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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-874

No. COA21-700

Filed 20 December 2022

Catawba County, Nos. 20CRS3951, 20CRS50474, 20CRS50476

STATE OF NORTH CAROLINA

v.

LEONARD NELSON AVERY, III, Defendant.

Appeal by defendant from judgment entered 5 April 2021 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State-appellee.

Jarvis John Edgerton, IV, for defendant-appellant.

GORE, Judge.

¶ 1

Defendant appeals from a judgment upon conviction of two counts of possession of stolen goods. Defendant argues, and the State concedes, the trial court erred by sentencing him on two counts of misdemeanor possession of stolen goods, because the jury returned two guilty verdicts arising from a single offense. Therefore, we vacate judgment on one count and remand the remaining count for resentencing.

I.

¶ 2 On 25 January 2020, Amanda Burt left her two cell phones (iPhone 10 in a pink case for personal use and iPhone 6 in a black case for work) in her office at United Church Homes and Services and later noticed both phones were missing. Burt began tracking her personal phone through a co-worker's phone, which showed her phone as moving along Highway 16. Burt drove on Highway 16 to search for her missing iPhones and saw a person in black pants and a hoodie with a backpack along Highway 16. Burt testified at trial she gave no permission to defendant to enter her place of work and take her phones.

¶ 3 Soon after, Jason Drum arrived at his home and discovered a man wearing a hoodie, dark pants, and a backpack, in his house rummaging through his roommate's belongings. Drum sought out a Deputy and gave a description of defendant and the recent occurrence. The Deputy found and arrested defendant, seized items believed to be stolen, and later returned to Drum items believed stolen from Drum's house. Drum discovered Burt's iPhone with the pink case in his house and Burt's other iPhone was found in defendant's possession. The Deputy subsequently returned the missing iPhones to Burt. Defendant was indicted by grand jury for felonious breaking and entering, felonious larceny after breaking and entering, felonious possession of stolen goods, misdemeanor possession of stolen goods, and attaining habitual felon status.

¶ 4 On 30 March 2021, defendant was convicted by a jury of: (1) felonious breaking and entering; (2) felonious larceny after breaking and entering; (3) non-felonious possession of stolen goods; (4) one count of misdemeanor possession of stolen goods (the two stolen cell phones); and (5) attaining habitual felon status. Because the jury returned a verdict of the lesser included offense non-felonious possession of stolen goods instead of felonious possession of stolen goods arising from the theft of Burt's two phones, this resulted in conviction of two counts of misdemeanor possession of stolen goods. The trial court sentenced on the verdicts of all five counts including both counts of misdemeanor possession of stolen goods.

¶ 5 On 5 April 2021, defendant's two Class D felonies were consolidated to one sentence in the presumptive range of 128 months to 166 months, with the two misdemeanors consolidated to one sentence running concurrently with the felony sentence for 120 days. Defendant timely appealed his misdemeanor convictions and did not appeal his felony convictions.

II.

¶ 6 Defendant was convicted of two counts of misdemeanor possession of stolen goods. *See* N.C. Gen. Stat. § 14-71.1 (2021). Defendant raises one issue on appeal. He argues the conviction of two counts of misdemeanor possession of stolen goods was duplicative.

¶ 7

Our Supreme Court previously explained how to differentiate separate counts of possession under N.C. Gen. Stat. § 14-71.1. “The statute individuates crimes of possession by the time at which the stolen goods came into the criminal’s possession rather than homogenizing all simultaneously possessed stolen items into one possessory offense.” *State v. White*, 322 N.C. 770, 778, 370 S.E.2d 390, 395 (1988). Further, the Court stated “possession . . . is a continuing offense” that begins “at the time of receipt and continu[es] until divestment.” *Id.* (quoting *State v. Davis*, 302 N.C. 370, 374, 275 S.E.2d 491, 494 (1981)); see *State v. Phillips*, 172 N.C. App. 143, 146–48, 615 S.E.2d 880, 882–83 (2005) (explaining at length the legal analysis required to determine the proper number of charges for criminal possession of stolen property, and ultimately concluding the five stolen ATVs from one person, on the same night, resulted in one count of possession of stolen property rather than five counts).

¶ 8

In the instant case, the facts are undisputed as to the timing and continued possession of the stolen iPhones by defendant. Defendant simultaneously stole both iPhones from the victim on 25 January 2020 from United Home Church and Services. Since both items were stolen at the same time, from the same location and continued in Defendant’s possession until “divestment,” the trial court erred by failing to arrest judgment of the additional count for misdemeanor possession of stolen goods returned by the jury’s verdicts.

III.

¶ 9

The trial court erred by failing to arrest judgment of the additional count for misdemeanor possession of stolen goods returned by jury verdict. The State concedes the error. Accordingly, we vacate judgment on one count of misdemeanor possession of stolen goods and remand the remaining count for misdemeanor possession of stolen goods for resentencing.

JUDGMENT VACATED AND REMANDED FOR RESENTENCING.

Judges TYSON and INMAN concur.

Report per Rule 30(e).