IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-904

Filed: 2 July 2019

Alamance County, No. 17 CRS 1643-44

STATE OF NORTH CAROLINA

v.

KYLE RICO MILLER

Appeal by defendant from judgment entered 11 October 2017 by Judge Andrew Taube Heath in Alamance County Superior Court. Heard in the Court of Appeals 5 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

W. Michael Spivey for defendant.

TYSON, Judge.

Kyle Rico Miller ("Defendant") appeals his conviction entered following a jury's verdict of guilty for larceny from a merchant. We find no error in part and dismiss Defendant's ineffective assistance of counsel claim without prejudice.

I. Background

Richard Palmer was the general manager and was present at the Polo Ralph Lauren Factory Store in Mebane on 14 October 2015. Palmer observed Defendant enter the store carrying a silver-colored Reebok bag. An employee alerted Palmer that Defendant's behavior was suspicious.

Palmer reviewed footage recorded on the store's video surveillance system and observed Defendant remove anti-theft sensors from various shirts and pants, place them into his Reebok bag, and walk out of the store without paying for the items. Palmer called the Mebane Police Department and gave them a description of Defendant and the items of clothing he had taken.

While Palmer was waiting for the police to arrive, he observed Defendant walk back into the store carrying his silver bag. Defendant remained inside the store when Mebane Police Officer Paul Davis arrived. Palmer indicated to Officer Davis where Defendant was located in the store. Officer Davis then approached Defendant and arrested him.

Palmer and Officer Davis discovered several Polo Ralph Lauren shirts inside of Defendant's Reebok bag and a security sensor, which had been removed. Palmer also located several discarded security sensors in various locations inside the store. Officer Davis searched Defendant's pockets and discovered a pair of wire cutters. Officer Davis also searched Defendant's car and recovered shirts that Palmer identified as having been stolen from the store.

A grand jury returned indictments against Defendant for larceny from a merchant and for attaining habitual felon status.

Defendant's case was originally scheduled for trial in January 2017. The first trial ended when the trial court dismissed the larceny indictment because of a fatal variance between the indictment and the evidence presented upon Defendant's motion. The State obtained a new grand jury indictment for larceny from a merchant.

Defendant's second trial began on 10 October 2017. Defendant filed a pre-trial motion to dismiss and argued double jeopardy. The trial court denied the motion.

Palmer and Officer Davis testified for the State at trial. Security video footage from the Polo Ralph Lauren Factory Store was admitted into evidence and presented to the jury without objection. The footage depicted Defendant moving throughout the store, removing security sensors from merchandise, and placing the merchandise into his bag.

Defendant made a motion to dismiss for insufficient evidence at the close of the State's evidence. Defendant also made a motion to dismiss the larceny indictment and argued that the entity alleged in the indictment as owning the stolen merchandise, Ralph Lauren Corporation, was not the entity who allegedly owned the stolen merchandise on the date of the offense. Defendant argued the property actually belonged to Polo Ralph Lauren Corporation. The trial court denied Defendant's motions.

Defendant presented no evidence in his defense and renewed his motion to dismiss at the close of all evidence. The jury returned a verdict of guilty for larceny from a merchant. Defendant pled guilty to attaining habitual felon status and stipulated to having a prior record level of VI for sentencing. The trial court entered judgment and sentenced Defendant to an active term of incarceration of between 103 to 136 months. Defendant gave notice of appeal.

II. Jurisdiction

Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. *Anders v. California*

Defendant's appointed appellate counsel was unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks this Court to conduct its own review of the record for possible prejudicial error.

Counsel has shown to the Court's satisfaction of his compliance with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and with *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising Defendant of his right to file written arguments with this Court and by providing him with the documents necessary for him to do so.

IV. Issues

Defendant has filed several *pro se* briefs in which he advances multiple

arguments. Defendant argues: (1) the trial court failed to grant his motion to dismiss the indictments violated his Fifth Amendment right against double jeopardy; (2) the trial court erred by denying his motion to dismiss for insufficient evidence; (3) his trial counsel prejudiced him by admitting Defendant's guilt to the jury during closing argument; (4) the State violated his rights by not fingerprinting him prior to trial; (5) Officer Davis did not have probable cause to arrest him; and, (6) Officer Davis's search of his car constituted an illegal search and seizure.

V. Analysis

A. *Double Jeopardy*

Defendant argues that the trial court erred by failing to grant his motion to dismiss. He asserts a second trial subjected him to double jeopardy in violation of the Fifth Amendment to the United States Constitution ("the Double Jeopardy clause"). *See* U.S. Const. amend. V (providing that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb.").

"The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citations omitted). "In a criminal prosecution, jeopardy attaches when a jury is impaneled to try a defendant on a *valid* bill of indictment." *State v. Schalow*, __ N.C. App. __, __, 795 S.E.2d 567, 574 (2016)

(emphasis supplied) (citing *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977)).

Based upon the transcript of the pre-trial motion hearing on Defendant's motion to dismiss, the trial court dismissed the original indictment for larceny from a merchant due to a fatal variance with the State's evidence in the first trial. The State voluntarily dismissed the original indictment for the habitual felon charge after the trial court had dismissed the larceny indictment.

It is well established that "[a] defendant is not subjected to double jeopardy when an insufficient indictment is quashed, and he is subsequently put to trial on a second, sufficient indictment." *State v. Oakes*, 113 N.C. App. 332, 340, 438 S.E.2d 477, 481 (1994) (citation omitted). Defendant has failed to cite any authority to show the original larceny from a merchant indictment did not fatally vary from the evidence presented, as the trial court had ruled in the first trial upon Defendant's own motion to dismiss. Defendant did not argue in his motion at the second trial that the original indictment was valid.

Defendant cannot now argue the original indictment was valid, as would be required for jeopardy to have attached, when he himself moved to dismiss because of a fatal variance with the State's evidence. *See State v. Grullon*, 240 N.C. App. 55, 58, 770 S.E.2d 379, 382 (2015) ("a defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error[.]") (citation omitted and first

alteration in original).

Defendant has failed to show the State violated his constitutional right against double jeopardy. *See Oakes,* 113 N.C. App. at 340, 438 S.E.2d at 481. The trial court did not err by denying Defendant's motion to dismiss for a purported violation of double jeopardy. *Id.*

To the extent Defendant appears to argue the trial court erred by denying his motion to dismiss the indictment for attaining habitual felon status, we note Defendant pled guilty to being an habitual felon. Defendant has no right to appeal his conviction for attaining habitual felon status entered pursuant to a guilty plea. N.C. Gen. Stat. § 15A-1444 (2017); *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008) ("Upon defendant's guilty plea, this Court is without authority to review, either as of right or by *certiorari,* the trial court's denial of defendant's motion to dismiss his habitual felon indictment.").

Defendant's arguments asserting the trial court erred by denying his motion to dismiss for a purported violation of the rule against double jeopardy are overruled.

B. *Insufficient Evidence*

Defendant next argues the trial court erred by denying his motion to dismiss for insufficient evidence. We disagree.

"In ruling on a motion to dismiss, the . . . court need determine only whether there is substantial evidence of each essential element of the crime and that the

defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (citation omitted). "In making its determination, the . . . 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." *Id.* at 492, 809 S.E.2d at 549-50 (citation omitted).

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss *de novo*." *Id.* at 492, 809 S.E.2d at 550 (citation omitted).

I. *Larceny from a Merchant*

Defendant was indicted for larceny from a merchant pursuant to N.C. Gen. Stat. § 14-72.11(2). "The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002). N.C. Gen. Stat. § 14-72.11(2) (2017) provides:

> A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:
> . . .
>
> (2) 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.

2. *State's Evidence*

Palmer testified he had observed Defendant, while inside the store, remove anti-theft sensors from various shirts and pants, place them in his Reebok bag, and walk out of the store without paying for the merchandise on the Polo Ralph Lauren Factory Store's video surveillance system. Officer Davis recovered wire cutters from Defendant's pocket, which he testified are often used by shoplifters to remove anti-theft sensors. Officer Davis also recovered Polo Ralph Lauren shirts from inside of Defendant's car, which Palmer identified as having been stolen from the Factory Store. Palmer testified the stolen shirts belonged to the Ralph Lauren Corporation.

Viewing this evidence in the light most favorable to the State, we conclude the State presented sufficient evidence from which a reasonable person could conclude the State satisfied each essential element of larceny from a merchant pursuant to N.C. Gen. Stat. § 14-72.11(2). The trial court properly denied defendant's motion to dismiss. Defendant's argument is overruled.

C. *Admission of Guilt*

Defendant appears to argue that his defense counsel was ineffective because he admitted Defendant's guilt by telling the jury during closing argument that "we know he did it."

The Supreme Court of North Carolina has held that ineffective assistance of

counsel is established when a defendant's counsel admits the defendant's guilt without the defendant's consent. *See State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985) (holding counsel's admission of defendant's guilt without defendant's consent establishes ineffective assistance of counsel, a *per se* violation of the Sixth Amendment of the United States Constitution).

Defendant states on appeal: "I neve[r] expected the attorney to tell the jury that I, his client, was guilty of the felony alleged against me." The trial transcript indicates "recordation was not requested, [and] the closing arguments of the attorneys were not taken or transcribed."

During the charge conference, the trial court had the following exchange with Defendant's counsel:

> THE COURT: Okay. Any admissions during closing?
>
> [Defense Counsel]: Like a *Harbison* type issues [sic]?
>
> THE COURT: Right.
>
> [Defense Counsel]: I may -- I may make that argument.
>
> THE COURT: Okay. Have you had that discussion with your client?
>
> [Defense Counsel]: I have.
>
> THE COURT: Okay.
>
> [Defense Counsel]: I told him I may ask the jury to -- to find him, in the alternative, guilty of that lesser included.

> THE COURT: Okay.
>
> [Defense Counsel]: He does understand that and the implications of that.
>
> THE COURT: Okay. And he has authorized that and agrees with that ---
>
> [Defense Counsel]: He has.
>
> THE COURT: Thank you.

Based upon the lack of a transcription of closing arguments, we are unable to determine whether defense counsel actually made the purported statement "we know he did it" to the jury. Presuming, without finding, that defense counsel did make the statement, we are unable to determine whether this was an admission of Defendant's guilt to larceny from a merchant or if counsel admitted Defendant's guilt to the lesser-included offense of larceny as a part of trial strategy as discussed during the charge conference.

Without a sufficient evidentiary record, this Court cannot determine the merits of Defendant's argument. We dismiss Defendant's argument without prejudice to Defendant's right to file a motion for appropriate relief with the trial court. *See State v. Streater*, 197 N.C. App. 632, 649, 678 S.E.2d 367, 378 ("[T]he proper action is to dismiss this assignment of error without prejudice, allowing defendant to file a motion for appropriate relief with the trial court. The trial court is in the best position to review defendant's counsel's performance.").

D. *Unpreserved Errors*

Defendant raises three additional arguments: (1) the State violated his rights by not fingerprinting him prior to trial; (2) Officer Davis did not have probable cause to arrest him; and (3) Officer Davis's search of his car constituted an illegal search and seizure. Upon review of the record, Defendant failed to object or argue these asserted errors before the trial court. Defendant has also not argued plain error with respect to any of these asserted errors on appeal.

It is well-established that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Holliman,* 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and internal quotation marks omitted). When a party changes theories between the trial court and appellate court, the argument is not properly preserved and is waived. *Id.* at 123-24, 573 S.E.2d at 686; N.C. R. App. P. 10(a)(1). Defendant has failed to preserve these alleged errors and his arguments are waived and dismissed.

V. Conclusion

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear and whether the trial court committed any prejudicial errors. After review and analysis, we find no error in the jury's verdict or the trial court's judgment entered thereon. We dismiss Defendant's argument

regarding ineffective assistance of counsel, without prejudice to his right to file a motion for appropriate relief with the trial court. The alleged errors Defendant failed to preserve are waived and dismissed. *It is so ordered*.

NO ERROR IN PART, DISMISSED WITHOUT PREJUDICE IN PART.

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).