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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-300

Filed 21 May 2024

Forsyth County, Nos. 21CRS57545, 21CRS820

STATE OF NORTH CAROLINA

v.

PLUCHIE DOMINIQUE GILMORE, Defendant.

Appeal by defendant from judgment entered 9 August 2022 by Judge Stanley L. Allen in Superior Court, Forsyth County. Heard in the Court of Appeals 31 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Raymond W. Goodwin, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgment entered following a jury verdict finding her guilty of felony larceny. Because there was not a fatal variance between the indictment and the evidence presented at trial, we conclude there was no error.

I. Background

On 13 August 2021, Maygen Taff, a loss prevention manager at a Dick's

Sporting Goods store in Winston-Salem, observed two boys and a woman enter the store. Ms. Taff watched the woman and the boys interact in the men's Nike Department; the woman "grab[bed] merchandise" and "handed it off to the boys," who were "holding merchandise as well." Ms. Taff testified that the boys were holding Nike merchandise. Ms. Taff observed the woman and the boys "quickly selecting merchandise without paying any attention to size, price, or color."

Ms. Taff watched the woman leave the store, get into a Dodge Durango, and pull up in front of the door. Shortly after the woman left, one of the boys answered a phone call; the boys "eased up towards the front door," ran outside with merchandise, and jumped in the back of the car. The car drove off. At trial, Ms. Taff identified the woman from the store as Defendant.

Ms. Taff called the police, and on 18 August 2021, she met with Officer J.D. Huntley of the Winston-Salem Police Department. Officer Huntley activated his Axon body camera when he entered the Dick's Sporting Goods store to meet with Ms. Taff. Officer Huntley and Ms. Taff watched the store's surveillance video from 13 August 2021; Officer Huntley's body camera recorded as they watched the surveillance video. While watching the surveillance video, Officer Huntley took a still shot photo of the woman. From that picture, Officer Huntley confirmed the woman in the picture was Defendant. He also testified that the video showed the boys holding clothes.

Defendant was indicted for felony larceny under North Carolina General

Statute Section 14-72. Ms. Taff testified that the original surveillance footage, which showed the incident from 13 August 2021, had been destroyed, as the “computer crashed.” Therefore, the jury did not have the opportunity to view—as Ms. Taff and Officer Huntley had done on 18 August 2021—the entire, official surveillance video from 13 August 2021. However, the jury watched a seventeen second clip of Officer Huntley’s body camera video, which had recorded the original surveillance video. The footage-within-footage clip shows the boys carrying clothing out of the store. The State also used photos of the inside of the store to identify where Defendant and the boys were standing when Ms. Taff observed them taking merchandise.

At the close of the evidence, Defendant moved to dismiss the charge of felony larceny, noting the “insufficiencies of the State’s evidence[;]” the trial court denied the motion. The jury found Defendant guilty of felony larceny. Defendant pled guilty to attaining habitual felon status. Defendant was sentenced. Defendant appeals.

II. Fatal Variance

Defendant argues that the trial court erred in denying her “motion to dismiss because there was a fatal variance between the indictment and the evidence at trial” regarding the identity of the stolen items.

Here, the indictment reads that Defendant “unlawfully willfully and feloniously did steal, take, and carry away clothes, including Nike Wind Breakers, Nike Pants, Nike Jackets, and Nike Shirts, the personal property of Dick’s Sporting Goods, Inc., such property having a value of approximately \$1325.00 United States

Dollars.” Defendant contends that at trial, there was no evidence of the specific type of merchandise taken by Defendant and the boys, beyond that the merchandise was Nike clothing. Defendant contends there was no evidence she “took the specific items identified in the indictment.”

“We review *de novo* the issue of a fatal variance.” *State v. Clagon*, 279 N.C. App. 425, 431, 865 S.E.2d 343, 347 (2021) (citation omitted). “It is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense.” *State v. McDowell*, 1 N.C. App. 361, 365, 161 S.E.2d 769, 771 (1968). “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). “The purpose for prohibiting a variance between allegations contained in an indictment and evidence established at trial is to enable the defendant to prepare a defense against the crime with which the defendant is charged and to protect the defendant from another prosecution for the same incident.” *Clagon*, 279 N.C. App. at 431-32, 865 S.E.2d at 347-48 (quotation marks and citations omitted). Thus, “[i]n general, a variance between the indictment and the proof at trial does not require reversal unless the defendant is prejudiced as a result.” *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (1996) (citation omitted). “This Court has required that a defendant demonstrate that he or she was misled by a variance, or hampered in

his/her defense before this Court will consider the variance error.” *Id.* at 291, 473 S.E.2d at 371.

Defendant was charged with felony larceny under North Carolina General Statute Section 14-72. *See* N.C. Gen. Stat. § 14-72 (2021). “The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the owner’s consent; and (4) with the intent to permanently deprive the owner of the property.” *State v. Justice*, 219 N.C. App. 642, 644, 723 S.E.2d 798, 801 (2012) (citation, quotation marks, and brackets omitted).

At trial, the State entered in evidence photographs from the Dick’s Sporting Goods store. Ms. Taff used the photographs to identify the “Nike pad” and the “specific fixtures” in the men’s wear section from which the boys took merchandise.¹ The photographs show clothing, including jackets, pants, and shirts, hanging on hangers on racks. Ms. Taff testified she saw Defendant and the boys in “grab merchandise” the men’s Nike department; she explained that Defendant would “hand” off the merchandise she collected to the boys, who were “holding merchandise as well.” Ms. Taff also observed Defendant “pointing at other items” in the men’s Nike Department and the boys “gathering the items that she was pointing at.” Although Ms. Taff used the word “merchandise” to describe the items Defendant and the boys were taking, in context, it is clear from the photographs and State’s Exhibit

¹ In the context of Ms. Taff’s testimony and descriptions of the photographs showing areas of the store, the “Nike pad” refers to the section of the store where the Nike merchandise is displayed and sold.

14 she was describing Nike clothing from the mens wear section.

Ms. Taff also testified about the detailed inventory of missing items she prepared “the night it happened” by scanning “every item on the fixture to determine what was missing” for each fixture where she saw Defendant and the boys take merchandise. This list of missing items was introduced into evidence as State’s Exhibit 14. Exhibit 14 included columns listing detailed information including a merchandise description; the UPC number assigned to each item; the department number indicating “mens’ athletic apparel”; the quantity of each item taken; and the “price per item.” This exhibit also noted that none of the items had been recovered. Ms. Taff testified that after Defendant left the store and the boys answered a phone call, the boys were still holding the Nike merchandise. Thus, taken all together, there was evidence that Defendant and the boys took clothing from the men’s Nike section, wherein jackets, pants, and shirts were located.

Defendant contends this case is like *State v. Simmons*, 57 N.C. App. 548, 291 S.E.2d 815 (1982). In *Simmons*, the defendant was charged with larceny; the indictment specified that the defendant took eight freezers and included the individual eight serial numbers. *Id.* at 552, 291 S.E.2d at 818. Evidence at trial revealed that one of the stolen freezers was recovered a week later and, according to the store’s manager, the recovered freezer had “the general appearance, the same name brand, the same design, that it was white like the rest of ours and it had the name brand ‘Imperial’ on it and the serial number on the freezer matched the serial

number on the list that we inventoried our freezers by.” *Id.* at 549, 291 S.E.2d at 816-17. A police officer testified about the recovered freezer and its corresponding serial number, but the serial number matched none of the eight serial numbers listed in the indictment. *Id.* at 550, 291 S.E.2d at 817. As a result, this Court held that there was a fatal variance in the indictment and proof at trial because “[w]e can discern no proof at trial that defendant took any of the freezers identified by the serial numbers in the indictment quoted above.” *Id.* at 552, 291 S.E.2d at 818.

This case is distinguishable from *Simmons*. Here, the indictment did not list the exact numbers of items of clothing taken nor any specific identifying information such as UPC numbers for each item of clothing taken. *Cf. id.* at 552, 291 S.E.2d at 818. Moreover, the missing property was never recovered, and so there was no evidence at trial regarding the identity of a specific recovered piece of merchandise. Here, it is *not* apparent from the evidence presented—as it was in *Simmons*—that the stolen property did *not* fall within the description of the property in the indictment. In other words, the evidence of the stolen property at this trial was consistent with the description of the items listed in the indictment.

Defendant contends that *Simmons* establishes that “in a trial for larceny, a variance in the identification of personal property between the indictment and the evidence is fatal, constituting reversible error.” However, Defendant misrepresents the language from *Simmons*:

It is elementary that a material element in an indictment

charging the offense of larceny is the identification of the “personal property” taken and carried away. Thus, a variance in the indictment and proof at trial in this regard is a material variance; further, such is a fatal variance if it hampers defendant’s ability to defend himself on the charge at trial and does not insure that defendant will be protected from another prosecution for the same offense.

Id. at 552, 291 S.E.2d at 818. Thus, *Simmons* does *not* hold that a variance in the identification of personal property is *per se* fatal; *Simmons* explicitly holds that a variance is fatal “if it hampers [a] defendant’s ability to defend himself on the charge at trial and does not insure that defendant will be protected from another prosecution for the same offense.” *Id.* *Simmons* is therefore consistent with this Court’s requirement that “a defendant demonstrate that he or she was misled by a variance, or hampered in his/her defense before this Court will consider the variance error.”

Weaver, 123 N.C. App. at 291, 473 S.E.2d at 371.

Defendant’s prejudice argument is:

The indictment failed to notify [Defendant] of the open-ended nature of the evidence that would be brought against her at trial. Although [Defendant] expected, as a result of the indictment, to be tried for the larceny of “Wind Breakers,” “Pants,” “Jackets,” and “Shirts,” she was instead tried for the larceny of clothing in general. This change permitted the State to overcome key weaknesses in its evidence, including the loss of the original surveillance footage and the inscrutable nature of the inventory report documenting the items actually stolen. Ultimately, [Defendant] was not convicted of the offence in the indictment; the jury did not once hear or read any of the words “Wind Breakers,” “Pants,” “Jackets,” or “Shirts” at trial. The variance was material, prejudiced [Defendant], and requires reversal.

However, based on the language of the indictment, Defendant *was on notice she was charged with stealing clothes*, including Nike items. Defendant has not demonstrated that her defense to larceny of “clothing in general” would be any different than her defense to larceny of “clothes, including Nike Wind Breakers, Nike Pants, Nike Jackets, and Nike Shirts.” Thus, Defendant “has failed to demonstrate she was misled by a variance” or “hampered in . . . her defense” and therefore, “this Court will [not] consider the variance error.” *Id.*

III. Conclusion

We conclude there was no fatal variance between the indictment and the evidence presented at trial.

NO ERROR.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).