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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-416

No. COA20-342

Filed 3 August 2021

Wilkes County, Nos. 18 CRS 52377, 52381, 52383, 19 CRS 64-67

STATE OF NORTH CAROLINA

v.

ADAM WAYNE ELLER, Defendant.

Appeal by Defendant from judgments entered 11 September 2019 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Adam Wayne Eller ("Defendant") appeals from judgments entered following a jury trial finding him guilty of violation of a domestic violence protective order ("DVPO"), felony larceny of a motor vehicle, two counts of felony breaking and entering, felony breaking and entering with intent to terrorize or injure, injury to real property, injury to personal property, felony hit and run causing injury, assault on a

female causing physical injury, and assault with a deadly weapon causing physical injury. On appeal, Defendant contends the trial court erred in four ways: (1) by denying his motion to dismiss the charge of felony larceny of a motor vehicle; (2) by denying his motion to dismiss the charge of breaking and entering with intent to commit a felony therein; (3) by entering judgment on two additional habitual breaking and entering enhancements; and (4) in classifying two counts of habitual breaking and entering as Class E felonies.

I. FACTS & PROCEDURAL HISTORY

¶ 2 The evidence presented at trial tends to show the following:

¶ 3 Defendant entered the home of his mother, Gaynell Eller ("Ms. Eller"), in violation of a DVPO on 8 September 2018. Ms. Eller described Defendant as "agitated" and "not very calm" at the time. Defendant told Ms. Eller he was going to see his child, Wayne,[1] who lived with his mother and her parents. Defendant showered and spent approximately 30 minutes at his mother's house. Defendant took the keys to Ms. Eller's 2005 Honda Civic without permission and without telling her he was leaving.

¶ 4 Later that night, Defendant drove to Wayne's maternal grandparents' house, kicked in the front door and entered the home. Wayne's mother and grandmother

[1] A pseudonym.

called 911 and forced Defendant outside. Defendant got back into the Honda and did "doughnuts" in the yard, tearing up the grass and knocking over a cement picnic table. He then drove up the driveway and the maternal grandmother of Defendant's child followed in her Buick LeSabre. Defendant stopped his Honda near the end of the driveway, put the car in reverse, "stepped on the gas," and "plowed into" the front of the Buick, causing the airbags to deploy. Defendant left his vehicle, approached the Buick wielding a tire iron, and punched the maternal grandmother in the face, leaving her with bruises and abrasions. He then jumped up and down on the hood of her car. The mother of Defendant's child caught up to the scene, took the keys to the Honda, and threw them into tall grass across the road. Defendant knocked her down an embankment and punched and stomped on her.

¶ 5 Defendant fled the scene and police could not locate him when they arrived. Defendant hid from police in an abandoned barn for weeks until he was hospitalized for treatment of a brown recluse spider bite.

¶ 6 At trial, the jury saw five photographs depicting the front, rear, and side of the Honda after Defendant rammed it into the Buick. The responding officer also testified about the preexisting and new damage to the Honda. Defendant was found guilty by jury verdict of felony larceny of a motor vehicle and felony breaking and entering with intent to commit a felony or larceny therein, along with other charges. Defendant pleaded guilty to several sentencing enhancements including two habitual

breaking and entering status enhancements. The trial court arrested verdicts on the DVPO violations and felony breaking and entering with intent to terrorize or injure and sentenced Defendant to an active term of 132 to 202 months in prison. Defendant appeals.

II. ANALYSIS

1. Insufficient Evidence of Value of Vehicle

¶ 7 Defendant contends that the State did not present sufficient evidence that the value of the Honda exceeded $1,000 at the time of the offense and that the trial court erred in denying his motion to dismiss the charge of felony larceny of a motor vehicle. After careful review, we agree.

¶ 8 We review a trial court's order denying a motion to dismiss for insufficient evidence *de novo*. *State v. Moor*e, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted). We must view the evidence in the light most favorable to the State to determine whether the record contains substantial evidence of each essential element of the crime and of the identity of the defendant as the perpetrator. *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (citation omitted).

¶ 9 Our General Statutes provide the "[l]arceny of goods of the value of more than one thousand dollars . . . is a Class H felony." N.C. Gen. Stat. § 14-72(a) (2019). A

misdemeanor larceny elevates to a felony larceny if the value of the goods stolen exceeds $1,000. *See State v. McRae*, 231 N.C. App. 602, 604, 752 S.E.2d 731, 733 (2014) (citations omitted). "Therefore, the value of the goods stolen is an integral element of the crime of felony larceny." *Id.* (citation omitted).

¶ 10 For purposes of the larceny statute, "value" means fair market value. *State v. Davis*, 198 N.C. App. 146, 151, 678 S.E.2d 709, 714 (2009). Fair market value is the item's reasonable selling price at the time and place of the theft, and in the condition in which it was when stolen. *State v. Redman*, 224 N.C. App. 363, 366, 736 S.E.2d 545, 549 (2012). Direct proof of value is not required so long as the jury is not forced to speculate. *Davis*, 198 N.C. App. at 151-52, 678 S.E.2d at 714. Value may be established by the car owner's opinion of the fair market value of the vehicle. *See, e.g., State v. Osborne*, 149 N.C. App. 235, 243-44, 562 S.E.2d 528, 534-35 (2002).

¶ 11 Here, the State only introduced evidence of the damage to the vehicle, not its fair market value at the time of the larceny. The responding officer described the collision between the Buick and Honda as a "significant impact" and estimated the damage to the Honda was $3,500. Ms. Eller affirmed this estimate as "reasonable." The State introduced several photographs of the vehicle *after* Defendant had damaged it, which included preexisting damage to the right front fender of the car. But the State presented no evidence regarding the value of the 13-year-old Honda Civic at the time of the offense. On this record, we hold the jury was impermissibly

forced to speculate as to the fair market value of the vehicle based on principles of depreciation and the condition of the Honda before the collision.

¶ 12 We are persuaded by Defendant's reliance on this Court's reasoning in *State v. Gorham*, 262 N.C. App. 483, 487, 822 S.E.2d 313, 315 (2018), that the estimated repair cost may not substitute for evidence demonstrating the fair market value of an item. In that case, this Court contrasted the felony larceny statute based on the fair market value of the stolen vehicle with felony larceny under N.C. Gen. Stat. § 14-72.8, which makes larceny of a motor vehicle a Class I felony "if the *cost of repairing the motor vehicle* is one thousand dollars . . . or more." *Id.* at 487, 822 S.E.2d at 315. We reasoned that "cases addressing larceny of property with a fair market value over $1,000.00 . . . are not directly analogous on the evidence required to show the value of 'property damage.'" *Id.* Therefore, the issue of damage to property "is distinct from the fair market value of an item of property." *Id.*

¶ 13 The State notes that during the charge conference defense counsel agreed there was not likely "any factual dispute [the Honda] was more than $1,000" and declined to have the jury instructed on misdemeanor larceny, instead opting for the lesser-included offense of unauthorized use of a motor vehicle. But the State does not argue that this was a binding admission barring Defendant's motion to dismiss the charge.

¶ 14 Viewing the evidence in the light most favorable to the State, the State failed to present sufficient evidence of the value of the Honda at the time of the offense, so

we hold the trial court erred in denying Defendant's motion to dismiss. Accordingly, we vacate Defendant's conviction for felony larceny of a motor vehicle and remand for entry of judgment on the lesser-included misdemeanor larceny and resentencing. *See State v. Parker*, 146 N.C. App. 715, 718, 555 S.E.2d 609, 611 (2001) (vacating the defendant's conviction for felony possession of stolen property and remanding for entry of judgment on the lesser-included misdemeanor because the State failed to provide sufficient evidence of the value of the stolen property); *see also State v. Bacon*, 254 N.C. App. 463, 473, 803 S.E.2d 402, 410 (2017) (vacating and remanding on the lesser-included offense).

2. Evidence of Intent to Commit Larceny

¶ 15 Defendant also asserts that the State did not present substantial evidence that Defendant intended to commit larceny of the Honda at the time he entered Ms. Eller's home and that the trial court erred in denying his motion to dismiss the charge of breaking and entering with intent to commit a felony or larceny therein. We disagree.

¶ 16 "Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2019). A defendant's intent to commit the felony or larceny must exist at the time of the entrance. *State v. Ly*, 189 N.C. App. 422, 430, 658 S.E.2d 300, 306 (2008). "[I]ntent of the defendant at the time of breaking or entering *may be inferred from the acts he committed subsequent to his breaking or entering the building*." *State v.*

Williams, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992) (citation omitted) (emphasis added).

¶ 17 Here, the trial court correctly instructed the jury they had to determine "that *at the time of the breaking or entering*, the defendant intended to commit . . . the felony larceny therein." (emphasis added). The trial court also instructed jurors on the lesser-included misdemeanor breaking and entering.

¶ 18 The following evidence, viewed in the light most favorable to the State, was sufficient for a juror to infer that Defendant had the intent to steal Ms. Eller's car keys, and ultimately her car, at the time he entered her home: (1) upon arriving at his mother's house, Defendant told Ms. Eller he wanted to see his son Wayne; (2) Defendant was "agitated" and "not very calm" when he entered his mother's home; (3) Defendant showered and hung around his mother's home for 30 minutes; (4) he did not have permission to take his mother's keys or use her car; (5) Defendant left his mother's home without telling her; (6) he stole his mother's Honda Civic; (7) Defendant used the car to damage property and injure people; and (8) Ms. Eller told a sheriff's deputy that she believed Defendant entered her home in order to steal her keys.

¶ 19 The mere possibility that Defendant formed the intent to steal the keys while in the shower or when he saw the keys as he left does not preclude the charge from

being submitted for the jury's consideration. We hold the trial court did not err in this respect.

3. Clerical Errors in Habitual Breaking and Entering Status and Class

¶ 20 Defendant argues we should vacate the trial court's entry of judgment on two additional habitual breaking and entering statuses in 19 CRS 64 and 19 CRS 66. In the alternative, Defendant would have us consider these clerical errors and remand the case for the trial court to remove the redundant judgments.

¶ 21 Our General Statutes provide: "Any person who has been convicted of or pled guilty to one or more prior felony offenses of breaking and entering . . . is guilty of the status offense of habitual breaking and entering." N.C. Gen. Stat § 14-7.26 (2019). A defendant who has attained the status of habitual breaking and entering shall be *sentenced* as a Class E felon. *Id.* at § 14-7.31(a) (emphasis added).

¶ 22 "Being an habitual felon is not a crime but is a status. The status itself, standing alone, will not support a criminal sentence." *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 722 (1988); *see also* Jamie Markham, *Habitual Breaking & Entering*, UNC Sch. of Gov't (Nov. 22, 2011), https://nccriminallaw.sog.unc.edu/habitual-breaking-and-entering/ ("The habitual [breaking and entering] status offense is similar operationally to the habitual felon law. Like being [an] habitual felon, it is a status, not a crime—a person cannot be prosecuted simply for having a prior covered felony."). A court may not sentence a

defendant upon an habitual status alone. *State v. Taylor*, 156 N.C. App. 172, 173, 576 S.E.2d 114, 115 (2003).

¶ 23 Defendant compares this case to *Taylor* in order to urge us to vacate his convictions in 19 CRS 64 and 19 CRS 66. That case is readily distinguishable. In *Taylor*, the trial court entered judgment on the defendant's habitual felon status and sentenced the defendant on that status alone. 156 N.C. App. at 173, 576 S.E.2d at 115. Our court reasoned "a trial court's entry of judgment *and sentence* on a 'non crime' is not a clerical error[,]" *id.* at 176, 576 S.E.2d at 117 (emphasis added); it is a prejudicial, judicial error. We vacated the defendant's sentences because they were based solely on his attainment of habitual felon status. *Id.* at 173, 576 S.E.2d at 115.

¶ 24 Where, however, a defendant is correctly sentenced and the error in the judgment does not prejudice the defendant, it "constitutes, at most, a correctable clerical error." *State v. Eaton*, 210 N.C. App. 142, 156, 707 S.E.2d 642, 651 (2011); *see also State v. McBride*, 173 N.C. App 101, 109-11, 618 S.E.2d 754, 760-61 (2005) (distinguishing from *Taylor* and remanding for correction of clerical error when the trial court entered judgment and commitment for the defendant under the case number assigned to the habitual felon indictment instead of the case numbers for the underlying offenses).

¶ 25 A clerical error is "an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial

reasoning or determination." *State v. Joiner*, 273 N.C. App. 611, 615, 849 S.E.2d 106, 110 (2020) (quoting *State v. Gillespie*, 240 N.C. App. 238, 245, 771 S.E.2d 785, 790 (2015)). When uncertain as to whether an error is clerical, our appellate courts "err on the side of caution and resolve the discrepancy in the defendant's favor." *State v. Jarman*, 140 N.C. App. 198, 203, 535 S.E.2d 875, 879 (2000) (cleaned up).

¶ 26 This Court has held the following constitute clerical errors: a designation of the defendant as an habitual felon instead of as an habitual breaking and entering offender, *Joiner*, 273 N.C. App. at 615, 849 S.E.2d at 110; an indictment charging a defendant with the wrong class of felony, *Eaton*, 210 N.C. App. at 156, 707 S.E.2d at 651; a recording of the wrong prior record level for felony sentencing, *State v. Murphy,* 193 N.C. App. 236, 239, 666 S.E.2d 880, 883 (2008); *see also State v. McIlwaine*, 169 N.C. App. 397, 401-02, 610 S.E.2d 399, 402 (2005); and filing a judgment under the habitual felon case number instead of the substantive offense number, *McBride*, 173 N.C. App. at 110, 618 S.E.2d at 760-61.

¶ 27 Here, the trial court entered judgment on habitual breaking and/or entering in 18 CRS 52377 and 18 CRS 52381. It then entered repetitive, separate judgments for habitual breaking and entering enhancements as file numbers 19 CRS 64 and 19 CRS 66 on the "Additional File No.(s) and Offense(s)" form:

STATE OF NORTH CAROLINA

File No. 18CRS052381 53

WILKES County

In The General Court Of Justice
☐ District ☒ Superior Court Division

STATE VERSUS

Name Of Defendant
ELLER,ADAM,WAYNE

ADDITIONAL FILE NO.(S) AND OFFENSE(S)

NOTE: *Use this page in conjunction with all NCAOC judgment or probationary forms, to list additional offenses of conviction, deferred prosecution, or conditional discharge addressed in the court's order. There are no A, B, C, D, or other variations of this form, so this page can be used to continue an offense list from any of the related forms, for any date(s) of offense or conviction.*

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
18CRS052383	51	FEL HIT/RUN INJURY RV 1	09/08/2018	20-166(E)	F	H	
19CRS000064	51	HABITUAL BREAKING/ENTERING	09/08/2018	14-7.26	F	E	
19CRS000065	51	HABITUAL MISDEMEANOR ASSAULT	09/08/2018	14-33.2	F	H	
19CRS000066	51	HABITUAL BREAKING/ENTERING	09/08/2018	14-7.26	F	E	
19CRS000067	51	HABITUAL MISDEMEANOR ASSAULT	09/08/2018	14-33.2	F	H	

The trial court effectively entered judgment on four counts of habitual breaking and entering instead of the two counts on which the jury had found him guilty. The record does not indicate that the trial court intended to enter additional or separate judgments and sentences on the two extra, erroneously listed counts.[2] Defendant has not alleged that the entry of the additional habitual felon statuses impacted his sentence, he has not otherwise shown prejudice by these entries, and the trial court imposed an appropriate sentence based on Defendant's convictions. Thus, the error was not judicial or prejudicial to Defendant, so we decline to vacate the judgments.[3]

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[2] During sentencing, the trial court judge stated, "on the jury finding the Defendant guilty of felony breaking or entering, the Court does find the enhancement in 19 CRS 64 *which takes it from a Class H felony to a Class E felony for sentencing purposes*," and "the Court does find the . . . habitual breaking or entering enhancement . . . from Class H to a Class E for sentencing purposes." (emphasis added).

[3] The State contends that Defendant is without a right to appeal these errors in the judgment. Because we hold these errors are clerical, not prejudicial in nature, the State's argument is without merit.

¶ 28 Where an error is clerical, we remand the case to the trial court for correction of the judgment. *See State v. Hauser*, 271 N.C. App. 496, 503, 844 S.E.2d 319, 325 (2020) ("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.") (quotation marks and citation omitted)); *Eaton*, 210 N.C. App. at 156, 707 S.E.2d at 651 (remanding for "correction of the clerical error in the judgment which identifies" the offense by the wrong felony class). Accordingly, on remand, the trial court should correct the "Additional File No.(s) and Offense(s)" form to remove the two additional habitual breaking and entering judgments.

¶ 29 Defendant further argues the trial court erred by designating two counts of habitual breaking and entering as the wrong felony class. In its judgment, the trial court designated Defendant's breaking and entering convictions, file numbers 18 CRS 52377 and 18 CRS 52381, as Class E felonies based on the habitual status enhancements. The trial court should have entered the judgments as Class H felonies, enhanced to Class E solely for sentencing purposes. Because the trial court nonetheless appropriately sentenced Defendant and because the error was clerical for the same reasons outlined above, we also remand to the trial court to correct the felony class designations of the breaking and entering convictions in its judgment.

III. CONCLUSION

¶ 30 For the foregoing reasons, we hold the trial court erred by denying Defendant's motion to dismiss the charge of felony larceny. We vacate the judgment on this conviction and remand for entry of judgment and resentencing for misdemeanor larceny. On remand, the trial court should also correct its clerical errors with regard to Defendant's habitual breaking and entering statuses and felony conviction classes. Defendant has failed to otherwise demonstrate reversible error.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).