IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-959

Filed: 26 March 2019

Forsyth County, Nos. 16 CRS 59699-700, 2455

STATE OF NORTH CAROLINA

v.

TERRENCE ANDREW THOMAS

Appeal by defendant from judgment entered 14 September 2017 by Judge Angela B. Puckett in Forsyth County Superior Court. Heard in the Court of Appeals 26 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

W. Michael Spivey, for defendant-appellant.

DAVIS, Judge.

Terrence Andrew Thomas ("Defendant") appeals his convictions for breaking or entering pursuant to N.C. Gen. Stat. § 14-54(a), larceny after breaking or entering pursuant to N.C. Gen. Stat. § 14-72(b)(2), and habitual breaking or entering pursuant to N.C. Gen. Stat. § 14-7.26. After a thorough review of the record and applicable law, we affirm Defendant's convictions.

Factual and Procedural Background

The State's evidence at trial tended to show the following: On 14 and 19 October 2016, break-ins occurred at four businesses located near Waughtown Street and Old Lexington Road in Winston-Salem. First, at approximately 1:18 a.m. on 14 October, Speedway, a convenience store located at 546 East Sprague Street, was broken into by way of a shattered front window and $88 in cash, $112 in coins, and 52 packs of cigarettes were taken. While the camera at Speedway was "forcefully repositioned" immediately prior to the break-in, video footage from an adjacent business showed a man walking from the direction of Speedway in the direction of Char's Hamburgers ("Char's"), a restaurant located at 636 Waughtown Street approximately 150 feet away from Speedway. He wore a light-colored sweatshirt with the hood pulled up and dark pants and carried a bag on his shoulder. He stopped at a red Mitsubishi Eclipse and placed the bag beneath it before approaching Char's.

Video surveillance from Char's showed that shortly after 1:00 a.m. on 14 October 2016, the glass front door of the restaurant was shattered, leaving an entry point large enough for a person to walk through. The same man who had previously been visible approaching Char's was captured on a security camera inside the restaurant entering the back office and going through the owner's desk. As he did so, a distinctive marking could be seen on his right hand. Nothing of value was taken

from the restaurant. The man subsequently exited Char's, walked back to the Eclipse, retrieved the bag, and walked away.

In the early morning of 19 October 2016, two additional nearby businesses were broken into, including La Sirenita, an ice cream store located at 623 East Sprague Street, and Euforia Nortena, a clothing store located next door at 625 East Sprague Street. At approximately 3:20 a.m., surveillance cameras from a nearby business filmed a man dressed in the same dark pants and light-colored hoodie walking towards La Sirenita and Euforia Nortena. The man's hood was down and he had dreadlocks with bleached ends. At some point during that morning, the glass in the door to La Sirenita was broken, and coins stored in a container were taken. The glass in the door of Euforia Nortena was also broken, and a cash register containing between $500 and $600 was stolen. Surveillance video captured the same individual depicted in the previous footage placing the empty cash register in a trash can behind a nearby business.

Investigator Lacey Barnes with the Winston-Salem Police Department served as the lead detective investigating the series of break-ins. She reviewed the surveillance footage from nearby shops and identified the individual shown in all of the videos as the suspect in the crimes. Members of the Street Crimes Unit identified Defendant as a suspect when they saw him while on patrol in a neighborhood within walking distance of the businesses that were broken into. On 21 October 2016, Officer

L.A. Veal observed Defendant in Skyline Village and learned that he had an active outstanding warrant for his arrest. She and two other police officers approached Defendant while he was playing basketball in Skyline Village. When the officers identified themselves, Defendant fled in the opposite direction. He was ultimately apprehended and taken into custody that same day, and a warrant was issued for his arrest based upon the four break-ins.

Following his arrest, Defendant waived his *Miranda* rights and was interviewed by Detectives Adam Darga and Bobby Hatcher with the Winston-Salem Police Department. When one of the detectives showed him a still photo taken from the surveillance tapes of Defendant at the red Mitsubishi Eclipse on 19 October 2016, he stated that he had entered the vehicle to smoke a cigarette but denied being the individual pictured in other surveillance footage from 14 and 19 October. At the time of his arrest, Defendant was wearing his hair in dreadlocks with bleached tips. He also had marks on his right hand that were consistent with the markings visible in the surveillance footage.

On 6 March 2017, Defendant was indicted by a grand jury on four counts of breaking or entering, three counts of larceny after breaking or entering, and one count of habitual breaking or entering. The State obtained superseding indictments as to each charge on 3 July 2017, which made changes to the names of the occupants alleged to be in each of the buildings but not to the location of the buildings.

A jury trial was held before the Honorable Angela B. Puckett in Forsyth County Superior Court beginning on 11 September 2017. Prior to the beginning of the proceedings, the State moved to amend the indictment alleging that Defendant had broken into Char's (the "Char's Indictment") to change the listed location of the building from 636 East Sprague Street to 636 Waughtown Street. The trial court granted the State's motion over Defendant's objection.

At trial, the State called nine witnesses to testify, including Investigator Barnes, Detective Darga, Officer Veal, and a number of individuals who owned or worked with the businesses that were broken into and other nearby businesses. The Defendant did not offer any evidence.

On 14 September 2017, the jury returned verdicts of not guilty as to two of the breaking or entering charges and two of the larceny after breaking or entering charges, all of which arose out of the break-ins at La Sirenita and Speedway. The jury found Defendant guilty of habitual breaking or entering, two charges of breaking or entering, and one charge of larceny after breaking or entering, all arising out of the break-ins at Char's and Euforia Nortena. Defendant was sentenced to consecutive terms of 33-52 months imprisonment for the breaking or entering at Char's, 27-45 months imprisonment for the breaking or entering at Euforia Nortena, and a suspended sentence of 10-21 months imprisonment for the larceny after

breaking or entering at Euforia Nortena subject to completion of 48 months of supervised probation. Defendant gave timely notice of appeal to this Court.

Analysis

On appeal, Defendant argues that the trial court erred by (1) permitting the State to amend its indictment regarding the break-in at Char's; and (2) committed plain error by admitting lay opinion testimony from police officers that Defendant was the person shown in the surveillance videos. We address each issue in turn.

I. Amended Indictment

We review a trial court's ruling permitting the State to amend an indictment *de novo*. *State v. Frazier*, __ N.C. __, __, 795 S.E.2d 654, 655, *review denied*, 369 N.C. 565, 799 S.E.2d 51 (2017). "Jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution. An indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (internal citations omitted). An "indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense," *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984) (citation omitted), as enabling the defendant to prepare for trial is "the primary purpose of the indictment," *State v. Farrar*, 361 N.C. 675, 678, 651 S.E.2d 865, 866 (2007).

> A bill of indictment may not be amended, and is considered to have been amended if there is any change in the indictment which would *substantially* alter the charge set forth in the indictment[.] Thus, while the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense, a non-essential variance is not fatal to the charged offense.

State v. Grady, 136 N.C. App. 394, 396, 524 S.E.2d 75, 77, *review denied*, 352 N.C. 152, 544 S.E.2d 232 (2000) (internal citations and quotation marks omitted).

Defendant was charged with breaking or entering under N.C. Gen. Stat. § 14-54(a). The essential elements of this crime are: (1) a breaking or entering; (2) of any building; and (3) with the intent to commit any felony or larceny therein. *State v. Jones*, 188 N.C. App. 562, 565, 655 S.E.2d 915, 917 (2008). Where the location of the building is not an element of the crime, "a variance between the allegations in the indictment and the proof at trial" may not constitute fatal error. *State v. Reffin*, 90 N.C. App. 705, 708, 370 S.E.2d 275, 276 (1988) (citation, quotation marks, and brackets omitted). Nevertheless, an indictment under N.C. Gen. Stat. § 14-54(a) must "identify the building with reasonable particularity so as to enable the defendant to prepare his defense." *State v. Norman*, 149 N.C. App. 588, 592, 562 S.E.2d 453, 456 (2002) (citation and quotation marks omitted). We find instructive several cases on this issue from our appellate courts.

In *State v. Smith*, 267 N.C. 755, 148 S.E.2d 844 (1966), the indictment alleged "that the defendant broke and entered a certain building occupied by one Chatham

County Board of Education, a Government Corporation." *Smith*, 267 N.C. at 756, 148 S.E.2d at 845. Our Supreme Court held that the indictment was "fatally defective in that it fail[ed] to identify the premises with sufficient certainty to enable the defendant to prepare his defense . . . . [U]nder the general description of ownership in the bill, it could have as well been any other school building or other property owned by the Chatham County Board of Education." *Id.*

In *State v. Ly*, 189 N.C. App. 422, 658 S.E.2d 300, *disc. review denied*, 362 N.C. 512, 668 S.E.2d 567 (2008), the defendants were convicted of breaking or entering. The indictments alleged that the "defendants broke and entered a building occupied by Xang Ly used as a dwelling house located at Albermarle [sic], North Carolina." *Ly*, 189 N.C. App. at 429, 658 S.E.2d at 305. The defendants argued that "the indictments failed to sufficiently identify the building because Xang Ly owned six buildings used as dwelling houses and the indictments do not specify which building defendants broke and entered." *Id.* This Court held that "the indictments were sufficient to reasonably identify the building as required by N.C.G.S. § 14-54," because while Xang Ly did own multiple rental houses, "there was only one building where Xang Ly actually lived." *Id.* at 429-30, 658 S.E.2d at 306.

The Char's Indictment from 31 July 2017 stated that Defendant "unlawfully, willfully and feloniously did break and enter a building occupied by BRYANT GEORGE, used as a RESTAURANT located at 636 E SPRAGUE ST, WINSTON

SALEM, NORTH CAROLINA with the intent to commit a LARCENY therein." Defendant asserts that the trial court incorrectly permitted the State to amend the indictment by changing the address to 636 Waughtown Street, Winston-Salem, North Carolina. Because the address of the restaurant was not an essential element of breaking or entering under N.C. Gen. Stat. § 14-54, the amendment did not "substantially alter the charge set forth in the indictment," and therefore would only be fatal to the indictment if it led to Defendant being "misled or surprised as to the nature of the charges against him." *Grady*, 136 N.C. App. at 397, 524 S.E.2d at 77 (citation omitted).

Defendant has failed to demonstrate that he was misled or surprised as to the charge of breaking or entering at Char's. We note from the record that he had access to discovery, including the warrants for his arrest, which correctly listed the address for Char's. *See id.* (holding that the "defendant could not have been misled or surprised" by an amendment correcting a typographical error in the indictment where the correct address was listed in another count in the indictment); *State v. Sisk*, 123 N.C. App. 361, 366, 473 S.E.2d 348, 353 (1996) (holding that use of incorrect bank name in indictment was not fatal error because it did not impact "defendant's understanding of the charge against which he needed to defend" (citation and quotation marks omitted), *aff'd in part, review denied in part,* 345 N.C. 749, 483 S.E.2d 440 (1997). "While we recognize that the indictment was carelessly drafted,

we do not believe that the variance between the indictment and the proof at trial is fatal." *Sisk*, 123 N.C. App. at 365, 473 S.E.2d at 351. We thus hold that the trial court did not err in permitting the State to amend its indictment.

II. Identification of Defendant

Defendant's final argument is that the trial court erred in admitting lay testimony by Investigator Barnes, Detective Darga, and Officer Veal as to his identity in the surveillance footage. Because Defendant failed to object to the trial court's admission of the testimony, our review of this issue is limited to plain error. *See* N.C. R. App. P. 10(a)(4) ("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.").

> 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 affects 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, quotation marks, and brackets omitted).

Lay testimony as to the identity of a criminal defendant in a photograph or videotape may be permitted "where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony." *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009) (citation and quotation marks omitted). In determining whether to admit such testimony, courts consider the following four factors:

> (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance video was taken or when the defendant was dressed in a manner similar to the individual depicted in the video; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

State v. Weldon, __ N.C. App. __, __, 811 S.E.2d 683, 688 (2018) (citation and brackets omitted).

Investigator Barnes, Detective Darga, and Officer Veal each gave testimony that the person in the surveillance footage was Defendant. They each admitted that they did not have any prior familiarity with Defendant's appearance. However, they stated that Defendant had disguised his appearance at the time of the offense by wearing a hood and long sleeves and by covering his face in much of the footage. The long sleeves covered the distinctive marks on Defendant's hands. The officers also

testified that he had altered his appearance between the date of the surveillance footage, his arrest, and trial in that his hair was worn back at trial and the previously distinctive bleached tips had faded to a less bright yellow color. *See id.* at __, 811 S.E.2d at 688 (police officer's testimony as to identity of defendant was properly admitted where defendant had distinctive style of hair during commission of crimes but had shaved head prior to trial).

Moreover, even assuming *arguendo* that the admission of the lay opinion testimony was error, Defendant has not demonstrated that "a different result probably would have been reached" but for admission of the testimony because the State provided sufficient other evidence tending to establish Defendant's guilt. *State v. Harris*, 222 N.C. App. 585, 590, 730 S.E.2d 834, 838, *review denied*, 366 N.C. 413, 736 S.E.2d 175 (2012), *cert. denied*, 569 U.S. 952, 185 L. Ed. 2d 876 (2013). First, the video recordings were shown to the jury at trial, and they were able to determine for themselves whether Defendant was the individual depicted in the videos. Second, Defendant admitted that he could be seen in one of the videos from 19 October 2016 sitting in the red Mitsubishi Eclipse. This placed him near Euforia Nortena close in time to the crime at a time when there were very few other individuals in the area. Furthermore, the State's evidence tended to establish that each of the crimes had been committed with the same modus operandi — that is, the suspect approached and left the crime scene by the same route, committed the crimes at the same time of

night, wore the same clothing, and entered the businesses with the same method of smashing a front glass door.

Therefore, even without admission of the lay witness testimony as to Defendant's identity, Defendant has not established prejudice or demonstrated a fundamental error at trial that "probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Collins*, 216 N.C. App. 249, 255, 716 S.E.2d 255, 260 (2011). *See id.* at 257, 716 S.E.2d at 261 (no plain error where trial court admitted lay testimony of police officer as to defendant's identity from surveillance footage).

Conclusion

For the reasons stated above, we affirm Defendant's convictions.

NO PLAIN ERROR.

Chief Judge McGEE and Judge DIETZ concur.

This opinion was authored by Judge Davis prior to 25 March 2019.

Report per Rule 30(e).