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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-435

Filed: 19 December 2017

Mecklenburg County, Nos. 16CRS205961-62, 16CRS019088

STATE OF NORTH CAROLINA

v.

KENNETH JAMES LANE

Appeal by Defendant from judgments entered 10 November 2016 by Judge Jeffrey P. Hunt in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 December 2016.

*Attorney General Joshua H. Stein, by Assistant Attorney General Oliver G. Wheeler IV, for the State.*

*Franklin E. Wells, Jr., for the Defendant.*

DILLON, Judge.

Kenneth James Lane (“Defendant”) appeals from judgments entered upon his convictions for felonious breaking and/or entering, felonious larceny, conspiracy to commit breaking and/or entering and larceny, and having achieved the status of an habitual felon. On appeal, Defendant argues: (1) the judgment incorrectly reflects that he was convicted of habitual larceny, when he was actually convicted of felonious

larceny; and (2) he received ineffective assistance of counsel because his trial attorney failed to file a timely motion to dismiss based on improper venue. After careful review, we find no error in part, and remand for correction of a clerical error.

### I. Background

In February 2016, a project manager discovered that his tools were missing from his workplace. The same day, a second project manager also discovered tools missing. The company's Chief Financial Officer ("CFO") was alerted about the possible thefts. The CFO reviewed surveillance footage from the day before, when the greenhouse was closed, and determined that a van had entered the property around 7:00 p.m. The surveillance footage further revealed a forklift carrying a large container of copper wire out of the greenhouse. The CFO subsequently determined that five spools of copper wire were missing.

A detective investigated the thefts. The detective determined that a van seen in the surveillance video belonged to Defendant's father. The detective then called Defendant on the phone, and Defendant admitted to going to the premises and removing copper wire.

Defendant was indicted on a number of charges in connection with the thefts. Defendant was convicted by a jury of felonious breaking and/or entering, conspiracy to commit breaking and/or entering and larceny, and felonious larceny. Defendant subsequently pleaded guilty to having achieved habitual felon status. The trial court

sentenced Defendant to 128 to 166 months of imprisonment for felonious breaking and/or entering, habitual larceny, and habitual felon, and a consecutive term of 50 to 72 months of imprisonment for the conspiracy and habitual felon. Defendant appeals.

## II. Analysis

Defendant first argues that the trial court erred by entering judgment on “habitual” larceny rather than “felonious” larceny. We agree. It appears that Defendant was indicted both for felonious larceny, *see* N.C. Gen. Stat. § 14-72(a) (2015), and habitual larceny, *see* N.C. Gen. Stat. § 14-72(b)(6) (2015). However, the trial court instructed the jury solely on felony larceny. Furthermore, the verdict forms indicate that the jury convicted defendant of felony larceny, not habitual larceny. The judgment in 16 CRS 205961 incorrectly reflects that Defendant was convicted on the charge of habitual larceny. We conclude, as argued by the State, that this error was merely clerical. Accordingly, we remand the judgment for correction. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008).

Defendant next argues that he received ineffective assistance of counsel because his trial attorney failed to file a timely motion to dismiss based upon improper venue. Defendant notes that at the close of the State’s evidence, counsel made a motion to dismiss, arguing that the State had failed to present evidence that the alleged criminal offenses occurred in Mecklenburg County. Defendant contends that trial counsel may have acted under the mistaken belief that the lack of evidence

that the theft occurred in Mecklenburg County deprived the trial court of jurisdiction. Defendant notes, however, that the issue is one of venue, not jurisdiction, and Defendant's trial counsel waived the issue by failing to raise the argument in a pre-trial motion. We are not persuaded.

To successfully assert an ineffective assistance of counsel claim, a defendant must satisfy a two prong test.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error[s] were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

*State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Here, Defendant is correct in arguing that questions concerning the location of the offense implicates venue, not jurisdiction, and the failure to raise the issue prior to trial constitutes waiver of the issue. See N.C. Gen. Stat. § 15A-631 (2015); *State v. Spencer*, 187 N.C. App. 605, 611, 654 S.E.2d 69, 72-73 (2007). Here, however, the record demonstrates that Defendant was indicted for offenses in Mecklenburg County, and the State presented testimony that the offense occurred in Huntersville. We take judicial notice of the fact that Huntersville is located in Mecklenburg County.

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*See State v. Darroch*, 305 N.C. 196, 210-11, 287 S.E.2d 856, 865 (1982) (taking “judicial notice of the fact that Bunnlevel is in Harnett County”). There is no evidence in the record that the offenses were committed somewhere other than Mecklenburg County. Thus, even if counsel had made a pre-trial motion, Defendant has failed to prove that the motion would have been granted. Moreover, even assuming *arguendo* that venue was improper, Defendant has failed to demonstrate prejudice by having his case heard in Mecklenburg County rather than elsewhere. Consequently, Defendant has failed to demonstrate either deficient performance by his trial counsel or prejudice, and has thus failed to establish that his trial counsel was ineffective.

NO ERROR IN PART; REMANDED IN PART FOR CORRECTION OF CLERICAL ERROR.

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).