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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-479

Filed: 1 December 2015

Caldwell County, Nos. 13 CRS 53678, 14 CRS 765

STATE OF NORTH CAROLINA

v.

JOSHUA SHANNON TOLBERT

Appeal by defendant from judgment entered 7 January 2015 by Judge Tanya T. Wallace in Caldwell County Superior Court. Heard in the Court of Appeals 5 November 2015.

Attorney General Roy Cooper, by Associate Attorney General Cara Byrne, for the State.

Russell J. Hollers III for defendant-appellant.

McCULLOUGH, Judge.

Joshua Shannon Tolbert (“defendant”) appeals from judgment entered upon his convictions for unauthorized use of a motor vehicle, felony possession of a stolen motor vehicle, and attaining the status of a habitual felon. For the following reasons, we find no error.

I. Background

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Defendant was arrested on 26 October 2014 and later indicted by a Caldwell County Grand Jury on 14 April 2014 on one count of larceny, one count of possession of a stolen motor vehicle, and for attaining the status of a habitual felon. Defendant's case came on for trial in Caldwell County Superior Court on 6 January 2015, the Honorable Tanya T. Wallace, Judge presiding. After the evidence was presented, the trial judge instructed the jury on felonious larceny, unauthorized use of a motor vehicle as a lesser-included offense of felonious larceny, and possession of a stolen motor vehicle. On 7 January 2015, the jury returned verdicts finding defendant guilty of unauthorized use of a motor vehicle and guilty of possession of a stolen motor vehicle. Defendant then pleaded guilty to attaining habitual felon status. The trial court consolidated the offenses for judgment, sentenced defendant to a term of 85 to 114 months imprisonment, and ordered defendant to pay restitution. Defendant gave notice of appeal in open court.

II. Discussion

The sole issue raised by defendant on appeal is whether the trial court erred by failing to instruct the jury on unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen motor vehicle.¹ In asserting the argument that unauthorized use of a motor vehicle is a lesser-included offense of possession of

¹ The State contends defendant failed to preserve the issue for appellate review, *see* N.C. R. App. P. 10(a)(1) and (2) (2015), and failed to assert plain error on appeal. Although it is not entirely clear that defendant requested the instruction as a lesser-included offense, in our discretion we reach the merits of defendant's argument.

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a stolen motor vehicle, defendant acknowledges that precedent “is dead against him[.]” Nevertheless, defendant asserts the argument to preserve the issue pending a decision on the issue by our Supreme Court. Our Supreme Court issued that opinion in *State v. Robinson* on 6 November 2015. See __ N.C. __, __ S.E.2d __ (2015) (No. 398PA14).

In *Robinson*, after applying a definitional test and comparing the elements of the two offenses, the Court held unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen motor vehicle because unauthorized use of a motor vehicle contains at least one essential element that is not an essential element of possession of a stolen motor vehicle. *Id.* at __, __ S.E.2d at __.

Applying *Robinson* to the present case we now hold the trial court did not err by failing to instruct the jury on unauthorized use of a motor vehicle as a lesser-included offense of possession of a stolen motor vehicle.

NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).