

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-801

Filed 17 October 2023

Transylvania County, Nos. 18 CRS 50330-31

STATE OF NORTH CAROLINA

v.

WAYNE HANSEN HSIUNG, Defendant.

Appeal by Defendant from judgments entered 6 December 2021 by Judge Peter B. Knight in Transylvania County Superior Court. Heard in the Court of Appeals 9 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert P. Brackett, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

MURPHY, Judge.

To preserve a challenge to the trial court's decision not to dismiss a juror for cause, the defendant must (1) have exhausted all of his peremptory challenges and (2) attempt to exercise another peremptory challenge after this exhaustion. Defendant failed to properly preserve under the second prong, and we accordingly do not consider the merits of his argument on this issue.

To preserve a request for special jury instructions, the defendant must submit his request to the trial court in writing; however, we may review the trial court's jury

instructions for plain error. Larceny remains a common law crime in North Carolina, but the essential elements of larceny do not require the subject property to have value. Accordingly, the trial court did not err by denying Defendant's request for special jury instructions regarding the value of a baby goat taken from victim's property.

BACKGROUND

Defendant Wayne Hansen Hsiung is an animal rights activist and an attorney licensed in California who appeals from convictions of felonious breaking or entering in violation of N.C.G.S. § 14-54(a) and felonious larceny after breaking or entering in violation of N.C.G.S. § 14-72(b)(2). Complainant Curtis Burnside is the owner of a 15-acre family farmstead, where he breeds and raises goats and chickens primarily for personal consumption. Burnside raises his baby goats in a barn on the ranch, and he occasionally sells these goats to the community.

On 10 February 2018, based on his personal belief that Burnside's goats were being mistreated, Defendant and three others video-streamed their "open rescue" of a baby goat from Burnside's farm on Facebook Live. They entered Burnside's farm, unlatched a gate, and entered the barn. Defendant and the others found a baby goat (referred to by Defendant as "baby goat Rain") which they believed was ill due to its lethargy and white discharge coming from its eye. Defendant took the goat away with him, accidentally dropping his driver's license at some time during these events.

Defendant then gave the goat to an animal rescue that facilitates foster homes and adoptions for animals.

On 11 February 2018, Burnside discovered that the gate was not fastened properly and that a goat was missing. He found Defendant's driver's license and called law enforcement. Both Burnside and law enforcement officers looked online and found a Facebook page, believed to be owned by Defendant, with the video of the livestreamed "rescue." Defendant was charged with felonious breaking or entering under N.C.G.S. § 14-72(a) and felonious larceny after breaking or entering under N.C.G.S. § 14-72(b)(2) in connection with the events.

On 29 November 2021, Defendant's jury trial began. During voir dire, Defendant attempted to challenge a potential juror, Juror Stoll, for cause based on the contention that she was biased against animal rights activists. Prior to this challenge, Defendant had exercised five of his six peremptory challenges. The voir dire of Juror Stoll was as follows:

[DEFENDANT]: Ms. Stoll, do you have any preexisting views about animal advocates or animal farmers strongly, one way or the other?

[STOLL]: Well, I don't understand a lot of it, you know, what -- . . . they're for, what they're against. You know, we take care of animals. And, you know, I have been in -- my family has killed pigs for years. My brother still does for the hams for Christmas, you know.

[DEFENDANT]: Uh-huh. So your family is involved in, a little bit, in animal production?

[STOLL]: My dad always was, yes. And a coworker I work with, she raises pigs to sell. And she raises fish, you know, and she has had goats, you know. And I've had goats over the years, you know. They are fun animals, you know.

[DEFENDANT]: They are.

[STOLL]: It's what you make out of it, you know.

[DEFENDANT]: Sure. And can you just share a little bit more about -- what family member did you say was raising pigs?

[STOLL]: My brother.

[DEFENDANT]: What is your involvement in that, if any?

[STOLL]: My husband goes and helps me sometimes. And my grandson does. You know, he brings all of the boys out and they do it.

....

[DEFENDANT]: And would you say you have a strong opinion about raising animals and production of animals one way or the other?

[STOLL]: No. I mean, I take care of them, gate them. You know, so a dog or cat, you take care of them in the proper way.

....

[DEFENDANT]: And what is your impression of the critics? Are they usually animal rights activists, people in the community?

[STOLL]: Oh, just people. I never had nothing to do with people that are bad.

....

What -- what they do or what their rights are or how they feel about it. You know, I don't know. I think it's maybe a little foolish maybe, but that's not -- that's just my opinion, you know.

[DEFENDANT]: That's fair.

[STOLL]: People mind their business, you know, on both sides, you know.

....

[DEFENDANT]: Do you think you would have a preexisting view of animal rights activists or critics of the industry who, you know --

[STOLL]: A little bit, yes, I guess I do.

[DEFENDANT]: You do? Okay.

[STOLL]: Them not minding their business, you know.

....

I don't think I would be biased. But I don't really know exactly what it's all about yet. So, you know, that -- I mean, you know, it's always that chance, but I don't think I would. I think I just wouldn't say anything, you know.

....

[DEFENDANT]: Do you think you'd have a bias in a case like this involving an animal advocate who removed -- allegedly removed a goat from a farm?

[STOLL]: Yes.

[DEFENDANT]: And if the Judge instructed you that you should try to set your opinion aside, would you have a

difficult time doing that given your prior experiences in animal farming?

[STOLL]: No.

[DEFENDANT]: You think you could if the Judge instructed you?

[STOLL]: Yeah.

. . . .

[DEFENDANT]: So you think you have a bias, but -- which is understandable, given your family business.

[STOLL]: Yeah. But if the Judge asks me to do my best, I got to do my best.

[DEFENDANT]: You can do your best?

[STOLL]: Yes, sir.

. . . .

[DEFENDANT]: And so the question is before you know anything about it, do you think you would have a bias, even if a Judge instructed you, that would prevent you from rendering a fair and impartial verdict?

[STOLL]: I guess I would.

[DEFENDANT]: Yeah? So the answer is yes, then?

[STOLL]: Uh-huh. Yes, sir.

After this exchange, Defendant challenged Juror Stoll for cause based on her alleged bias. The trial court denied this challenge after a colloquy with Juror Stoll:

[COURT]: And the fact that your husband may go and help, your grandchild may go over and help to feed the pigs or

otherwise . . . will that have any effect on your ability to listen to the evidence in this case?

[STOLL]: Yeah, I could listen to the evidence, yes, sir.

[COURT]: Will it have any [e]ffect on your ability to listen to the law as I give you the law?

[STOLL]: No, I could listen to the law.

[COURT]: And do you believe that you could consider the facts as you find those facts to be and apply the law that I will give you to those facts as you find those facts to be in arriving . . . at what you say the verdict in this case should be?

[STOLL]: I would do my best, yes, sir.

. . . .

[COURT]: Do you believe that you could set aside anything you know about or any feelings you have about the raising of pigs and consuming those pigs raised by your brother, I'm not saying you have consumed them, I'm just saying any feelings you have about the fact that he raised them for consumption, could you set aside those feelings during the course of this trial and, like I said, listen to the evidence?

[STOLL]: I would listen to the evidence, yes, sir.

[COURT]: And can you set aside those -- any feelings you have about it, either -- whatever feelings they are and just listen to the evidence without considering any feelings about your -- about the fact that your brother has raised pigs?

[STOLL]: Yeah. I mean, I would do my best, you know. Yes, sir.

[COURT]: I'll deny the motion at this time, then.

Defendant then addressed Juror Stoll again:

[DEFENDANT]: So I will say more general, then, in a case involving animal rights activists, it sounds like even if the Judge instructed you, you feel you would have a bias, is that correct, based on these prior experiences?

[STOLL]: Well, I don't know what the person -- it's criminal, I thought, if they took something, if it's about animal cruelty or if it's about stealing something, you know.

. . . .

Yes. Yes, I guess I would be biased against it.

[DEFENDANT]: Even if a judge instructed you, you have to try to get that bias out?

[STOLL]: Yes.

Defendant renewed his challenge of Stoll for cause. The trial court again denied Defendant's challenge, and Defendant used his final peremptory challenge to excuse Stoll from the jury.

At trial, Dr. Sherstin Rosenberg, a doctor of veterinary medicine, testified that white discharge in the baby goat's eyes could indicate it had pneumonia. Dr. Rosenberg also testified that treating a goat for pneumonia would cost between \$700.00 and \$1,000.00. Burnside had previously testified that the goat was healthy when taken, and that he typically sells a healthy goat for between \$250.00 and \$300.00. After closing arguments, Defendant orally requested that the trial court modify its pattern felony larceny instruction to include that, in order to find

Defendant guilty of felony larceny, the jury must find that the stolen baby goat “had some value[.]” The trial court denied Defendant’s request for a special jury instruction and noted his objection to its final jury instructions.

At the conclusion of the trial, the jury found Defendant guilty of both felonious breaking or entering and felonious larceny after breaking or entering. The trial court sentenced Defendant to serve a sentence of 6 to 17 months, suspended for 24 months, and placed him on supervised probation. Defendant timely appealed.

ANALYSIS

Defendant raises two arguments on appeal: (A) the trial court erred by denying his request to dismiss Juror Stoll for cause based on her bias against animal rights activists and (B) the trial court plainly erred in giving jury instructions which did not require the jury to find that baby goat Rain had “value” in order to find Defendant guilty of larceny.

A. Challenge of Juror Stoll for Cause

“The determination of whether excusal for cause is required for a prospective juror is vested in the trial court, and the standard of review of such determination is abuse of discretion.” *State v. Reed*, 355 N.C. 150, 155 (2002) (citation omitted). Abuse of discretion occurs when the trial court’s decision is “manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (marks omitted). However, when a challenge for cause is not properly

preserved for appeal, we do not review the merits of the appellant's argument. *State v. Clemmons*, 181 N.C. App. 391, 395-96, *aff'd*, 361 N.C. 582 (2007).

Defendant argues that Stoll was unable to render a fair verdict because she stated she was biased against animal rights activists and was unsure if she could set aside her biases at trial. Based on this argument, Defendant requests a new trial. Defendant failed to properly preserve this issue for appeal; accordingly, we do not discuss the merits of Defendant's argument.

N.C.G.S. § 15A-1214 details the proper procedure for preserving an alleged error in denying a party's for cause challenge as follows:

(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

(1) *Exhausted the peremptory challenges available to him;*

(2) Renewed his challenge as provided in subsection (i) of this section; and

(3) Had his renewal motion denied as to the juror in question.

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

(1) Had peremptorily challenged the juror; or

(2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. §§ 15A-1214(h)-(i) (2022) (emphasis added).

Defendant used his last peremptory challenge on Juror Stoll. Under N.C.G.S. § 15A-1214(h), a defendant may seek a new trial only if the trial court refused to grant his motion to excuse a juror for bias *after* the defendant has already exhausted all of his peremptory challenges. N.C.G.S. § 15A-1214(h) (2022). In other words, Defendant would have had to attempt to use another peremptory challenge on another specific juror after exhausting his last peremptory challenge on Juror Stoll to properly preserve the issue for appeal. *Clemmons*, 181 N.C. App. at 395 (“[I]t is clear that a defendant must make a futile effort to challenge a juror after exhausting peremptory challenges in order to demonstrate prejudice. It is insufficient for a defendant to simply challenge a juror for cause, exhaust all peremptory challenges, and then renew his previous challenge for cause in order to preserve his exception.”); *see State v. Allred*, 275 N.C. 554, 563 (1969) (holding Defendant must “thereafter assert his right to challenge peremptorily an additional juror”). “The purpose for challenging the additional juror is to establish prejudice by showing that [the] appellant was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges.” *Clemmons*, 181 N.C. App. at 395 (quoting *State v. Hartman*, 344 N.C. 445, 459-60 (1996)).

Defendant argues that he wished to use additional peremptory strikes against other jurors; however, Defendant did not attempt to exercise any peremptory challenges after using his last permissible challenge on Juror Stoll. Defendant has

not preserved the issue for appeal, and we do not analyze Defendant’s argument on its merits.

B. Denial of Oral Request for Special Jury Instruction

Defendant next contends that, in order to find a defendant guilty of larceny, the jury must find that the item allegedly taken by the defendant had monetary value. Defendant argues that the trial court erred by denying his request for special jury instructions regarding the value of baby goat Rain because, “[u]nder the common law, to be the subject to a larceny, property must have some value.” Defendant argues that baby goat Rain did not have any monetary value because the cost to treat a goat for pneumonia according to Dr. Rosenberg’s testimony—between \$700.00 and \$1000.00—substantially exceeds the price at which Burnside typically sells a baby goat—between \$250.00 and \$300.00.

1. Standard of Review

“If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.” N.C. R. Super. and Dist. Cts. Rule 21 (2023). “A request for a . . . deviation from the pattern jury instruction[] qualif[ies] as a special instruction, and would have needed to be submitted to the trial court in writing.” *State v. Brichikov*, 281 N.C. App. 408, 414 (citing *State v. McNeill*, 346 N.C. 233, 240 (1997) (“We note initially that [the] defendant’s proposed instructions were tantamount to a request for special instructions. . . . [A] trial court’s ruling denying requested instructions is not error where the defendant fails to submit

his request for instructions in writing. Defendant here did not submit either of his proposed modifications in writing, and therefore it was not error for the trial court to fail to charge as requested.”), *aff’d*, 383 N.C. 543 (2022). To preserve his request for special instructions, Defendant must have submitted the request in writing. *See State v. McVay*, 287 N.C. App. 293, 300 (2022) (marks omitted) (“A trial court’s ruling denying requested special instructions is not error where the defendant fails to submit his request for instructions in writing.”), *disc. rev. denied*, 384 N.C. 671 (2023). However, “[i]f an instructional issue is unpreserved in a criminal case, we may review the trial court’s decision for plain error, but only if ‘the defendant [] specifically and distinctly contends that the alleged error constitutes plain error.’” *Id.* at 301 (marks and emphasis omitted) (quoting *State v. Lawrence*, 365 N.C. 506, 516 (2012)).

On appeal, Defendant “specifically and distinctly contends” that “[t]he trial court plainly erred because the jury likely would have found that [the goat] had no value at the time of the taking due to needing expensive medical treatment[,] and they would not have convicted [Defendant] of felony larceny.” Our Supreme Court has adopted the principle that

the plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to

seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Lawrence, 365 N.C. at 516-17 (marks omitted) (quoting *State v. Odom*, 307 N.C. 655, 660 (1983)).

2. Essential Elements of Larceny

Defendant was convicted of felony larceny under N.C.G.S. § 14-72(b)(2).

N.C.G.S. § 14-72 reads in pertinent part as follows:

(a) Larceny of goods of the value of more than one thousand dollars (\$1,000[.00]) is a Class H felony. . . . Larceny as provided in subsection (b) of this section is a Class H felony. . . . Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars (\$1,000[.00]), is a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is any of the following:

. . . .

(2) Committed pursuant to a violation of [N.C.G.S. §] 14-51, 14-53, 14-54, 14-54.1, or 14-57.

N.C.G.S. § 14-72 (2022). “The purpose of [N.C.G.S. §] 14-72 is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses. Thus, larceny from

the person and larceny of goods worth more than \$1,000[.00] are not separate offenses, but alternative ways to establish that a larceny is a Class H felony.” *State v. Sheppard*, 228 N.C. App. 266, 270-71 (2013) (citation and marks omitted). “[T]he statutory provision [elevating] misdemeanor larceny to felony larceny does not change the nature of the crime; elements of proof remain the same.” *State v. Ford*, 195 N.C. App. 321, 323, *disc. rev. denied*, 363 N.C. 659 (2009) (marks omitted). In *Ford*, we held the statute codifying larceny as an offense did not describe its essential elements; accordingly, “in North Carolina, larceny remains a common law crime[.]” *Id.* (marks omitted).

Defendant argues that, “[u]nder the common law, to be the subject to a larceny, property must have some value.” For the purposes of elevating a larceny, “value” refers to “fair market value” or its “reasonable selling price.” *State v. McCambridge*, 23 N.C. App. 334, 336 (1974); *State v. Dees*, 14 N.C. App. 110, 112 (1972). Defendant contends that the statutory language “without regard to the value of the property in question,” N.C.G.S. § 14-72(b) (2022), “does not imply that a thing can be completely lacking in value and nonetheless be the subject of a larceny prosecution.” To support his contention, he cites *State v. Butler*, 65 N.C. 309, 309 (1871) (per curiam) (“To cut off and take away the ears or tail of a cow, might be malicious mischief, or might be indictable under [another law]; but it would not be larceny, as they are of no value as articles of property.”) and *State v. Bryant*, 4 N.C. 249, 249 (1815) (holding that theft of currency that is not currency of the State is not larceny because the currency has

no value within the State). However, Defendant ignores more recent case law from our Supreme Court, which indicates the four essential elements of larceny are “that [the defendant] (a) took the property of another; (b) carried it away; (c) without the owner’s consent; and (d) with the intent to deprive the owner of his property permanently.” *State v. Jones*, 369 N.C. 631, 633 (2017) (quoting *State v. White*, 322 N.C. 506, 518 (1988)).

Unlike opinions by our Court, under which we are bound by our earliest interpretation of the law, we are bound by our Supreme Court’s most recent exposition of the elements of larceny, a common law crime, even if they conflict with its earlier declarations of the elements of larceny. *See In re Civil Penalty*, 324 N.C. 373, 384 (1989) (“[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.”) Our Supreme Court’s holdings in *Butler* and *Bryant*, which predate its holding in *Jones*, indicate that, at the time these cases were decided, stolen property must have had “value as [an] article[] of property” within our State to be subject to a larceny. *Butler*, 65 N.C. at 309; *see Bryant*, 4 N.C. at 249. However, our Supreme Court’s more recent exposition of the elements necessary to prove common law larceny contains no such requirement. As such, an item’s “value” need not be proven for the purpose of establishing that a violation of N.C.G.S. § 14-72(b)(2) occurred. *See Sheppard*, 228 N.C. App. at 270-71.

The trial court did not err when it declined to give Defendant's special jury instructions regarding the value of the baby goat, where the instructions it gave correctly reflected the common law definition of larceny.

CONCLUSION

We dismiss Defendant's argument that the trial court erred by refusing to dismiss Juror Stoll for cause because Defendant did not properly preserve this issue. Furthermore, we find no plain error in the trial court's jury instructions.

DISMISSED IN PART; NO ERROR IN PART.

Judges HAMPSON and WOOD concur.