IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-929

Filed: 20 June 2017

Burke County, Nos. 15 CRS 862; 51241

STATE OF NORTH CAROLINA

v.

WESLEY TERRELL RHOM

On writ of certiorari to review judgment entered 17 December 2015 by Judge Nathaniel J. Poovey in Burke County Superior Court. Heard in the Court of Appeals 30 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Francisco Benzoni, for the State.

Guy J. Loranger for defendant-appellant.

ELMORE, Judge.

Defendant Wesley Terrell Rhom appeals by writ of certiorari from a judgment entered upon jury verdicts finding him guilty of larceny from a merchant and attaining habitual felon status. We find no error in part and dismiss without prejudice in part.

On 1 June 2015, a grand jury indicted defendant on felony larceny from a merchant and attaining the status of an habitual felon. The matter came on for trial on 14 December 2015.

The State's evidence at trial tended to show that on 25 April 2015, a loss prevention officer ("LPO") working at a Walmart in Morganton, North Carolina, noticed defendant in the toothpaste aisle of the store looking around suspiciously. The LPO observed defendant pick up a box of Crest Whitestrips that were inside an anti-theft box. The LPO then followed defendant to the tool aisle where he attempted to pry open the anti-theft box using different tools in the aisle.

After about fifteen minutes, defendant successfully pried the box open. The LPO followed defendant to the craft aisle and observed defendant put the anti-theft box on a shelf and open the packaging of the Crest Whitestrips. Defendant removed the strips from the packaging and placed them in his left front pocket. Defendant discarded the packaging on the shelf and exited the store without paying for the strips.

The LPO, along with a store manager, approached defendant outside the store and asked to speak with him about the merchandise for which he did not pay. Defendant denied taking anything from the store. The LPO insisted that she saw defendant take the Crest Whitestrips from the package and put them in his left front pocket. The LPO testified that defendant made a "[y]ou caught me gesture," removed

the strips from his pocket, and handed them to the LPO. When the LPO asked defendant to come back inside the store to talk, defendant refused and took off running. While pursuing defendant, the LPO called dispatch and provided them with a description of defendant.

Officer Stacey Huffman with the Morganton Department of Public Safety was on duty at the time and patrolling near the Walmart parking lot. The LPO flagged down Officer Huffman, gave her a description of defendant, and pointed her in the direction in which he ran. Officer Huffman quickly located defendant crouching behind a store. After a short chase and struggle, Officer Huffman apprehended defendant. While defendant was in Officer Huffman's custody, the LPO identified him as the man she saw take the Crest Whitestrips from the store.

Defendant did not present any evidence. Defendant moved to dismiss, and the trial court denied his motion. The jury found defendant guilty of larceny from a merchant and attaining the status of an habitual felon. The trial court consolidated the charges into one judgment entered on 17 December 2015 and sentenced defendant to a term of fifty-one to seventy-four months of imprisonment.

On 14 January 2016, defendant returned to superior court and gave oral notice of appeal from the judgment. The trial court prepared appellate entries and appointed appellate counsel. On 30 December 2016, defendant filed with this Court a petition for writ of certiorari recognizing that his notice of appeal was defective in

that (1) he did not give written notice of appeal, and (2) his oral notice of appeal was not given at the time of trial as required by Appellate Rule 4(a), but nearly a month later at a different hearing. In our discretion, we grant defendant's petition for writ of certiorari for the purpose of reviewing the judgment.

Counsel appointed to represent defendant states that he is unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel shows to the satisfaction of this Court that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary to do so.

Defendant filed *pro se* arguments with this Court alleging that his trial counsel was ineffective for failing to investigate his competency at the time of the offense due to involuntary intoxication and for failing to subpoena five witnesses who would have testified to support his claim of involuntary intoxication. Because defendant's claim requires further factual development before it can be reviewed on direct appeal, we dismiss this claim without prejudice to defendant's right to raise it in a post-conviction motion for appropriate relief before the trial court. *See State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) ("[S]hould the reviewing court determine

that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding."), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

In accordance with *Anders*, we have fully examined the record to determine whether any issue of arguable merit appears therefrom. We are unable to find any possible prejudicial error and conclude that defendant's appeal therefrom is wholly frivolous.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).