IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-557

Filed: 1 September 2020

Pitt County, No. 16CRS57113

STATE OF NORTH CAROLINA

v.

TREMAYNE ROGERS, Defendant.

Appeal by Defendant from judgment entered 23 August 2018 by Judge Leonard L. Wiggins in Pitt County Superior Court. Heard in the Court of Appeals 8 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine R. Laney, for the State.

Sharon L. Smith for the Defendant.

DILLON, Judge.

Tremayne Rogers ("Defendant") appeals from a jury verdict finding him guilty of misdemeanor larceny.

I. Background

After midnight on 27 September 2016, Kenneth Jones heard a commotion coming from a nearby church storage shed. He looked out his window and saw

someone rummaging around inside the shed. Mr. Jones called the church's pastor, who stated that no one had permission to be in the shed. Mr. Jones called the police to report his observations. He looked out his front door and saw Defendant placing items into a Ford Explorer. Mr. Jones approached Defendant and questioned him about the activity. Defendant said that a man had flagged him down to help move the few things that were laying on the sidewalk. When Mr. Jones saw the other man come out of the shed, Mr. Jones cautioned both men to wait for the police who were en route. The men began to remove the items from the truck, and Defendant fled. Thereafter, law enforcement arrived and observed eight items on the driveway leading to the shed. Of those items, the pastor of the church personally owned four of the items.

Police intercepted Defendant on the way back to his home two blocks away. They found two items owned by the church in Defendant's car. Defendant reported to police he had discovered those items in a junk pile in front of the church. However, the church's pastor testified that these items had not been discarded by the church.

Defendant was tried and found guilty of misdemeanor larceny. Defendant, appearing *pro se*, gave oral notice of appeal which did not strictly conform to the requirements of N.C. R. App. P. 4. Defendant filed a petition for writ of *certiorari*.

II. Analysis

Defendant argues that the trial court erred by denying his motions to dismiss based on (1) a fatal variance between the evidence presented and the indictment and (2) insufficiency of the evidence. We hereby grant Defendant's petition for writ of *certiorari* in order to address these issues.

A. Standard of Review

We review a trial court's denial of a motion to dismiss *de novo*. *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 freely 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) (internal quotation marks omitted).

B. Fatal Variance

Defendant first argues a fatal variance exists between the evidence presented at trial and the indictment. A motion to dismiss based on a fatal variance is, essentially, a contention that insufficient evidence supports a conviction. *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 590 (2009).

Specifically, Defendant argues that a fatal variance exists because:

(1) Count One of the indictment alleges Defendant broke into a property located on Boulevard Street, which was owned by the pastor, and that he stole certain items belonging to the pastor. However, the evidence at trial established that the pastor did not own the shed or reside at the address.

(2) Count Two of the indictment alleges that each item of stolen property listed in the indictment was the property of the pastor; however, the

> evidence at trial established that the pastor was the owner of only some of the items.

As an initial matter, Defendant was found not guilty of Count One, breaking and/or entering. Accordingly, any variance between Count One and the evidence established at trial is not at issue in this appeal.

As for Count Two, Defendant cites to *State v. Campbell,* 257 N.C. App. 739, 810 S.E.2d 803 (2018), to support his proposition that if the indictment fails to allege the existence of a person with title or special property interest, then the indictment contains a fatal variance. *Campbell* is inapplicable to the current case. In *Campbell*, the indictment alleged that the defendant broke into a church and stole items identified as the "personal property of [Pastor] Andy Stevens and Manna Baptist Church," while the evidence at trial failed to demonstrate that Pastor Stevens held title to or had *any* sort of ownership interest in the stolen property. *Id.* at 742, 757, 810 S.E.2d at 806, 814. In the present case, while it is true that the indictment alleged that the pastor owned all the property listed therein, the evidence at trial established that he did own *some* of the items. Thus, *Campbell* does not control.

Instead, *State v. Bacon,* 254 N.C. App. 463, 803 S.E.2d 402 (2017), is instructive here. In *Bacon*, the indictment incorrectly attributed ownership of *all* stolen items to a Ms. Faison when the evidence at trial established that she only owned *some* of the items. *Id.* at 464-66, 803 S.E.2d at 404-06. Our Court held that there was no fatal

variance because the variance in ownership of some of the items was mere surplusage not necessary to the underlying offense. *Id.* at 470, 803 S.E.2d at 408.

As in *Bacon*, the removal of items in this indictment, which the evidence failed to establish belonged to the pastor, does not create a fatal variance. Instead, we conclude that the indictment without surplusage properly alleges all the essential elements of larceny and any variance between the indictment and evidence established at trial was not fatal.

C. Essential Elements of Larceny

When reviewing a defendant's motion to dismiss for insufficient evidence, a court must inquire "whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). A court must view the evidence in the light most favorable to the State and give the State the benefit of all reasonable inferences. *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004).

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 his property permanently." *State v. Reid*, 334 N.C. 551, 558, 434 S.E.2d 193, 198 (1993). To withstand a defendant's motion to dismiss, the State must present substantial evidence of each of these elements and "that the defendant is the perpetrator" of the larceny. *See Call*, 349 N.C. at 417, 508 S.E.2d at 518.

Defendant also argues that the trial court erred in denying his motion to dismiss because the police discovered the stolen items upon the driveway between Mr. Jones' house and the house next door, rather than in Defendant's car. Thus, Defendant argues, the evidence was insufficient to establish that he "took" and "possessed" the stolen items.

For the crime of larceny, the element of taking is complete and satisfied "at the moment a thief *first* exercises dominion over the property." *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986) (emphasis added). Our Supreme Court has defined "taking" in this context as the "severance of the goods from the possession of the owner." *State v. Carswell*, 296 N.C. 101, 104, 249 S.E.2d 427, 429 (1978). "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." *Id.* at 104, 249 S.E.2d at 429.

Here, Mr. Jones testified that he had observed Defendant placing the property, which was stolen from the shed by his accomplice, into his vehicle. Defendant's acts constituted a taking, as the evidence tended to show that he not only moved the goods but had them in his possession and under his control, although briefly, thus severing them from the possession of the owner. *See id.* at 104, 249 S.E.2d at 429. Thus, the trial court did not err in concluding there was substantial evidence of a taking.

Defendant also contends that the evidence was insufficient to establish larceny because the stolen property belonging to the pastor was not in Defendant's possession after he fled the scene of the crime. That Defendant no longer had the items in his possession when the police responded to the scene is irrelevant. To establish an asportation or "carrying away," it is sufficient to show "[a] bare removal from the place in which [Defendant] found the goods, [even if he] does not quite make off with them[.]" *Id.* at 103, 249 S.E.2d at 428. Thus, there is a critical difference between a charge for possession of stolen property and larceny. "Larceny is a single, specific act occurring at a specific time. Possession of stolen property, however, is a continuing offense, terminating when defendant divests himself of the property." *State v. Andrews*, 52 N.C. App. 26, 35-36, 277 S.E.2d 857, 864 (1981), *aff'd in part, rev'd in part*, 306 N.C. 144, 291 S.E.2d 581 (1982).

Here, the State charged Defendant with larceny, not possession of stolen property. Therefore, the State was not required to prove that Defendant continued to possess the stolen items when questioned by the police. For the charge of larceny, it was sufficient that the State presented evidence that tended to show that Defendant directly placed the stolen property into his vehicle, constituting "carrying away." Thus, the trial court did not err in concluding that the State presented substantial evidence of "carrying away."

Defendant does not argue that the State's evidence was insufficient as to the fourth element of larceny. Therefore, that argument is abandoned on appeal. N.C. R. App. P. 28(a). Here, the evidence at trial tended to show that (1) Defendant took the property of the owner, (2) carried the items away without the owner's consent, and (3) with the intent to deprive the owner of his property. Considered in the light most favorable to the State, the evidence showed that Defendant knew the property he took was not abandoned and did not belong to his accomplice. Therefore, we conclude that there was substantial evidence presented to survive Defendant's motion to dismiss.

III. Conclusion

The trial court correctly denied Defendant's motions to dismiss.

AFFIRMED.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).