IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-855

Filed: 18 June 2019

Wake County, Nos. 17 CRS 89-90

STATE OF NORTH CAROLINA

v.

TONY LAVEL RICHARDSON

Appeal by Defendant from Judgments entered 9 November 2017 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 26 March 2019.

Attorney General Joshua H. Stein, by Deputy General Counsel Blake W. Thomas, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Tony Lavel Richardson (Defendant) appeals from criminal convictions on two counts of the Class H felony of Altering Court Documents or Entering Unauthorized Judgments in violation of N.C. Gen. Stat. § 14-221.2 and two counts of the Class F

felony of Access of a Government Computer to Defraud in violation of N.C. Gen. Stat. § 14-454.1(a)(1). The State's evidence presented at trial tends to show the following:

In November 2013, Defendant was involved in a car crash. As a result of a State Highway Patrol investigation into the crash, Defendant was charged in Wake County with Driving While Impaired and Texting While Driving (2013 DWI Charges). In February 2014, Defendant was again charged in Wake County with Driving While Impaired (2014 DWI Charges).

At some point during the first part of 2014, Defendant called into a general number at the Office of Wake County Clerk of Superior Court. Teresa Holliday (Holliday), then a Deputy Clerk, happened to answer the phone. Defendant inquired about a court date. During the call, however, Defendant acted upset and even seemed to start crying. Defendant told Holliday he was trying to regain visitation with his son and needed his driver's license back. Holliday looked up Defendant's court date and provided Defendant her direct number in case he had questions in the future.

Defendant called Holliday's direct line a couple of times over the following weeks upset and crying. Over the course of these phone calls, Holliday began to feel sorry for Defendant and eventually offered to call Defendant outside of work to discuss his problems. After exchanging a series of personal calls, Holliday agreed to meet Defendant in person. From there, the two began to see each other every couple of weeks and eventually began a sexual relationship.

During their dates and phone calls, Defendant consistently talked to Holliday about his DWI cases, telling Holliday he "wanted them to disappear" so he could regain visitation with his son. Holliday hoped her relationship with Defendant would become "serious," and she wanted him to see his son. By September 2014, Defendant was constantly insisting that he wanted the DWI charges to "disappear." It was then when Holliday told Defendant she "ha[d] an idea." Holliday, though, thought better of it and declined to tell Defendant her idea. In the weeks following, Defendant, however, continued to ask Holliday, "Can you get rid of them? What can you do? Because it would help me get [my son]." At this point, Defendant and Holliday were talking four to five times a week with almost every conversation about Defendant's custody battle. Holliday eventually told Defendant her plan.

On or about 29 December 2014, Holliday walked by another clerk's computer. Her fellow clerk was not at the desk but was still logged in to the system. Holliday accessed Defendant's file for the 2014 DWI Charges in the computer system and altered the record to reflect Defendant had been found "not guilty" in November 2014. Holliday then accessed the paper file from the 2014 DWI Charges and disposed of the file by placing it in a recycling bin. Holliday took a copy of the paper file to Defendant to show him what she had done, and Defendant destroyed the copy. At some point later, Holliday also altered the courtroom calendar from November by deleting the notation that Defendant received a continuance and changing it to instead reflect

that Defendant received a "not guilty" verdict for the 2014 DWI Charges at that setting.

After Holliday altered and destroyed the record of the 2014 DWI Charges, Defendant began to cajole Holliday to dismiss the 2013 DWI Charges. Holliday explained to Defendant, unlike the 2014 DWI Charges, the 2013 DWI Charges were assigned to a specialty DWI Court where the files were kept locked up. Because of this, Holliday did not think she would be able to access the file for the 2013 DWI Charges. However, Defendant persisted, asking: "Why can't you do it? Why can't you do that one? You got rid of the first one. What's taking so long now?" These conversations occurred two to three times a week. Holliday would testify at Defendant's trial in this matter: "[I]t was almost like he knew what I wanted to hear when he would talk to me and almost in a begging way. And he used [his son] a lot to pull at my heartstrings."

In February 2015, Holliday entered a courtroom to ask a fellow clerk a question. The clerk was not in the courtroom, but the computer was open and had not been locked. Holliday used the courtroom computer to access the 2013 DWI Charges and altered the computer record to reflect those charges had been "Dismissed by Court." Holliday could not, however, access the paper version of the file.

In April 2015, a supervisor in the Clerk's Office undid the disposition of the 2013 DWI Charges in the computer system, noting the entry of the dismissal was the

result of "Clerk Error." Defendant received a letter informing him the 2013 DWI Charges had been reset for trial. Defendant again questioned Holliday as to why she could not obtain the file.

In May 2015, Holliday had been assigned as the courtroom clerk in the specialized DWI Courtroom. She was filing cases in the DWI Court file room, which was unlocked. Holliday took the opportunity to take the paper file for the 2013 DWI Charges. She, again, accessed a fellow clerk's computer and, again, altered the computer file to reflect that the 2013 DWI Charges had been "Dismissed by Court." Holliday then placed the paper file for the 2013 DWI Charges in a recycling bin. Holliday's relationship with Defendant ended a few weeks later.

Around September 2015, the charging officer from the 2014 DWI Charges checked on the status of that case after seeing a news report involving Defendant. He discovered the entry of not guilty and having no recollection of any trial, approached the Wake County District Attorney's Office about the case. This ultimately triggered an investigation by the State Bureau of Investigation (SBI). The investigation eventually led to Holliday, who ultimately cooperated with the SBI investigation, including by recording phone calls with Defendant. In these recorded phone calls, Defendant tried to convince Holliday not to cooperate with law enforcement, including statements like:

> "You're trying to go in there and say I knew about it, but I didn't do anything down there, did I?" . . . "So if you're trying to go down there and throw me under the bus, it's not going to work."
>
> * * *
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> "[L]isten, this doesn't fall back on me. It's probably because it falls back on you. And you went out of your way to do things for me . . . because this doesn't involve me. It don't fall back on me. Do you understand that?"
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> * * *
>
> "But what I'm saying is -- it was both of us . . . but when you go down there and you say anything, they're not going to take anything out on me."
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> * * *
>
> "I didn't say that I didn't know what you was [sic] doing. I said, you know, I didn't go and put a gun to your head and make you do it."
>
> * * *
>
> "I'm just trying to tell you, today was not about me. It was about you. 'Cause like, as I said, they -- can't do anything else to me . . . [a]nd I just hate that I influenced you to do it."
>
> * * *
>
> "It's like, well, somebody told me to go rob that bank. It was his idea. And was he there and helping? No. Who they going to charge for robbing the bank? . . . You know, you're the one going to be charged. I mean, I just didn't want to see you do that to yourself."

On 21 March 2017, Defendant was indicted by a Grand Jury in Wake County on one count each of the charges of Altering Court Documents or Entering

Unauthorized Judgments and Access of a Government Computer to Defraud relating to the 2014 DWI Charges. In two separate indictments, the Grand Jury charged Defendant with two counts each of the charges of Altering Court Documents or Entering Unauthorized Judgments and Access of a Government Computer to Defraud arising from the 2013 DWI Charges. These indictments each related to the two separate alterations of the file in the 2013 DWI Charges. Both alleged Defendant "without lawful authority materially alter[ed] and chang[ed] an official case record to reflect a 'voluntary dismissal[.]' " Finally, a fourth indictment charged Defendant with Obstruction of Justice.[1]

The matter came on for trial on 6 November 2017. At the close of the State's evidence, Defendant moved to dismiss, arguing, *inter alia*, a fatal variance existed between the indictments and the State's proof. The trial court denied this Motion. Defendant presented evidence, and at the close of all the evidence, Defendant renewed his Motion to Dismiss. The trial court again denied this Motion. The State ultimately argued the case under theories of accessory before the fact and aiding and abetting.

The jury found Defendant not guilty of Altering Court Documents or Entering Unauthorized Judgments and Access of a Government Computer to Defraud relating to the 2014 DWI Charges. The jury also returned a not guilty verdict on Obstruction

[1] Holliday was separately charged with the same offenses.

of Justice. The jury, however, found Defendant guilty of two counts each of Altering Court Documents or Entering Unauthorized Judgments and Access of a Government Computer to Defraud arising from the 2013 DWI Charges.

The trial court consolidated the charges arising from each alteration of the files in the 2013 DWI Charges and sentenced Defendant to two consecutive mitigated prison sentences both with a minimum of 13 months and a maximum of 25 months.

Issue

On appeal, Defendant's sole argument is that the trial court erred in denying his Motion to Dismiss the two counts of Altering Court Documents or Entering Unauthorized Judgments related to the 2013 DWI Charges, where the indictments alleged the records were altered to reflect a "Voluntary Dismissal" but where the evidence reflected the alterations were to "Dismissal by Court." The dispositive issue then becomes whether the difference in the indictments and proof resulted in a fatal variance of an essential element of the offense of Altering Court Documents or Entering Unauthorized Judgments.

Analysis

A. Standard of Review

"The issue of variance between the indictment and proof is properly raised by a motion to dismiss." *State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195 (1995) (citation omitted). "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) (citation omitted).

B. Variance between Indictments and Proof

The indictments at issue in this case both alleged Defendant "without lawful authority materially alter[ed] and chang[ed] an official case record to reflect a 'voluntary dismissal[.]' " The State's evidence, however, tended to show the computer record of the 2013 DWI Charges was altered to reflect a dismissal by the trial court. Defendant contends a fatal variance in the indictments and proof existed in this case because a Voluntary Dismissal (as alleged in the indictments) and a Dismissal by the Court (as shown by the State's evidence) are legally distinct dispositions of criminal cases.[2]

However, not every variance between an indictment and proof is fatal.

> "In order for a variance to warrant reversal, the variance must be material." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citing *State v. McDowell*, 1 N.C. App. 361, 365, 161 S.E.2d 769, 771 (1968)). "A variance will not result where the allegations and proof, although variant, are of the same legal significance. If a variance in an indictment is immaterial, it is not fatal." *State v. Stevens*, 94 N.C. App. 194, 197, 379 S.E.2d 863, 865 (quotation and citation omitted), *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989).

[2] In particular, Defendant notes under N.C. Gen. Stat. § 15A-931 a voluntary dismissal does not necessarily preclude the same charges being reinstated against a Defendant. *See* N.C. Gen. Stat. § 15A-931 (2017).

State v. Roman, 203 N.C. App. 730, 733-34, 692 S.E.2d 431, 434 (2010). Rather, in order to prevail on a motion to dismiss based on a variance in pleading and proof, "the defendant must show a fatal variance between the offense charged and the proof as to '[t]he gist of the offense.' This means that the defendant must show a variance regarding an essential element of the offense." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (alteration in original) (citations omitted).

> An indictment based on a statutory offense is usually sufficient if "couched in the language of the statute." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977). "The [indictment] is complete without evidentiary matters descriptive of the manner and means by which the offense was committed." *State v. Lewis*, 58 N.C. App. 348, 354, 293 S.E.2d 638, 642 (1982) (internal quotation marks omitted), *cert. denied*, 311 N.C. 766, 321 S.E.2d 152 (1984).

State v. Williams, 201 N.C. App. 161, 170, 689 S.E.2d 412, 417 (2009) (alteration in original).

Defendant acknowledges the indictments at issue in this case may not require an allegation of a particular material alteration. Nevertheless, he urges us to hold that where the State elected to allege a particular alteration, the State should be required to prove that particular alteration. Defendant points to kidnapping cases as examples. It is true, in that context, we have recognized: "An indictment charging a defendant with kidnapping to facilitate commission of a felony need not specify which particular felony was facilitated by kidnapping the victims. . . . However, '[w]hen an indictment alleges an intent to commit a particular felony, the state must

prove the particular felonious intent alleged.' " *State v. Yarborough*, 198 N.C. App. 22, 26-27, 679 S.E.2d 397, 403 (2009) (alteration in original) (quoting *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 270 (1982)). There, though, kidnapping with the specific intent to commit a felony is an essential element of that crime. *See* N.C. Gen. Stat. § 14-39(a)(2) (2017). Thus, if the State alleges a defendant undertook a kidnapping with the specific intent to commit a *specific* felony, the State is required to prove the specific intent to commit the specified felony.

Here, the convictions challenged by Defendant are for the offense of Altering Court Documents or Entering Unauthorized Judgments. This offense is defined by statute as follows:

> Any person who without lawful authority intentionally enters a judgment upon or materially alters or changes any criminal or civil process, criminal or civil pleading, or other official case record is guilty of a Class H felony.

N.C. Gen. Stat. § 14-221.2 (2017).

Thus, the essential elements to be proven by the State were whether Defendant intentionally, and without lawful authority, materially altered or changed[3] the official case record in 13 CR 227952. *See Roman*, 203 N.C. App. at 734, 692 S.E.2d at 434. Whether the alteration reflected a Voluntary Dismissal or a Dismissal by the Court is immaterial and may be disregarded, as either form of alteration reflected a

[3] Or to be more precise: was an accessory to, or aided and abetted in, materially altering this case record.

disposition in the case where there had been none. *See Williams*, 201 N.C. App. at 170, 689 S.E.2d at 417.

Williams is instructive on this point. In that case, the indictment alleged the victim was strangled by hand, but the victim testified defendant used his foot or elbow. This Court, assuming *arguendo* that there was even a variance, noted, however, the indictment was "complete" without the method of strangulation. *Id.* (citation omitted). Therefore, "the method of strangulation was surplusage and should be disregarded[,]" and "the variance was immaterial and thus not fatal." *Id.* (citations omitted); *see also Pickens,* 346 N.C. at 645-46, 488 S.E.2d at 172 (no fatal variance where indictment for discharging a firearm into an occupied dwelling alleged the firearm was a shotgun but the evidence showed defendant used a handgun); *Roman*, 203 N.C. App. at 734, 692 S.E.2d at 434 (any variance between indictment and proof not fatal where indictment for assault on an officer discharging official duty alleged assault occurred during an arrest for communicating threats and evidence showed arrest was for being intoxicated and disruptive in public).

The pivotal essential element in this case, as it relates to this appeal, was whether there was an alteration of the official case record. Any variance between the indictment and proof as to whether the alteration of the case reflected a disposition by Voluntary Dismissal or a Dismissal by the Court was immaterial. Defendant makes no argument that the evidence does not support the existence of a material

alteration to the official case record. Moreover, Defendant makes no showing that any variance between the indictment and proof was prejudicial. Defendant also has not contended he was misled by any such variance or hampered in his defense. *See State v. Jones*, 188 N.C. App. 562, 567, 655 S.E.2d 915, 918 (2008); *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (1996). Thus, we conclude the trial court did not err in denying Defendant's Motions to Dismiss on the basis of a variance between the indictments for Altering Court Documents or Entering Unauthorized Judgments and the proof at trial.

Conclusion

Consequently, for the foregoing reasons, we conclude there was no error at Defendant's trial. Furthermore, Defendant, on appeal, does not challenge his convictions for Accessing a Government Computer to Defraud, and those convictions stand.

NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).