NO. COA00-1320

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v. Lenoir County
No. 98 CRS 12008

MELVIN LEON CLARK, JR.

Appeal by defendant from judgment entered 16 February 2000 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 11 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Herrin, for the State.

Edwin L. West, III, for defendant-appellant.

EAGLES, Chief Judge.

On 27 August 1999, a jury found defendant Melvin Leon Clark, Jr., guilty of breaking and entering, larceny after breaking and entering, and possession of stolen goods. The Honorable William C. Griffin, Jr. presided over defendant's trial. After the verdicts were returned but before the State proceeded with its habitual felon hearing, a defect in the habitual felon indictment was discovered. The habitual felon indictment listed Wayne County instead of Lenoir County as the location of the first felony offense. The State requested and Judge Griffin granted a prayer

for judgment continuing the matter for sentencing until 28 September 1999. Defendant next appeared on 16 February 2000. Judge Paul L. Jones entered judgment and sentenced defendant to eight to ten months incarceration. Defendant appeals.

At trial, the evidence tended to show: In the early morning hours of 24 November 1998, Kinston Police Officer Neal Flowers responded to an alarm call at Bert's Surf Shop. When he arrived, Officer Flowers saw defendant, carrying an unknown object under his arm, run out the northwest door. Officer Flowers chased defendant on foot to a nearby Super 8 Motel. Other officers joined the pursuit. At the Super 8 Motel, Officer Christopher Dale Cahoon saw defendant run into Room 207. Officer Flowers knocked on the door of Room 207. A woman came to the door and gave the officers permission to search the room. Officers Hewitt, Whitehurst, and Williams searched the room and found defendant hiding underneath the bed. The officers placed defendant under arrest. Near the front of the motel breezeway, approximately ten feet from Room 207, officers found a cash register drawer.

On appeal, defendant contends that the trial court erred by: (1) creating an atmosphere of presumed guilt by comparing defendant's case to "California" and by requiring that defendant be driven separately to a jury view and (2) denying defendant's motion to dismiss because the State failed to adduce sufficient evidence as to the ownership of the stolen property.

Defendant first argues that the trial court committed plain error by creating an atmosphere of presumed guilt at trial.

Defendant identifies two episodes at trial that he contends destroyed defendant's presumption of innocence and prejudiced the jury. Defendant first argues that the trial court erred when the trial judge compared defendant's case to "California." After introducing the attorneys and identifying for prospective jurors those witnesses who would likely testify in the case, Judge Griffin, in the presence of the prospective jurors, turned to prosecutor Don Strickland and stated: "It's not going to turn out to be like California, is it not, Mr. Strickland? We'll be here a month trying this case." Defendant contends that in the judicial system and among the general public, "California" has become synonymous with getting away with crime and that use of the term here implied a disdain for the presumption of innocence and created an atmosphere of presumed guilt.

Defendant also argues that he was prejudiced by the travel arrangements imposed by Judge Griffin for the jury's requested crime scene visit. During trial, the jury requested a visit to the crime scene. In making travel arrangements, Judge Griffin stated: "Myself and some of the other people will go in one vehicle and then [defendant's attorney] Mr. Cleavenger and his client will go in another vehicle. We'll all be there together." Defendant argues that the trial judge's travel arrangements and comments affect the presumption of innocence by implying that defendant is dangerous and must be kept apart from the others in the proceeding.

Constitutional questions not raised and passed upon at trial will not be considered on appeal. *State v. Golphin*, 352 N.C. 364,

411, 533 S.E.2d 168, 202 (2000). Here, defendant failed to object to either of the trial judge's statements. Defendant's failure to object at trial constitutes waiver. N.C. R. App. P. 10(b)(1).

Defendant also contends that the trial judge's statements constituted plain error. Our appellate courts have "applied the plain error analysis only to instructions to the jury and evidentiary matters." *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109 (1998), *cert. denied*, 526 U.S. 1147, 119 S.Ct. 2025, 143 L.Ed.2d 1036 (1999). Accordingly, we decline to extend application of the plain error doctrine to this case where (1) the trial judge, in the presence of prospective jurors, commented on the number of witnesses to be called to testify and (2) the trial judge established travel arrangements for a jury view of the crime scene. *See id.* at 81, 505 S.E.2d at 109-10. This assignment of error is without merit.

Defendant's remaining assignment of error is that the trial court erred by denying defendant's motion to dismiss. Defendant argues that the evidence presented at trial was insufficient to show that the property taken by defendant was that of Bertram Pearson Incorporated d/b/a Bert's Surf Shop and as such there was a fatal variance between the indictment and the evidence presented.

The indictment prepared by the State alleged that defendant "unlawfully and willfully did feloniously steal, take and carry away good and lawful United States monies, and a cash register money drawer, the personal property of Bertram Pearson Incorporated doing business as Bert's Surf Shop . . . ."

At trial, evidence of ownership of the cash register drawer came from Stephanie Pearson. Ms. Pearson testified to the following: (1) she was employed as the manager of Bert's Surf Shop in Kinston on 24 November 1998; (2) Ms. Pearson's father, Bert Pearson, was the owner of the shop; (3) on the morning of 24 November 1998, she reported to work, saw that the store had been broken into, noticed that the computer part of the store's cash register was on the floor, and that the cash register drawer was missing.

The evidence in a criminal case must correspond to the allegations of the indictment that are essential and material to charge the offense. *State v. McDowell*, 1 N.C. App. 361, 365, 161 S.E.2d 769, 771 (1968). "If the proof shows that the article stolen was not the property of the person alleged in the indictment to be the owner of it, the variance is fatal and a motion for judgment of nonsuit should be allowed." *State v. Eppley*, 282 N.C. 249, 259, 192 S.E.2d 441, 448 (1972).

Here, Ms. Pearson's testimony tends to prove that Bertram Pearson Incorporated d/b/a Bert's Surf Shop was the owner of the items alleged in the indictment to have been stolen by defendant. Ms. Pearson's testimony is consistent with and tends to establish the allegations raised in the indictment. Accordingly, this assignment of error fails.

After review of the judgment and commitment, we note that defendant was improperly sentenced for both possession of stolen goods and larceny after breaking and entering. In *State v.*

Andrews, 306 N.C. 144, 147, 291 S.E.2d 581, 583-84 (1982), the defendant argued that he "was placed in double jeopardy by being convicted and sentenced on duplicative charges -- the charge of felonious larceny and the charge of felonious possession of the identical property which was the alleged subject matter of that larceny." In resolving defendant's contention, our Supreme Court wrote:

> In [*State v.*] *Perry*, this Court held "[n]othing in the United States Constitution or in the Constitution of North Carolina prohibits the Legislature from punishing a defendant for both offenses" of larceny and possession since each crime required proof of an additional fact which the other did not. 305 N.C. 225, 234, 287 S.E.2d 810, 815-16 (1982). Notwithstanding that, however, our Court further held that, considering the legislative history, case law background and internal provisions of the possession statutes, the state legislature "did not intend to punish an individual for larceny of property and the possession of the same property which he stole." *Id.* at 235, 287 S.E.2d at 816 (emphasis added). Our final conclusion in *Perry* was that "though a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses." *Id.* at 236-37, 287 S.E.2d at 817 (footnote omitted).

Andrews, 306 N.C. at 148, 291 S.E.2d at 584.

Here, the situation is indistinguishable from both *Perry* and *Andrews*. Accordingly, we must vacate defendant's conviction for possession of stolen property. *Id.*

As to convictions for breaking and entering and larceny after breaking or entering: No error.

As to conviction for possession of stolen property: Judgment vacated.

Remanded for resentencing.

Judges McCULLOUGH and BIGGS concur.

Report per Rule 30(e).