IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-491

Filed: 4 December 2018

Wake County, Nos. 15 CRS 226278, 15 CRS 226279, 15 CRS 226392, 16 CRS 000028

STATE OF NORTH CAROLINA

v.

STANLEY DEMON DOWD, Defendant.

Appeal by Defendant from judgment entered 14 November 2017 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State.

Leslie C. Rawls for the Defendant.

DILLON, Judge.

Defendant Stanley Demon Dowd appeals from a judgment finding him guilty of first degree burglary, common law robbery, felony larceny, attempted first degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. After careful review, we affirm for the following reasons.

I. Background

The evidence at trial tended to show as follows: On Thanksgiving night 2015, Defendant broke into a residential condominium occupied by a seventy (70) year old woman. During the break-in, Defendant injured the resident and stole numerous items. He also got away by stealing the resident's motor vehicle.

Defendant was indicted on a number of charges in connection with the break-in. Defendant was also indicted on a charge of habitual felon. A jury found Defendant guilty of a number of charges, and Defendant pleaded guilty to the charge of habitual felon. The trial court consolidated the convictions and issued a judgment sentencing Defendant to a minimum of two hundred and sixty-four (264) months imprisonment. Defendant appealed.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Double Jeopardy

Defendant first argues that the trial court erred by entering judgments convicting him of *both* common law robbery *and* felony larceny, as the underlying facts to support these convictions constitute a single offense, thereby violating his constitutional protections against double jeopardy.

Defendant did not object to this alleged issue at trial and therefore waived the right to appeal this issue. *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529

(2004). Nevertheless, Defendant seeks review of this unpreserved double jeopardy issue under Rule 2 of our Rules of Appellate Procedure. Rule 2 permits this court the discretion "to suspend or vary the requirements or provisions of any of [the] rules in order [t]o prevent manifest injustice to a party." *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 204-05 (2007) (internal citations omitted). Our Supreme Court, though, has directed that we exercise our Rule 2 discretion "cautiously." *Id.*

We determine whether manifest injustice has occurred by viewing the convictions and their punishments for whether substantial rights of the appellant have been affected. *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984). We note that larceny is a lesser-included offense of common-law robbery. *See State v. White*, 322 N.C. 506, 514, 369 S.E.2d 813, 817 (1988); *see also State v. Jayes*, 342 N.C. 249, 275-76, 464 S.E.2d 448, 464-65 (1995) (finding a double jeopardy violation where the defendant was indicted and convicted for both robbery of victim's personal property and felonious larceny of victim's motor vehicles).

But, here, we do not believe Defendant has experienced manifest injustice and, therefore, in our discretion, decline to invoke Rule 2 to reach Defendant's double jeopardy argument. Specifically, the trial court consolidated all of Defendant's convictions, which included attempted first degree murder and first degree burglary. It, therefore, does not seem likely that Defendant's sentence would change if the felony larceny conviction was dismissed. Accordingly, we do not find Defendant's

rights were manifestly affected and do not exercise our discretionary powers under Rule 2 to review Defendant's appeal on this issue. *See State v. Rawlings*, 236 N.C. App. 437, 444, 762 S.E.2d 909, 914-15 (2014) (declining to invoke Rule 2 to address a double jeopardy issue because no manifest injustice resulted when defendant's sentences ran concurrently and, thus, arresting judgment on one of the convictions would not alter the time defendant was sentenced to serve).

B. Indictment Issues

Defendant's second issue on appeal is that the common law robbery indictment in 15 CRS 226278 was both wrongfully amended and facially deficient. We review both issues *de novo*. *See State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981).

Section 15A-923(e) of our General Statutes prohibits a bill of indictment from being amended. N.C. Gen. Stat. § 15A-923(e) (2016). This statute has been interpreted to mean "that an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994).

Our Supreme Court has stated that "[a] change in the name of the victim substantially alters the charge in the indictment." *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994). However, correcting a misspelling or reconciling an inconsistency with other indictments does not constitute a substantial alteration. *See*

State v. Marshall, 92 N.C. App. 398, 401-02, 374 S.E.2d 874, 875-76 (1988) (citing *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)).

Here, the *other* indictments correctly identified the victim by her first *and* last names. However, the robbery indictment only identified the victim by her first name, "Suzette":

> [T]he jurors for the State upon their oath present that on or about November 26, 2015, in Wake County, [Defendant] unlawfully, willfully and feloniously did steal, take and carry away another's personal property, [Car] Keys, Phone, and Wallet, having a value of $300.00 *from Suzette* by means of an assault upon them consisting of the forcible and violent taking of property. This act was done in violation of N.C.G.S. § 14-87.1 and Common Law.

(emphasis added). Defendant argues that the trial court erroneously allowed the State to amend the indictment and add the victim's last name. We conclude, however, that the mere insertion of the last name of the victim, which was correctly laid out in the other six indictments, does not substantially alter the indictment in this case. Defendant was sufficiently apprised of the allegations against him prior to the amendment, and Defendant did not suffer any undue surprise. Thus, the amendment was properly allowed by the trial court.

Defendant further argues that the indictment at issue was fatally defective prior to the amendment. We disagree. An indictment is not fatal merely because it is not perfect with regard to form or grammar, so long as the meaning of the

indictment is clearly apparent "so that a person of common understanding may know what is intended." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984).

The indictment language here clearly depicts the charge which Defendant was called upon to defend. Defendant was indicted for robbery, which is the "felonious taking of personal property from the person of another, or in [her] presence, without [her] consent, or against [her] will, by violence, intimidation or putting in fear." *State v. Sipes*, 233 N.C. 633, 635, 65 S.E.2d 127, 128 (1951). The allegation of ownership of the property taken is sufficient when it negates the idea that the accused was taking his own property. *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982). Here, the indictment clearly states that Defendant "did steal, take and carry away . . . from Suzette." The failure to fully name the victim does not render the indictment fatally defective. *State v. Thompson*, 359 N.C. 77, 107-08, 604 S.E.2d 850, 872 (2004) (holding that an indictment for robbery need not allege "a particular person"). Defendant makes no argument that the State's proof showed that the victim was someone other than the Suzette named in the other indictments. Therefore, the omission of Suzette's last name did not render the indictment defective.

III. Conclusion

The trial court is affirmed in its judgments against Defendant. Defendant did not experience manifest injustice upon his convictions of common law robbery and

felony larceny. Additionally, the indictment in 15 CRS 226278 for common law robbery was properly amended and not otherwise fatally defective.

NO ERROR.

Judges STROUD and BERGER concur.

Report per Rule 30(e).