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NO. COA02-715

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

Durham County
No. 01 CRS 042225

TREMAYNE MARKEESA STOVAL

Appeal by defendant from judgments dated 7 November 2001 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Heard in the Court of Appeals 30 December 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Judith Robb Bullock, for the State.

Russell J. Hollers, III for defendant appellant.

GREENE, Judge.

Tremayne Markeesa Stoval (Defendant) appeals judgments dated 7 November 2001 entered consistent with a jury verdict finding him guilty of felonious breaking or entering and felonious larceny.

On 30 April 2001, Defendant was indicted for felonious breaking and entering and felonious larceny. The indictment for the felonious larceny charge stated "[D]efendant . . . unlawfully, willfully, and feloniously did steal, take and carry away assorted grocery items, the personal property of Winn-Dixie Supermarket having a value of approximately \$3,799.00." At trial, the State's

evidence revealed that in the early morning hours of 13 February 2001, Officer David Brennan Ference (Officer Ference) of the Durham City Police Department was on patrol in the Highway 55 area. Officer Ference observed a gray sedan drive to the rear of the Winn-Dixie in the Triangle Square Shopping Center, which had been closed for several hours. After waiting a few minutes, Officer Ference proceeded to the rear of the Winn-Dixie and observed approximately three shopping carts full of merchandise positioned next to the gray sedan with its trunk open. Officer Ference noticed Defendant and another male loading merchandise into the sedan. The Winn-Dixie loading dock door was propped open, with more shopping carts containing merchandise located inside. When Officer Ference confronted the men, Defendant told Officer Ference he was a store employee who had purchased the merchandise and the people present were helping him take it home. Defendant, however, was unable to produce a receipt for the merchandise. The Winn-Dixie store manager testified Defendant was employed by the store as a stocker but had not been given consent to take the merchandise or to be in the store after hours on February 13.

At the close of the State's evidence and again at the close of all the evidence, Defendant moved to dismiss the charges against him. The trial court denied both motions.

The issue is whether the indictment properly identified Winn-Dixie as a legal entity capable of owning property.

Defendant contends the trial court erred by failing to dismiss

the charge of felonious larceny because the indictment does not sufficiently specify the ownership of the stolen property. We agree.

The essential elements of larceny are: (1) taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). To convict a person of larceny, the State must prove ownership, and therefore, "a proper indictment must identify as victim a legal entity capable of owning property." *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999). If the victim is not an individual and the indictment does not allege that the victim was "a legal entity capable of owning property, the bill of indictment is fatally defective." *Id.*

As Defendant notes, these principles were recently applied by this Court in *State v. Norman*, 149 N.C. App. 588, 562 S.E.2d 453 (2002). In *Norman*, the indictment charging the defendant with felonious larceny alleged the defendant "did 'steal, take and carry away 2 electric lamps, the personal property of Quail Run Homes Ross Dotson, Agent, such property having a value of \$40.00.'" This Court held that the indictment was fatally defective because it failed to indicate the legal ownership status of the victim as a person or a corporation capable of owning property. *Id.* at 593, 562 S.E.2d at 457.

In this case, the indictment alleged Defendant "did steal, take and carry away assorted grocery items, the personal property

of Winn-Dixie Supermarket having a value of approximately \$3,799.00." As this language fails to identify the victim as a natural person or a corporation, it is fatally defective and cannot support Defendant's larceny conviction. Accordingly, the judgment on the charge of felonious larceny must be vacated. The State, however, may re-indict Defendant for larceny. See *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990) ("[w]hen judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the [S]tate must seek a new indictment if it elects to proceed again against the defendant").

Vacated in part.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).