IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-253

Filed: 1 December 2020

Randolph County, Nos. 18 CRS 052126-27

STATE OF NORTH CAROLINA

v.

DANIEL CHRISTIAN GARNER, Defendant.

Appeal by Defendant from judgments entered 23 April 2019 by Judge Michael A. Stone in Randolph County Superior Court. Heard in the Court of Appeals 21 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State.

Blass Law, PLLC, by Danielle Blass, for Defendant-Appellant.

INMAN, Judge.

Defendant Daniel Christian Garner appeals from two judgments entered following convictions for resisting a public officer, felonious possession of stolen property, and felony larceny. Defendant argues that: (1) the trial court erred in denying his motion to dismiss the larceny charge for insufficiency of the evidence; (2) his convictions should be vacated for vindictive prosecution; and (3) in the alternative

to his second argument, his convictions should be vacated for ineffective assistance of counsel ("IAC") due to his attorney's failure to argue vindictive prosecution before the trial court. After careful review, we hold Defendant has failed to demonstrate error under his first argument, dismiss his vindictive prosecution argument as unpreserved, and dismiss his IAC claim without prejudice to him filing a motion for appropriate relief in the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

The evidence introduced at trial discloses the following:

On 5 May 2018, Dusty Potts, a resident of Randolph County, went to help his next-door neighbor, Walter Allen, fix a ramp leading into Mr. Allen's home. As Mr. Potts was on the way to his barn to pick up some pieces of wood to use in the repairs, he noticed that the doors to a woodshed that he shared with Mr. Allen were hanging open. Mr. Potts checked the building and observed that his 4-wheeler, its trailer, and a ladder were all missing. A second 4-wheeler belonging to Mr. Allen was also gone from the building. Mr. Potts was unable to determine from the scene exactly when the items must have gone missing, though he and Mr. Allen had seen them in the building three or four days earlier. Believing the property stolen, the two men called 911 and filed a report with the local sheriff's department.

Later that day, the sheriff's department received an anonymous tip that the missing items could be found at a home located at 215 Country Acres Road in

Asheboro. Deputy Travis Cox responded to investigate the tip and discovered a red 4-wheeler on a trailer attached to a Ford Explorer in the driveway of the home. Deputy Cox ran the license plate of the Explorer only to learn that the plate was fictitious. He then approached the vehicle and noticed Defendant asleep in the driver's seat of the Explorer.

Deputy Cox woke Defendant up and asked him his name and date of birth; Defendant responded that his name was "Mark Garner" and offered his birthday as 4 September 1985. Deputy Cox radioed this information to dispatch, who told him that they were unable to find anyone with that name and birthdate in their records search. He then confronted Defendant a second time and asked him for his real name; Defendant again insisted that his name was "Mark Garner."

Deputy Cox continued to question Defendant, asking him where he acquired the trailer, 4-wheeler, and ladder. Defendant answered that he received the items from a friend, though he refused to divulge who the friend was and where he picked them up. Deputy Cox then asked Defendant to step outside the Explorer, whereupon Defendant exited the vehicle and began to walk away. Given that he was unable to verify Defendant's name or the registration of the Explorer, and considering the presence of items matching those stolen from Mr. Potts and Mr. Allen, Deputy Cox stopped Defendant from leaving the scene and placed him in handcuffs.

With Defendant detained, Deputy Cox performed a pat-down search and discovered an I.D. identifying Defendant by his actual name. Using this information, Deputy Cox learned that Defendant had an outstanding warrant for his arrest. Deputy Cox then searched the Explorer and found a black backpack containing a white powder, four burned metal spoons, two glass pipes, and four intravenous needles.

Mr. Potts arrived at the scene while the vehicle search was underway and positively identified the trailer, ladder, and 4-wheeler as his. However, Mr. Potts noticed that the key to his 4-wheeler was missing; though there was a key in the ignition to the vehicle, that key actually belonged to Mr. Allen's 4-wheeler. Another key belonging to Mr. Allen's 4-wheeler was located in Defendant's pocket. When asked where Mr. Allen's 4-wheeler could be found, Defendant told a sheriff's deputy that it might be located at his half-brother's home. Mr. Allen's 4-wheeler was recovered from that address the following day.

Defendant was placed under arrest and the State procured two magistrate's orders on 5 May 2018; the first charged Defendant with misdemeanor possession of drug paraphernalia and misdemeanor resisting a public officer, while the second charged him with felony larceny and felony possession of stolen property.

Defendant was tried on the misdemeanor charges in district court on 18 May 2018, was found guilty, and appealed to superior court for trial *de novo*.

Roughly three months later, on 13 August 2018, the State procured a grand jury' indictment on the felony charges and they were scheduled for trial in superior court.

Defendant was tried on all the misdemeanor and felony charges before a jury on 22 April 2019.

At trial, Deputy Cox, Mr. Potts, and Mr. Allen testified consistent with the above recitation of the facts. At the close of the State's evidence, Defendant moved to dismiss all charges for insufficiency of the evidence. That motion was denied, and Defendant proceeded to testify in his own defense. In his testimony, Defendant denied giving a false name but admitted that he was found alone in the Explorer in the driveway of his home with the stolen property hitched to the vehicle and a key to one of the 4-wheelers in his pocket. He explained, however, that he lived in the home together with his mother and step-father, that the Explorer belonged to his father, and that he was in the process of searching the vehicle to determine what it was doing in the driveway when Deputy Cox arrived. Defendant further testified that he did not know how the stolen property came to be in his driveway, though he admitted telling Deputy Cox that Mr. Allen's 4-wheeler could be found at his brother's home.

Defendant's counsel renewed his motion to dismiss at the close of all evidence. That motion was denied, and the trial court proceeded to hold a charge conference. During the conference, the parties agreed to an instruction on the doctrine of recent

possession in support of the felony charges. They also realized, however, that there was a variance between the document charging Defendant with possession of drug paraphernalia and the evidence introduced at trial; as a result, the State voluntarily dismissed that misdemeanor charge.

Following closing arguments and instruction from the trial court, the jury found Defendant guilty on the remaining offenses. At sentencing, the trial court arrested judgment on Defendant's conviction for felony possession of stolen property, sentenced Defendant to 10 to 21 months imprisonment for felony larceny, and imposed a consecutive sentence of 60 days imprisonment for misdemeanor resisting a public officer. The trial court also suspended the latter sentence for 18 months supervised probation. Defendant gave timely written notice of appeal.

II. ANALYSIS

Defendant first contends that the trial court erred in denying his motion to dismiss the felony charges for larceny and possession of stolen property, asserting that the State failed to introduce sufficient evidence to support the doctrine of recent possession. He next argues that the trial court should have dismissed those charges for vindictive prosecution, though he acknowledges that the issue was never raised before the trial court. Defendant therefore presents an alternative argument that his trial counsel was ineffective by failing to argue vindictive prosecution below. We address each argument in turn.

1. Standard of Review

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Adams*, 218 N.C. App. 589, 592, 721 S.E.2d 391, 394 (2012). To survive a motion to dismiss for insufficiency of the evidence, the State must introduce "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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) (citations omitted). In reviewing that evidence, we examine it "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). We do not consider the defendant's evidence "unless it is favorable to the State or does not conflict with the State's evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation omitted). Furthermore, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. McDaniel*, 372 N.C. 594, 604, 831 S.E.2d 283, 290 (2019) (citation and quotation marks omitted).

2. Doctrine of Recent Possession

At trial, the State proceeded on, and Defendant was convicted under, the doctrine of recent possession. "That doctrine is simply 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." *State v. Maines*, 301 N.C. 669, 673-74, 273 S.E.2d 289, 293 (1981) (citations omitted). In order to receive the benefit of the doctrine, the State must show:

> (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

Id. at 674, 273 S.E.2d at 293 (citations omitted).

Defendant concedes the property was stolen but argues that the State failed to introduce evidence demonstrating the second and third prongs. Defendant contends the evidence did not establish Defendant's exclusive custody of the stolen goods in the face of his own testimony that the Explorer to which they were hitched belonged to his father. Defendant also contends that the evidence did not affirmatively establish *when* the goods were stolen and so did not demonstrate that Defendant possessed them close in time following the larceny.

In arguing that the State failed to satisfy the second prong of exclusive custody, Defendant focuses largely on his own testimony rather than the evidence pertinent to the standard of review—namely, the State's circumstantial evidence and any reasonable inferences taken therefrom viewed in the light most favorable to the State. *McDaniel*, 372 N.C. at 604, 831 S.E.2d at 290. "What amounts to exclusive possession of stolen goods to support an inference of a felonious taking most often turns on the circumstances of the possession." *Maines*, 301 N.C. at 675, 273 S.E.2d at 294. Here, Deputy Cox, in response to an anonymous tip, found Defendant alone in his driveway in the driver's seat of the Explorer hitched to a stolen trailer with a stolen 4-wheeler and ladder inside. The Explorer bore a fictitious plate that did not match any legal registration. Keys to another stolen 4-wheeler were found in Defendant's pocket and in the ignition of the 4-wheeler in the trailer; Defendant told Deputy Cox where he could find that second stolen 4-wheeler. Contrary to his argument on appeal, Defendant's testimony that the Explorer belonged to his father does not preclude the doctrine of exclusive possession. As this Court observed in a similar case, "borrowed, rented, or stolen cars may be used in criminal activities, including robberies and larcenies." *State v. McNair*, 72 N.C. App. 681, 683, 325 S.E.2d 274, 275 (1985). When taken together and viewed in the light most favorable to the State, the above evidence suffices to show that the Explorer and the stolen goods hitched to it were in Defendant's exclusive custody and control at the time of their recovery.

As to the third prong, the State's evidence established that the stolen goods had gone missing between three and four days prior to their discovery in Defendant's possession. Whether this is sufficiently recent is an intensely factual question that depends upon the facts and circumstances of each case:

> Among the relevant circumstances to be considered is the nature of the particular property involved. Obviously, if the stolen article is of a type normally and frequently traded in lawful channels, then only a relatively brief interval of time between the theft and finding a defendant in possession may be sufficient to cause the inference of guilt to fade away entirely. On the other hand, if the stolen article is of a type not normally or frequently traded, then the inference of guilt would survive a longer time interval. In either case the circumstances must be such as to manifest a substantial probability that the stolen goods could only have come into the defendant's possession by his own act, to exclude the intervening agency of others between the theft and the defendant's possession, and to give reasonable assurance that possession could not have been obtained unless the defendant was the thief.

State v. Blackmon, 6 N.C. App. 66, 76-7, 169 S.E.2d 472, 479 (1969) (citations omitted).

Defendant argues that the evidence introduced at trial discloses that 4-wheelers are "frequently traded in normal channels," as Mr. Potts testified that he regularly traded 4-wheelers on Craigslist and among a group of fellow ATV enthusiasts. But other evidence, considered in a light most favorable to the State, supports the inference that no one other than Defendant possessed the property after it was stolen. It is unlikely, for example, that Defendant traded for or purchased Mr.

Potts's 4-wheeler given that the key to that vehicle was never recovered. Also, 4-wheelers and trailers used to haul them are not as widely or easily traded as other consumer goods; an interested buyer must have sufficient space to store them and a vehicle capable of towing them. We hold that these surrounding circumstances suffice to show that Defendant's custody of the stolen items was sufficiently proximate to the theft to support his convictions based on the doctrine of recent possession.

3. Vindictive Prosecution

Defendant next argues that the prosecutor's decision to indict and try him on the two felony charges was vindictive and in violation of his constitutional due process rights. More specifically, he contends that the State elected to prosecute only the two misdemeanor charges in district court and only later decided to pursue the felonies to punish Defendant for appealing the misdemeanor convictions. Defendant acknowledges that he failed to argue this question before the trial court.

Defendant has failed to preserve this argument and we dismiss this portion of his appeal, as "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Rawlings*, 236 N.C. App. 437, 443, 762 S.E.2d 909, 914 (2014) (citing *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)). We also decline in our discretion to grant Defendant's request to reach the issue through application of Rule 2 of the North Carolina Rules of Appellate

Procedure. *See, e.g., State v. Bishop*, 255 N.C. App. 767, 769-70, 805 S.E.2d 367, 369-70 (2017) (declining to invoke Rule 2 to review a constitutional argument not presented to the trial court). Defendant was aware at the time of his bench trial in district court, before his conviction and notice of appeal, that he also faced felony charges. The record discloses no indication by the State that it would forego felony prosecution. The State routinely prosecutes felony charges in superior court. *Compare* N.C. Gen. Stat. § 7A-272(a) (2019) ("Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions . . . below the grade of felony.") *with* N.C. Gen. Stat. § 7A-271(a) (2019) ("The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article."). Defendant has failed to demonstrate that invocation of Rule 2 is necessary "[t]o prevent manifest injustice to a party, or to expedite [a] decision in the public interest." N.C. R. App. P. 2 (2020).

4. IAC Claim

As an alternative to his vindictive prosecution argument, Defendant contends that his convictions must be vacated for IAC as a result of his trial counsel's failure to present that constitutional argument to the trial court. We disagree. From the time of the magistrate's warrant, Defendant was on notice that he faced felony charges. There is no indication in the record that the prosecutor at any time represented that, contingent upon the outcome of the district court trial on

misdemeanor charges, the State would forego prosecuting Defendant on the felony charges. However, we cannot state with certainty what transpired in the district court given the absence of any transcript. When, as here, the record is insufficient to fully resolve an IAC claim, the proper disposition is to dismiss the IAC claim without prejudice to filing a motion for appropriate relief with the trial court. *State v. Stimson*, 246 N.C. App. 708, 713, 783 S.E.2d 749, 752 (2016). We therefore dismiss Defendant's IAC claim without prejudice consistent with that practice.

III. CONCLUSION

For the foregoing reasons, we hold that Defendant has failed to demonstrate error in the denial of his motion to dismiss for insufficiency of the evidence and dismiss Defendant's vindictive prosecution argument as unpreserved. We also dismiss Defendant's IAC claim without prejudice to filing a motion for appropriate relief in the trial court.

NO ERROR IN PART; DISMISSED IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).