IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-84

Filed: 15 October 2019

Mecklenburg County, No. 17CRS033889

STATE OF NORTH CAROLINA

v.

QUENTIN OMAR WEATHERS, Defendant.

Appeal by Defendant from judgment entered 13 July 2018 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 September 2019.

Attorney General Joshua H. Stein, by Associate Attorney General Elizabeth Jenkins, for the State.

Warren D. Hynson for the Defendant.

BROOK, Judge.

Quentin Omar Weathers ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of felonious possession of stolen goods and felony larceny. The trial court arrested judgment on the charge of felonious possession of stolen goods and sentenced Defendant on the felony larceny charge only. We hold that Defendant has failed to show error.

I. Background

In the evening hours of 27 December 2016, Bob Mott, a loss prevention officer at Dillard's at SouthPark Mall in Charlotte, North Carolina, noticed Defendant and three companions browsing in the denim department of the store. Defendant and one of his companions made their way to the table where the True Religion jeans were displayed. Suddenly, Defendant and his companion grabbed armfuls of the jeans and began running for the exit, leaving the store without paying for the jeans. Although security personnel attempted to catch Defendant and his companion, neither of them were apprehended at the time. Cameron Nivens, a contract security guard employed at Dillard's that day, testified that there were at least ten pairs of jeans in Defendant's arms when he left the store.

Later that evening, Sergeant Tom Galuski ("Officer Galuski") was conducting active patrol when he observed a white Chevy Impala without a tag driving on Carolina Place Parkway. Officer Galuski activated his blue lights and followed the vehicle into the parking lot of Macy's, where he proceeded to attempt to conduct a traffic stop. Although the vehicle began to slow, as Officer Galuski slowed down behind it, it began driving off again. Officer Galuski quickly re-positioned his car, but as he began to exit it, the other driver, Defendant, began driving away again. Officer Galuski yelled at Defendant to stop the car, which he eventually did.

Officer Galuski asked Defendant for his license and registration, and when Defendant replied that he did not have a license, Officer Galuski asked him to step outside the car. Once outside the vehicle Defendant became evasive and struggled with Officer Galuski and knocked him over, fleeing. Defendant was subsequently apprehended by Detective David Lindsey and placed under arrest.

Upon learning that Defendant had been taken into custody, Officer Galuski conducted an inventory search of the vehicle Defendant had been driving. While conducting the search, Officer Galuski discovered a number of pairs of True Religion jeans in the back seat with the tags still on them. In the trunk of the vehicle Officer Galuski found more new clothing still on the hangers, with tags and security sensors still attached.

Defendant was indicted on 11 December 2017 for felony larceny and felonious possession of stolen goods. The matter came on for trial on 9 July 2018 in Mecklenburg County Superior Court before the Honorable Eric L. Levinson. Judge Levinson presided over a two-day trial. The jury returned verdicts of guilty on both charges. The trial court arrested judgment on the felonious possession of stolen goods charge, determined Defendant to be a prior record level III offender, and sentenced him to eight to nineteen months in prison for felony larceny. Defendant entered timely written notice of appeal on 27 July 2018.

II. Analysis

Defendant raises two arguments on appeal, which we address in turn.

A. Fatal Variance

Defendant first argues that the trial court erred in denying his motion to dismiss at the close of the evidence because the evidence at trial varied materially from the charge of felony larceny charged in the indictment. Specifically, Defendant contends that there was no evidence presented at trial to establish that Dillard's, Inc., was a legal entity capable of owning property, and ownership of the property was an element of the crime with which he was charged. We hold that the evidence presented at trial did not vary fatally from the crime of felony larceny with which Defendant was charged.

The indictment charging Defendant with felony larceny alleges that "on or about and between the 27th day of December, 2016, and the 29th day of December, 2016, in Mecklenburg County, Quentin Omar Weathers unlawfully, willfully, and feloniously did steal, take and carry away assorted clothing, including True Religion jeans, the personal property of Dillard's, Inc., a corporation, a legal entity capable of owning property, such property having a value in excess of $1,000.00." Defendant argued to the trial court in his motion to dismiss at the close of the State's evidence that dismissal of this charge was required because of the absence of record testimony specifically stating that Dillard's at SouthPark was a legal entity capable of owning property. Although the trial court denied this motion, remarking that the evidence

that Dillard's owned the property was "plenary," Defendant preserved this argument for our review by raising it in his motion to dismiss.

We review preserved fatal variance arguments like the present one *de novo*. *See State v. Campbell*, ___ N.C. App. ___, ___, 810 S.E.2d 803, 824-26 (2018) (Berger, J., dissenting) (noting that because "a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction . . . [,] [t]his Court reviews the denial of [such] a motion . . . *de novo*") (internal marks and citation omitted).

Generally speaking, "[a] variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citation omitted). However, "[a] variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id.* Moreover, "not every variance that involves an essential element of the offense charged is necessarily material." *State v. Henry*, 237 N.C. App. 311, 323, 765 S.E.2d 94, 103 (2014). The twin purposes of the requirement that the crime charged in the indictment and the evidence offered at trial correspond are to ensure "that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *Norman*, 149 N.C. App. at 594, 562 S.E.2d at 457.

The longstanding rule in North Carolina is that an indictment for felony larceny from "[a] victim [that] is not an individual, . . . must [include] that the victim was 'a legal entity capable of owning property,'" or otherwise be considered "'fatally defective.'" *Norman*, 149 N.C. App. at 593, 562 S.E.2d at 457 (quoting *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999)). This requirement is not completely inflexible, however. For instance, "the fact of incorporation need not be alleged where the corporate name is correctly set out in the indictment." *State v. Thornton*, 251 N.C. 658, 661, 111 S.E.2d 901, 903 (1960) (citation omitted). Similarly, "alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property[.]" *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015). We have likewise held that an indictment charging felony larceny alleging that the property was owned by a business, which "obviously alleg[es] a proprietorship capable of owning property," but does not contain the phrase "a legal entity owning property," is adequate. *State v. Hall*, 57 N.C. App. 544, 547-48, 291 S.E.2d 873, 876 (1982).

The indictment in this case includes an allegation that the owner of the personal property, "Dillard's, Inc., [is] a corporation, a legal entity capable of owning property[.]" The indictment is therefore facially valid. *See State v. Brawley*, ___ N.C. App. ___, ___, 807 S.E.2d 159, 164 (2017) (Arrowood, J., dissenting) ("[A]n allegation

that the merchant named in the indictment is a legal entity capable of owning property is sufficient to meet the requirements that an indictment apprise the defendant of the conduct which is the subject of the accusation."), *rev'd for the reasons stated in the dissent*, 370 N.C. 626, 811 S.E.2d 144 (2018). As the Supreme Court has recently observed, "[t]he law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed." *State v. Rankin*, ___ N.C. ___, ___, 821 S.E.2d 787, 790-91 (2018).

As the trial court observed when rejecting the present argument, the evidence presented at trial that Dillard's was the owner of the personal property in question was plenary. Mr. Mott testified that he personally witnessed Defendant steal the True Religion jeans from the Dillard's at SouthPark. Mr. Nivens similarly testified that he saw Defendant steal at least ten pairs of jeans from the Dillard's that day. The surveillance video footage depicting the theft illustrated Messrs. Mott and Nivens's testimony, and was accepted by the trial court as substantive evidence of the events it depicted. As Officer Galuski noted, the True Religion jeans found in the back seat of the vehicle Defendant was driving that day, along with the other clothing discovered in the trunk of the vehicle, appeared to be new, and still had tags and security sensors attached.

We hold that the evidence presented at trial did not vary materially from the crime charged in the indictment, despite the fact that no specific testimony was elicited at trial that Dillard's, Inc. was an entity capable of owning property. While this "variance [] involves an essential element of the offense charged," *see Henry*, 237 N.C. App. at 323, 765 S.E.2d at 103, to wit – the element "that the personal property was that 'of another,' i.e., someone other than the person or persons accused," *see State v. Price*, 170 N.C. App. 672, 673, 613 S.E.2d 60, 62 (2005), in the present case, "we cannot see how [D]efendant was misled as to the ownership of the property in question or in any way hampered in his defense," *see Hall*, 57 N.C. App. at 548, 291 S.E.2d at 876. Accordingly, we overrule this argument.

B. Business Record

Defendant next argues that the trial court erred by allowing the property control sheet filled out by Detective Lindsey to be entered into evidence as substantive evidence of the value of the property taken from Dillard's. Specifically, Defendant contends that the trial court committed plain error in allowing this document to be introduced into evidence because it contains hearsay evidence offered for the truth of the matter asserted therein, without falling under any exception to the prohibition against hearsay evidence. We disagree.

In general, "[t]he admissibility of evidence at trial is a question of law and is reviewed *de novo*." *State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815

(2010) (citation omitted). However, "[u]npreserved error . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred . . . [that] had a *probable* impact on the jury's finding[.]" *Id.* at 518, 723 S.E.2d at 334 (internal marks and citation omitted) (emphasis added).

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c) (2017). Rule 803(6) of the North Carolina Rules of Evidence, however, "establishes an exception to the general exclusion of hearsay for business records." *State v. Jackson*, 229 N.C. App. 644, 649, 748 S.E.2d 50, 55 (2013). Business records are admissible under Rule 803(6) if they are

> (1) . . . a record of acts, events, or conditions, (2) . . . made at or near the time of the act, event, condition, (3) . . . by a person with knowledge, (4) . . . kept in the regular course of business, (5) . . . [in] the regular practice of that business to make such [] record[s], and (6) such is shown by the testimony of the custodian or other qualified witness.

CIT Group/Commercial Servs., Inc. v. Vitale, 148 N.C. App. 707, 708, 559 S.E.2d 275, 276 (2002) (internal marks and citation omitted). Business records thus need not be "authenticated by the person who made them." *Jackson*, 229 N.C. App. at 650, 748 S.E.2d at 55 (internal marks and citation omitted).

Defendant cites this Court's decision in *State v. Harper*, 96 N.C. App. 36, 384 S.E.2d 297 (1989), in support of his argument that the property control sheet prepared by Detective Lindsey was not admissible as a business record. This Court has observed that

> [t]he underlying theory behind excluding hearsay observations of police officers at the scene of the crime is that they may not be as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

McLean, 205 N.C. App. at 251, 695 S.E.2d at 816 (citing *Harper*, 96 N.C. App. at 40, 384 S.E.2d at 299). *Harper* held that "the notes of a non-testifying, undercover officer summarizing alleged drug transactions with a defendant were . . . inadmissible [as public records.]" *Id.* Likewise, the Supreme Court has held that a defendant's exculpatory statements contained in a police report are inadmissible as public records. *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988).

That said, the Supreme Court has more recently held that records prepared by the State Bureau of Investigation ("SBI") are admissible as business records despite being prepared in an investigative context so as long they reflect "purely ministerial observations." *State v. Forte*, 360 N.C. 427, 437, 629 S.E.2d 137, 144 (2006) (internal marks omitted). The Supreme Court in *Forte* noted that such "records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse." *Id.* at 435, 629 S.E.2d at 143.

The Supreme Court went on to explain that documents potentially admissible either as business records or public records may only be admitted as business records if they are admissible as public records too. *Id.* at 436-37, 629 S.E.2d at 144. Nevertheless, the Supreme Court held that reports prepared by the SBI were admissible both as business records *and* as public records because they "concern routine, nonadversarial matters." *Id.* at 437, S.E.2d at 144.

Our Court has similarly held that records from the National Crime Information Center ("NCIC") related to the possession and ownership of firearms and the serial numbers of these firearms, including whether they have been reported stolen, are admissible as business records under Rule 803(6) of the North Carolina Rules of Evidence. *State v. Sneed*, 210 N.C. App. 622, 629-31, 709 S.E.2d 455, 460-62 (2011). In *Sneed*, we reasoned that admission of NCIC records as business records and allowing their authentication by members of local law enforcement who may routinely *use* the NCIC database but who do not routinely *create* the records in the NCIC database "was proper because 'evidence showed the regularity of the preparation of the records and reliance on them by their preparers or those for whom they are prepared.'" 210 N.C. App. at 631, 709 S.E.2d at 461-62 (quoting *Cooper v. Commonwealth*, 54 Va. App. 558, 568, 680 S.E.2d 361, 366 (2009) (quoting *Frye v. Commonwealth*, 231 Va. 370, 387, 345 S.E.2d 267, 279-80 (1986))) (internal marks omitted).

We hold that the trial court did not err, much less plainly err, in allowing the property control sheet prepared by Detective Lindsey to be introduced as substantive evidence of its contents because this document falls within the business records exception to the prohibition against hearsay. Detective Lindsey testified that he prepared the document himself; that the document was prepared for the property that was seized from the vehicle Defendant was driving before it was placed in inventory at the Pineville Police Department; that it was his regular practice as an officer with the Pineville Police Department to prepare these documents; and that the contents of the document regarding the value of the True Religion jeans were based on the prices listed on the tags on the clothing he retrieved from the vehicle Defendant was driving. Detective Lindsey's testimony based on his personal knowledge of the contents of the document and his knowledge of how the document and other similar documents are created and maintained by the Pineville Police Department laid the foundation for the introduction of the document as a business record and authenticated the document. *See* N.C. Gen. Stat. § 8C–1, Rule 803(6) (2017). We hold that this evidence "showed the regularity of the preparation of the record[] and reliance on [it] by the[] preparer[] or those for whom [it] [was] prepared," as in *Sneed*. 210 N.C. App. at 631, 709 S.E.2d at 461-62. Accordingly, we overrule Defendant's argument that the trial court erred by allowing the property control

sheet filled out by Detective Lindsey to be entered into evidence as substantive evidence of the value of the property taken from Dillard's.

III. Conclusion

We hold that Defendant has failed to demonstrate error.

NO ERROR.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).