IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-306

Filed: 15 August 2017

New Hanover County, Nos. 15 CRS 59701, 16 CRS 1906

STATE OF NORTH CAROLINA

v.

JOEY TREMAINE SMITH

Appeal by defendant from judgment entered 20 September 2016 by Judge W. Douglas Parsons in New Hanover County Superior Court. Heard in the Court of Appeals 7 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State.

Julie C. Boyer for defendant-appellant.

TYSON, Judge.

Joey Tremaine Smith ("Defendant") appeals from a judgment entered upon his conviction for larceny from a merchant. We find no error in the judgment.

I. Background

On 22 November 2015, Defendant entered a Belk department store in Wilmington, North Carolina. Trevor Solis, a loss prevention officer at Belk, watched

Defendant's actions on the store's closed-caption television surveillance system. Mr. Solis observed Defendant pick up two pairs of Levi jeans and enter the women's dressing room. Mr. Solis went to the dressing rooms and waited outside until Defendant emerged. Defendant was no longer carrying the jeans. When Mr. Solis entered the dressing room, he found two anti-theft security sensors sitting on a bench, but no jeans were left behind. Mr. Solis stopped Defendant after he exited the store and, with the assistance of mall security, escorted Defendant back to the holding office inside Belk. As the men were walking down a hallway, a pair of Levi jeans fell out of Defendant's pants. Once inside the holding office, Defendant produced the other pair of jeans from his pants.

Wilmington Police Officer Wade Rummings responded to a shoplifter call at Belk. He met with Mr. Solis and was presented with the two anti-theft sensors Mr. Solis had recovered from the dressing room and the two pairs of jeans. Both of the jeans appeared to be cut where the anti-theft sensors were located.

On 4 April 2016, Defendant was indicted for felonious larceny from a merchant by removing an anti-shoplifting device and for attaining the status of being an habitual felon. On 20 September 2016, a jury found Defendant guilty of larceny from a merchant. Upon his larceny conviction, Defendant pled guilty to being an habitual felon. The trial court sentenced Defendant to 70 to 96 months imprisonment. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issue

Defendant contends the trial court lacked subject matter jurisdiction because the indictment for larceny from a merchant was fatally flawed. We disagree.

IV. Standard of Review

This Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012) (internal quotation marks and citation omitted).

V. Analysis

An indictment must set forth facts supporting each element of the offense and the defendant's commission thereof. N.C. Gen. Stat. § 15A-924(a)(5) (2015). If an indictment is defective, the superior court lacks subject matter jurisdiction over the case. *State v. Bell*, 121 N.C. App. 700, 702, 468 S.E.2d 484, 486 (1996).

"The essential elements of larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Osborne*, 149 N.C. App.

235, 242-43, 562 S.E.2d 528, 534 (internal quotation marks and citation omitted), *aff'd per curiam*, 356 N.C. 424, 571 S.E.2d 584 (2002). For larceny under N.C. Gen. Stat. § 14-72.11(2) (2015), the indictment must additionally allege that the larceny was committed "[b]y removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device." *See Justice*, 219 N.C. App. at 643-44, 723 S.E.2d at 800-01.

In this case, the indictment alleged Defendant

> unlawfully, willfully, and feloniously did steal, take, and carry away Two Pairs of Levi Jeans, the personal property of Belk, Inc., a corporation, merchant, and legal entity capable of owning property located at 3500 Oleander Drive, Wilmington, NC, such property having a value of $126.00. This larceny was committed by the defendant removing, destroying, or deactivating a component of an antishoplifting inventory control device to prevent the activation of any antishoplifting inventory control device in violation of 14-72.11(2).

Defendant argues the indictment fails to allege that the taking was done without the owner's consent and with the intent to permanently deprive the owner of the property. This argument has previously been rejected by this Court under substantially similar circumstances.

In *Osborne*, the indictment charging the defendant with larceny alleged in pertinent part that he "unlawfully, willfully, and feloniously did steal, take, and carry away . . . the personal property of Thomas Richard Klostermeyer, such property

having a value of $3,700.00. This is in violation of N.C.G.S. 14-72(a)." *Osborne*, 149 N.C. App. at 244, 562 S.E.2d at 535 (brackets omitted). The defendant argued "the indictment was insufficient in that it failed to specifically allege that defendant did not have consent to take the property, nor that defendant had the intent to permanently deprive [the victim] of his property." *Id.* This Court rejected the defendant's argument and stated:

> [T]he specific language used in the indictment here has previously been held to be sufficient to charge the offense of larceny. Moreover, we find the indictment sufficient to meet the underlying purpose of an indictment, which is "to ensure that a defendant may adequately prepare his defense and be able to plead double jeopardy if he is again tried for the same offense."

Id. at 245, 562 S.E.2d at 535 (quoting *State v. Madry*, 140 N.C. App. 600, 601, 537 S.E.2d 827, 828 (2000)).

Defendant's argument was previously rejected by this Court after reviewing an indictment, which used the same pertinent language as the indictment at issue here. In both cases, the indictment alleged the accused "did steal" personal property, which sufficiently alleges that the taking was without permission and with intent to permanently deprive. *See Justice*, 219 N.C. App. at 645, 723 S.E.2d at 801 ("[T]he word 'steal' is defined as, *inter alia*, '[t]o take (personal property) illegally with the intent to keep it unlawfully.'" (quoting *Black's Law Dictionary* 1453 (8th ed. 2004))). We are bound by this Court's holding in *Osborne*. *In re Civil Penalty*, 324 N.C. 373,

384, 379 S.E.2d 30, 37 (1989). Defendant presents no other arguments for this Court's review. Defendant's argument is without merit. We find no error in the judgment.

VI. Conclusion

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).