NO. COA13-162
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v.	Guilford County Nos. 11 CRS 91498
DARWIN VERNELL CHRISTIAN, Defendant.	11 CRS 91499 12 CRS 24062

Appeal by defendant from judgment entered 26 July 2012 by Judge Shannon R. Joseph in Guilford County Superior Court. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy Cooper, by Assistant Attorney General Susannah P. Holloway and Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

GEER, Judge.

Defendant Darwin Vernell Christian appeals from his conviction of attempted larceny from a merchant, assault, and being a habitual felon. On appeal, defendant primarily argues that the indictment charging him with attempted larceny from a merchant was fatally invalid for failing to allege that the attempted taking was without the owner's consent. Because the

indictment alleged that defendant "did attempt to steal" the property at issue, we hold the indictment sufficiently alleged that the attempted taking was without the owner's consent.

Facts

The State's evidence tended to show the following facts. On 26 October 2011, Garrett Thompson was working for Belk Loss Prevention at the Belk store in Four Seasons Town Center Mall in Greensboro, North Carolina. Mr. Thompson was notified by another employee that defendant made a suspicious return, and Mr. Thompson then located defendant in the Belk store on the store's close caption television ("CCTV") surveillance system. Mr. Thompson watched defendant on CCTV for about five or six minutes and saw defendant conceal three Izod shirts inside his jacket. At another rack of shirts, defendant pulled out a pair of pliers and attempted to remove an "EAS sensor" from one shirt and then successfully removed an EAS sensor from a different shirt. An EAS sensor is an electronic antishoplifting device that is attached to clothing in Belk stores. If the sensor travels through the doors of the store, it triggers an alarm.

Mr. Thompson watched defendant exit the Belk store and saw him leave one EAS sensor on a fixture by the door of the store. That sensor had been "manipulated." Mr. Thompson left the loss prevention office and followed defendant out of the store. Mr.

Thompson confronted defendant in the parking lot, identified himself verbally and by showing his Belk Loss Prevention identification card, and attempted to detain defendant and place him in handcuffs. Defendant still had the pliers in his hand and made a motion to strike Mr. Thompson with them. When Mr. Thompson moved defensively, defendant pushed Mr. Thompson with his other hand and Mr. Thompson fell to the ground, hitting his head on a car. Defendant ran towards the nearby Gander Mountain store, and Mr. Thompson called 911 to report the incident.

Officer C. B. Cline of the Greensboro Police Department responded to the call and entered Gander Mountain in search of defendant. Officer Cline noticed a black jacket balled up on a stool by the store's checkout. He then located and arrested defendant in the Gander Mountain store. Officer Cline searched defendant's person and retrieved some fragrances, two earrings, and three watches. Officer Cline then recovered the jacket, in which he found the same three shirts that Mr. Thompson had watched defendant place into the jacket. There was an EAS sensor still attached to one of the shirts, while the EAS sensor had been removed from another shirt. The total value of the merchandise recovered from defendant, all of which belonged to Belk, was $369.50.

On 23 January 2012, defendant was indicted for larceny by anti-inventory device in violation of N.C. Gen. Stat. § 14-72.11 (2011), common law robbery, and being a habitual felon. On 24 July 2012, the indictment charging larceny by anti-inventory device was amended to charge attempted larceny from a merchant in violation of N.C. Gen. Stat. § 14-72.11; other than amending the title of the charged offense, none of the allegations of the indictment were changed.

The jury found defendant guilty of attempted larceny from a merchant and assault. Defendant then pled guilty to being a habitual felon in exchange for the State's dismissing additional charges against defendant. The trial court consolidated all of the convictions into one judgment and sentenced defendant to a presumptive-range term of 117 to 150 months imprisonment. Defendant timely appealed to this Court.

Discussion

As an initial matter, we must address this Court's jurisdiction over defendant's appeal. Defendant failed to orally give notice of appeal at trial. Further, defendant's timely written notice of appeal is in violation of Rule 4 of the North Carolina Rules of Appellate Procedure because (1) the record contains no evidence that it was served on the State; and

(2) the notice of appeal fails to designate this Court as the court to which appeal is taken.

However, in *State v. Ragland*, ___ N.C. App. ___, ___, 739 S.E.2d 616, 620 (2013), this Court held that neither of these defects required dismissal of the appeal. Since this case is materially indistinguishable from *Ragland*, we hold that defendant's appeal is properly before us and dismiss defendant's petition for writ of certiorari as moot.

Defendant first argues that the indictment charging him with larceny from a merchant was fatally defective for failing to allege an essential element of the charged offense. "This Court reviews the sufficiency of an indictment *de novo*." *State v. Justice*, ___ N.C. App. ___, ___, 723 S.E.2d 798, 800 (2012). If an indictment fails to allege an essential element of an offense, then it is fatally defective. *Id.* at ___, 723 S.E.2d at 800. "If an indictment is fatally defective, then the superior court lacks subject matter jurisdiction over the case." *Id.* at ___, 723 S.E.2d at 800.

In this case, defendant was indicted for attempted larceny from a merchant in violation of N.C. Gen. Stat. § 14-72.11(2). "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).

For attempted larceny under N.C. Gen. Stat. § 14-72.11(2), the indictment must additionally allege the element of "removing, destroying, or deactivating a component of an antishoplifting or inventory control device." *Id.* *See Justice*, ___ N.C. App. at ___, 723 S.E.2d at 801 (holding that essential elements of larceny under N.C. Gen. Stat. § 14-72.11(2) are the four essential elements of larceny "and also removal of an antishoplifting or inventory control device").

In this case, defendant contends that the indictment failed to allege that the attempted taking of the property was without the owner's consent. The indictment in this case alleged in relevant part that defendant "unlawfully, willfully and feloniously did attempt to *steal*, take and carry away various clothing, jewelry and fragrances, the personal property of Belk, Inc., a merchant, with the intent to permanently deprive by removing, destroying, or deactivating a component of an anti-shoplifting or inventory control device to prevent the activation of said anti-shoplifting or inventory control

device." (Emphasis added.) The indictment further specifically alleged that defendant committed an "Offense in Violation of G.S. 14-72.11."

In *State v. Osborne*, 149 N.C. App. 235, 244, 562 S.E.2d 528, 535, *aff'd per curiam*, 356 N.C. 424, 571 S.E.2d 584 (2002), the defendant similarly argued on appeal that the indictment charging him with larceny was insufficient, in part, because "it failed to specifically allege that defendant did not have consent to take the property . . . ." The indictment in *Osborne* alleged in pertinent part that the "defendant 'unlawfully, willfully and feloniously did *[s]teal*, take, and carry away (see attached list), the personal property of [the victim], such property having a value of $3,700.00. This is in violation of N.C.G.S. 14-72(a).'" *Id.* (emphasis added).

The Court in *Osborne* rejected the defendant's argument, explaining: "[T]he specific language used in the indictment here has previously been held to be sufficient to charge the offense of larceny. Moreover, we find the indictment sufficient to meet the underlying purpose of an indictment, which is 'to ensure that a defendant may adequately prepare his defense and be able to plead double jeopardy if he is again tried for the same offense.'" *Id.* at 245, 562 S.E.2d at 535 (quoting *State v. Madry*, 140 N.C. App. 600, 601, 537 S.E.2d 827, 828 (2000)).

Since, in this case, the indictment, like the indictment in *Osborne*, alleged that defendant attempted to "steal" certain enumerated merchandise in violation of N.C. Gen. Stat. § 14-72.11, the indictment sufficiently alleged the element of an attempted taking without the owner's consent. *See also Justice*, ___ N.C. App. at ___, 723 S.E.2d at 801 (recognizing that "the word 'steal' is defined as, *inter alia*, '[t]o take (personal property) illegally with the intent to keep it unlawfully'" (quoting *Black's Law Dictionary* 1453 (8th ed. 2004))). The indictment was not, therefore, fatally detective.

Defendant next contends that the State failed to present sufficient evidence of attempted larceny from a merchant to survive a motion to dismiss. Defendant argues (1) that the evidence showed only a completed larceny, as opposed to an attempted larceny and (2) that the evidence showed only that defendant removed an entire antishoplifting device rather than "a component of an antishoplifting or inventory control device," which defendant contends is required by N.C. Gen. Stat. § 14-72.11(2).

However, because defendant failed to move to dismiss the charge of attempted larceny from a merchant at trial, his arguments are not preserved for appellate review. N.C.R. App. P. 10(a)(3). *See State v. Boyd*, 162 N.C. App. 159, 161-62, 595

S.E.2d 697, 698-99 (2004) (holding Court was precluded from reviewing issue of sufficiency of the evidence as to a conspiracy charge where defendant stated intent not to move to dismiss that charge at the close of the State's evidence and attempted to "renew" his nonexistent motion to dismiss the conspiracy charge at the close of all the evidence). Although defendant further asks this Court to exercise its discretion under Rule 2 of the North Carolina Rules of Appellate Procedure in order to review his arguments, we do not believe defendant's arguments warrant suspension of the appellate rules pursuant to Rule 2.

No error.

Judges ROBERT C. HUNTER and McCULLOUGH concur.

Report per Rule 30(e).