IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-170

Filed: 6 December 2016

Guilford County, Nos. 14 CRS 94941-42

STATE OF NORTH CAROLINA

v.

EDWARD LEE YORK

Appeal by Defendant from judgment entered 1 October 2015 by Judge Eric C. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Michael T. Wood, for the State.

Charlotte Gail Blake for Defendant.

STEPHENS, Judge.

Defendant Edward Lee York appeals from the judgment entered upon his convictions for felony larceny and resisting a public officer. York argues that the trial court erred by failing to give his proposed jury instruction. York was convicted of felony larceny under N.C. Gen. Stat. § 14-72(b)(6), which elevated his misdemeanor larceny conviction to a felony, because he had four prior larceny convictions. York's requested jury instruction would have required the jury to find that York was either

represented by counsel or had waived counsel for all of his prior larceny convictions in order to convict him of the felony larceny charge. Because York's requested instruction was not a correct statement of the law, and there was not substantial evidence to support a defense that York was not represented by counsel, we find no error in the court's refusal to instruct the jury as York requested.

Factual and Procedural Background

The evidence introduced at trial and the transcript of the trial proceedings tends to show the following:

On 21 December 2014, High Point police officer Andrew Dekker arrested York for stealing a camouflage jacket, knit hat, laundry detergent, soap, air fresheners, baby back ribs, sausages, and beer from a Walmart in High Point. On 10 March 2015, the Guilford County Grand Jury indicted York on one count each of felony larceny, resisting an officer, and second-degree trespass. The State subsequently amended the felony larceny indictment without objection from York to separate the allegations into two counts. Count II of the amended indictment for felony larceny stated that York stole the merchandise from Walmart "after the defendant had been convicted in this State for the offense of larceny under section N.C.G.S. 14-72, at least four (4) times." Additionally, Count II listed York's four previous convictions as: 8 June 2007 conviction for misdemeanor larceny pursuant to a guilty plea; 15 December 2008 conviction for misdemeanor larceny pursuant to a no contest plea; 15 July 2010

conviction for misdemeanor larceny pursuant to a guilty plea; and 21 September 2012 conviction for misdemeanor larceny pursuant to a guilty plea.

York was tried at the 28 September 2015 criminal session of the Guilford County Superior Court. At trial, York denied the four prior convictions for misdemeanor larceny. The State introduced into evidence a computer printout for each conviction from the state-maintained criminal records database. Each printout was certified as a true copy by Guilford County Clerk of Court Wendy Stuart and showed York's name, race, gender, date of birth, date of the offense, date of conviction, sentence, and whether he was represented by or waived counsel.

The printout for York's 21 September 2012 conviction for misdemeanor larceny showed that York was represented by attorney Aaron Wellman. This was contrary to the judgment contained in the court file, which showed that York waived counsel. Mr. Wellman had been appointed as counsel for York, but York waived his right to counsel on the day he pled guilty. Clerk Stuart testified it was likely that someone had not updated York's representation status in the criminal records database after York waived counsel and the judgment was entered. Although this was the only error identified in the printouts, the accuracy of the printouts for York's 2007 and 2008 convictions could not be checked against the actual court files, because the files were destroyed after five years in accordance with North Carolina state law. No challenge was made to the veracity of the printout for the 2010 conviction.

York requested a special jury instruction on the pending felony larceny charge which would have required the jury to find that York was either represented by counsel or had waived counsel for each of his prior misdemeanor larceny convictions. York's lawyer argued that this was an element of the crime of felony larceny which must be found by the jury when the felony is based on prior larceny convictions under N.C. Gen. Stat. § 14-72(b)(6). The trial court denied the requested instruction.

The jury found York guilty of felony larceny and resisting an officer following a jury trial on 30 September 2015. The court consolidated the convictions and sentenced York to 18 to 31 months in prison.

Discussion

On appeal, York argues that the trial court erred in refusing to give his requested jury instruction that the jury had to find York was either represented by or waived counsel for each of his prior misdemeanor larceny convictions, because the representation by or waiver of counsel is an element of the crime of felony larceny under N.C. Gen. Stat. § 14-72(b)(6). The State argues that the trial court correctly found that lack of representation by or waiver of counsel for prior convictions is in the nature of a defense to felony larceny under N.C. Gen. Stat. § 14-72(b)(6), and that York failed to present legally sufficient evidence to raise the defense. In analyzing whether representation by or waiver of counsel is an element of felony larceny under N.C. Gen. Stat. § 14-72(b)(6), we must first determine whether the indictment was

sufficient in order for this court to have subject matter jurisdiction over this appeal. We conclude that representation by or waiver of counsel is not an element of felony larceny under N.C. Gen. Stat. § 14-72(b)(6), and this Court therefore has jurisdiction over York's appeal. Further, because representation by or waiver of counsel is not an element of felony larceny under N.C. Gen. Stat. § 14-72(b)(6) and there is not substantial evidence to support a defense that York was not represented by counsel, the trial court did not err in refusing to give York's requested jury instruction.

I. Sufficiency of the Indictment

York does not argue that the indictment for felony larceny was insufficient. However, in his argument regarding the jury instruction, York does argue that representation by or waiver of counsel is an element of the crime of felony larceny under N.C. Gen. Stat. § 14-72(b)(6).[1] The indictment does not allege that York was either represented by or waived counsel for each of his prior misdemeanor larceny convictions. Thus, if representation by or waiver of counsel is an element of felony larceny under N.C. Gen. Stat. § 14-72(b)(6) which must be found by the jury, then the indictment was insufficient and the trial court lacked subject matter jurisdiction over York's felony larceny charge. We hold that the statutory language of N.C. Gen. Stat.

[1] York does not use the word "element" in his argument to this Court, despite using that language when he argued to the trial court. However, by arguing here that representation by or waiver of counsel is a fact that must be found by the jury in order to convict York of felony larceny, York argues that this factor is a part of the definition of the offense of felony larceny, which would render it an essential element. *See State v. Mather*, 221 N.C. App. 593, 599, 728 S.E.2d 430, 434 (2012).

§ 14-72(b)(6) creates an exception from the definition of felony larceny, and that representation by or waiver of counsel is consequently not an essential element of the crime.

> When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 580, 350 S.E.2d 83, 86, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986) (citation omitted).

A criminal indictment must contain "facts supporting every element of a criminal offense and the defendant's commission thereof." N.C. Gen. Stat. § 15A-924 (2015). If it does not, the indictment is facially invalid, and the trial court lacks jurisdiction over the charge. *See State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002). Further, the appellate court's jurisdiction is derivative, and the Court of Appeals also lacks jurisdiction over a charge based on a facially invalid indictment. *Id.* (citations omitted) (vacating the defendant's conviction, because the indictment was facially invalid, which deprived both the trial court and the Court of Appeals of jurisdiction).

A factor which excepts a case from the statutory definition of a crime is not an essential element of the crime if the factor is contained in a clause following a

"complete and definite" description of the crime. *Mather*, 221 N.C. App. at 598, 728 S.E.2d at 434 (quoting *State v. Connor*, 142 N.C. 700, 701, 55 S.E. 787, 788 (1906)). An exception withdraws a case from operation of the statute. *Id.* (citation omitted). Alternatively, a qualification brings a case within the operation of the statute. *Id.* (citation omitted). An indictment must allege facts to meet a qualification, but if a case is within an exception, "it is left to the defendant to show that fact by way of defense." *Id.* (quoting *Connor*, 142 N.C. at 703, 55 S.E.2d at 789). Regardless of the language used, any factor which is a part of the "definition and description of the offense" is an essential element of the crime which must be alleged in the indictment. *Id.* at 599, 728 S.E.2d at 434 (quoting *Connor*, 142 N.C. at 702, 55 S.E.2d at 788). In analyzing whether a factor is an essential element of a statutory crime or is a defense, it is "substantively reasonable to ask what would be a 'fair' allocation of the burden of proof, in light of due process and practical considerations, and then assign as 'elements' and 'defenses' accordingly." *Id.* at 601, 728 S.E.2d at 436 (quoting *State v. Trimble*, 44 N.C. App. 659, 666, 262 S.E.2d 299, 303 (1980)).

This Court examined a similar case of whether a statutory exception to a crime was an essential element of the crime in *State v. Brown*, 56 N.C. App. 228, 287 S.E.2d 421 (1982). In *Brown*, the defendant was indicted for larceny by an employee for stealing two cows which had been entrusted to him by his employer. The statute under which the defendant was charged provided:

> If any servant or other employee, to whom any money, goods or other chattels . . . by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods, or other chattels . . . with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; . . . the servant so offending shall be punished as a Class H felon: Provided, that nothing contained in this section shall extend to . . . servants within the age of 16 years.

Brown, 56 N.C. App. at 229, 287 S.E.2d at 422-23 (citation and internal quotation marks omitted). The defendant argued that being over the age of 16 was an element of the crime of larceny by an employee which must be charged and proven by the State. *Id.* at 230, 287 S.E2d at 423. This Court disagreed and held that being over the age of 16 was not an essential element of the crime. *Id.* at 231, 287 S.E.2d at 423. In its analysis, the Court concluded that the language before the colon in the statute completely defined larceny by an employee, and that the subsequent phrase created an exception to that definition for persons under the age of 16. *Id.* Further, the Court reasoned that it was not unfair or unconstitutional to shift the burden to the defendant to show that he was under 16, because age was "a fact particularly within defendant's knowledge." *Id.*

Section 14-72(b)(6), under which York was convicted, states:

> (b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is any of the following:
> . . . .

> (6) Committed after the defendant has been convicted in this State or in another jurisdiction for any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies, or a combination thereof, at least four times. A conviction shall not be included in the four prior convictions required under this subdivision unless the defendant was represented by counsel or waived counsel at first appearance or otherwise prior to trial or plea. If a person is convicted of more than one offense of misdemeanor larceny in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used as a prior conviction under this subdivision; except that convictions based upon offenses which occurred in separate counties shall each count as a separate prior conviction under this subdivision.

N.C. Gen. Stat. § 14-72(b)(6) (2015).

The statute here is separated into three sentences, the first two of which are relevant to York. The first sentence sets out that felony larceny shall include any larceny committed after four prior convictions for larceny in this state or a substantially similar offense in another jurisdiction. The language of the sentence is broad and contains several detailed clauses to encompass any prior larceny conviction or substantially similar offense regardless of jurisdiction or severity. This initially establishes the predicate offenses which can serve to qualify a defendant as an habitual offender.

In the following sentence, the statute states that "[a] conviction shall not be included in the four prior convictions . . . unless" a defendant was represented by or waived counsel. N.C. Gen. Stat. § 14-72(b)(6). The legislature separated this factor into a subsequent sentence after providing a detailed description of qualifying prior larcenies. Similar to the phrase at issue in *Brown*, which was separated from the definitional clause by a colon, this language thus establishes a second set of criteria which removes a case from the already-defined crime of felony larceny. Therefore, the language in the statute which removes prior convictions for which a defendant was either not represented by or did not waive counsel from the class of qualifying prior convictions to support a felony larceny conviction is in the nature of an exception to, rather than a qualification of, the crime of felony larceny.

In addition, the exclusion of prior convictions for which the defendant was either not represented by or had not waived counsel is not a "part of the definition and description of the offense." *Mather*, 221 N.C. App. at 599, 728 S.E.2d at 434. Like the first clause in the statute at issue in *Brown*, the first sentence of the statute here completely defines felony larceny as any larceny committed after having four prior larceny convictions. It is not necessary to include in the indictment that York was either represented by or waived counsel in the prior convictions in order to completely state the crime. *See Brown*, 56 N.C. App. at 231, 287 S.E.2d at 423; *Mather*, 221 N.C. App. at 599, 728 S.E.2d at 434.

Further, it is a fair allocation of the burden of proof to classify the lack of representation by or waiver of counsel as an exception in the nature of a defense to be raised by the defendant. As Clerk Stuart testified, district court files are destroyed after five years. As with York's 2007 and 2008 prior convictions, the only information available to the State regarding a defendant's representation in cases older than five years is in the criminal records database. This means that whether the defendant was represented by or waived counsel is "a fact particularly within [the] defendant's knowledge." *Brown*, 56 N.C. App. at 231, 287 S.E.2d at 423. Thus, representation by or waiver of counsel is not an essential element, but rather lack of representation or waiver of counsel is a defense to the crime of felony larceny under N.C. Gen. Stat. § 14-72(b)(6) which must be raised and proven by the defendant. The indictment against York is not insufficient for failing to allege facts regarding his representation by or waiver of counsel. This Court therefore has subject matter jurisdiction over York's appeal.

II. Requested Jury Instruction

York argues that the trial court erred in not giving his requested jury instruction, because York's representation by or waiver of counsel for each of his prior larceny convictions is a fact which must be found by the jury in order to convict him of felony larceny under N.C. Gen. Stat. § 14-72(b)(6). We disagree.

"Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (citation omitted), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). Due process requires that the jury be instructed on and find each essential element of a crime to return a guilty verdict. *See In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 469, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986) ("Elements of criminal offenses present questions of fact which must be resolved by the jury upon the State's proof of their existence beyond a reasonable doubt." (emphasis removed)); *see also Osborne v. Ohio*, 495 U.S. 103, 125-26, 109 L. Ed. 2d 98, 120 (1990) (reversing the defendant's conviction for possession of child pornography, because the jury was not instructed on the essential element of lewdness); *State v. Mundy*, 265 N.C. 528, 530, 144 S.E.2d 572, 574 (1965) (reversing the defendant's conviction for armed robbery, because the trial court failed to instruct the jury on the essential element of felonious intent).

York's requested jury instruction would have required the jury to find beyond a reasonable doubt that he was either represented by or waived counsel for each of his prior larceny convictions. However, as explained above, York's representation or

waiver for each of his prior convictions is not an essential element of felony larceny under N.C. Gen. Stat. § 14-72(b)(6), of which he was charged and convicted. Due process, therefore, does not require the jury to find that York was represented by or waived counsel in order to convict him of felony larceny. York's requested jury instruction is thus an incorrect statement of the law. This argument is overruled.

The State argues that the trial court did not err in refusing to give York's requested instruction, because York failed to present legally sufficient evidence to establish the defense that York was not represented by or had not waived counsel for each of his prior convictions. We agree.

"In determining whether to give the substance of an instruction concerning a defense, . . . the trial court must . . . assess the evidence first for the legal principles it implicates, and second for the sufficiency of the evidence itself." *State v. Clark*, 324 N.C. 146, 161, 377 S.E.2d 54, 63 (1989). An instruction is required on a defense where there is substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant. *State v. Brown*, 182 N.C. App. 115, 118, 646 S.E.2d 775, 777 (citation omitted), *disc. review denied*, 361 N.C. 431, 648 S.E.2d 848, *cert. denied*, 552 U.S. 1010, 169 L. Ed. 2d 373 (2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and internal quotation marks omitted).

As discussed *supra*, the language of N.C. Gen. Stat. § 14-72(b)(6) creates a defense to felony larceny by excepting cases in which the defendant was either not represented by or did not waive counsel in the predicate conviction. To raise the defense created by N.C. Gen. Stat. § 14-72(b)(6), the evidence would have to show that one or more of York's convictions was in the class of cases which the statute excepts from the crime of felony larceny. This would require the jury to find that York was either *not* represented by counsel or did *not* waive counsel for one or more of his prior convictions. The requested instruction incorrectly placed the burden on the State to produce evidence of York's representation or waiver. The law, however, places the burden on York to raise the defense by offering evidence which proves the opposite, that York was either not represented by counsel or did not waive counsel for one or more of his prior convictions.

York failed to present sufficient evidence to support instruction on the defense. York conflates facts establishing a defense with facts challenging the credibility of the State's evidence. York did elicit testimony at trial that the criminal records database may be inaccurate and that there were no court files to verify the accuracy of the database for cases older than five years. This evidence impeaches the credibility of the database printouts. However, it does not support the defense that York was either not represented by counsel or that he did not waive counsel for his prior convictions. No other evidence was presented in support of York's defense. Even in

the light most favorable to York, there is not substantial evidence in the record to support a defense that York was not represented by or did not waive counsel for one or more of his prior larceny convictions. The court was therefore not required to give York's requested jury instruction.

NO ERROR.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).