IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-152

Filed: 6 September 2016

Vance County, No. 14 CRS 052728

STATE OF NORTH CAROLINA

v.

STEVEN EVERETTE McCANN

Appeal by defendant from judgment entered 30 June 2015 by Judge Henry W. Hight, Jr. in Vance County Superior Court. Heard in the Court of Appeals 9 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Brittany K. Brown, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

TYSON, Judge.

Steven Everette McCann ("Defendant") appeals from jury convictions of felonious larceny and possession of stolen goods. We find no error at trial, vacate the trial court's restitution order, and remand to the trial court for further proceedings.

I. Background

Rudy Hunt lived across the street from the Satterwhites in Henderson, North Carolina. On 9 September 2014, Mr. Hunt saw a gray or brown sedan travel up the

Satterwhites' driveway toward their house. As a neighbor, he was familiar with the Satterwhites' regular comings and goings, and had never seen this particular vehicle at their house. Mr. Hunt called the Vance County Sherriff's Department and the Satterwhites to report the vehicle.

Mrs. Satterwhite returned home after she received Mr. Hunt's call. Upon arrival, she observed a dark gray four door sedan parked near the shed her husband used to store welding and farm equipment. Mrs. Satterwhite saw four individuals inside the vehicle. She identified Defendant as the driver of the vehicle.

Mrs. Satterwhite testified she observed Defendant drive down a path, through woods, and onto the roadway. Mrs. Satterwhite followed Defendant's vehicle, and testified the trunk and the rear of the vehicle were "practically dragging the ground." Defendant sped up and entered the roadway, and Mrs. Satterwhite lost sight of the vehicle in traffic. She returned to the shed and determined welding leads, scrap steel, and a large tractor blade had been stolen.

Henderson City Police Officer Tony Wallace arrived at the Satterwhites' home to investigate. Officer Wallace spoke with both Mr. Hunt and Mr. Satterwhite. After speaking with Mr. Hunt, Officer Wallace issued a "BOLO" for the vehicle Mrs. Satterwhite had observed on her property.

On 16 September 2014, Henderson Police Investigator Reese Wilkerson conducted a photographic lineup with Mrs. Satterwhite. She identified Defendant's

photograph as the person she had seen driving the vehicle away from her home with "100% confidence." Mrs. Satterwhite also gave a written statement to Officer Wallace identifying Defendant as the driver of the vehicle. Defendant was arrested the same day.

On 10 November 2014, Defendant was indicted for felonious larceny of "200 feet of welder leads, 100 feet of metal pipe, [a] Farmall tractor blade and assorted metal," the personal property of William Satterwhite. The indictment alleged the property to have a value of $1,700.00. Defendant was also indicted for felonious possession of stolen goods.

At trial, Mrs. Satterwhite testified the value of the stolen property "was over $3,000.00" During cross-examination, Mrs. Satterwhite testified that her valuation of the property was based upon a telephone conversation with "National Welding Lead . . . where my husband purchased it from, and he knew exactly how many feet of welding lead he had." Defendant's counsel objected and requested this line of questioning be stricken from the record. The trial court did not strike her testimony or issue limiting instructions to the jury. Mr. Satterwhite did not testify at trial.

The jury found Defendant guilty of felonious larceny and felonious possession of stolen goods. Defendant received an active prison sentence and was ordered to pay restitution in the amount of $3,632.00 to Mr. Satterwhite. The trial court arrested

judgment on the conviction for felonious possession of stolen goods. Defendant appeals.

II. Issues

Defendant argues: (1) the trial court committed plain error by allowing inadmissible hearsay testimony into evidence to prove the value of the property stolen; (2) the trial court erred by denying Defendant's motion to dismiss since the State failed to present sufficient, competent evidence to show the value of the property exceeds $1,000.00; (3) a fatal variance existed between the indictment and the evidence presented at trial over who owned the stolen property; (4) the trial court's instructions to the jury were not supported by the evidence presented at trial; and (5) the trial court erred by awarding restitution of $3,632.00 because insufficient evidence supported the award.

III. Value of the Stolen Property

Defendant first argues the trial court committed plain error by allowing inadmissible hearsay testimony into evidence to prove the value of the property stolen. Second, Defendant argues that the State failed to present sufficient, competent evidence tending to show Defendant stole property worth $1,000.00 or more and, as such, the trial court erred by denying his motion to dismiss. We disagree.

A. Standards of Review

"The admissibility of evidence at trial is a question of law and is reviewed *de novo*." *State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d. 813, 815 (2010) (citation omitted). "When a defendant fails to object at trial to the improper admission of evidence, the reviewing court determines if the erroneously admitted evidence constitutes plain error." *Id*. (citation omitted). To determine whether the alleged error rises to the level of plain error, the appellate court examines the entire record and decides whether the "error had a probable impact on the jury's finding of guilt." *Id*. (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d.375, 379 (1983)).

The denial of a motion to dismiss is an issue of law and is reviewed *de novo* on appeal. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). We review a trial court's ruling on a motion to dismiss and "must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is 'substantial' if a reasonable person would consider it sufficient to support the conclusion that the essential element exists." *State v. Harris*, 157 N.C. App. 647, 651, 580 S.E.2d 63, 66 (2003) (quoting *State v. Williams*, 151 N.C. App. 535, 539, 566 S.E.2d 155, 159, *cert. denied*, 356 N.C. 313, 571 S.E.2d. 214 (2002)).

B. Analysis

In order to prove larceny, the State must prove Defendant: "1) took the property of another; 2) carried it away; 3) without the owner's consent; and 4) with

the intent to deprive the owner of the property permanently." *State v. Pickard*, 143 N.C. App. 485, 490-91, 547 S.E.2d 102, 106 (citation omitted), *disc. review denied*, 354 N.C. 73, 553 S.E.2d 210 (2001). The crime of larceny becomes a felony when the value of the goods stolen exceeds $1,000.00. N.C. Gen. Stat. § 14-72(a) (2015).

"[A] non-expert witness who has knowledge of value [of the property] gained from experience, information, and observation may give his opinion of the value of personal property." *Williams v. Hyatt Chrysler-Plymouth, Inc.*, 48 N.C. App. 308, 317, 269 S.E.2d 184, 190, *disc. review denied,* 301 N.C. 406, 273 S.E.2d 451 (1980). The owner of a stolen vehicle may properly testify to the value of his own vehicle, and the owner's testimony of value is sufficient to submit the charge of felonious larceny to the jury. *State v. Huggins,* 338 N.C. 494, 501, 450 S.E.2d 479, 483 (1994).

In *Huggins*, the owner of the stolen vehicle testified his vehicle was worth $3,000.00 at the time it was stolen. *Id.* The defendant did not object to the owner's opinion testimony of his vehicle's value or offer any evidence to the contrary. *Id.* at 501, 450 S.E.2d at 483-84.

Here, during direct examination of Mrs. Satterwhite, the State solicited testimony regarding the value of the property:

> Q: [D]o you have an opinion as to the value of the property that was . . . there earlier that morning and was not there when you got home and saw the Defendant in the vehicle; do you have an opinion as to the value of the property that was missing?

A: It was over $3,000.

During cross examination, Defendant's counsel questioned Mrs. Satterwhite as follows:

> Q: Okay. Now, as far as the evaluation, you said it was worth at least $3,000?
>
> A: Uh-huh.
>
> Q: And did you -- how did you come up with that evaluation?
>
> A: We called and got the estimates.
>
> Q: Pardon me?
>
> A: We called and got the estimates.
>
> Q: Okay. And those estimates came from where?
>
> A: National Welding Lead is where my husband purchased it from, and he knew exactly how many feet of welding lead he had.
>
> Q: So, those persons are not in court here?
>
> A: Right. This is a company.
>
> [Defense Counsel]: Your Honor, we would ask that that particular testimony be stricken.
>
> THE COURT: You may go on.

Mrs. Satterwhite is a lay witness, who is permitted to give her opinion of the value of the property based on her "knowledge of value gained from experience, information, and observation. . . ." *Williams,* 48 N.C. App. at 317, 269 S.E.2d at 190.

The trial court did not err in permitting Mrs. Satterwhite's testimony regarding her opinion of the value of the stolen property. *Id.*

Based on the evidence presented, including Mrs. Satterwhite's testimony, the trial court properly instructed the jury on both felonious larceny and the lesser charge of non-felonious larceny. The jury determined the value of the property stolen was greater than $1,000.00 to convict Defendant of felonious larceny.

On cross-examination, Defendant's counsel asked Mrs. Satterwhite upon what she had based her opinion of the stolen property's value. Mrs. Satterwhite responded she and her husband had called the company from where he had purchased the items. Defendant seeks to invalidate his conviction and judgment upon information he sought and introduced on cross-examination. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2015). A "[d]efendant cannot invalidate a trial by introducing evidence or by eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State." *State v. Chatman,* 308 N.C. 169, 177, 301 S.E.2d 71, 76 (1983) (quoting *State v. Waddell*, 289 N.C. 19, 25, 220 S.E.2d 293, 298 (1975)).

Viewed in the light most favorable to the State, the State presented sufficient evidence that the stolen property's value exceeded $1,000.00. The trial court did not err by denying Defendant's motion to dismiss. Defendant's argument is overruled.

IV. Owner of the Stolen Property

Defendant argues a fatal variance existed between the indictment and the evidence presented at trial over who owned the stolen property. We disagree.

A. Standard of Review

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000) (internal quotations and citation omitted), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980).

B. Analysis

The indictment alleged Defendant "unlawfully, willfully and feloniously did steal, take, and carry away 200 feet of welder leads, 100 feet of metal pipe, Farmall tractor blade and assorted metal, the personal property of William Satterwhite, such property having a value of $1,700.00." At trial, Mrs. Satterwhite was asked who owned the stolen property. She answered: "My husband and I." Defendant argues the property alleged to be stolen or missing was jointly owned by William and Tabitha Satterwhite, and a spouse who jointly owns property must be identified in the larceny indictment.

The purpose of the indictment is to: "(1) inform defendant of the elements of

the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense." *State v. Greene*, 289 N.C. 578, 586, 223 S.E.2d 365, 370 (1976).

An indictment is defective and prevents the trial court from having jurisdiction over the offense charged when "it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (internal quotations omitted). In *Greene*, our Supreme Court explained:

> [T]he general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and the state must prove that that person has ownership, meaning title to the property or some special property interest. If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit.

289 N.C. at 584-85, 223 S.E.2d at 369-70 (citations omitted).

In *State v. Crawford,* 3 N.C. App. 337, 341, 164 S.E.2d 625, 628 (1968), the defendant and his accomplice were accused of breaking into a building owned by one entity and stealing from the vending machines owned by another entity. The indictment incorrectly alleged the money stolen from the vending machines was the property of the building's owner. This Court upheld the defendant's conviction because it was "not incumbent upon the State to establish the ownership of the

property [the defendant] intended to steal, the particular ownership being immaterial." *Id.*

Defendant cites *State v. Craycraft*, 152 N.C. App. 211, 567 S.E.2d 206 (2002), to support his contention the indictment was defective. In *Craycraft*, the defendant broke into the mobile home where his father had previously lived to collect his father's belongings. *Id.* at 212, 657 S.E.2d at 207-08. The landlord did not "have a special possessory interest in the table and chairs" because the landlord had not completed the civil ejectment procedure. *Id.* at 214, 657 S.E.2d at 208-09. The indictment only alleged the property belonged to the landlord. *Id.* This Court held that the indictment was improper, stating: "[i]f the indictment fails to allege the existence of a person with title or special property interest, then the indictment contains a fatal variance." *Id.*

Defendant's reliance on *Craycraft* is misplaced. Here, the indictment alleged Mr. Satterwhite was the owner, but the evidence presented at trial tended to show the property was owned by both Mr. and Mrs. Satterwhite. The indictment properly alleged the property belonged to Mr. Satterwhite, an owner and person who held a special possessory interest in the property. Defendant has not shown a fatal variance to vacate the indictment. Defendant's argument is overruled.

V. Jury Instructions

Defendant argues the evidence presented at trial was insufficient to convict him based upon the trial court's instruction to the jury. We disagree.

A. Standard of Review

The trial court must "instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw,* 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "The Due Process Clause . . . requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed." *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citing *Presnell v. Georgia*, 439 U.S. 14, 16, 58 L. Ed. 2d 207, 211 (1978)). Our Supreme Court has held that "the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984).

B. Analysis

The trial court instructed the jury as follows:

> Under count number one, the Defendant has been charged with Felonious Larceny. For you to find the Defendant guilty of this offense, the State must prove six things beyond a reasonable doubt: First, that the Defendant took property belonging to another person. Second*, that the Defendant carried away the property: welder leads, a metal pipe, a Farmall tractor blade and assorted metal or property*. Third, that the owner of the property did not consent to the taking and carrying away of the property.

> Fourth, that at the time of taking, the Defendant intended to deprive the owner of the property of its use permanently.
>
> Fifth, that the Defendant knew he was not entitled to take the property. And, sixth, that the property was worth more than $1,000. The value or worth of the property is the value of the property in the condition at the time the property was taken. It is not necessary that a witness be an expert witness in order to give their opinion as to the value of the property. (emphasis supplied).

Defendant argues no evidence was presented to show that any "metal pipes" or other "assorted metal" was stolen from the Satterwhites. During direct examination, Mrs. Satterwhite testified the "metal was under a shed and the welding lead was under the shed. The tractor equipment was beside the shed." Mrs. Satterwhite testified to where the metal was located before it was stolen, and saw Defendant driving away from the shed in a vehicle with the rear weighted down. The trial court instructed the jury in accordance with the evidence presented at trial. *See Shaw,* 322 N.C. at 803, 370 S.E.2d at 549. Defendant's argument is overruled.

VI. Restitution

Defendant argues that the trial court erred by awarding restitution of $3,632.00 where the evidence does not support the award.

A. Standard of Review

A trial court's award of restitution in a criminal case is reviewed *de novo* on appeal. *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801, *disc. review denied,* 365 N.C. 351, 717 S.E.2d 743 (2011). We determine whether the award was

supported by competent evidence. *Id*. Under N.C. Gen Stat. § 15A-1446(d)(18) (2015), the trial court's award of restitution is deemed preserved for appellate review without and in the absence of a specific objection by Defendant. *See State v. Smith*, 210 N.C. App. 439, 443, 707 S.E.2d 779, 782 (2011).

B. Analysis

As discussed *supra*, Mrs. Satterwhite testified the value of the property stolen "was over $3,000.00" On cross-examination, she testified she and her husband had determined the value of the missing property by speaking with someone at National Welding Lead, and her husband "knew exactly how many feet of welding lead he had." It is unclear whether Mrs. Satterwhite's valuation of the property is for just the welding leads, or of all of the stolen items.

At sentencing, the State presented a restitution worksheet seeking restitution of $3,632.00. No testimony or other evidence was offered to support the requested amount of restitution. The trial court ordered Defendant to pay the amount listed on the restitution worksheet to Mr. Satterwhite.

The amount of restitution cannot be based upon "guess or conjecture." *State v. Daye*, 78 N.C. App. 753, 758, 338 S.E.2d 557, 561, *aff'd*, 318 N.C. 502, 349 S.E.2d 576 (1986). "[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995).

This Court has held "[a] restitution worksheet, unsupported by testimony, documentation, or stipulation, 'is insufficient to support an order of restitution.'" *State v. Blount*, 209 N.C. App. 340, 348, 703 S.E.2d 921, 927 (2011) (quoting *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d. 774, 778 (2010)). "When . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986).

No admitted evidence supports the exact amount of restitution ordered by the court. *See State v. Buchanan*, 108 N.C. App. 338, 341-42, 423 S.E.2d 819, 821 (1992) ("[N]o evidence was presented at trial or at sentencing which supports the figures offered by the State. The trial court therefore based the amount of restitution only upon the unsworn statements of the prosecutor, which does not constitute evidence and cannot support the amount of restitution recommended."). We vacate that portion of the judgment which orders restitution, and remand the matter to the trial court for findings of fact based upon the evidence presented to support any award of restitution due to the Satterwhites.

VII. Conclusion

Defendant has failed to show the trial court committed plain error by admitting the testimony of Mrs. Satterwhite. Defendant elicited her testimony during cross

examination. The trial court properly overruled Defendant's motions to dismiss. Defendant received a fair trial, free from prejudicial errors he asserts on appeal.

The trial court's precise award of restitution is unsupported by record evidence. That portion of the judgment is vacated and remanded to the trial court for further proceedings.

NO ERROR AT TRIAL, RESTITUTION AMOUNT VACATED AND REMANDED.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).