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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1068

Filed: 17 April 2018

Mecklenburg County, Nos. 15 CRS 212574-75

STATE OF NORTH CAROLINA

v.

NICOLA JUANITA GILES

Appeal by defendant from judgment entered 15 February 2017 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Shawn Maier, for the State.

Sean P. Vitrano for defendant.

ARROWOOD, Judge.

Nicola Juanita Giles ("defendant") appeals from judgment entered upon her convictions for larceny from a merchant and conspiracy to commit felony larceny. For the following reasons, we find no error.

I. Background

Defendant was arrested and later indicted by a Mecklenburg County Grand Jury on charges of larceny from a merchant and conspiracy to commit felony larceny. The charges were joined for trial and were tried in Mecklenburg County Superior Court beginning 13 February 2017, the Honorable Nathaniel J. Poovey, Judge presiding.

On 15 February 2017, the jury returned guilty verdicts on both charges. The trial court consolidated the convictions and entered judgment sentencing defendant to a term of 5 to 15 months imprisonment, suspended on condition that defendant be placed on supervised probation for 18 months. Defendant filed notice of appeal on 23 February 2017.

II. Discussion

On appeal, defendant challenges the denial of her motions to dismiss, the trial court's jury instructions for conspiracy, and the trial court's jurisdiction to enter judgment on the conspiracy conviction. We address each issue in turn.

1. Motions to Dismiss

Defendant first argues the trial court erred in denying her motions to dismiss the larceny from a merchant charge. Defendant contends there was insufficient evidence to support her conviction. We disagree.

At the close of the State's evidence, defendant moved to dismiss the charges for insufficiency of the evidence and for a variance between the crimes charged and the

evidence. The trial court denied the motion. Defendant renewed the motion to dismiss for insufficiency of the evidence at the conclusion of her evidence. Again, the court denied the motion.

"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). " 'Upon defendant's motion for dismissal, the question for the Court 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. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. S*mith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must

> consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation, quotation marks, and emphasis in original omitted).

In this case, defendant was indicted of larceny from a merchant under N.C. Gen. Stat. § 14-72.11 "by using aluminum foil to prevent the activation of the antishopping [sic] or inventory control device." "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 permanently deprive the owner of the property." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (1985) (citation omitted). N.C. Gen. Stat. § 14-72.11 makes larceny a Class H felony if committed against a merchant under certain circumstances, including "[b]y removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device." N.C. Gen. Stat. § 14-72.11(2) (2017). Thus, the State had to prove the essential elements of larceny and that the larceny was from a merchant and accomplished by using aluminum foil to prevent activation of an antishoplifting or inventory control device.

Defendant does not deny that her acquaintance, Sharon Anderson, committed larceny from a merchant by using aluminum foil to thwart Old Navy's antitheft system in order to carry clothing items out of the store. Defendant instead asserts that she did not participate in the offense. Specifically, defendant contends, "[h]ere, the evidence did not permit more than a suspicion that [she] personally used aluminum foil to defeat Old Navy's antitheft system or carried clothing belonging to the Old Navy store off the store premises." Defendant further contends "there was insufficient evidence [that she] acted in concert with Anderson to disable the antitheft devices and remove clothing from the store." Defendant asserts that the evidence raises only a mere suspicion or conjecture that she committed larceny from a merchant.

Upon review of the record, we hold there was sufficient evidence to support defendant's conviction for larceny from a merchant under an acting in concert theory.

"Acting in concert means that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Wade*, 213 N.C. App. 481, 487, 714 S.E.2d 451, 456 (2011) (quotation marks and citation omitted), *disc. review denied*, 366 N.C. 228, 726 S.E.2d 181 (2012). "Under the doctrine of acting in concert when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of

the common plan or purpose." *State v. Thomas*, 325 N.C. 583, 595, 386 S.E.2d 555, 561 (1989).

In this case, the evidence was that defendant and Anderson went to Old Navy and entered the store together. Inside the store, defendant and Anderson separated. Defendant selected clothing items from a rack and then went to where Anderson was in the store. Defendant handed Anderson the clothing items and then reached down to pick up a phone for Anderson. Anderson concealed the clothes under her dress and defendant placed empty hangers back on the racks. Defendant walked away from Anderson to the front of the store, where she spoke with a store clerk. A few minutes later, Anderson walked by defendant and left the store. Defendant then followed Anderson out of the store. Neither purchased anything. Most items of clothing in Old Navy have security tags that will sound an alarm if they leave the store. No alarm went off as Anderson and defendant left the store. Defendant and Anderson got into the same vehicle; defendant was driving. Police stopped the vehicle several minutes later. Clothing items from Old Navy were discovered in the backseat floorboard area of the vehicle. The security tags were still attached but were wrapped in aluminum foil to thwart the antitheft system.

Viewed in the light most favorable to the State, we hold this evidence is more than sufficient to support a reasonable inference that defendant was acting in concert

with Anderson to commit larceny from a merchant. Therefore, the trial court did not err in denying defendant's motions to dismiss.

2. Jury Instructions

Defendant also challenges the trial court's jury instructions for the conspiracy charge. Defendant argues the trial court plainly erred by instructing the jury on conspiracy to commit larceny from a merchant because she was not specifically indicted for that offense.

The trial court addressed the jury instructions for the conspiracy charge during the charge conference when the parties requested that the court recite the conspiracy instructions it would give. The court explained it would instruct as follows:

> The defendant has been charged with feloniously conspiring to commit larceny. For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant and Sharon Anderson entered into an agreement. Second, that the agreement was to commit larceny. And then I define larceny. And third, that the defendant and Sharon Anderson intended that the agreement be carried out at the time it was made. Then I give the mandate.

Defendant did not object to the court's proposed instructions.

When the discussion turned to the verdict sheets, defendant argued the proposed verdict sheet for the conspiracy charge should specify that the offense was conspiracy to commit "felonious" larceny, bringing the proposed conspiracy instructions back in issue because the instructions did not indicate the larceny

conspired to was a felony. During the ensuing discussion, the court acknowledged that the indictment charged conspiracy to commit felony larceny. Defendant argued "the instructions should comport to what the State is alleging and charging[,]" further explaining as follows:

> And my understanding and reading of the charging documents was that it was they're charging her with conspiracy to felony larceny.
>
> And that conspiracy would have to be a conspiracy and an agreement to do a larceny that would constitute a felony. Since the monetary value of the items aren't at issue here, nor any of the other items that make a larceny a felony, the antitheft-device-defy -- defeating item of the aluminum foil would be necessary to be part of the agreement for the agreement to constitute an agreement to felony larceny, which is what was charged.

To make certain it understood defendant's request with respect to the conspiracy charge, the court asked defendant:

> So what you're saying I think, then, is that when I define larceny I don't define just the general larceny charge. That I define larceny from a merchant?

Defendant responded, "Correct."

The State and the court were amenable to changing the definition of larceny in the conspiracy instructions to include larceny from a merchant. The court, however, then raised an issue with the conspiracy indictment because the indictment did not specify how the larceny was a felony. At that point, defendant moved to dismiss the conspiracy charge for insufficiency of the indictment for failing to state

with specificity which version of felony larceny was conspired to. The trial court denied the motion to dismiss.

During the court's charge to the jury, the court instructed the jury on conspiracy to commit felonious larceny as follows:

> For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt:
>
> First, that the defendant and Sharon Anderson entered into an agreement.
>
> Second, that the agreement was to commit felonious larceny. Felonious larceny as it relates to this case is the taking and carrying away of the personal property of a merchant, without consent, with the intent to deprive that merchant of possession permanently, by deactivating a component of an antishoplifting or inventory control device to prevent activation of the antishoplifting or inventory control device.
>
> And third, that the defendant and Sharon Anderson intended that the agreement be carried out at the time it was made.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant agreed with Sharon Anderson to commit felonious larceny from a merchant, and that the defendant and Sharon Anderson intended at the time the agreement was made that it would be carried out, it would be your duty to return a verdict of guilty to that charge. If you do not so find, or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty to that charge.

Defendant did not object to the instructions.

The North Carolina Appellate Rules provide that "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . . ." N.C.R. App. P. 10(a)(2) (2018); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). Nevertheless, "[i]n 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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury . . . ." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Despite the absence of an objection below, defendant has asserted plain error on appeal. Therefore, we limit our review of the jury instructions to plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that 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) (internal citations and quotation marks omitted).

"It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). "[T]he failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction." *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986).

The conspiracy indictment in this case charged "conspiracy to commit felony larceny – common law" and alleged as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 7th day of April, 2015, in Mecklenburg County, [defendant] did unlawfully, willfully, and feloniously conspire with Sharron Anderson to commit the felony of Larceny, G.S. 14-72.1, against Old Navy, LLC, a limited liability company.

N.C. Gen. Stat. § 14-72.1 concerns concealment of merchandise in mercantile establishments and provides in subsection (a) that "[w]hoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor . . . ." N.C. Gen. Stat. § 14-72.1(a) (2017). While that section

establishes a misdemeanor, the statute further provides that "any person who violates subsection (a) . . . by using a lead-lined or aluminum-lined bag, a lead-lined or aluminum-lined article of clothing, or a similar device to prevent the activation of any antishoplifting or inventory control device is guilty of a Class H felony." N.C. Gen. Stat. § 14-72.1(d1).

There was no mention of concealment of merchandise as the offense is defined in N.C. Gen. Stat. § 14-72.1(a) and (d1) in the instructions given to the jury. Because the trial court instructed the jury that felonious larceny for the conspiracy charge was larceny from a merchant instead of the offense in N.C. Gen. Stat. § 14-72.1 specified in the indictment, we hold the trial court erred. That error, however, does not amount to plain error in this instance.

In arguing plain error, defendant compares her case to three sexual offense cases in which the defendants were indicted for a forcible offense but convicted based on instructions for a statutory offense not alleged in the indictment. In *State v. Williams*, the defendant was indicted for first-degree and second-degree rape by force and against the will of the other person. *Williams*, 318 N.C at 630, 350 S.E.2d at 357. However, the trial court instructed the jury on first-degree statutory rape and the jury found defendant guilty on that basis. *Id.* at 630-31, 350 S.E.2d at 357. This Court found the court's instructions were "fundamentally in error" and vacated the judgment entered on the conviction. *Id.* at 631, 350 S.E.2d at 357. Similar to

Williams, in both *State v. Bowen*, 139 N.C. App. 18, 22, 533 S.E.2d 248, 251 (2000), and *State v. Miller*, 137 N.C. App. 450, 457-59, 528 S.E.2d 626, 630-31 (2000), this Court found plain error where the juries rendered guilty verdicts based on jury instructions for statutory sexual offense while the indictments charged forcible sexual offense.

The present case is easily distinguishable from *Williams*, *Bowen*, and *Miller*. The rape and sexual offenses felonies at issue in those cases may be proven by alternative theories with distinctly different elements, namely whether the offense was perpetrated by use of force or whether the victim and the defendant are of certain ages. The jury instructions given in *Williams*, *Bowen*, and *Miller* for statutory offenses based on the ages of the victims and the defendants allowed the juries to convict the defendants on entirely different theories than alleged in the indictment.

In the present case, although the elements for felony larceny under N.C. Gen. Stat. §§ 14-72.1 and 14-72.11 are not identical, the elements for felony concealment of merchandise in mercantile establishments pursuant to N.C. Gen. Stat. § 14-72.1(a) and (d1) are inherent in the elements for larceny from a merchant pursuant to N.C. Gen. Stat. § 14-72.11(2). The only material difference is that larceny from a merchant requires proof of an additional element, the successful taking and carrying away of the goods out of the store. There was sufficient evidence in this case to prove both offenses. In other cases in which juries have been instructed on an offense requiring

proof of elements beyond those of the offense alleged in the indictment, this court has found no prejudice to the defendants because any error was favorable to the defendants. *See State v. Farrar*, 361 N.C. 675, 678-79, 651 S.E.2d 865, 867 (2007) (no prejudicial error when trial court's instructions on first-degree burglary benefited the defendant because instructions charged that the jury could find the defendant guilty if it found defendant intended to commit armed robbery instead of larceny, a lesser included offense) (citing *State v. Beamer*, 339 N.C. 477, 484-85, 451 S.E.2d 190, 194-95 (1994) (variance not fatal when it benefits the defendant)). We find that to be the case in the instant case. Because defendant was not prejudiced by the error, it is clearly not plain error.

Moreover, it may be argued that defendant invited the error. As detailed above in the recap of the charge conference, defendant indicated that it was proper for the trial court to instruct the jury on conspiracy to commit felony larceny describing the felony larceny as larceny from a merchant. "[N.C. Gen. Stat. §] 15A[-]1443(c) states that '[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.' Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (internal citations omitted).

3. Jurisdiction to Enter Judgment

In the alternative to defendant's argument challenging the jury instructions for conspiracy, in the last argument raised on appeal, defendant argues the trial court lacked jurisdiction to enter judgment for conspiracy to commit felonious larceny.

"The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012).

In this case, the verdict sheet returned by the jury found defendant "guilty of conspiracy to commit felonious larceny." The trial court entered judgment for conspiracy to commit felonious larceny and specified N.C. Gen. Stat. § 14-72(a). That statute provides that "[l]arceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony." N.C. Gen. Stat. § 14-72(a) (2017).

Defendant now argues the trial court lacked jurisdiction to enter the judgment because defendant was not indicted for conspiracy to commit felonious larceny as that offense is set forth in N.C. Gen. Stat. § 14-72(a). Upon review, we agree the trial court lacked jurisdiction to enter judgment for conspiracy to commit felonious larceny in violation of N.C. Gen. Stat. § 14-72(a). However, it is clear to this Court that the trial court's recordation of N.C. Gen. Stat. § 14-72(a) in the judgment instead of N.C. Gen. Stat. § 14-72.1, as alleged in the indictment, was merely a clerical error. Both

offenses are Class H felonies that result in Class I felonies when charged as conspiracies. *See* N.C. Gen. Stat. §§ 14-72(a), -72.1(a) and (d1), and -2.4 (2017).

We are not persuaded by defendant's argument that the court misunderstood the charges throughout the proceedings. A review of the record shows the trial court understood the charges, instructed the jury as defendant requested, which was sufficient for the offense charged in the indictment, and simply recorded the wrong statute when entering judgment. Thus, we remand to the trial court for correction of the clerical error in the judgment. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.") (internal quotation marks and citations omitted).

Furthermore, although the issue is not raised on appeal, we further note that the reference to the statute recorded in the judgment for larceny from a merchant, N.C. Gen. Stat. § 14-72.11(1), is also incorrect. Defendant was convicted for larceny of a merchant "by removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device[]" in violation of N.C. Gen. Stat. § 14-72.11(2). The judgment should be corrected accordingly.

III. Conclusion

For the reasons discussed, we find the trial court did not err in denying defendant's motions to dismiss, did not plainly err in instructing the jury on conspiracy to commit felonious larceny, and committed clerical errors in entering judgment.

NO ERROR, REMAND FOR CORRECTION OF CLERICAL ERROR.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).