NO. COA12-224
NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2012

STATE OF NORTH CAROLINA

v. Wake County
No. 10 CRS 3428
No. 10 CRS 208186

SIDNEY EVANS, III

Appeal by defendant from judgment entered 25 April 2011 by Judge W. Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 29 August 2012.

Attorney General Roy Cooper by Special Deputy Attorney General June S. Ferrell for the State.

M. Alexander Charns for defendant-appellant.

STEELMAN, Judge.

The trial court properly denied defendant's motion to dismiss based on sufficiency of the evidence. Where defendant failed to raise the issue of a fatal variance between the indictment and the testimony presented at trial, that argument is dismissed. The trial court did not err in admitting evidence of defendant's prior acts pursuant to N.C.R. Evid. 404(b).

I. Factual and Procedural Background

On 10 January 2010, Tanisha Robinson (Robinson), a loss prevention officer at Macy's Department Store (Macy's), was monitoring the store using the cameras on the closed circuit television system. She noticed a man in the bedding department and recognized him from a previous encounter in the store. She could not see everything the man was doing because of the angle of the cameras. Robinson decided to personally investigate. She checked the parking lot for getaway cars, locked one set of doors at the exit closest to the bedding department, and waited near the exit for the man to attempt to leave the store.

Sidney Evans III (defendant) walked past Robinson to the exit, waited, and then returned to the bedding section. A few minutes later, he returned to the exit, where Robinson was waiting, carrying two comforters. He tried to leave through the door that Robinson had locked. When Robinson approached him, he pushed her, dropped the comforters, and ran to the parking lot. Robinson saw him get into a dark blue Ford Taurus. Robinson returned to the loss prevention office and called the police to report the incident.

Comforters were frequently stolen from the Macy's store so it was a store policy to put antishoplifting devices (security tags) on all the comforters worth more than one hundred dollars.

The two comforters that defendant dropped before he ran from the store did not have antishoplifting devices attached to them. With the use of a special tool, the antishoplifting devices could be removed. After recovering the two comforters, Robinson found two unattached security tags at the back of a shelf in the domestics department. She did not observe defendant remove the security tags from the comforters. The non-attached tags were on the shelf below the one from which defendant had taken the comforters. All of the other comforters had security tags.

Defendant was indicted for attempted felony larceny from a merchant and for being an habitual felon. A jury found defendant guilty of the attempted larceny charge. Defendant subsequently pled guilty to habitual felon status. Defendant was sentenced to an active term of imprisonment of 120-153 months.

Defendant appeals.

II. Motion to Dismiss

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the attempted larceny charge based upon the sufficiency of the evidence. We disagree.

A. Standard of Review

> We review the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The trial court must determine

> whether there is substantial evidence of each essential element of the offense charged and that the defendant is the perpetrator of the offense. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985).
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> "In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002). "The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. All evidence actually admitted both competent and incompetent, which is favorable to the State must be considered." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984) (internal citation omitted).

State v. Brown, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2012 WL 2282549 (19 June 2012).

B. Analysis

"The essential elements of attempted larceny are (1) an intent to take and carry away the property of another; (2) without the owner's consent; (3) with the intent to deprive the owner of his or her property permanently; (4) an overt act done for the purpose of completing the larceny, going beyond mere preparation; and (5) falling short of the completed offense." *State v. Weaver*, 123 N.C. App. 276, 287, 473 S.E.2d 362, 369 (1996). In the instant case, the State was required to

prove the elements of attempted larceny, together with one of the four elements set forth in N.C. Gen. Stat. § 14-72.11. Under the facts of this case, the applicable element is found in N.C. Gen. Stat. § 14-72.11 (2).

> A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances . . .
>
> (2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.

N.C. Gen. Stat. § 14-72.11(2) (2011).

On appeal, defendant argues that the State's evidence amounted to nothing more than a "strong suspicion" and "conjecture" that defendant removed the antishoplifting device from the comforters. We note that the State can prove its case by presenting either direct or circumstantial evidence. *State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (1984). "[C]ircumstantial evidence is proof of a claim of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence" *Adcock*, 310 N.C. at 36, 310 S.E.2d at 607-08.

In the instant case, the State presented circumstantial

evidence, pertaining to the guilt of the defendant, as follows (1) Robinson observed defendant in the domestics department among the comforters; (2) Robinson observed defendant attempting to leave the store with two comforters; (3) Robinson observed defendant dropping the two comforters before running from the store and getting into a vehicle in the parking lot; (4) all of the other comforters had antishoplifting devices attached to them; (5) Robinson found two unattached antishoplifting devices among the comforters; (6) it was store policy for all of the comforters worth more than one hundred dollars to have antishoplifting tags attached to them because they were high risk items; and (7) if merchandise with an antishoplifting device still attached to it was taken from the store, it would set off an alarm.

Comforters were a "high risk" item, meaning they were frequently stolen, so it was policy to place antishoplifting devices (security tags) on all the comforters worth more than a hundred dollars. The two comforters at issue in this case were worth a combined $650.00. Based upon the above evidence, the State presented sufficient circumstantial evidence from which a reasonable person could conclude that defendant removed the security tags from the comforters while in the domestics department and then attempted to remove the comforters from the

store.

Viewing this evidence in the light most favorable to the State, the State presented sufficient evidence that the defendant attempted to steal the comforters, and removed "a component of an antishoplifting or inventory control device." N.C. Gen. Stat. § 14-72.11(2). The trial court properly denied defendant's motion to dismiss.

This argument is without merit.

III. Alleged Variance Between Indictment and Evidence at Trial

In his second argument, defendant contends that the trial court erred in denying his motion to dismiss because the indictment alleged that a different entity owned the merchandise than was testified to at trial. We disagree.

A. Standard of Review

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10 (a)(1) (2011). To preserve the issue of a fatal variance for review, defendant must state at trial that a fatal variance is the basis for the motion to dismiss. *State v. Curry*, ___ N.C. App. ___, ___, 692 S.E.2d 129, 137, *appeal dismissed and disc.*

review denied, 364 N.C. 437, 702 S.E.2d 496 (2010). In *Curry*, the Court held that because the "defendant failed to argue a variance between his indictment and the evidence presented at trial or even to argue generally the sufficiency of the evidence regarding the type of firearm or weapon possessed to the trial court, he has waived this issue for appeal." *Curry*, ___ N.C. App. at ___, 692 S.E.2d at 138.

B. Analysis

In the instant case, at the close of the State's evidence, defendant moved to dismiss the attempted larceny charge based on the sufficiency of the evidence. Defendant did not move to dismiss based on a fatal variance between the indictment and the evidence presented at trial. Defendant failed to preserve this issue for appeal, and it is dismissed.

Even assuming *arguendo* that defendant did preserve this issue for appeal,

> allegations and proof must correspond [] based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

State v. Simmons, 57 N.C. App. 548, 551, 291 S.E.2d 815, 817 (1982).

"However, [a] variance will not result where the allegations and proof, although variant, are of the same legal signification. An immaterial variance in an indictment is not fatal." *Simmons*, 57 N.C. App. at 551, 291 S.E.2d at 818 (internal quotation marks and citations omitted) (alteration in original). Variance is fatal and material "if it hampers defendant's ability to defend himself on the charge at trial and does not insure that defendant will be protected from another prosecution for the same offense." *Simmons*, 57 N.C. App. at 552, 291 S.E.2d at 818.

In *State v. Wilson*, 264 N.C. 595, 597, 142 S.E.2d 180, 181 (1965), the defendant was charged with larceny of chattels. *Wilson*, 264 N.C. at 596, 142 S.E.2d at 181. The indictment referred to chattels of "one B. M. Hancock & Son, a corporation." *Id.* Witnesses at trial referred to the identical building and the owner of the chattels as "B. M. Hancock & Son's," "B. M. Hancock & Son," "B. M. Hancock & Son's Feed Mill," "B. M. Hancock's Feed Mill," "B. M. Hancock's Mill," and "B. M. Hancock." *Id.* "During the trial, no attempt was made to stress or identify the precise corporate name. The various names indicated were used interchangeably to identify the occupant of the building and the owner of the chattels therein." *Id.* It is apparent that all the witnesses were talking about the same

thing. *Wlison*, 264 N.C. at 597, 142 S.E.2d at 181. The Court held that the variance was not fatal. *Id*.

In the instant case, although the indictment referred to the owner of the property at issue as "Macy's Retail Holdings, Inc." and the testimony at trial referred to the owner of the property as "Macy's," the variation in names does not constitute a material difference or fatal variance. *State v. Jones*, 151 N.C. App. 317, 327 566 S.E.2d 112, 119 (2002) (holding that variance between indictment charging defendant with felonious possession of stolen goods and proof at trial regarding identity of owner of the stolen goods was not fatal; name of person from whom the goods were stolen was not an essential element of the indictment); *State v. Hauser*, 183 N.C. 769, 770, 111 S.E.2d 349, 350 (1922) (holding that variance between indictment alleging a ring with nine diamonds and proof that it was a gold ring with a cluster of larger diamonds was not material).

In this case, it is apparent that all the witnesses were talking about the same corporate entity when they referred to "Macy's," "Macy's Department Store," and "Macy's Retail Holdings, Inc.," making the difference in names immaterial. *See State v. Wyatt*, 254 N.C. 220, 221 118 S.E.2d 420, 421 (1961). The variation in names did not hamper defendant's ability to defend himself or expose defendant to potential future

prosecution for the same crime.

IV. Admission of Other Crimes Evidence

In his third argument, defendant contends that the trial court erred in admitting evidence of his other crimes. We disagree.

A. Standard of Review

The determination of whether evidence was properly admitted under N.C.R. Evid. 404(b) and 403 involves a three-step analysis. *State v. Houseright*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2012).

> First, is the evidence relevant for some purpose other than to show that defendant has the propensity to commit the type of offense for which he is being tried? *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. Second, is that purpose relevant to an issue material to the pending case? *State v. Anderson*, 350 N.C. 152, 174, 513 S.E.2d 296, 310 (1999). Third, is the probative value of the evidence substantially outweighed by danger of unfair prejudice pursuant to N.C.R. Evid. 403? *Summers*, 177 N.C. App. at 697, 629 S.E.2d at 907.
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> The first two steps involve questions of relevance as defined by N.C.R. Evid. 401. *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. . . . [W]e hold that questions of relevance are, in fact, reviewed *de novo*. This Court reviews the trial court's determination anew, but accords deference to the trial court's ruling.
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> The third step of the N.C.R. Evid. 404(b) analysis consists of the N.C.R. Evid. 403 balancing test. This test is reviewed

> for abuse of discretion. *Summers*, 177 N.C. App. at 697, 629 S.E.2d at 907.

Houseright, ___ N.C. App. at ___, ___ S.E.2d at ___.

B. Analysis

The trial court admitted evidence of defendant's prior acts. The prior acts were that on 3 January 2009, defendant admitted to trying to steal comforters at the J.C. Penney at North Hills. Second, on 2 April 2010, defendant had been detained at the Belk's department store at Triangle Town Center for alleged larceny.

First, we consider whether the evidence of defendant's other crimes "was relevant for some purpose other than to show that defendant had the propensity for the type of conduct for which he was being tried." *Houseright*, ___ N.C. App. at ___, ___ S.E.2d at ___. The trial court concluded that the evidence was relevant and admissible for the purpose of showing identity and intent.

In the incident at J.C. Penney, defendant tried removing comforters from a department store by exiting the store near the bedding department, but was stopped in the vestibule by loss prevention employees who spotted him through the use of security cameras. Defendant acknowledged that he was trying to steal the comforters and claimed that it was for his children. This prior act of defendant is nearly identical to the incident in the

instant case and shows defendant's intent in trying to remove the comforters from the store. The second prior act of defendant occurred at Belk's Department Store at Triangle Town Center where defendant was detained for larceny. The investigating officer checked defendant's vehicle for any other potentially stolen goods and found comforters in the vehicle, but could not establish that they were stolen. Since both extrinsic events involve defendant stealing items from a department store, they tend to show defendant's intent. The trial court admitted the evidence because there was sufficient similarity to the events upon which the trial was being conducted and there was reasonable proximity as to time.

Next, we review whether intent was relevant to an issue material to the instant case. *Houseright*, ___ N.C. App. at ___, ___ S.E.2d at ___. "[T]he decision to admit the evidence implies that the trial court concluded that defendant's plan or intent was relevant to a material issue." *Houseright*, ___ N.C. App. at ___, ___ S.E.2d at ___. In the present case, defendant dropped the comforters when confronted by Robinson at the store exit. One element of attempted felony larceny from a merchant is defendant's intent to take the comforters from Macy's. *Weaver*, 123 N.C. App. at 287, 473 S.E.2d at 369. Defendant's attempt to steal comforters from J.C. Penney and Belk's was relevant to

show his intent to take the comforters from Macy's and to deprive Macy's of them permanently.

The trial court expressly limited the consideration of this evidence in its instructions to the jury.

> This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, that the defendant had the intent, which is a necessary element of the crime charged in this case, and that there existed in the mind of the defendant a plan involving the crime charged in this case. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received.

The evidence of defendant's prior acts was relevant to his intent and plan to actually remove the comforters from the store.

In the third step of our analysis, we review for abuse of discretion the trial court's determination that the probative value of [the other acts] was not substantially outweighed by the danger of unfair prejudice pursuant to N.C.R. Evid. 403. *Houseright*, ___ N.C. App. at ___, ___ S.E.2d at ___. The trial court determined that "the probative value of such 404(b) evidence is not substantially outweighed by the danger of unfair prejudice or other factors under Rule 403. In fact, the Court rules that the probative value outweighs the danger of unfair prejudice." "This determination is within the sound discretion

of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *State v. Stevenson* 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005). In this case, we discern no abuse of discretion in admitting this evidence to show intent.

This argument is without merit.

DISMISSED IN PART, NO ERROR IN PART.

Judges HUNTER, Robert C. and BRYANT concur.

Report per Rule 30(e).