IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-328

No. COA21-277

Filed 3 May 2022

Duplin County, Nos. 17CRS52248-50

STATE OF NORTH CAROLINA

v.

WILLIAM TAYLOR, Defendant.

Appeal by defendant from judgment entered 15 April 2019 by Judge Leonard L. Wiggins in Duplin County Superior Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling P. Rozear, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant William Taylor pled guilty pursuant to *Alford* to charges for larceny after breaking and entering, safecracking, felony breaking and entering, and injury to personal property. Defendant petitions this Court to issue writ of certiorari because he failed to designate the judgment from which he is taking appeal. The State filed a motion to dismiss. Defendant raises three issues on appeal: (1) the trial

court lacked subject matter jurisdiction based on a fatally defective indictment; (2) the trial court erred by accepting his guilty plea absent a sufficient factual basis; and (3) the trial court failed to follow the procedures established in N.C. Gen. Stat. § 15A-1024 during sentencing. We discern no error in the trial court's judgment.

I. Background

¶ 2 On 26 November 2018, defendant was indicted on two counts of felony breaking and entering, and one count each of larceny after breaking and entering, possession of stolen goods, safecracking, injury to personal property, for having attained habitual breaking and entering status and having attained habitual felon status.

¶ 3 On 15 April 2019, defendant pled guilty pursuant to *State v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), to two counts of felony breaking and entering, one count of larceny after breaking and entering, one count of injury to personal property, one count of safecracking, and attaining habitual felon status. In exchange for defendant's guilty plea, the State dismissed the charges of possession of stolen goods and having attained habitual breaking and entering status.

¶ 4 The trial court accepted defendant's guilty plea and found defendant to be a prior record level five for felony sentencing purposes. The trial court imposed a sentence of 111 to 146 months of imprisonment for one count of breaking and entering, followed by a consecutive sentence of 89 to 119 months for the remaining offenses which were all consolidated.

¶ 5 On 24 April 2019, defendant filed written notice of appeal. On 28 May 2019, defendant filed a motion for appropriate relief ("MAR") in the trial court, followed by an amended MAR on 28 June 2019. On 17 December 2020, the trial court denied defendant's MAR on grounds that the trial court was divested of jurisdiction due to defendant's notice of appeal.

¶ 6 On 18 May 2021, defendant filed the record on appeal for this case. On 17 June 2021, defendant filed his appellant brief along with a petition for writ of certiorari pursuant to N.C.R. App. P. 21 and N.C. Gen. Stat. § 15A-1444(e). The State filed its appellee brief, a response to defendant's petition for writ of certiorari, and a motion to dismiss defendant's appeal.

II. Jurisdiction

¶ 7 As acknowledged by defendant, he has no right of appeal because he pled guilty pursuant to *Alford* and because he failed to properly identify in his notice of appeal the judgments from which he was convicted in this case. § 15A-1444 (listing issues defendant who pled guilty may appeal as a matter of right); N.C.R. App. P. 4(b) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken . . . ."). A failure to enter notice of appeal in compliance with Rule 4 deprives this Court of jurisdiction. "A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

¶ 8 Defendant's brief asserts a claim that the trial court lacked subject matter jurisdiction over one of the charges against him due to a facially defective indictment. Defendant also challenges the sufficiency of the factual basis for three of the charges he pled guilty to. Finally, defendant asserts a claim that the trial court violated § 15A-1024 when it imposed a sentence that materially differed from that which the parties agreed to in the plea arrangement, without first informing defendant of his right to withdraw his plea and have the case continued.

¶ 9 Defendant acknowledges review of these issues is contingent upon this Court granting a writ of certiorari, in the event we find his notice of appeal to be defective. *See, e.g., State v. Collins*, 221 N.C. App. 604, 605-06, 727 S.E.2d 922, 924 (2012) (granting certiorari to review factual basis for guilty plea and sufficiency of the indictment after guilty plea); *State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011) (granting certiorari to review compliance with § 15A-1024).

¶ 10 Regarding his notice of appeal, "a mistake in designating the judgment . . . should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443 (2006) (citations omitted) (emphasis in original). Here, defendant appeals from a judgment which included a conviction of "Felony Habitual Breaking and Entering a Dwelling." While defendant was convicted of several offenses subject to two judgments, he was

not convicted of felony habitual breaking and entering. The proper judgment cannot be fairly inferred from defendant's written notice of appeal. Thus, defendant's notice of appeal does not comply with the requirements of Rule 4, and we necessarily grant the State's motion to dismiss. *See State v. Hammonds*, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012).

¶ 11 "To meet the pleading requirements for a petition for a writ of certiorari, a party must demonstrate: (1) no appeal is provided at law; (2) a *prima facie* case of error below; and (3) merit to its petition." *House of Raeford Farms, Inc. v. Raeford*, 104 N.C. App. 280, 284, 408 S.E.2d 885, 888 (1991) (*purgandum*). In our discretion, we grant our writ of certiorari pursuant to N.C.R. App. P. 21 and § 15A-1444(e) to permit review.

III. Defective Indictment

¶ 12 First, defendant argues the trial court lacked subject matter jurisdiction over the charge of injury to personal property because the indictment was facially invalid. Specifically, he contends that because the indictment alleges that he damaged a door, which is real property and not personal property, the indictment fails to allege an essential element of the offense it purports to charge. We disagree.

¶ 13 "According to well-established North Carolina law, a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Lofton*, 372 N.C. 216, 221, 827 S.E.2d 88, 91 (2019) (citation and quotation marks

omitted). "If the charge is a statutory offense, the indictment is sufficient when it charges the offense in the language of the statute." *Collins*, 221 N.C. App. at 610, 727 S.E.2d at 926 (citation and quotation marks omitted). Generally, an indictment "is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *State v. Ellis*, 368 N.C. 342, 345, 776 S.E.2d 675, 677 (2015) (citation and quotation marks omitted). The purposes of an indictment are two-fold: 1) "to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked;" and 2) "to put the defendant on reasonable notice so as to enable him to make his defense." *Collins*, 221 N.C. App. at 610, 727 S.E.2d at 926 (*purgandum*). "We review the issue of insufficiency 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).

¶ 14 "The essential elements of injury to the personal property of another are (1) that personal property was injured; (2) that the personal property was that of another, . . . (3) that the injury was inflicted wantonly and willfully; and (4) that the injury was inflicted by the person or persons accused." *State v. McNair*, 253 N.C. App. 178, 197, 799 S.E.2d 631, 644 (2017) (*purgandum*). The indictment charging defendant with injury to personal property contains the following allegation:

> [T]he jurors for the State upon their oath present that on

> or about the date of offense shown and in Duplin County the defendant named above unlawfully and willfully did wantonly injure personal property, *the second story back door of 521 Landfill Road*, Rose Hill, North Carolina, the property of Reginald Kenan. The damage caused was in excess of $200.00.

¶ 15 The State cites this Court's decision in *State v. Locklear*, 269 N.C. App. 385, 836 S.E.2d 787, 2020 N.C. App. LEXIS 28 (unpublished), as a direct rebuttal to defendant's argument. *Locklear* is an unpublished opinion and is not controlling authority. Nonetheless, we find its reasoning persuasive, and apply it here.

¶ 16 In *Locklear*, this Court differentiated between a fatal defect in an indictment and a fatal variance. "A fatal defect in an indictment arises when the indictment fails on its face to confer subject matter jurisdiction on the trial court." *Id.* at *3 (citation omitted). "Since a fatally defective indictment raises a jurisdictional deficiency, the indictment may be challenged at any time—even for the first time on appeal." *Id.* at *4.

> 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. 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. If a fatal variance claim is not raised at trial, it is waived. 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.

Id. (citations omitted).

¶ 17 Here, the indictment contains a plain and concise statement that tracks the language of the statute (§ 14-160), alleges all the essential elements of the crime charged, and provides reasonable notice as to enable a defense. As our Supreme Court observed in *Ellis*, "a criminal pleading purporting to charge the commission of a property-related crime like injury to personal property is not facially invalid as long as that criminal pleading adequately alleges the existence of at least one victim that was capable of owning property . . . ." 368 N.C. at 347, 776 S.E.2d at 678-79. The State's offer of proof, a door, is a variance from the core allegations of the criminal complaint, but that does not render the indictment itself defective. Defendant's argument is essentially reduced to that of fatal variance. Thus, the indictment was not fatally defective, and defendant's challenge to the trial court's jurisdiction on this basis necessarily fails. Moreover, because defendant pled guilty pursuant to *Alford*, he is barred from raising the issue of fatal variance on appeal.

IV. Factual Basis for Guilty Plea

¶ 18 Next, defendant argues the trial court erred in accepting his guilty plea when there was not a sufficient factual basis to support guilty pleas to three of the charged crimes: larceny, safecracking, and injury to personal property.

¶ 19 This issue is not preserved for appellate review, and we decline to address it. *See* N.C.R. App. P. 10(a)(1). Defendant did not object to the State's summary of the factual basis to support his plea. He made no argument before the trial court

challenging the existence of a factual basis to support his plea. Further, he declined to correct the factual basis after it had been offered. This issue was not raised before the trial court, and we decline to extend our writ of certiorari to permit review of this issue on appeal. *See State v. Monroe*, 256 N.C. App. 565, 569, 822 S.E.2d 872, 875 (2017); *State v. Canady*, 153 N.C. App. 455, 458, 570 S.E.2d 262, 264-65 (2002); *State v. Kimble*, 141 N.C. App. 144, 147, 539 S.E.2d 342, 344-45 (2000).

V. Sentencing Procedures

¶ 20 Finally, defendant argues the trial court erred by failing to follow the procedures established in § 15A-1024 during sentencing. We disagree.

¶ 21 While a party must normally object to preserve an issue for appellate review, a defendant need not voice a contemporaneous objection to preserve a non-constitutional sentencing issue for appellate review. *State v. Meadows*, 371 N.C. 742, 747-48, 821 S.E.2d 402, 406 (2018).

¶ 22 Pursuant to § 15A-1024,

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

§ 15A-1024 (2019).

¶ 23 Defendant argues the trial court reversibly erred because he entered into a

plea arrangement with the State, which specifies one consolidated sentence in the presumptive range of 89 to 111 months' imprisonment. Because the trial court imposed a sentence deviating from that plea arrangement, 111 to 146 months' imprisonment for one count of breaking and entering followed by a consecutive sentence of 89 to 119 months for the remaining consolidated charges, the trial court was required to inform defendant of his right to withdraw his plea.

¶ 24 Defendant's argument and interpretation of the plea agreement is not supported by the written transcript of the plea:

> *Subject to the approval of the court*, and in exchange for defendant's plea of guilty to the offenses of: two counts breaking and entering (F), one count of larceny after breaking and entering, one count of safecracking, one count of injury to personal property, and [attaining] habitual felon status, the State shall dismiss charges of (F) [possession of stolen goods] PSG and habitual breaking and entering offender; *ultimate sentencing shall be in the discretion of the court*. *If the court allows*, the parties have agreed to one consolidated sentence in the presumptive range, 89 to 111 months, *in the court's discretion*.

¶ 25 Defendant confirmed, under oath, that the judge read his full plea arrangement, which did not include sentencing terms. After the judge read the plea agreement, defendant declined to ask questions about his case when given the specific opportunity to do so. The written transcript of plea is consistent with the colloquy from the bench. Defendant was on notice that while the parties would advocate for a single consolidated sentence in the presumptive range, 89 months to 111 months

imprisonment, his specific sentencing terms were firmly in the discretion of the trial court per the terms of his written transcript of plea.

VI. Conclusion

¶ 26 For the foregoing reasons, we discern no error in this case.

NO ERROR.

Judge HAMPSON concurs.

Chief Judge STROUD concurs in result only.

Report per Rule 30(e).