his ownership in the air conditioners. However, foreclosed or soon-to-be foreclosed property is not axiomatically abandoned property. A mortgagor who is foreclosed upon cannot be said to have "abandoned" property; the mortgagee would still retain rights to the property in the case of a default. *Weathersbee v. Goodwin*, 175

N.C. 234, 235, 95 S.E. 491, 492 (1918) ("[A]fter default of the mortgagor in paying the debt secured by the mortgage, the mortgagee is entitled to the possession, and is accountable to the mortgagor for rents and profits; and, nothing else appearing, the mortgagee, or his assignee, who has the same right, is entitled to recover upon the mere strength of the legal title so held by him."). Further, air conditioning equipment is properly considered a fixture which would be held by the mortgagee in case of default. *See Brown v. N.C. Joint Stock Land Bank of Durham*, 213 N.C. 594, 597, 197 S.E. 140, 141 (1938) ("'When a mortgagor who is allowed to retain possession . . . makes improvements and erects fixtures, he does so for the purpose of enhancing the value of the property, and having made this addition to the land, he is not at liberty to subtract it.'" (quoting *Moore v. Valentine*, 77 N.C. 188, 191 (1877)(alteration in original) (emphasis omitted))); *Voight v. Ott*, 341 P.2d 923, 927 (Ariz. 1959) (finding an air conditioning system was a fixture); *Appliance Buyers Credit Corp. v. Crivello*, 168 N.W.2d 892, 897 (Wis. 1969) (holding air conditioning equipment to be a fixture). Regardless of the air conditioning units' status as a fixture, here Mr. Graham would only relinquish control of the air conditioning because of a *duty* to fulfill the mortgagor's security interest, meaning the property is not properly classified as abandoned. *See West*, 293 N.C. at 30, 235 S.E.2d at 157 ("Abandonment must be made by the owner *without being pressed by*

any duty, necessity or utility to himself[.]" (emphasis added)). Thus, the second element that Defendant took stolen property is satisfied.

Third, Defendant argues that the State failed to prove that he knowingly possessed stolen property and that the State was required to provide direct evidence of Defendant's knowledge.

The State must prove that Defendant "knew or had reasonable grounds to believe that the [property was] stolen." *State v. Brown*, 85 N.C. App. 583, 589, 355 S.E.2d 225, 229 (1987). "On a motion to dismiss, *circumstantial evidence constitutes sufficient substantial evidence* where 'the court decides that a reasonable inference of defendant's guilt may be drawn.'" *Ethridge*, 168 N.C. App. at 362, 607 S.E.2d at 327 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993)) (emphasis added). Accordingly, circumstantial evidence of Defendant's knowledge that he possessed stolen goods is appropriate.

Here, the State provided ample circumstantial evidence sufficient for the jury to make a reasonable inference that Defendant knew or had reasonable grounds to know the air conditioners were stolen property. First, the circumstances of Officer Navratil's initial interaction with Defendant suggest that a crime was in progress at that time. Police stated that they drove by a home under construction and noticed a no trespassing sign located on the driveway gate. Less than an hour later, police said they found the

gate open, Defendant's van parked in the driveway, the no trespassing sign stowed under Defendant's car seat, and two air conditioners located in the Defendant's van, one of which had fresh green shrubbery attached to it. The State presented testimony to show fresh muddy footprints lead from Defendant's van to the house's interior and straight to intact air conditioning units. Defendant's van also contained a dolly, which could conceivably be used to carry the air conditioners from the home to the van.

Additionally, Defendant's information concerning his possession of the air conditioners proved to be unverifiable. Defendant provided an inaccurate faded bill of sale transferring the air conditioners. Detective Kelly testified the information on the bill of sale led to a vacant lot and listed a disconnected phone number. Furthermore, Defendant acknowledged he was looking for metal to sell for profit at a scrapyard. These pieces of evidence create a reasonable inference that Defendant had reasonable grounds to believe he was in improper possession of the air conditioners and may have been about to come into possession of additional contraband. Thus, sufficient evidence existed to show Defendant either knew or should have known the air conditioners in question were stolen.

Lastly, Defendant argues the State failed to prove the air conditioners were worth more than $1,000. When proving the value of a stolen item at trial, "'value' means the fair market value of the stolen item at the time of the theft." *State v. Shaw*, 26

N.C. App. 154, 157, 215 S.E.2d 390, 392 (1975); *see also State v. Dallas*, 205 N.C. App. 216, 223, 695 S.E.2d 474, 479, *disc. review denied*, 364 N.C. 604, 703 S.E.2d 737 (2010).

"[I]n the case of common articles having a market value," value denotes "the price which the subject of the larceny would bring in open market . . . at the time and place of the theft, and in the condition in which it was when the thief commenced the acts culminating in the larceny." *State v. Dees*, 14 N.C. App. 110, 112, 187 S.E.2d 433, 435 (1972) (citation and quotation marks omitted). However, "where stolen property is not commonly traded and has no ascertainable market value, a jury may infer the market value of the stolen property from evidence of the replacement cost." *State v. Helms*, 107 N.C. App. 237, 240, 418 S.E.2d 832, 833 (1992) (replacement cost of a pay phone admissible because there was no readily available "market value"). "The State is not required to produce direct evidence of value to support the conclusion that the stolen property was worth over $1,000.00, provided that the jury is not left to speculate as to the value of the item." *State v. Rahaman*, 202 N.C. App. 36, 47, 688 S.E.2d 58, 66, *disc. review denied*, 364 N.C. 246, 699 S.E.2d 642, *abrogated in part by State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010) (citation and quotation marks omitted).

At trial, the State's only evidence of the air conditioners' value was Mr. Graham's testimony and a receipt showing the replacement cost, $3,500, of the air conditioners in 1999. "[A] witness who has knowledge of value gained from experience, information

and observation may give his opinion of the value of specific personal property." *State v. Boone*, 39 N.C. App. 218, 221, 249 S.E.2d 817, 820 (1978) (holding a store clerk's testimony about goods stolen from her store admissible). The witness need not be an expert; the witness must only be familiar enough with the item so as to knowledgably and intelligently place a price on the item. *Id.*

Here, Mr. Graham had knowledge of the value of the air conditioners because he paid for the air conditioners and also knew their replacement cost. The State's evidence was sufficient to allow a reasonable juror to find that the value of the stolen property exceeded $1,000. This evidence of a replacement cost did not leave the jury to merely speculate about their value. *See State v. Davis*, 198 N.C. App. 146, 151–52, 678 S.E.2d 709, 714 (2009). There was also no indication that used air conditioners were commonly traded such that their actual market value was readily ascertainable. Thus, a reasonable juror could find the value exceeded $1,000 and the final element was met.

IV. Conclusion

For the foregoing reasons, the judgment of the trial court is

AFFIRMED.

Judges ROBERT C. HUNTER and CALABRIA concur.

Report per Rule 30(e).