NO. COA11-357
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v. Cumberland County
No. 09 CRS 54863

ANDREW DAVID OWENS

Appeal by defendant from judgments entered 16 November 2010 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 6 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Ebony J. Pittman, for the State.

Mercedes O. Chut for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant Andrew David Owens appeals from judgments entered upon jury verdicts finding him guilty of identity theft and misdemeanor larceny. Defendant argues the trial court erred in denying his motion to dismiss the charges for insufficiency of the evidence. Because we find the State presented sufficient evidence as to the disputed elements of the offenses to withstand a motion to dismiss, we find no error.

The State's evidence tended to show the following: On 8 April 2009, Timothy Brown was working as a security guard at a Wal-Mart in Fayetteville. Mr. Brown witnessed defendant enter the store, grab a plastic shopping bag, and proceed to the beer aisle. Defendant looked around to make sure no one was watching him, and then placed a twelve-pack of beer in the plastic bag. Defendant walked to the front of the store, briefly stood in the checkout line, and then, without having paid for the beer, began to walk out of the store.

As defendant passed through the metal detectors, Mr. Brown stopped defendant and identified himself as a Wal-Mart employee. Mr. Brown asked defendant to follow him into the "loss prevention office," and defendant complied. Mr. Brown asked defendant for a form of identification, and defendant handed Mr. Brown two birth certificates, each with a different name. Because he could not verify defendant's identity, Mr. Brown called the police.

Officer Rodney Miller of the Fayetteville Police Department responded to the call. Officer Miller asked defendant who he was, and defendant answered that his name was Michael Street, which corresponded to the name on one of the birth certificates. Officer Miller asked defendant if he had any photo identification, but defendant only produced the two birth certificates. Upon returning to his patrol car and running

"Michael Street" through the police database, Officer Miller could not positively determine defendant was Michael Street. While detained at the Wal-Mart, defendant later explained to Officer Miller that the second birth certificate belonged to a deceased friend named David Owens.

Officer Miller arrested defendant and secured a folder carried by defendant, which contained several documents. Because defendant identified himself as Michael Street and said the birth certificate in the name of Michael Street belonged to him, Officer Miller processed and fingerprinted defendant for misdemeanor larceny under the name Michael Street.

Upon going through defendant's paperwork a second time, Officer Miller found a document that contained a photograph of defendant and gave his name as "Owens, Andrew D," which matched the name on the birth certificate defendant claimed belonged to his friend. When Officer Miller brought this to defendant's attention, defendant said, "You got me." Defendant was then reprocessed as Andrew David Owens and charged with identity theft in addition to misdemeanor larceny. A latent fingerprint examiner with the Fayetteville Police Department found that defendant's fingerprints taken on 8 April 2009 matched those on file for "Andrew David Owens."

Defendant now argues the trial court erred in denying his motion to dismiss the charges of identity theft and misdemeanor

larceny for insufficiency of the evidence. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense and that defendant is the perpetrator of the offense. *See State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 717, 483 S.E.2d at 434 (citation and quotation marks omitted). "In ruling on the motion to dismiss, the trial court must view all of the evidence . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958).

Identity theft occurs when:

> A person [] knowingly obtains, possesses, or uses identifying information of another person, living or dead, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or *for the purpose of avoiding legal consequences*. . . .

N.C. Gen. Stat. § 14-113.20(a) (2009) (emphasis added). Under the statute, "identifying information" includes social security numbers, state identification cards, and "[a]ny other numbers or information that can be used to access a person's financial resources." *Id.*

Defendant argues that the statute contains no specific reference to birth certificates, and is therefore inapplicable. We disagree.

Once defendant was stopped for shoplifting, he faced potential legal consequences. To avoid those consequences, he pretended to be someone else by presenting that person's birth certificate as a means of identification. We hold that use of another's birth certificate as identification for the purpose of avoiding legal consequences falls within the scope of N.C. Gen. Stat. § 14-113.20. Accordingly, we conclude that the State presented sufficient evidence to establish that defendant committed the offense of identity theft, and thus the trial court did not err in denying defendant's motion to dismiss.

Defendant further argues that the trial court erred in denying his motion to dismiss because the State did not prove that "the original owner of the information used by defendant did not give his consent . . . ." Defendant correctly points out that in *State v. Dammons*, 159 N.C. App. 284, 295, 583 S.E.2d 606, 613, *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133

(2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382 (2004), this Court found lack of consent to be an essential element of identity theft. However, in *Dammons*, the acts took place in 2001, prior to a change in the statute. *Id.* at 287-88, 583 S.E.2d 608-09. In 2002, the North Carolina General Assembly removed the element of lack of consent from N.C. Gen. Stat. § 14-113.20(a). *See* 2002 N.C. Sess. Laws 788, ch. 175, § 4. Accordingly, this argument is overruled.

Next, defendant argues that the trial court erred in failing to dismiss the charge of misdemeanor larceny. We disagree. Larceny is "a wrongful taking and carrying away of the personal property of another without his consent with intent to deprive the owner of his property." *State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (citation and quotation marks omitted). Without the element of carrying the property away, there is no larceny, only attempted larceny. *See State v. Wilfong*, 101 N.C. App. 221, 222, 398 S.E.2d 668, 669 (1990), *appeal dismissed*, 328 N.C. 336, 404 S.E.2d 864 (1991). This Court has held that an article need not be completely removed from the owner's premises to constitute larceny. *See State v. Walker*, 6 N.C. App. 740, 171 S.E.2d 91 (1969). In *Carswell*, our Supreme Court held that removal of an air conditioner from its base in the window to a point on the floor four to six inches toward the door was a sufficient taking and

asportation to support a larceny conviction. *Carswell*, 296 N.C. at 104, 249 S.E.2d at 429.

Here, Mr. Brown stopped defendant "as soon as he had passed the metal detector." Although the evidence does not reveal whether defendant was inside or outside the store at the point where he was stopped, it does reveal that he had put the beer in a plastic bag and was leaving the store without paying. Viewing this evidence in the light most favorable to the State, we find it sufficient to withstand defendant's motion to dismiss. Accordingly, we overrule defendant's argument and find he received a fair trial, free from error.

No error.

Judges MARTIN and THIGPEN concur.

Report per Rule 30(e).