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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 16-772

Filed: 21 March 2017

Forsyth County, Nos. 14 CRS 056565, 14 CRS 000041

STATE OF NORTH CAROLINA

v.

JOHN LOUIS ANDREWS, III

Appeal by Defendant from judgment entered 21 January 2016 by Judge Anderson D. Cromer in Superior Court, Forsyth County. Heard in the Court of Appeals 6 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine F. Jordan, for the State.

Mark Hayes for Defendant.

McGEE, Chief Judge.

John Louis Andrews, III (“Defendant”) appeals his convictions for larceny from the person. We vacate Defendant’s convictions and remand for entry of judgment on the lesser included offenses of misdemeanor larceny.

I. Background

Defendant worked “off and on” for Dr. Gary Barger (“Dr. Barger”) at Barger Chiropractic (“the office”) in Kernersville for seventeen years. Defendant performed various tasks at the office, including collections, calling insurance companies and attorneys, filing, running the front desk, answering the telephone, and occasionally assisting Dr. Barger with patient treatments.

Defendant was working in the office on 3 July 2014 when Lois Nieuwenhuis (“Ms. Nieuwenhuis”) arrived for a chiropractic appointment around 2:00 p.m. Ms. Nieuwenhuis had been a patient of Dr. Barger’s for about twenty years and had interacted with Defendant in the office several times prior to her 3 July 2014 visit. When Ms. Nieuwenhuis arrived that day, she had approximately \$130.00 in cash in her purse. Some of the cash was inside a zippered wallet and some was “stuck in a little side slot” of the same wallet. Her purse was zippered shut on top. Ms. Nieuwenhuis first went into a room for a back massage on an automated table. Dr. Barger then called her into a second, smaller treatment room. Ms. Nieuwenhuis placed her purse on a table in the corner of the room and laid face-down on an examination table. She placed her face in a cut-out area at one end of the table. She was able to talk, but she “[couldn’t] see anything but the floor.” Ms. Nieuwenhuis remained in that position throughout her treatment.

After several minutes, Dr. Barger left the room and Defendant entered. Ms. Nieuwenhuis was aware it was Defendant who entered the room, but she never lifted

her head to look at him. Defendant performed a preliminary back massage on Ms. Nieuwenhuis using a handheld machine. The machine had a running motor and made a loud vibrating noise. This treatment usually lasted between five and ten minutes. Defendant had performed this treatment on Ms. Nieuwenhuis at previous appointments, but during her 3 July 2014 visit, “it [felt] different [to Ms. Nieuwenhuis] from what [Defendant] usually did” because the vibrating machine “would go slow and sometimes it would stop and then it would move again but there was very little pressure applied.” Ms. Nieuwenhuis did not change her face-down position at any time while Defendant was in the room. Dr. Barger returned and Defendant left the room. When Dr. Barger finished the adjustment, Ms. Nieuwenhuis turned over, stood, collected her purse, and left the room. When she went to the receptionist’s desk to pay, the top of her purse was zipped shut. Ms. Nieuwenhuis paid with a debit card located in a slot on the outside of her wallet and left the office.

After arriving home, Ms. Nieuwenhuis discovered cash was missing from her wallet. She returned to the office and explained the situation to Dr. Barger. Ms. Nieuwenhuis also told Dr. Barger about “the differences in . . . the services that [Defendant] gave [her] that day as opposed to in the past[.]” Later that evening, she received a phone call from an officer with the Kernersville Police Department (“KPD”), who informed her that her money had been found and she needed to claim it. Ms. Nieuwenhuis went to the KPD and collected \$130.00 in cash.

Sherry Bray (“Ms. Bray”) arrived at Dr. Barger’s office around 3:30 p.m. on 3 July 2014. Before going to the office, Ms. Bray had stopped at a bank to cash a check in the amount of \$1,830.00. The cash was in an envelope, which Ms. Bray “tucked . . . down into the main compartment [of her purse] tightly behind [her] wallet.” Ms. Bray snapped her purse shut and went directly to her chiropractic appointment. After checking in, the receptionist called Ms. Bray into the first treatment room, where she laid on her back on the automated massage table. After five or ten minutes, Ms. Bray went to Dr. Barger’s office, which was also a treatment room. Ms. Bray placed her purse on a chair located next to Dr. Barger’s desk. She laid face-down on the treatment table, placing her face in the cut-out area. Dr. Barger began performing an ultrasound treatment on Ms. Bray’s back. Dr. Barger “[s]ometimes . . . [performed] the entire treatment himself[.]” but on busy days he occasionally called another employee into the room to finish the treatment. On this day, Dr. Barger left the room and Defendant entered to continue Ms. Bray’s ultrasound treatment. Ms. Bray did not lift her head from the table at any time. At one point, Defendant said “just a minute” and stopped the treatment. Ms. Bray did not lift her head, but she could tell “by sound” that Defendant “walked over to Dr. Barger’s desk on the other side of the room.” Ms. Bray found this odd, because no employee had ever stopped in the middle of a treatment. Defendant instructed Ms. Bray: “Don’t pick up your head[.]” Defendant returned and resumed Ms. Bray’s treatment, but

then said: “Oh, the timer went off on the machine. I have to go ask [Dr. Barger] if he wants me to continue the treatment . . . because sometimes he does and sometimes he doesn’t.” This also seemed strange to Ms. Bray, because the timer had never gone off during her previous treatments. Defendant left the room for a few minutes, then reentered and completed the ultrasound treatment. Dr. Barger returned and Defendant left the room. After Dr. Barger performed an adjustment on Ms. Bray, she got up from the table, picked up her purse, and went to the front desk to check out. She paid with a debit card and left the office.

Ms. Bray stopped on her way home to buy a coffee. She opened her purse to pull out the envelope of cash and discovered it was missing. Ms. Bray immediately began mentally retracing her steps from the bank to Dr. Barger’s office. She searched her purse and vehicle thoroughly, but could not find the money. Ms. Bray returned to the office, where she spoke to the receptionist and then to Dr. Barger. She told Dr. Barger about the missing money. She also told him that Defendant left her side twice during her treatment that day. Dr. Barger asked Ms. Bray to wait in the lobby. Ms. Bray observed that Defendant was still at the office. After Ms. Bray waited for a while, two KPD law enforcement officers arrived, including Sergeant Rocky Joyner (“Sergeant Joyner”).

Based on the similarities in the descriptions provided by Ms. Nieuwenhuis and Ms. Bray, Sergeant Joyner asked Dr. Barger “what areas [of the office] [Defendant]

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had access to [that day][.]” Dr. Barger indicated Defendant “was in the bathroom for a pretty good while.” Sergeant Joyner searched the bathroom, where he found \$130.00 in cash stuffed inside a paper towel roll that was attached to the wall in a plastic holder. Sergeant Joyner also searched an area outside the back entrance of the office. He found an envelope containing approximately \$1,800.00 buried in the mulch between two cedar trees located across a driveway behind the office building. Sergeant Joyner returned to the office lobby and gave the envelope to Ms. Bray.

Defendant was indicted on 5 January 2015 on two counts of larceny from the person and one count of attaining the status of an habitual felon. At Defendant’s trial on 20 January 2016, he presented no evidence. At the close of all the evidence, defense counsel moved to dismiss the charges of larceny from the person based on insufficient evidence. Defendant’s motion was denied. The trial court submitted two possible charges to the jury: felony larceny from the person and misdemeanor larceny. Defendant was found guilty on both counts of larceny from the person. He entered a plea of no contest with respect to his status as an habitual felon. The trial court sentenced Defendant to two consecutive terms in the mitigated range of 84 to 113 months’ imprisonment. Defendant appeals.

II. Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss the charges of larceny from the person because the State failed to demonstrate that the 3 July 2014 thefts were “from the person.” We agree.

A. Standard of Review

“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). “The standard of review for a motion to dismiss in a criminal case is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Irons*, 189 N.C. App. 201, 204, 657 S.E.2d 733, 735 (2008) (citation and internal quotation marks omitted); *see also State v. Marley*, 227 N.C. App. 613, 615, 742 S.E.2d 634, 636 (2013) (“The standard of review of a [trial court’s] decision to deny a motion to dismiss is not ‘beyond a reasonable doubt,’ but whether there is substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (citation and internal quotation marks omitted)). “The evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.” *State v. Burke*, 185 N.C. App. 115, 118, 648 S.E.2d 256, 258-59 (2007) (citation and internal quotation marks

omitted). However, “[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted).

B. Analysis

1. Preservation

The State argues Defendant failed to preserve this issue for appellate review, because Defendant’s trial counsel “failed to state that [Defendant] was presenting a motion to dismiss before the trial court at either the close of the State’s evidence or the close of all evidence[,]” thereby waiving Defendant’s right to raise the issue on appeal. This argument is without merit.

N.C.R. App. P. 10(a)(1) provides that “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” Rule 10 further provides that, “[i]n a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . [was] made at trial.” *See* N.C.R. App. P. 10(a)(3). “[I]f a defendant fails to move to dismiss the action . . . at the close of all the evidence, [the] defendant may not challenge on appeal the sufficiency of the evidence

to prove the crime charged.” *Id.* We therefore consider whether, in the present case, Defendant (1) moved to dismiss the charges, (2) at the close of all the evidence, (3) based on insufficiency of the evidence, and (4) obtained a ruling on the motion.

At the close of the State’s evidence, the trial court asked if “[a]nyone wish[ed] to be heard[.]” Defense counsel responded:

I do, Your Honor. As Your Honor knows[,] . . . at the end of the State’s evidence there has to be substantial [evidence] of every element of the crime [charged] and substantial evidence of the perpetrator as being the defendant. And then substantial evidence is any relevant evidence that a reasonable mind would accept as supporting a conclusion.

The first thing I would like to address, Your Honor, is . . . felony larceny from the person. The first element is that the defendant took the property of another from the person of the victim, Your Honor, and I think the State has failed, even at this point, to prove “from the person” given the case.

Although counsel did not explicitly use the phrase “motion to dismiss for insufficiency of the evidence,” counsel first articulated the standard applicable to motions to dismiss based on insufficient evidence, then argued the State had failed to prove an essential element of the offense of larceny from the person. *See State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (“To survive a motion to dismiss for insufficient evidence, the State must present substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense.” (citation and internal quotation marks omitted)). After arguing that a

conviction for larceny “from the person” requires “the awareness of the victim of the theft at the time of [the] taking,” counsel contended that, in Defendant’s case, “neither [victim] . . . had the awareness that a theft had occurred until after they had left the doctor’s office[.]” and reiterated Defendant’s position that “even in the light most favorable to the State, [the State] ha[d not] met its burden of going forward at this time on larceny from the person.” Counsel also specifically argued the State “ha[d not] met the burden . . . of identifying the perpetrator as [being] . . . [D]efendant.” After hearing from defense counsel, the trial court stated: “Thank you very much. Motion denied.” It is thus apparent from the transcript that Defendant sought dismissal of the charges of larceny from the person, based on insufficient evidence of that offense, and obtained a ruling from the trial court denying the request.

At the close of all the evidence, the trial court asked whether “there [were] any motions[.]” Defense counsel responded:

Yes, Your Honor. I am going to rest and renew and I am still going to reargue the position and just reiterate that . . . what distinguishes . . . [cases finding] . . . larceny from the person, from [cases finding] . . . only misdemeanor larceny, is not only the distance involved, . . . but also the awareness of the victim of the theft at the time of the taking[.]

The State responded that, “[a]s to the awareness, . . . it is not an element of the crime [of larceny from the person].” Accordingly, the transcript shows Defendant renewed his motion to dismiss the charges of felony larceny from the person at the close of all

the evidence, based on the State's alleged failure to prove an essential element of that crime. The trial court indicated it would review relevant case law before "ruling . . . [on] the motion." The following morning, the trial court opened by asking whether "anyone wish[ed] to be heard further on . . . [D]efendant's motion[.]" The court heard additional arguments from both Defendant and the State regarding the elements of larceny from the person; specifically, the disputed element of an alleged victim's "contemporary awareness" of the theft. The court then stated: "Thank you. Motion denied."¹ Thus, Defendant also obtained a ruling on his renewed motion to dismiss the charges of larceny from the person for insufficient evidence. We conclude Defendant preserved the right to appeal the trial court's denial of his motion to dismiss.

2. Larceny from the Person

"[W]e affirm the denial of a motion to dismiss for insufficient evidence if the record discloses substantial evidence of each essential element constituting the offense for which the accused was tried[.]" *State v. Davis*, 198 N.C. App. 146, 151, 678 S.E.2d 709, 713 (2009) (citation, internal quotation marks and internal alteration omitted). "The essential elements of [misdemeanor] larceny are that [the] defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent;

¹ Although the trial court declined to dismiss the charges of larceny from the person, it did grant defense counsel's request to add a special jury instruction to the effect that, with respect to the "from the person" element of the offense, "the awareness of the alleged victim of the theft at the time of the taking is relevant to [whether the property is under the victim's] protection and control."

and (4) with the intent to permanently deprive the owner of the property.” *State v. Justice*, 219 N.C. App. 642, 644, 723 S.E.2d 798, 801 (2012) (citation and quotation marks omitted). “It is larceny *from the person* if the property is taken *from the victim’s person or within the victim’s protection and presence at the time of the taking*.” *State v. Hull*, 236 N.C. App. 415, 418, 762 S.E.2d 915, 918 (2014) (citation and internal quotation marks omitted) (emphases added); *see also State v. Henry*, 57 N.C. App. 168, 170, 290 S.E.2d 775, 776 (1982) (“[M]isdemeanor larceny is a lesser included offense of *felony* larceny, which lacks the essential element[] . . . that the larceny was from the person.” (emphasis added)).

“Property *attached* to [a] person is under the protection of the person even while he is asleep.” *State v. Barnes*, 345 N.C. 146, 148, 478 S.E.2d 188, 190 (1996) (citation omitted) (emphasis in original). However, if the property taken is not attached to the victim, larceny from the person cannot occur unless the property is “controlled by [the victim] at the time [of the taking] in some equivalent manner.” *Id.* at 149, 478 S.E.2d at 190. According to Defendant, if the property taken was not attached or affixed to the victim at the time of the taking, the State must demonstrate a contemporaneous “level of awareness [that] result[ed] in an immediate or near-immediate notice [by the victim] of its theft.” Absent such awareness, Defendant contends, there can be no larceny from the person. Defendant’s argument has merit.

This Court most recently considered the elements necessary to support a conviction for larceny from the person in *State v. Greene*, ___ N.C. App. ___, ___ S.E.2d ___, 2017 WL 163735 (2017). In *Greene*, two individuals fell asleep on a couch in a hospital waiting room with their purses nearby. When one of the women awoke, her purse was on the floor with some of its contents spilled out, and her grandmother's purse was on the couch in a similar condition. A pistol was missing from one purse and \$75.00 in cash was missing from the other purse. Hospital surveillance video had captured footage of a man, later identified as the defendant, going through the women's purses and other personal property while the women slept. The defendant was subsequently charged with two counts of larceny from the person. At trial, the defendant moved to dismiss the charges of larceny from the person on the basis of insufficient evidence. The trial court denied the motion and the defendant was convicted on both counts.

In reversing the trial court's denial of the motion to dismiss the charges of larceny from the person, this Court observed that, in past cases addressing larceny from the person, our appellate courts have "emphasize[d] the importance of 'the awareness of the victim of the theft at the time of the taking[.]'" *Id.*, 2017 WL 163735 at *3 (quoting *State v. Boston*, 165 N.C. App. 890, 893, 600 S.E.2d 863, 865 (2004)). We concluded in *Greene* that "the essence of larceny from the person is still that it is *from the person*, which requires the person's awareness at the time of the taking

unless the item was attached to the person.” *Id.* at *4 (emphasis in original). The State argued that video surveillance footage of the theft provided a sufficient substitute for actual, contemporaneous human awareness of the theft, which this Court rejected. In *Greene*, the victims were asleep when the thefts occurred, and “[e]ven though the purses were close to their owners, the evidence [did] not show that the purses were actually even touching them.” *Id.* Accordingly, we held “there was insufficient evidence that the property was taken from the victims’ person or within the victims’ protection and presence at the time of the taking.” *Id.* (citation, internal quotation marks, and internal alterations omitted).

The reasoning in *Greene* also applies in the present case. Because the purses of Ms. Nieuwenhuis and Ms. Bray were not attached to or touching either woman when the thefts occurred, there could be no taking “from the person” unless the purses were otherwise under the women’s “protection and control” at the time of the takings. *See State v. Sheppard*, 228 N.C. App. 266, 270, 744 S.E.2d 149, 152 (2013) (noting that “[w]here larceny from the person does not require that the property taken be attached to the victim,” property must be “taken from the victim’s presence *while under the victim’s protection or control*[.]” (emphasis added)). As discussed above, our appellate courts have interpreted “protection and control” in this context to require a contemporaneous awareness by the victim that the theft is occurring or has just occurred. *See, e.g., State v. Buckom*, 328 N.C. 313, 318, 401 S.E.2d 362, 365 (1991)

(upholding defendant's conviction for larceny from the person, where evidence showed cashier "had her left hand in the [open] cash [register] drawer, and was in the process of making change for the defendant when he reached in and grabbed the money."); *Hull*, 236 N.C. App. at 419, 762 S.E.2d at 918 (finding sufficient evidence to sustain charge of larceny from the person, where evidence suggested victim "became aware of the taking as it occurred."); *cf. State v. Lee*, 88 N.C. App. 478, 479, 363 S.E.2d 656, 656 (1988) (finding insufficient evidence of larceny from the person, where victim left her grocery cart unattended for several minutes, did not see defendant remove her purse from the cart or leave the store, and only realized her purse was missing "[u]pon returning to the cart[.]")

Although Ms. Nieuwenhuis and Ms. Bray were awake when the thefts occurred, both women were prostrate on a treatment table, with their faces in a cut-out area at one end of the table, and "[couldn't] see anything but the floor" when Defendant entered and while he remained in the room with them. Neither woman changed her position or lifted her head. Ms. Bray testified that, once she was face-down on the treatment table, she lost sight of her purse and did not see it again until Dr. Barger "finished adjusting [her] and [she] stood up from the table and then went to the chair to . . . pick [her] purse up." Ms. Bray did not make any particular observations about her purse at that time or while checking out at the front desk afterward. Ms. Nieuwenhuis testified she did not hear anything other than the sound

of the handheld machine Defendant used to massage her back. Ms. Bray testified that, although she could hear Defendant walk to the other side of the room at one point, she did not lift her head and “didn’t think about [Defendant] walking to [her] purse.” Both women testified they did not realize money was missing from their purses until after leaving Dr. Barger’s office.

The uncontroverted evidence showed that neither Ms. Nieuwenhuis nor Ms. Bray was aware at any time during their chiropractic appointments that Defendant touched, searched, moved, or removed any items from their purses. The women did not observe anything unusual about their purses when their treatments concluded or when they paid for their services, and only realized money was missing once they were either at home or on the way home. This Court’s holding in *Greene* makes clear that, due to this lack of contemporaneous awareness by Ms. Nieuwenhuis or Ms. Bray that any theft was in progress or had just occurred, there was insufficient evidence to sustain Defendant’s convictions for larceny from the person. Accordingly, the trial court erroneously denied Defendant’s motion to dismiss the charges of larceny from the person.

III. Conclusion

For the foregoing reasons, we vacate Defendant’s convictions for larceny from the person. Defendant has not challenged the sufficiency of the evidence with respect to the lesser included offense of misdemeanor larceny and we therefore remand for

entry of judgment on that offense on both counts. *See Greene*, 2017 WL 163735 at *4 (citing *Lee*, 88 N.C. App. at 479-80, 363 S.E.2d at 657)). Additionally, we note that “[h]abitual felon status only attaches to a defendant who has committed three prior non-overlapping felonies *and is then convicted of a fourth felony.*” *State v. Parks*, 146 N.C. App. 568, 572, 553 S.E.2d 695, 698 (2001) (emphasis added). Because Defendant’s improper convictions for larceny from the person “served as the ‘substantive felony’ underlying his conviction for having [attained] habitual felon status,” we also vacate Defendant’s habitual felon conviction. *See State v. Jones*, 157 N.C. App. 472, 479, 579 S.E.2d 408, 413 (2003); *see also State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) (“The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status.”).

VACATED AND REMANDED.

Judges STROUD and TYSON concur.

Report per Rule 30(e).