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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-584

Filed: 20 December 2016

Edgecombe County, Nos. 14CRS001837, 52688, 52720–21

STATE OF NORTH CAROLINA

v.

DAVEY RAY MOSS

Appeal by defendant from judgments entered 19 September 2015 by Judge Alma L. Hinton in Edgecombe County Superior Court. Heard in the Court of Appeals 28 November 2016.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

BRYANT, Judge.

Where the trial court erred in sentencing defendant for both felony larceny and felonious possession of stolen goods, we arrest judgment for the same and remand for resentencing where that charge was consolidated with others. Where the evidence would allow a jury to reasonably infer that defendant committed an assault with a deadly weapon on a government official, the trial court properly denied defendant's motion to dismiss, and we find no error. Further, where the indictment, evidence

presented, and arguments to the jury made clear that Detective Ellis was the intended victim in the assault charge, we find no plain error in the trial court's instructions to the jury and the jury verdict sheet's failure to name the victim. Lastly, where a variance between the indictment and jury instructions was not material and, thus, not fatal, we find no plain error in the trial court's instructions to the jury.

On 28 August 2014, James Webb contacted the Rocky Mount Police Department regarding the theft of his grandmother's John Deere lawnmower and trailer. James discovered it was missing around 4:30 p.m. That same day, Sharpsburg Police Detective Lieutenant Hilliard went to the home of Charles Barnes, the cousin of defendant Davey Ray Moss, regarding an investigation he was conducting into stolen property. Lt. Hilliard was informed that defendant was not home, but within the hour, Lt. Hilliard returned to Barnes's home and observed a Chevrolet Blazer leaving the property. Defendant was driving the Chevrolet, which had a trailer attached to it carrying a lawnmower.

Lt. Hilliard activated his blue lights and siren in order to conduct a vehicle stop. Defendant pulled to the shoulder of the road and Lt. Hilliard got out of his car. As Lt. Hilliard walked toward defendant's car, defendant drove off. Lt. Hilliard returned to his vehicle and began a pursuit of defendant.

Lt. Hilliard pursued defendant for six to ten minutes and notified other law enforcement of the chase by radio. When defendant made a left turn onto a dirt road

producing a cloud of dust, Lt. Hilliard was unable to continue his pursuit. Lt. Hilliard returned to the Barnes residence and again observed defendant's Chevrolet pass by, without the trailer and mower, as other police vehicles followed. Lt. Hilliard joined the chase again.

Sheriff Deputy Cameron Barber was on duty at the courthouse when he heard about the chase over the radio, and Detective R. Ellis[1] heard about it while at the sheriff's office. Both officers joined the chase.

The chase reached speeds of over eighty miles per hour. Officers observed defendant drive his car all over both sides of the road, drive in a reckless manner, fail to stop at stop signs, drive a patrol car off the road, and cross into the lane of oncoming traffic, causing other drivers to take evasive maneuvers to avoid a head-on collision. Deputy Barber activated his dash camera during the chase.

During the chase, Detective Ellis, driving an unmarked patrol vehicle, but with blue lights and siren activated, attempted to pass defendant's car twice in order to clear traffic in a school zone up ahead. On his first attempt, Deputy Barber observed defendant's car swerve into the left-hand lane to block Detective Ellis's vehicle as it approached the rear of defendant's car. As Detective Ellis drew level with defendant, defendant again swerved his vehicle in Detective Ellis's direction. Detective Ellis had to slow down and swerve twice to avoid a collision, but was eventually able to pass

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[1] Detective Ellis is referred to interchangeably throughout the record as Sergeant Ellis or Detective Ellis. Hereinafter, we will refer to him as Detective Ellis as reflected in the indictment.

defendant without further incident. The chase ended when defendant's car flipped and crashed. Detective Ellis cut defendant out of his car. The lawn mower and trailer were later found off Railroad Street, within a half-mile of the place where defendant ran off the road to elude Lt. Hilliard in the first part of the chase.

Defendant was indicted on multiple charges, many of which were later dismissed. Defendant ultimately went to trial for two counts of felonious fleeing to elude arrest, assault with a deadly weapon on a government official, felonious larceny, felonious possession of stolen goods, and habitual felon.

On 15 and 16 September 2015, the cases were tried in Edgecombe County before the Honorable Alma L. Hinton, Superior Court Judge presiding. At trial, defendant presented no evidence, but during closing arguments, defendant consented to his counsel acknowledging to the jury that defendant was guilty of misdemeanors in these cases, that defendant did flee and used his vehicle to block lanes, but, he argued, defendant did not mean to hit anybody. The jury found defendant guilty of all charges, including both felonious larceny and felonious possession of stolen goods for the same goods—the trailer and lawnmower. Defendant pled guilty to being an habitual felon.

The trial court sentenced defendant as an habitual felon to 146 to 188 months for assault with a deadly weapon on a government official and entered a consecutive, consolidated sentence of 128 to 166 months for felonious larceny, felonious possession

of stolen goods, and fleeing to elude arrest. The transcript does not contain any indication that defendant gave oral notice of appeal at trial.

On 28 September 2015, defendant entered *pro se* written notice of appeal based on ineffective assistance of counsel, which was file-stamped on 1 October 2015. Also on 28 September 2015, Judge Hinton signed the appellate entries for this case. Because defendant's notice of appeal was defective—it did not include a certificate of service and was file-stamped one day after the deadline had passed—defendant filed a petition for writ of certiorari on 24 June 2016. The State filed its response to defendant's petition on 30 June 2016. We allow defendant's petition for writ of certiorari and address the merits of his issues on appeal.

I

First, defendant contends the trial court erred as a matter of law by entering judgment as to the charge of possession of stolen goods when defendant was also convicted and sentenced for larceny of the same property, the trailer and lawnmower. We agree.

> Our Supreme Court has held that the legislature did not intend to punish a defendant for possession of the same goods that he stole. *State v. Perry*, 305 N.C. 225, 236, 287 S.E.2d 810, 817 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010). "Since the defendant can only be convicted of either the larceny or the possession of stolen property, judgment must be arrested in one of the two cases." *State v. Dow*, 70 N.C.

> App. 82, 87, 318 S.E.2d 883, 887 (1984). The fact that the trial court consolidated the verdicts in larceny and possession of stolen goods for sentencing does not preclude arresting judgment. *Id.*

State v. Szucs, 207 N.C. App. 694, 702–03, 701 S.E.2d 362, 368 (2010).

Here, the State concedes that the trial court erred in sentencing defendant for both felony larceny and felony possession of stolen goods for the same objects, and we agree. Thus, where, as here, a judgment must be arrested upon one of two sentences of equal severity, "the sentence which appears later on the docket, or is second of two counts of a single indictment, or is the second of two indictments, will be stricken." *Dow*, 70 N.C. App. at 87, 318 S.E.2d at 887 (quoting *State v. Pagon*, 64 N.C. App. 295, 299, 307 S.E.2d 381, 384 (1983)). As the offense of possession of stolen goods is listed as the second of two counts in the indictment and because the charge of possession of stolen goods was consolidated with other charges, defendant's sentence is vacated, and we remand with instructions to the trial court to arrest judgment for the offense of possession of stolen goods and to resentence defendant accordingly. *State v. Hager*, 203 N.C. App. 704, 711, 692 S.E.2d 404, 409 (2010) (citations omitted) (holding where the trial court erred in entering judgment against defendant for both larceny and possession of stolen goods, it was not cured by consolidation of the judgments, and

therefore vacating conviction for possession of stolen goods and remanding to the trial court to arrest judgment for possession of stolen goods, and ordering a resentencing).[2]

II

Defendant next argues the trial court erred when it denied his motion to dismiss the assault with a deadly weapon on a government official charge as there was insufficient evidence of an assault. We disagree.

"This Court reviews 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) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). " 'Under a *de novo* review, the court considers the matter anew and substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"[A]n individual is guilty of [felony] assault with a deadly weapon on a government official where the individual: (I) commits an assault; (II) with a firearm or other deadly weapon; (III) on a government official; (IV) who is performing a duty of the official's office." *State v. Spellman*, 167 N.C. App. 374, 380, 605 S.E.2d 696, 701

[2] Because defendant's guilty plea to attaining the status of habitual felon was not predicated on the felonious possession of stolen goods conviction, the habitual felony conviction need not be vacated. *Cf. State v. Little*, 121 N.C. App. 619, 620, 468 S.E.2d 423, 424 (1996) (vacating sentence for habitual felon where defendant was erroneously convicted of both felony larceny and felony possession of stolen property where felony possession conviction was a predicate felony for habitual felon conviction).

(2004). Our Supreme Court has defined assault as "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (quoting *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995)). Proof of assault requires evidence of "an intentional attempt, by violence, to do injury to the person of another." *State v. Carter*, 153 N.C. App. 756, 761–62, 570 S.E.2d 772, 776 (2002) (quoting *State v. Britt*, 270 N.C. 416, 419, 154 S.E.2d 519, 521 (1967)).

However,

> [w]hile noting that "[i]ntent is an essential element of the crime of assault," this Court has recognized that "intent may be implied from culpable or criminal negligence . . . if the injury or apprehension thereof is the direct result of intentional acts done under circumstances showing a reckless disregard for the safety of others and a willingness to inflict injury."

Spellman, 167 N.C. App. at 384, 605 S.E.2d at 703 (alterations in original) (quoting *State v. Coffey*, 43 N.C. App. 541, 543, 259 S.E.2d 356, 357 (1979)).

A "deadly weapon" is "any article, instrument or substance which is *likely* to produce death or great bodily harm." *State v. Bagley*, 321 N.C. 201, 212, 362 S.E.2d 244, 251 (1987) (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)). "It is well settled in North Carolina that an automobile can be a deadly

weapon if it is driven in a reckless or dangerous manner." *Jones*, 353 N.C. at 164, 538 S.E.2d at 922 (citing *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 779 (1955)).

Viewing the evidence in the instant case in the light most favorable to the State, defendant operated his vehicle in such a manner that it constituted a deadly weapon when he drove carelessly and recklessly while fleeing from officers at speeds of eighty miles per hour in a fifty-five mile-per-hour speed limit zone, failed to stop at stop signs, and intentionally swerved his vehicle into the lane where Detective Ellis was approaching with blue lights flashing. We reject defendant's argument that *State v. Ashley*, 231 N.C. 508, 57 S.E.2d 654 (1950), applies, for nothing in *Ashley* suggests the officers were in a car or engaged in a high-speed chase when the defendant drove towards the officers "weaving from side to side." *See id.* at 509, 57 S.E.2d at 655. Instead, the circumstances in *Ashley* showed the defendant might have been seeking to avoid hitting the four men whose presence and identity in a dark, narrow driveway was undisclosed, and to escape, rather than to intentionally injure them. *Id.*

Here, however, defendant had knowledge that the victim, Detective Ellis, was a government official as he was operating his unmarked patrol car with blue lights and siren in pursuit of defendant. Furthermore, it is undisputed that Detective Ellis was performing a duty of his office when he attempted to pass defendant, siren on and blue lights flashing, in order to clear traffic in the road ahead. Accordingly, where defendant swerved into the lane knowing that a law enforcement official was present

and attempting to carry out the duties of his office, this shows defendant intended to harm Detective Ellis and/or acted in such a matter as to show reckless disregard for Detective Ellis's safety. *See Coffey*, 43 N.C. App. at 544, 259 S.E.2d at 357–58 (noting defendant's motion for nonsuit was properly denied where "[t]he evidence for the State was sufficient to show that defendant was operating [an] automobile in a dangerous and reckless manner and in complete disregard for the rights and safety of others").

Because the evidence would allow a jury to reasonably infer that defendant committed an assault with a deadly weapon on a government official, the trial court properly denied defendant's motion to dismiss. Defendant's argument is overruled.

III

Defendant also argues his conviction for assault with a deadly weapon on a government official must be reversed as the trial court failed to name the victim in its instructions to the jury, thereby violating his right to a unanimous jury verdict. Specifically, defendant contends the trial court should have named the exact officer he was charged with assaulting as it was possible the jury could have concluded defendant assaulted either Detective Ellis, Detective Horton, Deputy Revis, or Deputy Barber, as they were all involved in the portion of the chase in which defendant swerved his car at a police vehicle. We disagree.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2015). At trial, defendant did not object to either the jury verdict sheets or the trial judge's instructions to the jury. Accordingly, we review this issue for plain error. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "To constitute plain error, defendant must convince the appellate court that absent the error, the jury probably would have reached a different verdict." *State v. Bell*, 166 N.C. App. 261, 263, 602 S.E.2d 13, 14 (2004) (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)).

In prosecutions for crimes against the person, the identity of the victim is an element which must be properly alleged and proved. *See State v. Lyons*, 330 N.C. 298, 307, 412 S.E.2d 308, 314 (1991). In the instant case, defendant argues that the broad descriptions in the jury instruction could have implicated any of the officers involved in the pursuit as a potential victim of the assault and that the verdict sheet similarly failed to specify the victim, as it offered only a choice between "Guilty of Assault with a Deadly Weapon on a Government Official," "Guilty of Assault on a Government Official," and "Not Guilty." However, we disagree, and find defendant cannot show that either the trial court's instructions to the jury or the jury verdict sheets

amounted to plain error, as the indictment, evidence presented, and arguments to the jury made clear that Detective Ellis was the intended victim of the assault charge.

First, as discussed in Section IV, *infra*, the indictment alleging assault on a government official identifies Detective Ellis as the intended victim defendant attempted to strike with his vehicle. We note, however, that defendant does not challenge that the indictment failed to allege the name of the victim, but that the trial court failed to name the victim in its instructions to the jury. Nevertheless, we are not persuaded by defendant's argument.

At trial, the State's evidence and arguments to the jury clearly indicated that Detective Ellis was the alleged victim of the assault with a deadly weapon on an officer charge. For example, during his opening statement the prosecutor stated as follows:

> [T]he felony assault with a deadly weapon on a government official you'll hear that during that particular high speed chase Sergeant Ellis, along with the other deputies, was engaged in that pursuit.
>
> And you'll have an opportunity to review some video of which Sergeant Ellis is nearly run off the road.

Detective Ellis also testified and explained what was happening while the video of the chase was played for the jury:

> Q. Can you describe for the jury what it appears on the video, what's happening when you attempted to pass [defendant].
>
> A. All right, I started my pass there. (Indicating.) he tried

> to block me there. And right as I got -- it's hard to tell from the video but right as I got up beside him, I looked over at him and he swerved at me. I swerved over to the left to avoid him. Then I punched the gas and went on.

Lastly, in the State's closing argument, the prosecutor addressing the assault charge by specifically mentioning Detective Ellis by name:

> The felony assault on a government official is going to turn between a felony and a misdemeanor on whether a deadly weapon was used. So it's pretty clear that the defendant knew that the vehicle, the Charger, was an officer, a government official. You saw the video. Detective Ellis's blue lights were active.
>
> . . .
>
> You're here in superior court because this is a serious crime and Detective Ellis could have been seriously injured or killed had his car been struck going 80 miles an hour by a 3,000 pound Chevrolet Blazer, he might not be here today.
>
> . . .
>
> And I think it's pretty clear that he was trying to block and run Detective Ellis off the road. Fortunately, he didn't. But that doesn't make it any less of an assault.

And, in order to clarify the identity of the victim even further, the prosecutor stated as follows:

> Probably could have been charged with running Sergeant West off the road, which you didn't get to see on the video but which was testified to by several deputies. He wasn't so that's not for you to consider. But that is something for you to consider along with all the other evidence in determining whether it was reckless driving and felony fleeing.

Based on all of the foregoing, defendant cannot show that any error regarding the jury instructions or verdict sheet was plain error as the uncontroverted evidence presented at trial, which included testimony and video tape, shows that absent any alleged error, the jury would not have reached a different result. Defendant's argument is overruled.

IV

Lastly, defendant argues the trial court committed plain error in instructing the jury on assault with a deadly weapon on a government official because the instruction created an impermissible risk of variance between the indictment and the proof supporting the conviction. We disagree.

Whether the trial court's instruction to the jury varied impermissibly from the indictment is subject to plain error review in the absence of an objection made at trial. *See State v. Turner*, 98 N.C. App. 442, 447, 391 S.E.2d 524, 526–27 (1990). For the error to constitute plain error, a defendant must demonstrate that the error had a probable effect on the verdict. *See State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

"[W]hen a variance exists between the bill of indictment and the jury charge, the Court must inquire whether the variance was prejudicial error, and therefore fatal." *State v. Hines*, 166 N.C. App. 202, 206, 600 S.E.2d 891, 895 (2004) (citation omitted).

> In determining whether the variance of the trial court's charge from the precise allegations of a bill constituted prejudicial error requiring reversal, we must look to the purposes served by the bill of indictment. The first purpose of the bill is to identify the crime for which the defendant stands charged. A second purpose of the bill is to protect the defendant against being tried twice for the same offense. A third purpose of the bill is to provide a basis upon which the defendant may prepare his defense. Finally, the bill guides the trial court in the imposition of sentence upon a determination of the defendant's guilt.

State v. Rhyne, 39 N.C. App. 319, 324, 250 S.E.2d 102, 105–06 (1979) (citations omitted). "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Pender*, ___ N.C. App. ___, ___, 776 S.E.2d 352, 358 (2015) (quoting *State v. Norman,* 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002)).

The indictment in 14CRS52688 Count II (assault with a deadly weapon on a government official) provided the following:

> And the jurors for the State upon the oath present that on or about the date of offense shown and in the county and state named above, the defendant named above, unlawfully and feloniously did assault Detective R.N. Ellis, a government officer of Edgecombe County Sheriff's Office, with a Chevrolet Blazer, which is a deadly weapon, by *attempting to strike the officer's vehicle with his vehicle at a high speed*. At the time of assault, the officer was performing the following duty of that office *attempting to pass the subject to clear a school zone which the subject was heading towards while fleeing to elude arrest*.

The trial court's instructions to the jury provided in relevant part as follows: "First, that the defendant assaulted the victim by intentionally and without justification or excuse *driving the vehicle he was driving in the direction of the deputy*." (Emphasis added). Defendant contends a fatal variance exists between the italicized portions of the indictment and jury instructions. We disagree.

Defendant contends the indictment alleged a limited time in which the assault could have occurred by indicating that Detective Ellis was passing defendant when defendant attempted to strike him with his vehicle. Therefore, defendant argues, the broad instruction to the jury that the officer was "investigating a larceny" when defendant drove in his direction forced defendant to defend his driving for the entire time he was on the road with the officers, rather than for the "limited time" alleged in the indictment. Defendant makes much of this difference, however, this technical variance between the judge's charge to the jury and the indictment did not prejudice defendant. The trial court was describing one of the duties Detective Ellis was performing at the time of the assault—when defendant drove his car toward Detective Ellis. Reading as a whole the paragraph of the judge's instruction containing the words "driving the vehicle he was driving in the direction of the deputy," it is clear the judge instructed the jury that they must find that defendant assaulted the victim—"intentionally and without justification or excuse" and that he was performing a duty of his office at that time—in order to enter a guilty verdict.

Defendant's argument that because the indictment referred to a more "limited time" period within the six-to-ten minute chase than the jury instruction did, and this somehow impacted his ability to prepare his defense, is unpersuasive.

Therefore, we hold that any variance between the indictment and the jury instruction was not material and, thus, not fatal, and as such, the trial court's instructions to the jury did not constitute plain error. Defendant's argument is overruled.

REMANDED FOR RESENTENCING IN PART; AFFIRMED IN PART.

Chief Judge MCGEE and Judge ENOCHS concur.

Report per Rule 30(e).