IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-462

Filed 16 April 2024

Craven County, Nos. 20 CRS 53071, 22 CRS 637

STATE OF NORTH CAROLINA

v.

THOMAS G. LONG, Defendant.

Appeal by Defendant from judgments entered 12 January 2023 by Judge Clint D. Rowe in Craven County Superior Court. Heard in the Court of Appeals 23 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Hunter E. Fritz, for the State.

Phoebe W. Dee for defendant-appellant.

MURPHY, Judge.

Defendant fails to establish that he was prejudiced by the trial court's denial of his motion to continue on the morning of trial. Defendant was unable to open the video file of his codefendant's statement provided to him earlier that morning. However, the State had previously provided a written summary and an audio

recording of the statement. Further, Defendant failed to include the video file in the record on appeal, and we are unable to determine the prejudice to him, if any.

The State provided substantial evidence from which the jury could infer that the combined value of the property exceeded $1,000.00. The trial court did not err in denying Defendant's motion to dismiss.

BACKGROUND

Defendant Thomas Long appeals his judgments resulting from events which occurred in October 2020 involving himself, Kristen Hubley, and Robert Galloway. Hubley and Galloway first met around August 2019, when they worked together doing construction projects. Shortly afterwards, Hubley and Galloway became involved in a romantic relationship and began doing business together. Around September 2020, Galloway introduced Hubley to Defendant, who briefly worked in construction with the couple. Hubley also became aware of Defendant's cousin, Jones, after Defendant mentioned to her and Galloway that he and Jones had been stealing things in the Fairfield Harbor neighborhood. However, Hubley never met Jones.

On 18 October 2020, the Craven County Sheriff's Office received a report that a 2018 Perception Carolina kayak and a paddle had been stolen from a home in Fairfield Harbor. At this time, Sergeant David Moore was investigating a series of larcenies and related crimes in the area. As the lead investigator in these cases, Sergeant Moore reviewed recordings taken between 13 October and 18 October 2020 from neighborhood surveillance cameras. During his review of the recordings,

Sergeant Moore recognized Jones and attempted to locate him at his residence. Although Jones was not at the residence, Sergeant Moore spoke with his grandmother, Ms. Long, and identified Defendant as an additional person of interest in the series of crimes. Following this exchange, Sergeant Moore located Defendant and asked him directly about the stolen kayak, but Defendant denied any knowledge of it.

On 20 October 2020, Sergeant Moore located Jones, who further implicated Defendant in the series of larcenies. Using a law enforcement database, Sergeant Moore determined that a kayak matching the stolen kayak's description had been sold to a pawn shop in Jacksonville by Hubley soon after it was reported stolen. Law enforcement officers also received a video surveillance recording of the kayak being carried away from the owner's property in a gold Chevrolet Tahoe. Sergeant Moore performed a DMV search of Hubley and determined that she had registered a Chevrolet Tahoe in her name.

Later that day, law enforcement officers located the gold Chevrolet Tahoe, Hubley, and Galloway on the shoulder of Highway 70, where the vehicle had run out of fuel. Law enforcement officers arrested Hubley and Galloway and interviewed them about the larcenies. During Hubley's interview, Hubley told Sergeant Moore about the stolen kayak, stating that Defendant and Galloway were responsible for the theft and confirming that she sold the kayak to the pawn shop. Hubley stated that she, Galloway, and Defendant used the money from the sale to purchase drugs.

Defendant was served with an arrest warrant on 26 October 2020 and remained in custody through trial. On 12 September 2022, he was indicted for felony larceny, felony possession of stolen goods, conspiracy to obtain property by false pretenses, obtaining property by false pretenses, and for attaining the status of habitual felon; and trial was scheduled to begin on 9 January 2023. Defendant filed numerous motions for discovery materials leading up to his trial date. On the morning of trial, Defendant filed a motion to continue, arguing the following grounds:

> As of the trial date of [9 January 2023], Defendant has not yet received all of the discovery from the State. The week prior, Defense Counsel informed the State that the Defense had not yet received all of the discovery, that it would be impossible to try the case without that discovery, and that Defense Counsel would be requesting a continuance. To require the Defendant to try his case without receiving all of the discovery in that case, some of which is potentially exculpatory, would result in a gross violation of the rights guaranteed to the Defendant through the United States and North Carolina Constitutions. Furthermore, not only must the State provide said information to the Defendant, it must be provided in a manner that allows the Defendant enough time to make effective use of that information.

Defendant renewed his motion to continue multiple times, and the trial court denied Defendant's motion each time.

During trial, the State called the owner of the stolen kayak, Mr. Florence, to testify. During direct examination, Florence testified as follows:

> [THE STATE:] Mr. Florence, where did you get the kayak?
>
> [FLORENCE:] I bought it online through Academy Sports
> . . . .

[THE STATE:] And when did you buy that kayak?

[FLORENCE:] I bought it in 2019.

[THE STATE:] Okay. So within the last year of when -- within the last year of [18 October 2020]?

[FLORENCE:] Right. Correct.

[THE STATE:] Do you remember how much you paid for it?

[FLORENCE:] Not the exact amount, but I know it was over a thousand dollars.

[THE STATE:] Okay. Do you -- was it more than, say, [$1,100.00]?

[FLORENCE:] Yes, sir.

[THE STATE:] Was it more than, say, [$1,200.00]?

[FLORENCE:] I believe around [$1,200.00], yes, sir.

[THE STATE:] Okay. Did you have a paddle with that kayak as well?

[FLORENCE:] Yes, sir.

[THE STATE:] Did you purchase that separately, or did it come with the kayak?

[FLORENCE:] No, I paid it separate.

[THE STATE:] Okay. Do you know how much you paid for the paddle?

[FLORENCE:] Not right offhand, but I would say [$150.00]. Around there.

> . . . .
>
> [THE STATE:] Okay. What kind of condition was that kayak in at the time that it was taken? This is before it was stolen.
>
> [FLORENCE:] It was brand new. Excellent condition.
>
> [THE STATE:] Any damage to it?
>
> [FLORENCE:] The only damage was from what I did. Just bottom scratches from running over things and stuff like that, but no -- no damage other than that.
>
> [THE STATE:] Had anything that would affect, you know, the integrity of the kayak?
>
> [FLORENCE:] No.
>
> [THE STATE:] Okay. Was it leaking at all or anything like that?
>
> [FLORENCE]: No.
>
> [THE STATE:] So just superficial scratches?
>
> [FLORENCE:] Right. Correct.

At the close of the State's evidence, Defendant made a motion to dismiss, arguing that the State failed to meet its burden of proof to establish each element of the charged offenses by substantial evidence. The trial court denied this motion. Defendant elected not to present evidence and renewed his motion, which the trial court again denied. The next day, prior to closing arguments, Defendant clarified that his motion to dismiss was based specifically on the State's failure to introduce evidence that the kayak and paddle were worth more than $1,000.00 at the time they

were stolen. The trial court noted this clarification but declined to rule again on the motion.

On 12 January 2023, Defendant was convicted of felony larceny, felony possession of stolen goods, and obtaining property by false pretenses. Defendant then pleaded guilty to attaining the status of habitual felon. The trial court arrested judgment on Defendant's felony possession of stolen goods conviction; sentenced Defendant to an active term of 110 to 144 months for the felony larceny conviction as a habitual felon; and sentenced Defendant to an active term of 110 to 144 months for the obtaining property by false pretenses conviction as a habitual felon, to run consecutively to the first sentence. Defendant timely appealed.

ANALYSIS

On appeal, Defendant argues that the trial court erred by (A) denying Defendant's motion to continue for insufficient time to prepare for trial and (B) denying Defendant's motion to dismiss for lack of sufficient evidence as to the combined value of the stolen kayak and paddle.

A. Motion to Continue

Ordinarily, we review a trial court's order denying a motion to continue for abuse of discretion. *State v. Tunstall*, 334 N.C. 320, 328 (1993). However, if the motion is made to protect a constitutional right, we review the trial court's order de novo. *Id.* "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present

his defense." *Id.* at 329. Even if the trial court erred by denying the motion to continue, a defendant must show that he suffered prejudice as a result of this error to be entitled to a new trial. *State v. Taylor*, 354 N.C. 28, 33-34 (2001), *cert. denied*, 535 U.S. 934 (2002).

A defendant may demonstrate that the trial court's denial of his motion to continue was in error by showing either (1) deficient performance with a prejudicial effect pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), or (2) circumstances justifying a presumption of prejudice "without inquiry into the actual conduct of the trial" because "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote under the circumstances. *State v. Rogers*, 352 N.C. 119, 125 (2000) (quoting *United States v. Cronic*, 466 U.S. 648, 659-60 (1984)).

On appeal, Defendant argues pursuant to *Rogers* that the trial court erred by denying his motion to continue trial, as even a fully competent lawyer could not provide effective assistance with the insufficient time given to review discovery materials—specifically, surveillance videos received on 30 December 2022, the video of codefendant Hubley's statement to law enforcement, and locations not noted in police reports where stolen property had been recovered—and Defendant's inability to open the video file of Hubley's statement. Defendant does not argue, and we do not consider, any potential error under *Strickland*.

On 1 February 2022, the State provided Defendant with preliminary discovery consisting of "10 reports . . . including surveillance video that has been later

requested, surveillance video of pawnshop videos, still-photographs from surveillance at Fairfield Harbor showing a vehicle that [D]efendant's alleged to be driving in, [and] an audio recording of [Hubley's] interview."

On 21 September 2022, Defendant filed his request for discovery. On 2 December 2022, Defendant appeared before the trial court for a bond hearing. During this hearing, the State requested that trial be scheduled for January 2023. Trial counsel responded, "Judge, we've received some discovery. Only the [State] can tell us if it's complete discovery. Other than that, I have no objection." Trial was scheduled to begin on 9 January 2023.

On 30 December 2022, the State provided trial counsel with two additional PDF files, including a plea transcript of Jones, "in an effort to comply with [trial counsel's] motion seeking . . . information relating to . . . any deals or concessions that had been made." On 5 January 2023, after receiving a voicemail indicating that Defendant was missing some discovery materials, the State provided trial counsel "with the PDF files, a summary of a meeting that [the State] had in trial preparation with [Hubley][,]" and "business record affidavits, which [it] had just received." The State also informed trial counsel that it had requested that law enforcement officers confirm the videos given to trial counsel were complete. On 6 January 2023, the State provided trial counsel with two additional surveillance videos, additional photos, and reports regarding each of the codefendants.

During the hearing on Defendant's motion to continue on the morning of trial, trial counsel stated that he had insufficient time to review the USB drive containing the 15-minute video of Hubley's interview because the State had provided it to him earlier that morning. The State responded as follows:

> That interview is referenced in the report that [trial counsel] received, and that interview is basically summarized. It's approximately a 15-minute interview. I saw it for the first time Friday after -- Friday after five was the first time I saw it. In fact, I called [trial counsel] and turned it over to him before I even seen it myself. It was only after that that I attempted to watch it.
>
> But it was again made available to [trial counsel] on Friday. He elected not to come pick it up until this morning.

The trial court ruled as follows:

> Well, here's what I'm going to do. Unless the defense introduces it in some way or uses it in some way, the two videos that they -- that he was not provided still-shots from -- from citizens cannot be used. I'm going to allow the interview to be used by either side.

Defendant renewed his motion on 10 January 2023, stating that defense counsel was unable to use the USB drive with his computer to view the video that had been provided the day before. The trial court denied Defendant's motion, and trial proceeded.

Defendant argues that his case is similar to *State v. Rogers*, in which our Supreme Court held "that [the] defendant's [trial] counsel had insufficient time to prepare for the defense of [his] case[,]" which "involv[ed] multiple incidents in

multiple locations over a two-day period[,]" in "only [the] thirty-four days [after being appointed to represent the defendant] . . . ." *Id.* Defendant contends that his circumstances are similar to those in *Rogers* because "[he] found himself without access to critical trial assistance because he did not receive his discovery" with sufficient time to review it and prepare his defense. Defendant argues that "the video of the co-defendant's statement [] was effectively never provided to counsel because he could never open the file."

In *Rogers*, the defendant's trial counsel was appointed to replace his previous counsel, who had failed to interview any witnesses prior to withdrawing, only thirty-four days before the defendant's trial date. Twenty-three days later, the defendant's trial counsel filed a motion to continue for insufficient time to prepare a defense and a motion to withdraw pursuant to counsel's belief that Rule 6(a) of the Rules of Professional Conduct prohibited counsel from representing the defendant in a case in which "there was no possibility for them to be fully prepared." *Id.* at 123. The trial court denied both motions, and the case proceeded to trial. *Id.* at 124. Our Supreme Court ultimately held that the trial court's denial of the defendant's motion to continue was erroneous, as "[i]t is unreasonable to expect that any attorney, no matter his or her level of experience, could be adequately prepared to conduct a bifurcated capital trial for a case as complex and involving as many witnesses as the instant case[]" in only thirty-four days. *Id.* at 125. Our Supreme Court noted that the facts in *Rogers* were "unique" and cautioned that our appellate courts "will

vigilantly resist any manipulation by parties or their counsel, in capital cases or otherwise, to disrupt or obstruct the orderly progress of the court[] under the guise of generalized, unsupported, or otherwise nonmeritorious motions to continue." *Id.* at 126 (citation and marks omitted).

Defendant does not argue similar complexity in this case. However, Defendant contends that, like the defendant in *Rogers*, he is entitled to a presumption of prejudice, *id.* at 125, "because [trial counsel] either received the discovery with inadequate time or no time" to "provide effective assistance[] [by] reviewing the discovery with him and preparing for trial in consultation with him." We disagree.

"In the instant case, there is no issue concerning the timing of the appointment of trial counsel." *State v. Mitchell*, 194 N.C. App. 705, 710 (2009), *appeal dismissed*, 363 N.C. 391 (2010). Furthermore, although Defendant argues that "a police report summary of a statement's content is [not] the same thing as the video of the statement[]" because "it erases a key role of defense counsel . . . [to] review evidence with [the] lens [of] defense counsel[,]" he concedes that the State provided for his review, at minimum, a police report summarizing Hubley's statement's contents. Furthermore, the record reflects that the State provided Defendant with an audio recording of Hubley's interview on 1 February 2022.

Defendant argues that only a new trial could remedy "his [lost] opportunity to review significant portions of the discovery, to explore the potentially exculpatory portions of his co-defendant's statements to law enforcement, and to discuss with his

attorney, considering that discovery, whether he should accept or reject a plea offer in his case." Defendant argues he suffered material prejudice from the denial of his motion to continue, "in part, because [it] denied him the opportunity to meaningfully assist with his defense and participate in plea negotiations[,]" particularly because Defendant was informed that he faced 102 years in prison for the charged offenses. *See State v. Barlowe*, 157 N.C. App. 249, 254, *writ denied*, 357 N.C. 462 (2003) ("When the individual interest at stake is the defendant's life or liberty, the individual interest is especially compelling."). Defendant did not accept a plea offer for felony larceny or felony possession of stolen property but was found guilty of both offenses at trial. Afterwards, he accepted a plea agreement dictating that the "State agrees to arrest judgment on possession of stolen goods . . . [,]" "Defendant admits status as a habitual felon[,]" and "[Defendant] [s]pecifically reserves his right to appeal the judgment [in this case]."

As in *Mitchell*,

> Defendant has not demonstrated that the circumstances surrounding the trial court's refusal to postpone the trial merit a presumption of ineffective assistance of counsel and a presumption of prejudice arising therefrom.
>
> Further, on appeal, defendant has not included any of the discovery materials in question in the record on appeal, and asks this Court to presume prejudice based upon his vague description of what was contained in these materials. It is the duty of the appellant to include in the record all materials necessary for this Court to consider the issues raised in his appeal. It is impossible for this Court to evaluate how defendant was prejudiced, if at all, or

> whether his attorney would have been better prepared had the continuance been granted.
>
> The trial court did not commit error in its denial of defendant's motions for continuance.

Mitchell, 194 N.C. App. at 710.

Even if the trial court erred by denying Defendant's motion to continue, it would be impossible for us to determine whether this error was prejudicial because of Defendant's failure to include the bases of his appellate argument—the 15-minute video of Hubley's statement to law enforcement, surveillance videos received on 30 December 2022, and locations not noted in police reports where stolen property had been recovered—in the record. Defendant has failed to demonstrate that the trial court erred by denying his motion to continue, that he was entitled to a presumption of prejudice, or that he was otherwise prejudiced by the motion's denial.

B. Motion to Dismiss

We review the trial court's denial of Defendant's motion to dismiss de novo to determine whether, in the light most favorable to the State, the State presented substantial evidence of each element of the charged offense.

> "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301 (2002)). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* (quoting *Mann*, 355 N.C. at 301). In evaluating the sufficiency of the evidence to support a criminal conviction,

> the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99 (1980)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.'" *Id.* at 575 (quoting *State v. Locklear*, 322 N.C. 349, 358 (1988)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Chekanow*, 370 N.C. 488, 492 (2018) (quoting [*State v. Crockett*, 368 N.C. 717, 720 (2016)]).

State v. Golder, 374 N.C. 238, 249-50 (2020) (first alteration in original).

Pursuant to N.C.G.S. § 14-72, both "[l]arceny of goods of the value of more than one thousand dollars ($1,000[.00])" and "[t]he receiving or possessing of stolen goods of the value of more than one thousand dollars ($1,000[.00]) while knowing or having reasonable grounds to believe that the goods are stolen" are Class H felonies. N.C.G.S. § 14-72(a) (2023). Absent any circumstances described in N.C.G.S. § 14-72(b) or (c), "larceny of property, or the receiving or possession of stolen goods [while] knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars ($1,000[.00]), is a Class 1 misdemeanor." *Id.* For the purposes of this statute, "value" refers to an item's "fair market value" or its "reasonable selling price." *State v. McCambridge*, 23 N.C. App. 334, 336 (1974); *State v. Dees*, 14 N.C. App. 110, 112 (1972).

Defendant contends that the trial court erred by denying his motion to dismiss the felony larceny and felony possession of stolen goods charges *only* because the State failed to establish by substantial evidence that the market value of the kayak and paddle exceeded $1,000.00. Defendant does not challenge the sufficiency of the State's evidence for obtaining property by false pretenses, nor does he challenge the sufficiency of the State's evidence for any other elements of felony larceny or felony possession of stolen goods. Defendant requests that we vacate the trial court's felony judgment and remand to the trial court for entry of judgment on the lesser included misdemeanor offenses.

Defendant first contends that our Supreme Court "has ruled that when the State's sole evidence of value was an owner's testimony regarding the replacement costs for the stolen property, it was error to deny [the] defendant's motion for a directed misdemeanor verdict" in *State v. Morris*. This is not what occurred in *Morris*.

In *Morris*, the defendant was charged with felonious larceny of goods valued at more than $400.00 in relation to a stolen lawn mower and edger. *State v. Morris*, 318 N.C. 643, 644-45 (1986). During trial, the owner of the property estimated the approximate value of the mower and edger together would be $500.00, "explain[ing] that this figure represented replacement cost of both items. He did not remember what he had paid for either, nor was he sure how long he had owned them." *Id.* at 645. Furthermore, the State submitted "no evidence at all about the condition of the lawn mower." *Id.* At trial, the defendant requested a jury instruction on

misdemeanor larceny of goods valued not more than $400.00, believing that the jury could infer, based on lack of evidence of value other than the owner's opinion as to the mower and edger's replacement costs, that the defendant committed the lesser included offense of misdemeanor larceny. *Id.* Our Supreme Court agreed based on well-established jurisprudence "that the trial court is required to instruct on a lesser-included offense when there is evidence from which the jury could infer that the defendant committed the lesser offense." *Id.* (citing *State v. Gerald*, 304 N.C. 511 (1981)). Our Supreme Court made no sweeping holding in *Morris* as to the sufficiency of an owner's testimony in determining the value of stolen property; but, rather, reversed our holding that the defendant was not entitled to a *jury instruction* on the lesser included misdemeanor larceny, as was in line with its earlier jurisprudence.

Here, unlike in *Morris*, the State submitted more than "the owner's estimate of replacement cost[,]" *id.* at 644, to establish the value of the stolen kayak and paddle. Defendant concedes that the State may use replacement cost of the kayak and paddle as one metric for the jury's consideration of value. *See State v. Helms*, 107 N.C. App. 237 (1992). At trial, Florence testified as to approximately how much he paid for the kayak and paddle, when and where he purchased the kayak, how old the kayak was, and in what condition the kayak was stolen—each factors which our Supreme Court noted that the State did not present in *Morris*. Furthermore, the issue reviewed in *Morris* is not present here. The trial court *did* instruct the jury on non-felonious larceny and non-felonious possession of property worth not more than

$1,000.00, but the jury ultimately convicted Defendant of the felony charges. In the light most favorable to the State, and giving the State the benefit of every reasonable inference, the State presented substantial evidence of the value of the stolen kayak and paddle, and this evidence could permit the jury to find that Defendant committed the offenses of felony larceny and felony possession of stolen goods. Pursuant to N.C.G.S. § 14-72, the trial court properly instructed the jury to act "as the sole judges of the weight to be given any evidence[,]" and the jury determined, based on the State's evidence and permissible inferences therefrom, that the value of the stolen kayak and paddle was more than $1,000.00. *See State v. Blagg*, 377 N.C. 482, 488-89 (2021) (marks omitted) ("Courts considering a motion to dismiss for insufficiency of the evidence should not be concerned with the weight of the evidence.").

CONCLUSION

Defendant failed to demonstrate that the trial court erred by denying his motion to continue and that, based on this error, he was entitled to a presumption of prejudice under *Rogers*. In the absence of this presumption, Defendant failed to demonstrate prejudicial error justifying a new trial. The State's evidence, including the owner's testimony of the condition, purchase price, and age of the stolen property, was sufficient for the jury to find that Defendant committed the charged offenses.

NO PREJUDICIAL ERROR IN PART AND AFFIRMED IN PART.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).