NO. COA10-16

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. Randolph County
Nos. 05 CRS 55173-74

DAVID LEE WOOD

Appeal by defendant from judgments entered 24 September 2009 by Judge William R. Pittman in Randolph County Superior Court. Heard in the Court of Appeals 27 May 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Peter Wood, for defendant-appellant.

JACKSON, Judge.

David Lee Wood ("defendant") appeals from the 24 September 2009 judgments entered upon a jury's verdicts finding him guilty of felonious larceny, felonious breaking and entering, and misdemeanor damage to personal property. On appeal, defendant argues that (1) the trial court committed prejudicial error when it entered judgment on the charge of felonious larceny because the indictment was fatally defective; (2) the trial court committed plain error when it failed to give the jury proper instruction on felonious larceny; and (3) the trial court committed prejudicial error when

it denied defendant's motion to dismiss at the close of all the evidence because the State failed to present sufficient evidence on every element of each offense. For the reasons set forth below, we hold no error.

On 14 March 2005, at approximately 5:00 a.m., Officer Lucas Barber ("Officer Barber") of the Randolph County Sheriff's Office responded to an alarm call from the Tabernacle Elementary School of the Randolph County Schools in Asheboro, North Carolina ("the school").

Officer Barber found a 1980 Pontiac registered to Rhiannon Banks[1] ("Banks") parked in the bus parking lot, with Banks asleep in the front passenger seat. Officer Barber knocked on the window for several minutes and shined his flashlight in her face to awaken her. When Officer Barber spoke with Banks, he noted that she was intoxicated and had a knife and a large bottle of beer beside her. Officer Barber conducted an inventory search of the vehicle and found school property valued at $1359.00 in the trunk.

Officer Barber placed Banks under arrest for possession of alcohol and possession of a weapon on school property, and he transported her to the Randolph County Sheriff's Office after assisting officers who searched the school. Banks later was charged with breaking and entering and felonious larceny, and the State dismissed the felonies on the condition that she testify truthfully against defendant. Banks testified that, on the night

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[1] Banks and defendant were married by the time of the trial, and her last name had changed to Wood. For clarity, we refer to her as Banks throughout the opinion.

prior to her arrest, she had consumed alcohol and went for a drive with defendant and defendant's brother. Banks testified that she was "dazed and confused" when officers awakened her and she did not know how she had gotten to the school, how long the car had been parked there, or what had happened to defendant or his brother, and told police she did not want to give any more information about defendant's brother.

On 24 September 2009, a jury found defendant guilty of felonious possession of stolen property, felonious breaking and entering, felonious larceny, and misdemeanor injury to personal property. The trial court arrested judgment on the possession of stolen goods charge and entered judgment consistent with the remaining jury verdicts against defendant. The trial court sentenced him to two consecutive sentences of twenty to twenty-four months imprisonment in the North Carolina Department of Correction and imposed a concurrent sentence of sixty days for the misdemeanor charge. Defendant appeals.

On appeal, defendant first argues that the trial court erred when it entered judgment on the charge of felonious larceny because the underlying indictment was fatally defective. In relevant part, the indictment alleged that "the defendant . . . unlawfully, willfully, and feloniously did steal, take and carry away . . . the personal property of Randolph County Board of Education (Tabernacle School) . . . ." Defendant argues that the indictment was fatally defective because it failed to allege the victim was a legal entity capable of owning property. We disagree.

Our review of whether the indictment was fatally defective is *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729-30 (1981)), *disc. rev. denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). Our Supreme Court has held that

> [a] bill of indictment is insufficient to confer jurisdiction unless it charges all essential elements of a criminal offense. Where no crime is charged in the warrant or bill of indictment upon which the defendant has been tried and convicted the judgment must be arrested.
>
> A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged.

State v. Benton, 275 N.C. 378, 381-82, 167 S.E.2d 775, 777 (1969) (internal citations and quotation marks omitted).

> It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. Thus, defendant's motion, attacking the sufficiency of an indictment, falls squarely within the proviso of G.S. 15A-1415(b)(2), . . . and as such may be made for the first time in the appellate division.

State v. Sturdivant, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (internal citations omitted). To convict a defendant of felonious larceny the State must show, *inter alia*, that the defendant took the property of another. N.C. Gen. Stat. § 14-72(a) (2009). "Because the State is required to prove ownership, a proper indictment must identify as victim a legal entity capable of owning property. An indictment that insufficiently alleges the identity of the victim is fatally defective and cannot support conviction of

. . . a felony." *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999).

In *State v. Turner*, 8 N.C. App. 73, 173 S.E.2d 642 (1970), the defendant alleged that an indictment for larceny was fatally defective because it failed to allege that "the owner of the property allegedly stolen is either a natural person or a legal entity capable of owning property." *Id.* at 74, 173 S.E.2d at 642. This Court held that "the words 'City of Hendersonville' denote a municipal corporate entity[,]" capable of purchasing and holding personal property. *Id.* at 75, 173 S.E.2d at 643. The Court supported its holding by citing Chapter 352 of the 1913 Private Laws of North Carolina which "provides in Section 1, at page 1044, as follows: '[t]hat the name of the town of Hendersonville . . . be changed to The City of Hendersonville, which shall be a municipal corporation[.]" *Id.* at 74, 173 S.E.2d at 642-43. In addition, the Court noted that section 160-2(4) of the General Statutes explains that "[m]unicipal corporations are expressly authorized to purchase and hold personal property." *Id.* at 75, 173 S.E.2d at 693 (citing N.C. Gen. Stat. § 160-2(4)). Pursuant to this authority, we held that the bill of indictment was proper because "[i]t is well established that judicial notice will be taken of public laws of this State[.]" *Id.* at 74, 173 S.E.2d at 643 (citation omitted).

In comparison, in *State v. Price*, 170 N.C. App. 672, 613 S.E.2d 60 (2005), we held that an indictment for larceny and injury to personal property was fatally defective when it identified the victim as "City of Asheville Transit and Parking Services." *Id.* at

674, 613 S.E.2d at 62. There, we distinguished *Price* from *Turner* by noting that, in *Turner*, the indictment's use of "'City of Hendersonville' . . . clearly denoted a municipal corporation authorized to own personal property." *Id.* In *Price*, we explained that

> the words 'City of Asheville Transit and Parking Services' do not indicate a legal entity capable of owning property. Moreover, this case is unlike *Turner*, in which 'City of Hendersonville' was sufficient as it clearly denoted a municipal corporation, because the additional words after 'City of Asheville' make it questionable what type of organization it is.

Id.

We hold the case *sub judice* to be more like *Turner*. The indictment in the instant case states that

> the defendant named above unlawfully, willfully, and feloniously did steal, take and carry away one computer with monitor and keyboard, one printer, one CD player, one VCR, one hose, one gas cap, one container of gas, assorted tools, and one pair of head phones the personal property of *Randolph County Board of Education* (Tabernacle School) having a value of 1,359.00 dollars pursuant to the commission of felonious breaking and entering described in Count I above.

(Emphasis added). In addition to this indictment, North Carolina General Statutes, section 115C-40 explains that

> [t]he board of education of each county in the State shall be a body corporate by the name and style of "The _____ County Board of Education[.]" . . . The several boards of education, both county and city, shall hold all school property and be capable of purchasing and holding real and personal property, of building and repairing schoolhouses, of selling and transferring the same for school purposes, and of prosecuting

> and defending suits for or against the corporation.

N.C. Gen. Stat. § 115C-40 (2009). The indictment identifies the "Randolph County Board of Education" properly, pursuant to section 115C-40. In *Turner*, we held that "The City of Hendersonville" statutorily was authorized to purchase and hold property when it was determined that the court must follow applicable statutory law of this state. *Turner*, 8 N.C. App. at 75, 173 S.E.2d at 643. In the instant case, "The Randolph County Board of Education" also is an entity authorized by statute to purchase and hold real and personal property. N.C. Gen. Stat. § 115C-40 (2009). In this case, the only words on the indictment following "Randolph County Board of Education" are "(Tabernacle School)." These words, placed parenthetically after "Randolph County Board of Education" only serve to identify which particular school within the county the property belongs to. We hold that the bill of indictment was not fatally defective.

Next, defendant argues that the trial court committed plain error when it failed to instruct the jury properly on the charge of felonious larceny. We disagree.

"[Pursuant to] plain error review, defendant has the burden of convincing this Court: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.'" *State v. McNeil*, 165 N.C. App. 777, 784, 600 S.E.2d 31, 36 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)), *aff'd*, 359 N.C. 800, 617 S.E.2d 271

(2005). "'It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *State v. Tirado*, 358 N.C. 551, 574, 599 S.E.2d 515, 532 (2004) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

Defendant argues that the trial court failed to specifically instruct the jury "that they had to find that the victim was a person or legal entity capable of owning property." However, as explained *supra*, the Randolph County Board of Education is defined by statute as "a body corporate" and is expressly authorized by statute to "hold all school property and be capable of purchasing and holding real and personal property . . . ." N.C. Gen. Stat. § 115C-40 (2009). Given this statutory language, we are not persuaded that a different outcome would have resulted if the trial court had instructed the jury that they had to determine whether the school board was capable of owning property. Therefore, the trial court did not commit plain error in not instructing the jury on an element of the offense which already has been established by statute.

Defendant's final argument on appeal is that the trial court erred when it denied his motion to dismiss the charges of felonious larceny, felonious possession of stolen property, felonious breaking and entering, and misdemeanor damage to personal property. We disagree.

This Court previously has held that "[i]n ruling on a motion to dismiss on the ground of insufficiency of the evidence, the

trial court must determine 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" *State v. Williams*, 150 N.C. App. 497, 501, 563 S.E.2d 616, 618 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "'Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence.'" *State v. Workman*, 344 N.C. 482, 508, 476 S.E.2d 301, 316 (1996) (quoting *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996)).

Defendant argues that the State failed to provide substantial evidence that the Randolph County Board of Education was a legal entity capable of owning property. We already have explained at length why this contention is without merit. *See supra*.

Additionally, defendant argues that the trial court erred in denying his motion to dismiss because the State did not present substantial evidence that he was the perpetrator of the offenses. At trial, the State introduced State's exhibit 13 during the testimony of Detective Aundrea Azelton ("Detective Azelton").[2] Detective Azleton read this exhibit, a handwritten statement signed by defendant, which stated:

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[2] We note that Detective Azelton had attained the rank of Captain by the time of the trial; however, for clarity, we refer to her by her rank at the time of the commission of the underlying offenses.

> I have been charged for two crimes, case numbers 05 CR 055173 through . . . 05 CR 055174.[3] I am pleading guilty to these charges. I was informed that you are or have charged my fiancé [sic] with the same charges . . . . She is innocent of these charges. *I am the only one guilty*. You have no need to involve her with this case or these cases.

(Emphasis added). This statement, offered by the State, provides substantial evidence that the defendant committed each offense. Therefore, the trial court did not err in denying defendant's motion to dismiss.

For the reasons set forth above, we hold that the indictment for felonious larceny was not fatally defective, that the trial court did not commit plain error in the instruction to the jury on the felony larceny charge, and that the trial court did not err in denying defendant's motion to dismiss the charges at the close of all of the evidence.

No error.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).

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[3] The two case numbers, 05 CR 055173 and 05 CR 055174 correspond to the four crimes with which defendant had been charged. Case number 05 CR 055173 encompasses the three felony charges: felony breaking and entering as count I, felony larceny as count II, and felonious possession of stolen goods as count III. Case number 05 CR 055174 corresponds to misdemeanor injury to personal property.