NO. COA14-574

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Wilkes County
No. 12 CRS 53828

KELLY WINTON PIERCE

Appeal by defendant from judgment entered 7 November 2013 by Judge Ronald E. Spivey in Wilkes County Superior Court. Heard in the Court of Appeals 21 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Brock & Meece, P.A., by C. Scott Holmes, for defendant.

HUNTER, Robert C., Judge.

Defendant appeals the judgment entered after he was convicted of failing to notify the sheriff's office of a change of address as a registered sex offender ("failure to notify") and pled guilty to attaining habitual felon status. On appeal, defendant only challenges the failure to notify conviction and argues that: (1) the indictment was fatally defective because it named the wrong sheriff's department where notification was required and failed to allege a "failure to report in person";

(2) the trial court erred in allowing the indictment be amended with regard to the dates of offense; and (3) the trial court erred in denying defendant's motion to dismiss because the State failed to provide substantial evidence that he resided in Wilkes County.

After careful review, we find no prejudicial error.

Background

In 2009, defendant was convicted of four counts of indecent liberties with a child, an offense that required him to register as a sex offender. In November 2010, defendant registered as a sex offender in Burke County. Deputy Robin Jennings at the Burke County Sheriff's Office reviewed all the sex offender registration requirements with defendant, including the requirement that, if he moved to a different county, he would be required to appear in-person and provide written notice of the address change to both the sheriff in the county where he was most currently registered and the new sheriff. However, the State contends that defendant moved to Wilkes County during the summer of 2012 but failed to notify the Wilkes County Sheriff's Office that he had moved. Defendant denies it and claims that he still resided in Burke County throughout 2012 where he was

properly registered. Both sides presented evidence at trial in support of their contentions.

I. The State's Evidence

Defendant's ex-wife, Marilyn Joann Long ("Joann"), lived in Wilkes County. At trial, Melissa Anderson ("Melissa"), who lived next door to Joann, testified on behalf of the State. Melissa claimed that, beginning in June 2012, she saw defendant at Joann's house "all week," "at least five days a week," and "every evening." Although she acknowledged that defendant would usually be gone on the weekends, he was "always there" during the week. Furthermore, she alleged that defendant did things around Joann's home "like a normal person living in a house" such as mowing the yard.

Joy Griffin ("Joy"), who lived in the trailer in front of Joann's, also testified at trial. She claimed that, in June, she saw defendant in her backyard with a headlight on his head. Joy alleged that defendant would be at Joann's two or three days, leave for a day, and then come back. He would be there all day and all night. Ultimately, in November 2012 after she found out that defendant was a registered sex offender, Joy called the Wilkes County Sheriff's Office and reported that defendant was living with Joann.

II. Defendant's Evidence

Defendant testified on his own behalf at trial and claimed that he never moved in with Joann. Although he conceded that he may have stayed with Joann two or three days in a row to help her with home improvement projects, he usually just drove back and forth between Morganton and Wilkesboro. Joann's testimony was similar to defendant's. She claimed that defendant travelled back and forth between Morganton and Wilkesboro to help her. According to Joann, although he may have spent one or two nights with her a week, "that was about the limit."

At trial, defendant produced several documents showing an address in Burke County, including his driver's license, an electricity bill from November 2012, his bank account statements, a wireless phone bill, car registration and tax bill, and his disability check. According to defendant, these documents showed that he still resided in Burke County.

Defendant also relied on the testimony of Earl Miller ("Earl"), his neighbor in Burke County, to support his claim that he never moved to Wilkes County. According to Earl, he helped defendant complete several projects around his mobile home, including installing a water pump and water heater. Earl claimed that he and his wife saw defendant every other day

during 2012 and that defendant often ate dinner with him, sometimes five times a week.

On 7 November 2012, Lieutenant Whitley from the Wilkes County Sheriff's Office took the report from Joy that defendant was living with Joann. He and Sergeant Coles went to Joann's home to investigate. Defendant denied that he was living with Joann, claiming that he stays with her "from time to time." Based on their investigation and defendant's failure to register in Wilkes County, they arrested defendant for failure to notify the Wilkes County Sheriff's Office.

On 22 July 2013, defendant was indicted for failure to notify pursuant to N.C. Gen. Stat. §§ 14-208.11(a)(7) and 14-208.9(a). The date of offense was 7 November 2012. The indictment read as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did as a person required by-Article 27A of Chapter 14 of the General Statues to register as a sexual offender, moved from Morganton, North Carolina, which is Burke County, North Carolina to Wilkes County, North Carolina, thereby the defendant changed his address to Wilkes County, North Carolina, and the defendant failed to provide written notice within 10 days after his change of address to the last registering sheriff by failing to report his change of address to the

> Wilkes County Sheriff's Office as required by statute.

At trial, the court allowed the State to amend the date of offense from 7 November 2012 to June to November 2012. The jury found defendant guilty on 6 November 2013 of failing to notify the Wilkes County Sheriff's Office of his address change, and defendant pled guilty to attaining the status of being a habitual felon. The trial court sentenced defendant to a minimum term of 87 months to a maximum term of 117 months imprisonment. Defendant appeals.

Arguments

Defendant first argues that the indictment was fatally defective because it failed to include all the essential elements of the offense. Specifically, defendant contends that the indictment was fatal in two respects. First, it failed to include the essential element that defendant "report in person" as required by sections 14-208.11(a)(7) and 14-208.9(a). Second, defendant argues that it improperly alleges a failure to notify "the last registering sheriff"; in contrast, defendant contends that it should allege that defendant failed to notify "the sheriff of the new county." We disagree; although the indictment improperly alleges that defendant failed to notify the "last registering sheriff" of his address change, the

indictment's remaining language was sufficient to put defendant on notice that he was being indicted for failing to register his new address with the Wilkes County Sheriff's Office—the "new county sheriff."

This Court reviews the sufficiency of an indictment de novo. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "The purpose of an indictment is to give a defendant notice of the crime for which he is being charged[.]" *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000).

Regarding its sufficiency, it is well-established that:

> The indictment is sufficient if it charges the offense in a plain, intelligible and explicit manner. Indictments need only allege the ultimate facts constituting each element of the criminal offense, and an indictment couched in the language of the statute is generally sufficient to charge the statutory offense. While an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.

State v. Barnett, __ N.C. App. __, __, 733 S.E.2d 95, 98 (2012).

A person who is required to register as a sex offender commits a felony if he "[f]ails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A." N.C. Gen. Stat. § 14-208.11(a)(7) (2013). In turn,

section 14-208.9(a), the statute defendant was indicted for violating, sets out two basic sets of notification requirements for registered sex offenders. First, to the sheriff of the county with whom the person had last registered, i.e., the "last registering sheriff," the person must provide in-person and written notice of the new address "not later than the third business day after the change." *Id.* Second, if the person moves to a new county, he must also report in-person and provide written notice of his address within 10 days after the change in address to the sheriff of the new county, i.e., the "new county sheriff." *Id.*

Here, the indictment alleges that defendant violated section 14-208.9(a) by failing to provide 10 days of written notice of his change of address to "the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office as required by statute." As to defendant's first contention that the indictment was fatally defective for not alleging that defendant failed to give in-person notification to the Wilkes County Sheriff's Office, defendant has failed to show any defect in the indictment. Defendant is correct that a registered sex offender must provide both in-person notification and written notice of the new address.

However, defendant was only prosecuted and convicted based on his failure to give 10 days of written notice, which, by itself, constitutes a violation of section 14-208.9(a). Thus, the indictment properly charged a violation of section 14-208.9(a) based on his failure to provide written notice of his new address to the "new county sheriff." Consequently, defendant has failed to establish any defect in the indictment based on the type of notification defendant was charged with failing to provide.

Next, as to the indictment's reference to the wrong sheriff's department, clearly, there is a conflict in the language of the indictment. Specifically, while the indictment alleges that defendant failed to give written notification of the address change to "the last registering sheriff," it references the Wilkes County Sheriff's Office which is the new county's sheriff's office. Thus, the issue is whether the conflict constituted a fatal variance.

Here, read in totality, the language of the indictment would put defendant on notice that he was being prosecuted for failing to give notice to the "new county sheriff," not the "last registering sheriff," for two primary reasons. First, the indictment actually named the sheriff's department properly—the

Wilkes County Sheriff's Office. Second, the 10-day notice requirement only applies to the "new county sheriff," not the "last registering sheriff." Thus, although the indictment improperly references the "last registering sheriff," this language is not fatal to the indictment because the other language was sufficient to charge a violation of section 14-208.9(a) for failing to provide in-person notification to the "new county sheriff."

Next, defendant argues that the trial court erred in allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. We disagree.

This Court reviews a trial court's granting of the State's motion to amend an indictment *de novo*. *State v. White*, 202 N.C. App. 524, 527, 689 S.E.2d 595, 596 (2010). "A change of the date of the offense is permitted if the change does not substantially alter the offense as alleged in the indictment." *State v. Wallace*, 179 N.C. App. 710, 716, 635 S.E.2d 455, 460 (2006). "Where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set

forth in the indictment." *State v. Taylor*, 203 N.C. App. 448, 457, 691 S.E.2d 755, 763 (2010).

Here, the amendment of the dates of offense did not substantially alter the charge against defendant because the specific date that defendant moved to Wilkes County was not an essential element of the crime. In *State v. Harrison*, 165 N.C. App. 332, 336, 598 S.E.2d 261, 263 (2004), this Court rejected the defendant's argument that the specific date that the sex offender moved was an essential element of the crime of failing to register as a sexual offender pursuant to N.C. Gen. Stat. § 14-208.11(a)(2). Accordingly, time is not be an essential element of a violation under section 14-208.11(a)(7), and the trial court was permitted to amend the dates of offense in the indictment.

Furthermore, defendant's argument that "timing is of the essence in charges involving failure to report a change of address as a sex offender" is without merit. The only time element that must be alleged in the indictment charging a violation of section 14-208.11 is the time period in which the registered sex offender has to notify the sheriff of a change of address, not the date he moves. Here, since the indictment properly alleged that defendant failed to provide written notice

to the Wilkes County Sheriff's Office within 10 days after his change of address, the indictment sufficiently alleged the relevant time element, and the amendment of the dates of the offense did not substantially alter the charges against defendant.

Finally, defendant has failed to show that he detrimentally relied on the original date of offense and was substantially prejudiced by the amendment. *See State v. Stewart*, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001). Defendant contends he was deprived of the ability to present a meritorious defense because he only focused on the original date in the indictment in preparing for trial. Specifically, he claims that he only brought bills and proof of his address from November and December 2012. However, at trial, both Joann and Earl testified that defendant was still living in Burke County throughout the time period set out in the amended indictment. Therefore, defendant has not demonstrated that he was prejudiced by relying on the original timeframe set forth in the indictment. Accordingly, the trial court did not err in allowing the amendment of the indictment.

Next, defendant argues that the trial court erred in denying his motion to dismiss because the State failed to

provide substantial evidence that defendant changed his address. Taking the evidence in a light most favorable to the State, we disagree.

"'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007). However, the trial court must consider all the evidence in a light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

With regard to what constitutes a sex offender's "home address," our Supreme Court has rejected the notion that it is only "a place where a registrant resides and where that registrant receives mail or other communication." *State v. Abshire*, 363 N.C. 322, 330, 677 S.E.2d 444, 450 (2009). Instead, the Court held that

> a sex offender's address indicates his or her residence, meaning the actual place of

> abode where he or she lives, whether permanent or temporary. Notably, a person's residence is distinguishable from a person's domicile. Domicile is a legal term of art that denotes one's permanent, established home, whereas a person's residence may be only a temporary, although actual, place of abode.

Id. at 331, 677 S.E.2d at 451 (internal citations and quotation marks omitted). The Court went on to say that

> mere physical presence at a location is not the same as establishing a residence. Determining that a place is a person's residence suggests that certain activities of life occur at the particular location. Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address.

Id. at 332, 677 S.E.2d at 451. Thus, the issue is whether the State presented substantial evidence that defendant changed his residence or actual place of abode, even temporarily.

Here, the testimony of Melissa and Joy support a reasonable inference that defendant resided with Joann at her home in Wilkes County. Specifically, Melissa testified that, even though defendant often left on weekends, he would be at Joann's house all week, including the evenings; Joy claimed that defendant would be at Joann's house more often than not. Furthermore, Melissa testified that defendant engaged in certain

"activities of life," *id.*, like mowing the yard, that would be normal for someone residing at Joann's. In sum, the evidence tended to show that defendant had more than just a "physical presence" at Joann's but, instead, had established a residence there. Thus, the State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a "temporary home address," *see id.* at 331, 677 S.E.2d at 451, in Wilkes County. Accordingly, this evidence tended to show that defendant changed his "home address," as that term is described in *Abshire*, and was sufficient to defeat defendant's motion to dismiss.

We find the facts of this case analogous to *Abshire*. In *Abshire*, the defendant, a registered sex offender, was charged with violating section 14-208.11 by failing to notify the Caldwell County Sheriff's department that she changed her address *Id.* at 326, 677 S.E.2d at 448. The evidence at trial tended to show that, in July 2006, the defendant notified the Caldwell County Sheriff's Office that she had changed her address to a house on Gragg Price Lane in Hudson, North Carolina. *Id.* at 324-25, 677 S.E.2d at 447. This home was owned by Ross Price ("Mr. Price"). *Id.* at 325, 677 S.E.2d at 447. In September, the defendant's children's school became

concerned about the children's poor attendance. *Id.* A school social worker visited Mr. Price's home and was told that the defendant had not lived at that address for a couple of weeks. *Id.* Although Mr. Price stated that the defendant still received mail there and had been "in and out" of the residence, he did not know where the defendant was currently residing. *Id.* A Caldwell County Sheriff's Detective also visited Mr. Price's home in an attempt to find the defendant; Mr. Price told him that the defendant "got mad a couple of weeks ago and went to go stay with her father" at his house on Poovey Drive in Granite Falls. *Id.*

Based on this, the defendant was arrested for failing to register her change of address to Poovey Drive. *Id.* at 326, 677 S.E.2d at 447-48. After her arrest, the defendant submitted a statement to the sheriff's department, claiming that, although she was staying with her father on Poovey Drive, she still received mail at Mr. Price's house and planned on returning there, at some point in the future, to live. *Id.* at 326, 677 S.E.2d at 448. Moreover, during the trial, she testified that she visited her house on Gragg Price Lane daily and that she considered it her "home." *Id.* at 327, 677 S.E.2d at 448.

At trial, the defendant made a motion to dismiss, arguing that there was insufficient evidence that she changed her address. *Id.* The trial court denied her motion. *Id.* A divided panel of this Court agreed with the defendant and vacated her conviction. *State v. Abshire*, 192 N.C. App. 594, 605, 666 S.E.2d 657, 665. The defendant appealed to the Supreme Court. *Abshire*, 363 N.C. at 327, 677 S.E.2d at 448.

On appeal, our Supreme Court first discussed the definition of a sex offender's "home address" for purposes of the registration statutes. *Id.* at 329, 677 S.E.2d at 449. The Court noted that the intent of the legislature was clear and that even a sex offender's "temporary home address must be registered so that law enforcement authorities and the general public know the whereabouts of sex offenders in our state." *Id.* at 331, 677 S.E.2d at 450-51. Viewing the evidence in a light most favorable to the the State, our Supreme Court held that there was sufficient evidence that the defendant changed her address to defeat the motion to dismiss. *Id.* at 333, 677 S.E.2d at 452. Specifically, the Court concluded that the jury could have reasonably inferred that although "[the] defendant carried out the core necessities of daily living at Gragg Price Lane[,]" she resided at her father's house on Poovey Drive. *Id.* In

other words, even though the defendant still received mail and maintained a presence on Gragg Price Lane, her "place of abode," even if it was temporary, was at her father's. *Id.* Consequently, the Supreme Court held that the trial court properly denied the defendant's motion to dismiss and reversed this Court. *Id.*

Similar to *Abshire*, the evidence here showed that defendant still received mail, maintained a presence, and engaged in some "core necessities of daily living," *id.*, at his home in Burke County. However, the evidence also would allow a jury to reasonably conclude that he temporarily resided at Joann's in Wilkes County. Specifically, Joy and Melissa testified that defendant was often at Joann's all week. Furthermore, Melissa testified that defendant engaged in activities that only someone living at Joann's would do. Thus, as in *Abshire*, the evidence supported a reasonable conclusion that not only did defendant maintain a permanent domicile in Burke County, but he also had a temporary residence or place of abode at Joann's in Wilkes County. Although defendant may have considered the house in Burke County his "home," *Abshire* makes it clear that his subjective belief and even the fact that he was "in and out" of the Burke County house does not prevent him from having a

second, temporary residence. Accordingly, the State's evidence was sufficient to defeat defendant's motion to dismiss. We note that although defendant may have "changed" his address by temporarily residing at Joann's house, he still had an obligation under the law to remain registered in Burke County since he also had his permanent domicile there.

Conclusion

Because the indictment's language was sufficient to put defendant on notice that he was indicted for failing to register his address with the Wilkes County Sheriff's Office, any conflict in the indictment did not constitute a fatal variance. In addition, the trial court did not err in allowing the State to amend the dates of the offense because the amendment did not substantially alter the charges against defendant. Finally, because the State presented substantial evidence that defendant had a temporary residence in Wilkes County, the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges DILLON and DAVIS concur.