IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-474

No. COA21-664

Filed 5 July 2022

Pitt County, Nos. 19CRS057083, 20CRS498

STATE OF NORTH CAROLINA

v.

WALLACE EARL ANDERSON, Defendant.

Appeal by Defendant from judgment entered 27 January 2021 by Judge Marvin K. Blount, III, in Pitt County Superior Court. Heard in the Court of Appeals 6 April 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Locke Milholland, IV, for the State.

W. Michael Spivey for the Defendant.

DILLON, Judge.

¶ 1 This case is about whether an indictment that charged Defendant under the wrong offense was invalid. We affirm.

I. Background

¶ 2 After his release from prison, Defendant, a convicted sex offender, failed to notify the registry of his new address. He was charged with failing to register as a sex offender, triggering another charge for being a habitual felon.

¶ 3 Defendant was found guilty by a jury of the first charge, and he pleaded guilty to the second. He was sentenced to 77-105 months imprisonment.

¶ 4 Defendant timely appealed.

II. Argument

A. Variance

¶ 5 Defendant argues, under a fatal variance theory, that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. Defendant, however, waived this argument by not raising it in the trial court below. Rather, his counsel merely argued: "Here at this – close of all evidence it would be my motion to dismiss the case. There is not sufficient evidence that the jury would find him guilty."

¶ 6 Our Supreme Court has held that a challenge based on a fatal variance in the indictment is waived if not specifically stated in a motion to dismiss based on the sufficiency of the evidence. *State v. Pickens,* 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review.").

B. Indictment

¶ 7 Defendant argues that the indictment was invalid because it charged him under the wrong offense. We disagree.

¶ 8 "[W]hen an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001).

¶ 9 Here, the indictment cites N.C. Gen. Stat. § 14-208.7, a section governing the *initial registration* for sex offenders.[1] Defendant, however, was already a registered sex offender. The indictment should have cited Section 14-208.9, which dictates mandatory reporting when *registered offenders* change their address.

¶ 10 Indeed, our Supreme Court has instructed that "N.C.G.S. § 14-208.9, the 'change of address' statute, and not section 14-208.7, the 'registration' statute, governs the situation when, as here, a sex offender who has already complied with the initial registration requirements is later incarcerated and then released." *State v. Crockett*, 368 N.C. 717, 722, 782 S.E.2d 878, 882 (2016). "[D]espite its seemingly plain text, section 14-208.7 appears in context to refer only to *initial registration* requirements." *Id.* at 721, 782 S.E.2d at 881 (emphasis added).

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[1] Defendant was also indicted under N.C. Gen. Stat. § 14-208.11, a section that merely classifies offenders as committing a Class G felony.

¶ 11 We agree with Defendant that the indictment cited the wrong statute. But, even so, the error is not fatal if the charging *language* sufficiently includes facts to charge Defendant under the correct statute.

¶ 12 As set out by our Supreme Court, "An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978). If an indictment "avers facts which constitute every element of an offense, it is not necessary that it be couched in the language of the statute." *State v. Anderson*, 259 N.C. 499, 501, 130 S.E.2d 857, 858 (1963).

¶ 13 Here, the indictment alleged that Defendant:

> Unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the General Statutes to register, fail to register and verify address in person with the Sheriff of Pitt County within three(3) business days after *being released from a penal institute* as required by law.

(Emphasis added.)

¶ 14 Section 14-208.9—the section the trial court should have cited instead of Section 14-208.7—reads:

> If a person required to register *changes address*, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person

had last registered.

N.C. Gen. Stat. § 14-208.9(a) (emphasis added).

¶ 15 The only issue before us is whether the allegation in the indictment that Defendant was released from a penal institute sufficiently satisfies the element of a change of address. We conclude that it does.

¶ 16 Defendant's address can no longer be the prison due to his release. It logically follows then that Defendant changed his address, which is subject to reporting. Accordingly, we hold that the indictment provided sufficient facts for the "change of address" element.

III. Conclusion

¶ 17 We conclude that Defendant waived his fatal variance argument in the lower court. Further, the indictment alleges sufficient facts to put Defendant on notice for his defense. Defendant was given a fair trial, free from reversible error.

NO ERROR.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).