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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-487

Filed: 7 January 2020

Robeson County, No. 17CRS052801

STATE OF NORTH CAROLINA

v.

BOBBY ALAN LOCKLEAR, Defendant.

Appeal by Defendant from judgment entered 11 December 2018 by Judge Robert F. Floyd in Robeson County Superior Court. Heard in the Court of Appeals 13 November 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Robert C. Ennis, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant.*

BROOK, Judge.

Bobby Alan Locklear (“Defendant”) appeals from judgment entered upon plea of guilty to misdemeanor injury to personal property. Defendant claims the trial court lacked jurisdiction to enter judgment against him because the indictment was fatally defective. Defendant further argues the trial court erred in accepting his plea

because the factual basis underlying the offense was insufficient. For the following reasons, we uphold the judgment of the trial court.

I. Procedural and Factual History

On 4 December 2017, a grand jury indicted Defendant on four counts of felony discharging certain barreled weapons or a firearm into occupied property, four counts of felony conspiracy to commit a felony, and one count of misdemeanor injury to personal property. On 10 December 2018, Defendant pleaded guilty to misdemeanor injury to personal property for damage to the home of Billie Hammonds, and the State dismissed his other charges. Defendant was sentenced to 120 days' imprisonment, suspended upon 12 months of supervised probation.

Defendant filed a notice of appeal *pro se* on 20 December 2018 but failed to serve his notice of appeal on the district attorney. N.C. R. App. P. 4. Appeal from a final judgment entered upon a plea of guilty lies of right with this Court under N.C. Gen. Stat. §§ 15A-1444(a2)(1)-(3) and 7A-27(b) (2017). Appellate counsel was appointed on 8 January 2019, and Defendant filed a petition for writ of certiorari. The State responded and filed a motion to dismiss the appeal, arguing Defendant's appeal should be dismissed because this Court does not have jurisdiction to hear Defendant's claim absent our granting Defendant's petition for writ of certiorari.

This Court has discretion to grant a petition for writ of certiorari and hear an appeal, and we exercise that discretion here. *See State v. McKoy*, 171 N.C. App. 636,

638, 615 S.E.2d 319, 320 (2005) (“While this Court cannot hear [a] defendant’s direct appeal [for failure to comply with Rule 4], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*.”). Having granted Defendant’s petition, we necessarily deny the State’s motion to dismiss.

## II. Analysis

On appeal, Defendant makes two arguments: first, the indictment charging him with injury to personal property was fatally defective because the injured property was real property and not personal property; and second, Defendant’s plea was unsupported by a sufficient factual basis.

### A. Sufficiency of Indictment

We review the issue of the sufficiency of an indictment under a *de novo* standard of review. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citation omitted). “Under a *de novo* review, th[is] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and marks omitted).

Defendant argues the trial court lacked jurisdiction to accept his guilty plea for injury to personal property because the indictment was facially invalid. However, we conclude Defendant’s argument on appeal is more accurately construed as one of

fatal variance, not of fatal defect, and Defendant did not properly preserve the issue for appellate review.

A fatal defect in an indictment arises when the indictment fails on its face to confer subject matter jurisdiction on the trial court. *See State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). An indictment “for a statutory offense, following substantially the language of the statute, is sufficient if it charges the essential elements of the offense in a plain, intelligible and explicit manner.” *State v. Helms*, 247 N.C. 740, 742, 102 S.E.2d 241, 243 (1958). However, “[o]ur Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense.” *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003). Since a fatally defective indictment raises a jurisdictional deficiency, the indictment may be challenged at any time—even for the first time on appeal. *See id.*

A fatal variance, by contrast, occurs when the evidence introduced at trial does not match the facts alleged in the indictment as to a material element of the crime charged. *See State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102-03 (2014). While an alleged defect in an indictment may be raised at any time, a fatal variance may not because it is not a jurisdictional defect. *See State v. Hooks*, 243 N.C. App. 435, 442, 777 S.E.2d 133, 139 (2015). If a fatal variance claim is not raised at trial, it is waived. *Id.* Further, where—as here—Defendant pleads guilty rather than

proceeding to trial, he may not argue for a fatal variance because there was no evidence produced at trial. Instead, Defendant must—as here—challenge the factual basis for the plea.

Injury to personal property is defined as follows: “[i]f any person shall wantonly and willfully injure the personal property of another, causing damage in an amount in excess of two hundred dollars (\$200.00), he shall be guilty of a Class 1 misdemeanor.” N.C. Gen. Stat. § 14-160(b) (2017). In order to be sufficient, the indictment must allege all of the elements of injury to personal property and also contain an allegation as to the owner or person in lawful possession of the stolen property. *State v. Lilly*, 195 N.C. App. 697, 701, 673 S.E.2d 718, 721 (2009).

Injury to real property is defined, in part: “[i]f any person shall willfully and wantonly damage, injure, or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a Class 1 misdemeanor.” N.C. Gen. Stat. § 14-127 (2017). There is no requirement, as opposed to injury to personal property, that the indictment contain the owner or lawful possessor’s name of the property. *See State v. Spivey*, 368 N.C. 739, 744, 782 S.E.2d 872, 875 (2016). However, the indictment must identify the “specific parcel of real property” the defendant is accused of injuring. *Id.*

The indictment here alleged:

[T]he [D]efendant named above unlawfully and willfully did wantonly injure personal property, four bullet holes to

the exterior and interior walls to the residence of 187 McKinnon Rollin Road, Lumberton, N.C., the property of Billie Carol Hammonds. The damage caused was in excess of \$200.00, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

It charged Defendant with injury to personal property.

We conclude the indictment is not fatally defective as to the charge of injury to personal property. It tracks the plain language of the statute and properly identifies the owner of the property—“Billie Carol Hammonds”—which is required to allege injury to personal property and thereby confer subject matter jurisdiction upon the trial court. Moreover, had Defendant been charged with injury to real property, the indictment would have been sufficient because it also follows the language of the statute and properly identifies the specific parcel of real property: “187 McKinnon Rollin Road, Lumberton, N.C.”

Given that the indictment was not fatally defective, Defendant would be left to argue fatal variance in challenging the indictment on appeal. This he cannot do, however, because he entered a plea of guilty. Under our case law, Defendant may then only challenge the trial court’s jurisdiction or the factual basis for the plea.

#### B. Sufficient Factual Basis

Defendant next argues the trial court erred in accepting his guilty plea because there was an insufficient factual basis for the plea. We decline to reach this issue because Defendant did not properly preserve the argument for appellate review.

A plea of guilty is improperly accepted unless the trial judge has first determined that there is a factual basis for the plea. N.C. Gen. Stat. § 15A-1022(c) (2017). The trial court may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. *Id.* This determination may be based upon information including but not limited to the following:

- (1) A statement of the facts by the prosecutor[;]
- (2) A written statement of the defendant[;]
- (3) An examination of the presentence report[;]
- (4) Sworn testimony, which may include reliable hearsay[;]
- (5) A statement of facts by the defense counsel.

*Id.*

In *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), the defendant attempted to challenge the sufficiency of the factual basis of his plea on appeal even though he had neither objected to the State's summary nor argued factual insufficiency before the trial court. *Id.* at 147, 539 S.E.2d at 344. This Court held that the sufficiency issue, "which was not raised before the trial court, [was] therefore not properly before this Court." *Id.*, 539 S.E.2d at 344-45. Likewise, in this case, Defendant did not object to the State's summary of the facts underlying the offense nor did he argue factual insufficiency before the trial court. He therefore has not preserved this issue for appellate review. *See* N.C. R. App. P. 10(b)(1).

STATE V. LOCKLEAR

*Opinion of the Court*

III. Conclusion

For the above reasons, we affirm Defendant's conviction for injury to personal property.

AFFIRMED.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).