IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-419

Filed: 2 February 2016

Forsyth County, Nos. 12 CRS 62096, 62730, 63017 & 13 CRS 7746, 50468

STATE OF NORTH CAROLINA

v.

MICHAEL ANTHONY YORK

Appeal by Defendant from judgments entered 23 May 2014 by Judge David L. Hall in Superior Court, Forsyth County. Heard in the Court of Appeals 5 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Steven Armstrong, for the State.

Marilyn G. Ozer for Defendant.

McGEE, Chief Judge.

Michael Anthony York ("Defendant") was convicted on 23 May 2014 of three counts of felonious breaking and entering, three counts of felonious larceny, two counts of possession of stolen goods, and two counts of obtaining property by false pretense. Defendant then pleaded guilty to having attained habitual felon status. The State's evidence at trial tended to show the following.

3 December 2012

Defendant went to the townhome residence of Dustin and Kristina Marie Kelly Crouch ("the Crouches") on several occasions prior to 3 December 2012, ostensibly to inquire about a vacant townhome next door to the Crouches' townhome ("the Crouch residence"). Defendant sometimes attended assistance programs at Lloyd Presbyterian Church ("the church") that was located next to the small housing complex in which the Crouches lived.

On the morning of 3 December 2012, a neighbor, Sheri Clawson ("Clawson") observed a man, later identified as Defendant, and another man walking on a path that led from the church and in the direction of the Crouch residence. The men were not carrying anything at that time. There had been problems in the neighborhood before and, because Clawson did not recognize the men, she left her residence to investigate. Clawson noticed that the rear door of the Crouch residence was ajar. She was uncertain whether Kristina Crouch was at home. Clawson returned to her residence, but remained suspicious and continued to keep a lookout. Approximately twenty minutes later, Clawson saw Defendant and the other man walking back in the direction of the church carrying numerous items, including backpacks, a guitar case, and a rectangular black case "like a piano case." Clawson knew that Dustin Crouch owned a guitar. Clawson saw the other man throw the guitar case "down in the bushes." Clawson later recovered the guitar case from the bushes and returned it to Dustin Crouch when he returned home. Dustin Crouch identified the guitar case

as belonging to him. The Crouch residence had been broken into and numerous items in addition to the recovered guitar case had been taken, including laptops, other electronic devices, and an electronic keyboard in a black rectangular case.

Charles Andrew Key ("Key") volunteered at the church and knew Defendant and Dustin Crouch. On the morning of 3 December 2012, Key was at the church when he received information that the Crouch residence might have been broken into. Key walked over towards the Crouch residence and saw "the door was broke, broken into." Key saw that the door was "splintered, and it was sort of cracked open, and you could tell it had been broken into." Key returned to the church and saw Defendant with another man, and Defendant was holding a rectangular black case. Key had seen Defendant earlier that morning, and Defendant was not carrying the case at that earlier time. Key "asked [Defendant] why did they break into the house, and they need to stay [at the church] until we get this matter cleared up." Key unsuccessfully attempted to prevent Defendant and the other man from leaving the church. Police were called and responded to the Crouch residence. Some of the Crouch's stolen property was later recovered from a pawn shop.

7 December 2012

Filomena Maria Wampler ("Wampler") left her townhome for a weekend trip at about 9:45 a.m. on 7 December 2012. When Wampler returned on 10 December

2012, she noticed her rear patio door had been damaged, her bedroom had been ransacked, and some of her watches, jewelry, and valuable coins were missing.

Susan Priest ("Priest") was the manager of Apple Pawn Shop on 7 December 2012. Priest testified that on that date Defendant attempted to pawn jewelry and coins at her store. Defendant told Priest that the jewelry and coins were from a family member. However, Priest became suspicious and decided not to accept the items. Later, on 7 December 2012, Defendant went to Akron Drive Pawn Shop ("Akron Pawn") and received $2,000.00 in exchange for some of Wampler's jewelry. Defendant provided his identification in order to complete the exchange. Police retrieved Wampler's jewelry from Akron Pawn.

Some of Wampler's stolen jewelry was also recovered from an ashtray/trash can ("the trash can") located just outside the GMAC building in downtown Winston-Salem. A housekeeper working in the GMAC building found the jewelry. Although the housekeeper did not testify at trial, Detective Kevin Burns ("Detective Burns"), of the Winston-Salem Police Department, testified without objection that some of Wampler's jewelry was recovered from a GMAC building trash can.

Leslie Jo McClearen ("McClearen"), the site supervisor for Securitas USA, which provided security services for the GMAC building, testified that she reviewed security cameras located in and around the GMAC building to try and determine how the jewelry had ended up in the trash can. McClearen saw two people who were

captured on video by one of the security cameras. The two people were later identified as Defendant and Shaundra Inzar ("Inzar"). At one point, Inzar was seen on the video walking to the trash can and then walking away from the trash can. Inzar was the only person seen on the video who came into direct contact with the trash can in the relevant time period.

Inzar testified at trial. She testified that Defendant had shown her some jewelry on 7 December 2012, and she identified the two people shown on the security footage from the GMAC building as being Defendant and herself. Inzar testified that she threw a cracker box "with some crackers and some food products in it" into the trash can. She told Detective Burns that "she didn't know it was jewelry in [the box]."

Defendant was arrested pursuant to an unrelated warrant on 12 December 2012. Defendant was carrying a bag of silver coins when he was arrested. Subsequent to being read his *Miranda* rights, Defendant told Detective Burns that the coins had been given to him by a "young man" whom "he was with right before he was arrested," and that he was going to give the man ten dollars for the coins. When Defendant was first asked the last time he had been to a pawn shop, Defendant replied: "I don't do pawn shops like that." Detective Burns then specifically referenced Akron Pawn and the jewelry, and Defendant admitted he had sold some jewelry at Akron Pawn. Defendant stated that he had purchased the jewelry for $45.00 from a man named "Billy" "two days before [Defendant] sold it." Defendant

acknowledged he had pawned some of the items he had purchased from "Billy." When confronted with the fact that the jewelry was stolen on the same day that it was sold to Akron Pawn and, therefore, Defendant could not have had it in his possession two days before he sold it, Defendant changed his story. Defendant said "Billy" showed him the jewelry two days before Defendant took it to Akron Pawn, but that "Billy" did not give him the jewelry until 7 December 2012. Wampler identified the coins and the jewelry recovered from Akron Pawn as items that were stolen from her townhome on 7 December 2012.

22 December 2012

Jazmin Garcia Alvarez ("Alvarez") was living in a single story apartment home across the street from her sister, Olga Garcia Alvarez ("Olga") on 22 December 2012. As Alvarez left her house that morning, she noticed a suspicious vehicle parked in front of her house. Alvarez called Olga and asked her to investigate. Olga noticed a man getting into the driver's seat of the suspicious vehicle — a dark blue or black sedan — that she described as resembling a police-type vehicle without the markings or lights. Olga called 911, and observed the man she later identified as Defendant, back the vehicle up onto the lawn and around behind Alvarez's apartment. Olga was able to give police a partial license plate number for the vehicle — AAK or AKK, 3979, or 3929. When Alvarez returned home, the police were at her house. Alvarez's back door had been broken into and numerous items of her personal property had been

taken, including a television, two laptops, and jewelry. A fingerprint was recovered from Alvarez's back door. When it was entered into the local fingerprint database, it registered as potentially being Defendant's fingerprints. Further analysis confirmed the print was from Defendant.

While driving his car on 24 December 2012, Defendant was stopped by the police. Defendant was driving a dark blue Ford Crown Victoria, with license plate number AAK 3991. Police noticed that Defendant's vehicle matched the description of the suspicious vehicle reported by Alvarez and Olga, that Defendant's license plate number was similar to the numbers Olga had provided, that one of Defendant's tire treads was similar to impressions left at the scene, and that Defendant matched Olga's description of the man she had seen in the suspicious vehicle. Once the fingerprint recovered from Alvarez's house came back as a match for Defendant, Defendant was arrested for the break-in at Alvarez's house.

Trial

Defendant was indicted on 9 September 2013 for three counts of breaking or entering, three counts of larceny after breaking or entering, two counts of possession of stolen goods, and three counts of obtaining property by false pretenses – all for the events of 3 December, 7 December, and 22 December 2012. Defendant was also indicted for having attained habitual felon status. Defendant was brought to trial on 17 March 2014 for the charges related to the 22 December 2012 breaking and entering

and larceny at Alvarez's home. The jury deadlocked and a mistrial was declared. The State filed motions on 8 April 2014 to join all charges related to the 3 December, 7 December, and 22 December 2012 events, and the trial court granted the State's joinder motions on 10 April 2014. Defendant's trial in this matter began 19 May 2014. At the close of the State's evidence, the trial court dismissed one count of obtaining property by false pretenses. Following the close of all the evidence on 23 May 2014, Defendant was found guilty of all remaining charges. Defendant then pleaded guilty to having attained habitual felon status. Defendant appeals.

I.

In Defendant's first argument, he contends he was deprived of a fair trial by the joinder of the charges related to the 3 December, 7 December, and 22 December 2012 events. We disagree.

Our Supreme Court has recognized that public policy favors consolidation of charges because consolidation

> "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once."

State v. Williams, 355 N.C. 501, 531, 565 S.E.2d 609, 627 (2002) (citations omitted). "The joinder motion is ordinarily addressed to the sound discretion of the court and, absent abuse of discretion, its ruling will not be disturbed. Whether an abuse of

discretion occurred must be determined as of the time of the order of consolidation; subsequent events are irrelevant on this issue." *State v. Neal*, 76 N.C. App. 518, 520, 333 S.E.2d 538, 539-40 (1985) (citations omitted). Even where the trial court errs in consolidating charges for trial, the defendant must still "show[ ] a reasonable possibility that the jury would have reached a different verdict if the [charges] had not been joined. G.S. 15A-1443(a)." *Id.* at 521, 333 S.E.2d at 540.

Even assuming, *arguendo*, the trial court abused its discretion by joining charges from the three incidents for trial, Defendant fails in his burden of proving prejudice. Concerning the 3 December 2014 incident, Defendant was identified approaching the scene empty-handed, and leaving the scene carrying items matching those stolen from the Crouch residence. Key saw Defendant carrying items that matched those stolen from the Crouch residence. Defendant was identified on video as being in the vicinity of the trash can at the GMAC building on 7 December 2012, the same day items were recovered that had been stolen from the Wampler residence. One of the people who identified Defendant was Inzar, who had accompanied Defendant to the GMAC building that morning. Defendant admitted to selling certain items of Wampler's jewelry to Akron Pawn. Finally, Olga identified Defendant as the man whom she saw in a suspicious vehicle waiting outside Alvarez's house on 22 December 2012, and identified Defendant as the same man she saw getting into the suspicious vehicle and driving it onto the lawn behind Alvarez's

apartment. A partial fingerprint matching Defendant was recovered from the frame of Alvarez's back door, and Defendant's car and license plate were similar to the description of the suspicious vehicle and the partial license plate reported by Olga to 911 on the morning of 22 December 2012. Olga identified Defendant's vehicle as the one she saw on 22 December 2012, and the license plate for Defendant's vehicle was very close to the potential numbers Olga had given to police on 22 December 2012. We hold that Defendant has failed to prove there was a "reasonable possibility that the jury would have reached a different verdict if the [charges] had not been joined." *Id*. at 521, 333 S.E.2d at 540. This argument is without merit.

II.

In Defendant's second argument, he contends the trial court erred by "allowing a lay witness to identify Defendant on a surveillance video and admitting the video without testimony from the individual who maintained and serviced the equipment." We disagree.

The State called McClearen, a site security supervisor for the GMAC building. McClearen testified concerning the security video recorded at the GMCA building on 7 December 2012. After a GMAC housekeeper reported having discovered some jewelry in the trash can, McClearen was asked by the police to review security footage from the morning of 7 December 2012. At trial, McClearen was testifying concerning the footage when the State approached her with three still photographs taken from

the video and asked McClearen if she could identify the photographs. McClearen responded: "That's Poplar Street, and that's Mr. York [Defendant]." Defendant objected and a conference was held at the bench. Following the unrecorded bench conference, the trial court stated: "Overruled at this time." On this record, it is unclear if the basis of Defendant's objection was McClearen's identification of Defendant in the photograph.

On cross-examination, Defendant questioned McClearen about the video, and whether there was another person with Defendant as depicted in the video. Defendant elicited testimony that, though Defendant was visible in the video, he was never shown depositing anything in the trash can. Initially, the State did not question McClearen concerning Defendant's whereabouts in the video; the State simply used McClearen to lay the foundation for admitting the video and the photographs into evidence, and McClearen spontaneously identified Defendant. It was Defendant who questioned McClearen concerning the contents of the video and, in doing so, admitted to Defendant's presence in the video.

Defendant argues the trial court erred in allowing McClearen to testify that Defendant was depicted in one of the still photographs taken from the video. However, once Defendant acknowledged at trial that he was in the video, any objection to McClearen's identification was lost. *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) (citations omitted) ("Where evidence is admitted over

objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."). Further, even assuming *arguendo* the trial court erred in this respect, Defendant does not show that McClearen's identification of him prejudiced him at trial, and we can find no potential prejudice, as there was plenary evidence that Defendant was at the GMAC building with Inzar on 7 December 2012. Defendant, through cross-examination of McClearen, conceded that he was in the video from which the still photographs were taken. However, Defendant argues that this identification "was harmful, because after the court had allowed the identification, both parties treated [McClearen's] identification as accurate. From that point on, Defendant was limited to stressing that while [he] was in the video he was not seen tossing anything into the trash can." In light of Inzar's identification of Defendant, Defendant's own acknowledgment that he was with Inzar outside the GMAC building that day, and Defendant's acknowledgment that he pawned some of the jewelry stolen from Wampler's residence that same day, Defendant fails in proving McClearen's identification of him from the still photograph prejudiced him at trial.

Second, Defendant argues that the video itself should have been excluded because "the State failed to call the individual who serviced and maintained the surveillance equipment to testify." Because Defendant did not object at trial on this basis, he now argues plain error. However, Defendant does not contend on appeal

that the video failed to record events as they happened on 7 December 2012. Defendant failed to object to any insufficiency of evidence related to the proper functioning of the video equipment at trial, but now wants this Court to find plain error based on an unargued, and now impossible to prove, potential that the video equipment was not functioning properly. As Defendant does not contend that the video itself depicts anything either incorrect or prejudicial, Defendant fails in his burden of proving plain error.

III.

In Defendant's third argument, he contends that "the trial court [committed prejudicial error] by allowing [McClearen] to testify to where the jewelry was found when she was not present and was not watching the monitor." We disagree.

First, the following testimony of Detective Burns was admitted at trial without objection:

> I got a call and – where they had found some of Ms. Wampler's stolen property in the trash can at GMAC, and I was told that Officer Bracken had followed up on that and had located possibly someone that had tried to sell that – some additional property, being that bracelet, to the pawn shop – Apple Pawn Shop downtown, and that Apple Pawn Shop was able to provide the driver's license number, which, in turn, identified [Defendant], at which point I ran [Defendant] through our pawn system and found that he, in fact, later on that day, had sold a quantity of jewelry to Akron Pawn.

Officer Scott Darin Bracken also testified without objection to the fact that the jewelry had been recovered from "a trash can outside the building." Because the objected-to evidence — that some of Wampler's jewelry was found in the trash can at the GMAC building — was admitted without objection through Detective Burns' testimony, Defendant's objection to McClearen's testimony has been lost. "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *Alford*, 339 N.C. at 570, 453 S.E.2d at 516 (citations omitted).

Second, Defendant argues that "allowing in evidence which purported to show a connection between [Defendant] and the personal property stolen on December 7 was material and prejudicial" because "[n]o one witnessed the break-in or even knew it had occurred until days later." However, as Defendant acknowledges, Defendant "did identify himself as the individual attempting [on 7 December 2012] to pawn items from the break-in[.]" Defendant contends, however, "that evidence would support possession of stolen property more than the actual break-in." We fail to see any prejudicial difference between Defendant attempting to dispose of the jewelry on 7 December 2012 by pawning it and Defendant disposing of the jewelry on 7 December 2012 by having it deposited in a trash can. This argument is without merit.

In Defendant's final argument, he contends that "the State's evidence on the doctrine of recent possession was insufficient to carry the charges of breaking and entering of the Crouch residence to the jury." We disagree.

> The doctrine of recent possession is "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." When "there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering." "When the doctrine of recent possession applies in a particular case, it suffices to repel a motion for nonsuit and defendant's guilt or innocence becomes a jury question."
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> "The possession must be so recent after the breaking or entering and larceny as to show that the possessor could not have reasonably come by it, except by stealing it himself or by his concurrence."

State v. Brown, 221 N.C. App. 383, 388, 732 S.E.2d 584, 588 (2012).

Defendant's argument is that, though two witnesses testified to having seen Defendant and his companion walking away from the direction of the Crouch residence with certain items matching those stolen from the Crouch residence, because the witnesses did not testify that they saw the word "Yamaha" on the black rectangular electronic keyboard-sized case, there was insufficient evidence presented at trial to submit an instruction on recent possession to the jury. We disagree.

There was evidence presented that Defendant had come to the Crouch residence several times before the break-in. Defendant and his companion were seen walking on a path in the direction of the Crouch residence just prior to the break in, and were then observed walking back on the path away from the direction of the Crouch residence just after the break-in. In the interim, a suspicious neighbor investigated and found the rear door of the Crouch residence ajar. Among other items, Defendant was seen with a black rectangular case matching the description of one discovered stolen from the Crouch residence, except that these witnesses did not testify to having seen the word "Yamaha" on the case. However, Clawson testified concerning the case: "I own a Casio, so I kind of know what the case looks like, so it's familiar to me. A piano case is long. It's not like a suitcase. It's very unique in its shape." Defendant's companion was seen with a guitar case which Defendant's companion then abandoned in some bushes. This guitar case was recovered by Clawson and identified by Mr. Crouch as belonging to him. These facts, considered together, were sufficient for the jury to decide that the black rectangular electronic keyboard-sized case was the same black rectangular case that contained Mr. Crouch's electronic keyboard and that was stolen from the Crouch residence. There was also sufficient evidence to indicate that the electronic keyboard was stolen at approximately the same time Defendant and his companion were seen walking towards, then away from, the Crouch residence. We hold that there was sufficient

evidence of each element required for instructing the jury on the doctrine of recent possession. *Id*. Defendant's argument is without merit.

NO PREJUDICIAL ERROR.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).