IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-543

Filed: 18 February 2020

Mecklenburg County, No. 17 CRS 221217

STATE OF NORTH CAROLINA

v.

ISIAH BOYD

Appeal by defendant from judgment entered 19 July 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Jason Christopher Yoder for defendant-appellant.

TYSON, Judge.

Isiah Boyd ("Defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of felony larceny. We find no error.

I. Background

Sean Patterson listed his Nintendo 3DS handheld video game system and several video games for the Nintendo for sale on the letgo app, an online marketplace,

for $200.00. A potential buyer messaged Patterson using letgo's chat feature around midnight on 5 June 2017. The potential buyer wanted to know if the items were still for sale and then offered to buy the Nintendo device and the games.

Patterson asked the potential buyer where they should meet to complete the transaction. The potential buyer "messaged" in response that he did not have a car to travel to Patterson, but "would throw in like 50 extra dollars" if Patterson would bring the items to him. The potential buyer messaged Patterson the address of a park and they agreed to meet there in the early hours of 6 June 2017.

Patterson and Eugene Ellington drove together to the designated park. They met and confirmed that Defendant was the potential buyer they had communicated within letgo's online chat. Patterson got out of the passenger's side of the vehicle and approached Defendant. Patterson carried the Nintendo and the games inside a plastic grocery bag.

Defendant was shown the items inside of the bag. Defendant then handed Patterson a folded piece of paper, which Patterson believed to be an envelope containing payment for the items. Patterson testified Defendant "snatched" the bag from him. In the process of grabbing the bag, Defendant tore open the bag, and its contents spilled onto the ground. Defendant shoved Patterson onto the ground and told him "Don't f---ing get up or I'll f--k you up."

Defendant grabbed the Nintendo, while Patterson was on the ground, and ran away. Ellington got out of the car and began to chase after Defendant. Patterson got up and also began chasing Defendant. After a few seconds, Patterson gave up the chase and called for Ellington to do the same. During the chase, Ellington lost the flip-flop sandals he was wearing.

Patterson and Ellington returned to the vehicle. They discovered the "envelope" tendered by Defendant as payment for the items was only a folded piece of paper. However, the folded paper contained a copy of Defendant's social security card. Patterson and Ellington called 911 to report the incident.

Charlotte-Mecklenburg Police Officer Daniel Youngblood responded to the call in the park and met with Patterson and Ellington. Officer Youngblood located an address to match Defendant's name on the social security card. Officer Youngblood went to Defendant's residence. Defendant was present and spoke with officers. Defendant gave officers permission to search his residence. Officers did not locate the Nintendo inside of Defendant's residence. Officers searched in the park and found a pair of flip-flop sandals, a power cord, and a plastic bag with the Nintendo games inside. The Nintendo handheld game was never recovered.

Officers conducted a "show up" outside of Defendant's residence. Patterson and Ellington both identified Defendant was the man who they had met in the park. Defendant was arrested and transported to the police station.

Officer Youngblood and Officer Joshua Gaskin interviewed Defendant. Defendant initially denied having anything to do with the incident during the interview. Defendant told the officers he was at his home.

The officers informed Defendant that he had given Patterson a copy of his social security card. Officer Gaskin testified Defendant "told us everything. How he was out there, and how he attempted to grab the [Nintendo]." Defendant told the officers he ran off with the Nintendo, but had dropped it in an unknown location.

Defendant was indicted for common law robbery. On 19 July 2018, the jury acquitted Defendant of common law robbery, but returned a verdict and convicted him of felony larceny. The trial court sentenced Defendant to an active term of 7 to 18 months in prison. Defendant timely appealed.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court lacked jurisdiction to enter judgment for felony larceny and committed plain error by not instructing the jury on attempted larceny.

IV. Indictment

Defendant argues the indictment was fatally defective. He asserts the indictment for common law robbery did not identify the name of the owner of the property. During his motion to dismiss, Defendant argued a fatal variance existed in the indictment and the evidence presented by the State. Defendant did not challenge the lack of an allegation of ownership of the property in the indictment.

A fatally defective indictment deprives the trial court of subject matter jurisdiction. A lack of subject matter jurisdiction may be raised for the first time on appeal. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000); *State v. Call*, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208 (2001).

This Court has stated: "A defendant must be convicted, if at all, of the particular offense charged in the indictment" and "[t]he State's proof must conform to the specific allegations contained in the indictment." *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985) (citations omitted). This rule "insure[s] that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citations omitted).

Not all purported errors or variances in an indictment are fatal. "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." *Id* (citations and parenthetical omitted).

A. Standard of Review

"This Court reviews the sufficiency of an indictment *de novo*." *State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citations, alterations, and internal quotations omitted).

B. Analysis

1. State v. Young

Our Supreme Court has long recognized "robbery to be merely an aggravated larceny and thus has held that a defendant may be properly convicted of larceny from the person upon an indictment for common law robbery." *State v. Young*, 305 N.C. 391, 392, 289 S.E.2d 374, 375 (1982) (citations omitted).

Defendant was indicted for common law robbery and convicted of felony larceny. In *Young*, our Supreme Court examined the sufficiency of an indictment in an analogous situation where a defendant challenged the validity of a conviction for larceny from a person based upon an indictment for common law robbery. Our Supreme Court held "a defendant, who has been formally charged with common law robbery, may be convicted of the 'lesser included' offense of larceny from the person pursuant to G.S. 15-170 upon proper instructions to the jury by the trial court." *Id.* at 393, 289 S.E.2d at 376.

2. State v. White

This holding was reaffirmed by our Supreme Court in *State v. White*, 322 N.C. 506, 517 n.1, 369 S.E.2d 813, 819 n.1 (1988) ("We also reaffirm our prior holdings that common law robbery is a lesser included offense of armed robbery, and that larceny is a lesser included offense of common law robbery." (citations omitted)). Defendant has not challenged either the instructions by the trial court for this issue, or the sufficiency of the indictment to allege common law robbery.

The State argues larceny from the person is a lesser-included offense of common law robbery. Defendant asserts that a lesser-included offense must have all of the essential elements of the greater offense. *White*, 305 N.C. at 513-14, 369 S.E.2d at 816-17. Specifically, Defendant argues "*White* does not squarely address the question of whether a trial court has jurisdiction over larceny where the common law robbery indictment failed to identify the owner of the property." We read *Young* to address this question and the Supreme Court's opinion in *White* to reaffirm the holding in *Young*. *Id.* at 517, 369 S.E.2d at 819.

3. State v. Brooks and State v. Bennett

This reasoning was also applied by this Court with similar fact patterns in two unpublished cases: *State v. Brooks*, 231 N.C. App. 714, 754 S.E.2d 258, 2014 WL 47078 (2014) (unpublished); and *State v. Bennett*, 175 N.C. App. 592, 624 S.E.2d 430, 2006 WL 91359 (2006) (unpublished).

In *Brooks*, the defendant was indicted for common law robbery and convicted of the lesser-included larceny charge. In *Brooks*, the indictment for common law robbery alleged:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 17th day of November 2011, in Wake County, the defendant named above [did] unlawfully, willfully, and feloniously steal, take and carry away, three female skirts, having a value of $27.97 in US currency, from the person and presence of Tahsin Haopshy by means of an assault upon him consisting of the forcible and violent taking of the property. This was done in violation of N.C.G.S. § 14-87.1.

Brooks, 2014 WL 47078 at *2.

Defendant's indictment for common law robbery herein alleged:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 5th day of June 2017, in Mecklenburg County, Isiah Boyd, did unlawfully, willfully, and feloniously steal, take, and carry away another's personal property, Nintendo 3DS gaming system, of value, from the person and presence of Sean Patterson, by means of an assault upon him consisting of the forcible and violent taking of the property.

In *Brooks*, the defendant therein argues the indictment was factually defective because it failed to identify the owner of the property. *Id.* This Court upheld the indictment, even though it did not allege the owner of the property. *See id*.

In *Bennett*, the defendant was indicted for common law robbery of a package of cigarettes. The indictment did not allege the ownership of the property. *Bennett*,

2006 WL 91359 at *1. The defendant's conviction for the lesser-included larceny charge was upheld by this Court. "We conclude that the trial court could properly try defendant on the charge of larceny from the person based on the indictment for common law robbery." *Id.*

"While an unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority[,] N.C. R. App. P. 30(e)(3), we find the Court's analysis [in *Brooks* and *Bennett*] persuasive and adopt it here." *State v. Burrow*, 248 N.C. App. 663, 670 n.1, 789 S.E.2d 923, 929 n.1 (2016) (citations, quotations, and alterations omitted).

4. State v. Wilson

Defendant cites *State v. Wilson*, where this Court found a trial court lacked jurisdiction for a fatally deficient indictment. *State v. Wilson*, 128 N.C. App. 688, 690, 497 S.E.2d 416, 418 (1998). The indictment charged the defendant with kidnapping and the trial court issued an instruction on a lesser-included offense of felonious restraint. *Id.* The defendant was convicted on the felonious restraint charge. *Id.* On appeal, the defendant argued the trial court lacked jurisdiction over felonious restraint because the indictment failed to allege all the essential elements of felonious restraint. This Court in *Wilson* recognized our General Assembly stated: "Felonious restraint is considered a lesser included offense of kidnapping." N.C. Gen. Stat. § 14-43.3 (1995). However, this Court found the General Assembly's proclamation did not

"relieve the State of its duty to allege" all the essential elements. *Wilson*, 128 N.C. App. at 696, 497 S.E.2d at 422.

The decision of larceny from the person being a lesser-included offense of common law robbery is contained in our Supreme Court's decisions in both *Young* and *White*. *Young*, 305 N.C. at 392, 289 S.E.2d at 375; *White*, 322 N.C. at 517 n.1, 369 S.E.2d at 819 n.1. We are bound by our Supreme Court's decisions until otherwise instructed. *See Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985). Defendant's argument is overruled.

V. Attempted Larceny Instructions

Defendant argues the trial court erred by not instructing the jury on attempted larceny because he never possessed the Nintendo.

A. Standard of Review

Defendant acknowledges he did not request an instruction on attempted larceny and this issue is reviewed for plain error.

"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) (emphasis supplied).

To constitute plain error, Defendant carries the burden to show "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Plain error should only be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted).

B. Analysis

Defendant argues the trial court plainly erred by not instructing the jury on attempted larceny. Defendant asserts he never possessed the Nintendo, therefore he never "secured possession." During Defendant's interview with officers, he stated when he ran the contents of the bag fell out and he "didn't have nothing." Defendant further supports this contention by asserting the Nintendo was never recovered from the park nor from his residence.

"The essential elements of larceny are that the defendant: 1) took the property of another; 2) carried it away; 3) without the owner's consent; and 4) with the intent to deprive the owner of the property permanently." *State v. Osborne*, 149 N.C. App. 235, 242-43, 562 S.E.2d 528, 534 (2002) (citations and quotation marks omitted). Defendant argues the testimony does not support the first or second elements of taking and carrying away.

Defendant's argument misapplies our precedent. Our Supreme Court "has defined taking in this context as the severance of the goods from the possession of the owner. Thus, the accused must not only move the goods, but he must also have them in his possession, or under his control, even if only for an instant." *State v. Carswell*, 296 N.C. 101, 104, 249 S.E.2d 427, 429 (1978) (internal citations and quotations omitted).

"A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away." *Id.* at 103, 249 S.E.2d at 428 (internal citations and quotations omitted). "An attempt charge is not required if the State's evidence tends to show completion of the offense." *State v. Broome*, 136 N.C. App. 82, 88, 523 S.E.2d 448, 453 (1999).

During the interview with officers, Defendant admitted he had taken Patterson's property from him by force and ran off, but later dropped or lost it. Defendant did not know the location of where he had dropped the Nintendo. This testimony, along with Patterson's testimony, satisfies the asportation requirement of *Carswell* and that Defendant took and carried away Patterson's property to complete the larceny. The trial court did not err by failing to give an instruction on the lesser-included offense of attempted larceny where the evidence did not merit its inclusion. *See id.* Defendant's argument is without merit and is overruled.

VI. Conclusion

The indictment was not fatally defective and supports the felony larceny conviction. The trial court did not commit error and no plain error in omitting a jury instruction on attempted larceny.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant's argument under plain error review is without merit. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges HAMPSON and BROOK Concur.

Report per Rule 30(e).