No. 126PA20 DISTRICT TWENTY-SIX

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Mecklenburg County
	)	
ISIAH BOYD	)	

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NEW BRIEF FOR DEFENDANT-APPELLANT

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ISSUE PRESENTED

THE COURT OF APPEALS ERRED IN FINDING THAT THE INDICTMENT WAS SUFFICIENT TO SUPPORT A CONVICTION FOR LARCENY WHERE IT FAILED TO IDENTIFY THE OWNER OF THE PROPERTY.

STATEMENT OF THE CASE

On 17 June 2017, a Mecklenburg County Grand Jury indicted Mr. Isiah Boyd for common law robbery. (R p 5).[1] The case came on for trial at the 16 July 2018 Criminal Session of Mecklenburg County Superior Court, the Honorable Hugh B. Lewis presiding. (T p 1). On 19 July 2018, the jury acquitted Mr. Boyd of common law robbery but convicted him of felony larceny. (R p 31).

On 18 February 2020, the Court of Appeals issued an unpublished opinion finding no error. *State v. Boyd*, COA19-543 (N.C. Ct. App. 18 Feb. 2020) (unpublished) (Appendix). On 13 August 2021, this Court allowed Mr. Boyd's Petition for Discretionary Review.

GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction to review Mr. Boyd's case pursuant to the 13 August 2021 order allowing Mr. Boyd's Petition for Discretionary Review. N.C. Gen. Stat. § 7A-31(c).

STATEMENT OF THE FACTS

Around 5 June 2017, Sean Patterson listed a Nintendo 3DS and three Pokémon games for sale using the online application "Letgo." (T pp 255, 315). Around midnight that evening Patterson agreed to meet a potential buyer in a

[1] The Record on Appeal shall be referred to as "R." The transcript of the trial shall be referred to as "T."

public park in Mecklenburg County. (T p 256). Patterson's husband drove him to the park for the sale. (T pp 295-97). Patterson exited the car and showed the buyer the bag with the 3DS, the charger, and some games inside. (T pp 261, 317). The man handed Patterson a piece of folded paper. (T pp 261-62, 304). Patterson thought the paper contained the money. (T p 374). As he was handing the man the bag, the man grabbed the bag but it tore open. (T pp 261-62, 299). Everything went "flying" and landed a distance away. (T p 262). Patterson jumped on the man's back. (T p 284). The man pushed Patterson to the ground. (T pp 262, 291, 320). The man then took the 3DS from the ground and issued a threat before fleeing through the park. (T pp 262, 285).

Upon returning to their car, Patterson and his husband opened the piece of paper. It did not contain any money but was instead a piece of paper that included an image of Mr. Boyd's social security card. (T pp 262-63). A police officer used the name on the social security card to locate an address. (T pp 270, 346). When officers arrived, Mr. Boyd gave them permission to search his house. (T pp 353, 360). Three officers thoroughly searched the house but did not find a Nintendo 3DS. (T pp 353, 360-61).

On 17 June 2017, a Mecklenburg County Grand Jury issued the following indictment:

> THE JURORS FOR THE STATE, UPON THEIR OATH PRESENT [t]hat on or about the 5th day of June, 2017, in Mecklenburg County, Isiah Boyd, did

> unlawfully, willfully, and feloniously, steal, take and carry away another's personal property, Nintendo 3DS gaming system, of value, from the person and presence of Sean Patterson, by means of an assault upon him consisting of the forcible and violent taking of the property.

(R p 5). After a jury trial in Mecklenburg County Superior Court, the jury acquitted Mr. Boyd of common law robbery but convicted him of felony larceny from the person. (R p 31).

Mr. Boyd's Appeal

On appeal, Mr. Boyd argued, in relevant part, that the indictment, while sufficient to support robbery, was defective to enter judgment for the charge of felony larceny because it failed to identify the owner of the property as is required by this Court under *State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 904 (1960).

In an unpublished opinion, the Court of Appeals did not address the fact that the indictment failed to allege an essential element of larceny, the only offense Mr. Boyd was ultimately convicted of. *State v. Boyd*, COA19-543 (N.C. Ct. App. 18 Feb. 2020) (unpublished). Instead, the Court of Appeals concluded that the indictment was adequate because it was bound by this Court's decision in *State v. Young*, 305 N.C. 391, 392, 289 S.E.2d 374, 375 (1982) as well as a footnote in this Court's split-decision in *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988).

STANDARD OF REVIEW

This Court reviews a Court of Appeals opinion to determine whether it contains errors of law. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). Errors of law are reviewed *de novo*. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010). Under the *de novo* standard of review, "the reviewing court considers the matter anew and freely substitutes its own judgment for that of the [lower] court." *N.C. Department of Environment and Natural Resources v. Caroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING THAT THE ROBBERY INDICTMENT WAS CONSTITUTIONALLY SUFFICIENT TO SUPPORT A CONVICTION FOR LARCENY.

Since the founding of this State, our Constitution has required the return of a valid indictment to vest jurisdiction in a trial court and enable the court to enter judgment against a defendant. *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952).

Our constitution states that

> no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

N.C. Const. art. I, § 22; *accord* N.C. Const. of 1868, art. I, § 12 (1949); N.C. Const. of 1776, Declaration of Rights § 8. "It is hornbook law that it is an essential of jurisdiction that a criminal offense should be sufficiently charged in a warrant or an indictment." *State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968).

The validity of an indictment is determined "based solely upon the language of the criminal pleading in question" without consideration of the evidence offered at trial in support of the indictment. *State v. Ellis*, 368 N.C. 342, 347, 776 S.E.2d 675, 679 (2015); *State v. White*, 372 N.C. 248, 254, 827 S.E.2d 80, 84 (2019).

The general rule regarding facial validity reflects our constitutional commitment to prevent individuals from being tried for a crime without probable cause, a prerequisite for the grand jury to return an indictment in secret proceedings under N.C. Gen. Stat. § 15A-628(a)(1).

The constitutional requirement of an indictment by a grand jury "plays a critical role in protecting individual liberty[,]" *State v. Rankin*, 371 N.C. 885, 916, 821 S.E.2d 787, 809 (2018), and is "one of the greatest safeguards of the freedom of the citizen." *State v. Barker*, 107 N.C. 913, 919, 212 S.E.115, 117 (1890). So important is the right to an indictment, "[i]f a man were to commit a capital offence in the face of all the Judges of [this State], their united authority could not put him upon his trial; they could file no complaint against

him even upon the records of the Supreme [] Court, … The grand jury alone could arraign him, and in their discretion might likewise finally discharge him by throwing out the bill with the names of all your [honors] as witnesses on the back of it." *Id.* at 915, 12 S.E. at 116 (internal quotation marks and citation omitted).

This Court has stated that to be valid, an indictment must charge "all essential elements of a criminal offense." *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975) (emphasis added). Recently, this Court reaffirmed this elementary principle of law:

> 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, 344, 776 S.E.2d 675, 677 (2015) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)).

White, 372 N.C. at 250, 827 S.E.2d at 82.

"If the indictment fails to state an essential element of the offense, any resulting conviction must be vacated." *State v. Rankin*, 371 N.C. 885, 886–87, 821 S.E.2d 787, 790 (2018); *see also State v. Cook*, 272 N.C. 728, 731, 158 S.E.2d 820, 822 (1968); *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 919 (1953); *McClure v. State,* 267 N.C. 212, 148 S.E.2d 15 (1966) (finding that a judgment entered without jurisdiction is a "nullity"); *State v. Russell*, 282 N.C. 240, 245, 192 S.E.2d 294, 297 (1972).

A. Ownership of property is an essential element of larceny that must be properly alleged in an indictment for larceny.

In the present case, judgment was entered against Mr. Boyd for the charge of felony larceny "from the person," under N.C. Gen. Stat. § 14-72(b)(1). (R pp 34-35). For the Court to have jurisdiction to enter judgment on this crime, it was essential that the indictment charge "all essential elements" of the offense. *Crabtree*, 286 N.C. at 544, 212 S.E.2d at 105

It has long been established that "proof of offense of the ownership rights of another is an essential element of larceny." *State v. Thompson,* 359 N.C. 77, 108, 604 S.E.2d 850, 872 (2004); *see also State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 904 (1960). "Larceny is a common law offense not defined by statute." *State v. Weaver,* 359 N.C. 246, 255, 607 S.E.2d 599, 604 (2005). 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 deprive the owner of [the] property permanently.

State v. Perry, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (emphasis added) *overruled on* other grounds by *State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010). Under N.C. Gen. Stat. § 14-72(a) and (b), larceny may be elevated to a

felony upon allegation and proof of certain enumerated additional elements, such as when it is "from the person." N.C. Gen. Stat. § 14-72(b)(1).

Larceny from the person is a greater offense to larceny with the sole statutory difference being the existence or non-existence of the "from the person" element. *State v. Barnes*, 345 N.C. 146, 151, 478 S.E.2d 188, 191 (1996).

Accordingly, for the trial court to have jurisdiction to enter judgment for felony larceny, it must be upon an indictment that "'allege[s] the ownership of the [stolen] property either in a natural person or a legal entity capable of owning (or holding) property." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (emphasis added) (*quoting State v. Jessup*, 279 N.C. 108, 112, 181 S.E.2d 594, 597 (1971) (citations omitted); *see also State v. Ellis,* 368 N.C. 342, 345, 776 S.E.2d 675, 677 (2015) (*citing Thornton*, 251 N.C. at 662, 111 S.E.2d at 904 with approval).

The ownership element serves multiple purposes. First, the indictment must identify the person or entity with an ownership interest with sufficient specificity "in order to enable the accused to know exactly what charge he will be called upon at the trial to meet[.]" *Thornton*, 251 N.C. at 662, 111 S.E.2d at 903. Second, the element provides protection against double jeopardy. *Id.* Lastly, the element allows the defendant to meet the charge that the owner did

not consent to the taking or that there was no intent to permanently deprive the owner of the property, both essential elements of a larceny crime.

Accordingly, when an indictment for larceny fails to allege the identity of the person or entity with an ownership interest in the property, the indictment is fatally defective, *Thornton* at 662, 111 S.E.2d at 904, and the judgment must be vacated. *State v. McKoy*, 265 N.C. 380, 381, 144 S.E.2d 46, 47 (1965); *State v. Biller*, 252 N.C. 783, 784, 114 S.E.2d 659, 660 (1960); *State v. Johnson*, 77 N.C. App. 583, 585, 335 S.E.2d 770, 772 (1985) (vacating larceny judgment where the larceny indictment failed to identify the person's name who owned the property); *State v. McNeil*, 209 N.C. App. 654, 659, 707 S.E.2d 674, 679 (2011) (same).

The ownership allegation also provides a critical defense at trial in the form of a motion to dismiss for failure to prove the offense alleged in the indictment because where ownership by one person is alleged in the indictment, but the evidence at trial proves ownership in a different person or entity, there is a fatal variance and the charge must be dismissed. *State v. Downing*, 313 N.C. 164, 168, 326 S.E.2d 256, 259 (1985); *State v. Eppley*, 282 N.C. 249, 259, 192 S.E.2d 441, 448 (1972); *Jessup*, 279 N.C. at 112, 181 S.E.2d at 597; *State v. Law*, 227 N.C. 103, 104, 40 S.E.2d 699, 700 (1946); *State Jenkins*, 78 N.C. 478, 479 (1878).

Lastly, for a larceny charge to be proven, the State must show the ownership as alleged in the indictment with proof of possession being insufficient to sustain a conviction. *See, e.g., State v. Downing,* 313 N.C. 164, 166-68, 326 S.E.3d 256, 258 (1985) (fatal variance between felony larceny indictment alleging that items were the personal property of a mother who owned the building and evidence showing that items were owned by the daughter's business, which was located in the building); *Eppley*, 282 N.C. at 259-60, 192 S.E. 2d at 448 (fatal variance between larceny indictment alleging that property belonged to James Ernest Carriker and evidence showing that although the property was taken from Carriker's home, it was owned by his father); *State v. Craycraft,* 152 N.C. App. 211, 213-14 567 S.E.2d 206, 214 (2002).

The indictment in this case stated:

> THE JURORS FOR THE STATE, UPON THEIR OATH PRESENT [t]hat on or about the 5th day of June, 2017, in Mecklenburg County, Isiah Boyd, did unlawfully, willfully, and feloniously, steal, take and carry away another's personal property, Nintendo 3DS gaming system, of value, from the person and presence of Sean Patterson, by means of an assault upon him consisting of the forcible and violent taking of the property.

(R p 5). Here, the indictment merely alleged that the 3DS gaming system was "another's personal property." However, the indictment 1) failed to identify that owner, 2) failed to state that the owner was unknown and 3) failed to

allege the property was owned by Sean Patterson. Thus, under *Thornton, Campbell, Biller, McKoy*, and numerous other cases holding the same, the indictment in this case failed to allege an essential element of larceny.

B. Ownership of property is not an essential element of robbery.

This Court has held that "robbery and larceny are separate and distinct crimes with separate elements[.]" *Thompson,* 359 N.C. at 108, 604 S.E.2d at 872 (emphasis added).[2]

In contrast with larceny, this Court has repeatedly stated that ownership of property is not an element of robbery, *State v. Spillars*, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972), and "there is no requirement that the person from whom the property is taken be the owner." *State v. Pratt*, 306 N.C. 673, 681, 295 S.E.2d 462, 467 (1982).

An allegation of ownership is not required because "[t]he gist of the offense of robbery is the taking by force or putting in fear." *Spillars*, 280 N.C.

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[2] Though not at issue in this case, there are other differences between larceny and robbery. For instance, unlike larceny, in a robbery, "the kind and value of the property taken is not material." *State v. Sawyer,* 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944). Because the identity of the items is immaterial to a robbery, there is no variance where the indictment alleges certain items were taken, but the evidence at trial shows differently. *Id.* In contrast, a variance in the identity of items is fatal in a larceny conviction. *See State v. Simmons,* 57 N.C. App. 548, 291 S.E.2d 815 (1982).

at 345, 185 S.E.2d at 884; *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972) ("The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery."); *Sawyer,* 224 N.C. at 65, 29 S.E.2d at 37 ("The gist of the offense is not the taking, but a taking by force or the putting in fear").

For this reason, "it is not necessary that ownership of the property be laid in a particular person [in the indictment] in order to allege and prove … robbery." *Spillars*, 280 N.C. at 345, 185 S.E.2d at 884*; see also Thompson,* 359 N.C. at 108, 604 S.E.2d at 872 ("an indictment for armed robbery is not fatally defective simply because it does not correctly identify the owner of the property taken"); *see also Pratt*, 306 N.C. at 681, 295 S.E.2d at 467 ("As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery"); *Ballard*, 280 N.C. 479 at 485, 186 S.E.2d at 375 ("[I]n an indictment for robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property.").

As a result, in a robbery trial any "[v]ariance between the allegations of the indictment and the proof in respect of the ownership of the property taken is not material." *Ballard*, 280 N.C. at 485, 186 S.E.2d at 375. Because of this crucial difference in elements, what would be a complete defense to a larceny

– variance in the ownership – is totally unavailable to a defendant charged with robbery.

To be sure, while an allegation of ownership is not necessary for a robbery indictment under our law, many indictments rightly do, in fact, include a specific allegation of ownership as required for larceny. For instance, in *State v. Rogers*, the defendant was indicted for

> unlawfully, willfully, forcible, violently and feloniously take, rob, steal and carry away $ 415.00 in lawful money of the United States, the property of Ronald W. Loftin to wit: $415.00 of the value of more than $ 200.00 from the presence, person, place of business, and resident of Ronald W. Loftin[.]

273 N.C. 208, 210, 159 S.E.2d 525, 527 (1968).

A complete allegation such as the one in *Rogers* guarantees not only that that the State can obtain a conviction for robbery, but that the indictment is sufficient to allow the defendant to prepare for trial against all of the lesser-included larceny offenses as well.

C. The indictment for robbery does not include all the elements required for an indictment for larceny.

North Carolina has long adhered to a definitional test to determine whether an offense is a lesser-included offense and whether an indictment will support a conviction for a lesser charge. *State v. Weaver,* 306 N.C. 629, 295 S.E.2d 375 (1982) (overruled on other grounds); *See* 4 Strong's North Carolina Index 3d, Criminal Law, Section 115 (1977). Under this test "[i]f the lesser

crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *Weaver*, 306 N.C. at 635, 295 S.E. 2d at 379.

Only a few years ago, this Court re-affirmed this rule:

> [T]he test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains an essential element that is not an essential element of the greater crime, then the lesser crime is not a lesser included offense.

State v. Nickerson, 365 N.C. 279, 282, 715 S.E.2d 845, 847 (2011). The Nickerson Court held that the definitional test is "required." *Id.* at 280, 715 S.E.2d at 846.

Based on this test, this Court has held that a defendant "may be convicted of the charged offense or a lesser included offense when the greater offense which is charged in the bill of indictment contains all of the essential elements of the lesser." *State v. Hunter*, 299 N.C. 29, 38, 261 S.E.2d 189, 195 (1980) (emphasis added).

Here, while the indictment may contain all of the essential elements of robbery, it does not contain all of the essential element of larceny as it fails to allege the ownership in the property. Thus, while the indictment was sufficient to support robbery, it was insufficient to support the charge of larceny.

This Court's history of applying the definitional test to common law robbery and larceny is somewhat inconsistent. Despite the well-established definitional test in North Carolina, and despite the clear differences between the elements of robbery and larceny, this Court has repeatedly held that an indictment for robbery can support a conviction for larceny. But in so doing, this Court has never consistently applied the "required" definitional test and at times, has actively dismissed it.

For example, in *State v. Young*, relied upon by the Court of Appeals, the defendant contended on appeal that "(1) larceny from the person is not a crime of "less degree" of common law robbery, under G.S. 15-170, because both crimes are felonies carrying the same penalties (maximum imprisonment of ten years); and (2) the submission of a crime which carries the threat of identical punishment as a lesser included offense of the crime charged in the indictment would violate constitutional due process." 305 N.C. 391, 392-93, 289 S.E.2d 374, 376 (1982).

The *Young* Court did not apply a definitional test because the challenge below was unrelated to any of the elements of larceny or robbery. Rather, the *Young* Court reasoned that where an offense is included in another, neither N.C. Gen. Stat. § 15-170 nor any other source of law requires that it "also be one which is subject to less punishment than the 'greater offense' charged in the indictment." *Id.* at 393, 289 S.E.2d at 376. Therefore, this Court held that

"a crime of 'less degree' under G.S. 15-170, *supra*, is not, contrary to defendant's contention, exclusively one which carries a less severe sanction than the crime formally charged in the indictment." *Id.* The *Young* Court never addressed how larceny would be an "included" offense under the definitional test.

In *State v. Hurst*, 320 N.C. 589, 592, 359 S.E.2d 776, 778 (1987), this Court did apply the definitional test, concluding that larceny was not a lesser-included offense of armed robbery, because armed robbery does not require a taking. *Id.* Again, the issue of ownership was not raised in *Hurst*.

A year later, in *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), this Court discarded the definitional test and reversed *Hurst*, finding that a defendant should have been given an instruction for misdemeanor larceny when he was charged with armed robbery. The *White* opinion was a divided 4-3 opinion.

This Court's majority announced that larceny was a lesser-included offense of armed robbery because the "natural," *id.* at 514, 369 S.E.2d at 817, or "special relationship," between the two offenses, *id.* at 516, 369 S.E.2d at 818, as well as

> the worthy goals of economy, efficiency, accuracy and fairness in judicial proceedings . . . by placing all options raised by . . . the evidence before the same jury in a single trial.

Id. at 518, 369 S.E.2d at 819. In doing so, the majority expressly rejected *Weaver*'s definitional test as controlling.

The dissenters chastised the majority for abandoning the definitional test:

> The majority has refused to analyze [the definitional rule] in deciding this case. Indeed they cannot because it leads to the conclusion that larceny is not a lesser included offense of armed robbery.

Id. at 519, 369 S.E.2d at 820 (White, J. dissenting). The dissenters concluded that it is the Court, and not the General Assembly, that determines what is a lesser included offense. *Id.* at 520, 369 S.E.2d at 820.

In *White*, the majority did not discuss the numerous differences between robbery and larceny. Further, while common law robbery was not at issue in *White*, the majority included a footnote, relied upon by the Court of Appeals in this case, stating that "[w]e also reaffirm our prior holdings that common law robbery is a lesser included offense of armed robbery, and that larceny is a lesser included offense of common law robbery." *Id.* at 517 fn. 1, 369 S.E.2d at 819 fn. 1.

As in *Young* and *Hurst*, the issue of ownership was not raised in *White*. Because "[t]he issue [of ownership] was neither briefed nor argued; thus, the language amounted to dictum." *White*, 322 N.C. at 517, 369 S.E.2d at 819.

Since *White,* this Court has repudiated the transactional approach it used in *White* and stated that the correct approach is "definitional, not transactional[.]" *State v. Hudson,* 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997) and that the definitional test is "required." *Nickerson*, 365 N.C. at 282, 715 S.E.2d at 847.

The Court of Appeals has recognized that *White* discarded the traditional definitional test, at least as it applies to robbery and larceny. *State v. Brooks*, COA13-663, slip op. 5 (N.C. Ct. App. 7 Jan. 2014) (unpublished) (Appendix) (stating that this Court has decided that this "requirement does not apply for larceny and common law robbery."). In *Brooks,* the Court of Appeals concluded that a robbery indictment was sufficient for larceny even though it failed to allege the essential element of larceny of ownership.

The Court of Appeals has otherwise rejected this Court's approach in *White* and continued to apply the definitional test when determining if an indictment is sufficient. For instance, in *State v. Wilson* the defendant was indicted for first degree kidnaping and assault. 128 N.C. App. 688, 690, 497 S.E.2d 416, 418, *review allowed, writ allowed,* 348 N.C. 290, 502 S.E.2d 850, *review improvidently allowed,* 349 N.C. 289, 289, 507 S.E.2d 38, 39 (1998). At the conclusion of the trial, the defendant was acquitted of the assault charge but convicted of felonious restraint, which was submitted to the jury as a lesser-included offense under the kidnaping indictment. *Id.* On appeal, the

defendant contended that the trial court lacked jurisdiction over the charge of felonious restraint because the indictment for first degree kidnapping did not include all of the elements of felonious restraint. *Id.* at 689–90, 497 S.E.2d at 418.

In agreeing with the defendant's claim, the Court of Appeals noted that the fact that the General Assembly specifically stated that "felonious restraint is considered a lesser included offense of kidnapping" in N.C. Gen. Stat. § 14-43.3 was irrelevant to its determination of whether the indictment was valid. *Id.* at 694–96, 497 S.E.2d at 421–22. After determining that the indictment failed to allege the essential elements of felonious restraint, the Court of Appeals remanded the case for entry of judgment for false imprisonment, a lesser-included offense for kidnapping that would have been supported by the indictment. *Id.*

Similarly, in *State v. McCain*, 212 N.C. App. 157, 160, 713 S.E.2d 21, 24 (2011), the Court of Appeals vacated the defendant's conviction and sentence as to possession with the intent to manufacture cocaine on grounds that possession with the intent to manufacture cocaine was not a lesser included offense of trafficking in cocaine and the indictment therefore, did not support the lesser charge.

Like *Wilson* and *McCain*, the indictment in this case was also defective as to the larceny judgment because it lacked an essential element of larceny.

Under our law, larceny requires proof of ownership, a fact that is not necessary to prove in a robbery trial. Further, as explained above, our case law has developed specific defenses based on the ownership element that are available to a larceny defendant but that are not available to a robbery defendant.

Even assuming *arguendo* that larceny is a lesser-included offense of robbery, this does not diminish Mr. Boyd's claim. Under the narrow facts of this case, a defendant charged with robbery may also be called on to defend against larceny, as was the case here. In those cases where the proof of robbery fails, the ownership element provides a valid defense to the lesser offense of larceny. As this notice is required in order to allow the defendant to prepare a defense, the indictment in this case was fatally defective. The conviction for larceny should be vacated.

CONCLUSION

For all these reasons, Mr. Boyd respectfully requests that this Court vacate the conviction for felony larceny.

Respectfully submitted, this the 12th day of November, 2021.

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ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original New Brief for Defendant-Appellant was filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Supreme Court.

I further certify that a copy of the foregoing New Brief for Defendant-Appellant was duly served upon the following party by electronic mail:

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This the 12th day of November, 2021.

/s/ JASON CHRISTOPHER YODER
Electronically submitted
Jason Christopher Yoder
ATTORNEY FOR DEFENDANT-APPELLANT

No. 126PA20 DISTRICT TWENTY-SIX

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Mecklenburg County
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ISIAH BOYD	)	

****

APPENDIX

****

Appendix 1

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-543

Filed: 18 February 2020

Mecklenburg County, No. 17 CRS 221217

STATE OF NORTH CAROLINA

v.

ISIAH BOYD

Appeal by defendant from judgment entered 19 July 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Jason Christopher Yoder for defendant-appellant.

TYSON, Judge.

Isiah Boyd ("Defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of felony larceny. We find no error.

I. Background

Sean Patterson listed his Nintendo 3DS handheld video game system and several video games for the Nintendo for sale on the letgo app, an online marketplace,

for $200.00. A potential buyer messaged Patterson using letgo's chat feature around midnight on 5 June 2017. The potential buyer wanted to know if the items were still for sale and then offered to buy the Nintendo device and the games.

Patterson asked the potential buyer where they should meet to complete the transaction. The potential buyer "messaged" in response that he did not have a car to travel to Patterson, but "would throw in like 50 extra dollars" if Patterson would bring the items to him. The potential buyer messaged Patterson the address of a park and they agreed to meet there in the early hours of 6 June 2017.

Patterson and Eugene Ellington drove together to the designated park. They met and confirmed that Defendant was the potential buyer they had communicated within letgo's online chat. Patterson got out of the passenger's side of the vehicle and approached Defendant. Patterson carried the Nintendo and the games inside a plastic grocery bag.

Defendant was shown the items inside of the bag. Defendant then handed Patterson a folded piece of paper, which Patterson believed to be an envelope containing payment for the items. Patterson testified Defendant "snatched" the bag from him. In the process of grabbing the bag, Defendant tore open the bag, and its contents spilled onto the ground. Defendant shoved Patterson onto the ground and told him "Don't f---ing get up or I'll f--k you up."

Defendant grabbed the Nintendo, while Patterson was on the ground, and ran away. Ellington got out of the car and began to chase after Defendant. Patterson got up and also began chasing Defendant. After a few seconds, Patterson gave up the chase and called for Ellington to do the same. During the chase, Ellington lost the flip-flop sandals he was wearing.

Patterson and Ellington returned to the vehicle. They discovered the "envelope" tendered by Defendant as payment for the items was only a folded piece of paper. However, the folded paper contained a copy of Defendant's social security card. Patterson and Ellington called 911 to report the incident.

Charlotte-Mecklenburg Police Officer Daniel Youngblood responded to the call in the park and met with Patterson and Ellington. Officer Youngblood located an address to match Defendant's name on the social security card. Officer Youngblood went to Defendant's residence. Defendant was present and spoke with officers. Defendant gave officers permission to search his residence. Officers did not locate the Nintendo inside of Defendant's residence. Officers searched in the park and found a pair of flip-flop sandals, a power cord, and a plastic bag with the Nintendo games inside. The Nintendo handheld game was never recovered.

Officers conducted a "show up" outside of Defendant's residence. Patterson and Ellington both identified Defendant was the man who they had met in the park. Defendant was arrested and transported to the police station.

Officer Youngblood and Officer Joshua Gaskin interviewed Defendant. Defendant initially denied having anything to do with the incident during the interview. Defendant told the officers he was at his home.

The officers informed Defendant that he had given Patterson a copy of his social security card. Officer Gaskin testified Defendant "told us everything. How he was out there, and how he attempted to grab the [Nintendo]." Defendant told the officers he ran off with the Nintendo, but had dropped it in an unknown location.

Defendant was indicted for common law robbery. On 19 July 2018, the jury acquitted Defendant of common law robbery, but returned a verdict and convicted him of felony larceny. The trial court sentenced Defendant to an active term of 7 to 18 months in prison. Defendant timely appealed.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court lacked jurisdiction to enter judgment for felony larceny and committed plain error by not instructing the jury on attempted larceny.

IV. Indictment

Defendant argues the indictment was fatally defective. He asserts the indictment for common law robbery did not identify the name of the owner of the property. During his motion to dismiss, Defendant argued a fatal variance existed in the indictment and the evidence presented by the State. Defendant did not challenge the lack of an allegation of ownership of the property in the indictment.

A fatally defective indictment deprives the trial court of subject matter jurisdiction. A lack of subject matter jurisdiction may be raised for the first time on appeal. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000); *State v. Call*, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208 (2001).

This Court has stated: "A defendant must be convicted, if at all, of the particular offense charged in the indictment" and "[t]he State's proof must conform to the specific allegations contained in the indictment." *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985) (citations omitted). This rule "insure[s] that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citations omitted).

Not all purported errors or variances in an indictment are fatal. "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *Id* (citations and parenthetical omitted).

A. Standard of Review

"This Court reviews the sufficiency of an indictment *de novo*." *State v. Harris*, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citations, alterations, and internal quotations omitted).

B. Analysis

1. State v. Young

Our Supreme Court has long recognized "robbery to be merely an aggravated larceny and thus has held that a defendant may be properly convicted of larceny from the person upon an indictment for common law robbery." *State v. Young*, 305 N.C. 391, 392, 289 S.E.2d 374, 375 (1982) (citations omitted).

Defendant was indicted for common law robbery and convicted of felony larceny. In *Young*, our Supreme Court examined the sufficiency of an indictment in an analogous situation where a defendant challenged the validity of a conviction for larceny from a person based upon an indictment for common law robbery. Our Supreme Court held "a defendant, who has been formally charged with common law robbery, may be convicted of the 'lesser included' offense of larceny from the person pursuant to G.S. 15-170 upon proper instructions to the jury by the trial court." *Id.* at 393, 289 S.E.2d at 376.

2. State v. White

This holding was reaffirmed by our Supreme Court in *State v. White*, 322 N.C. 506, 517 n.1, 369 S.E.2d 813, 819 n.1 (1988) ("We also reaffirm our prior holdings that common law robbery is a lesser included offense of armed robbery, and that larceny is a lesser included offense of common law robbery." (citations omitted)). Defendant has not challenged either the instructions by the trial court for this issue, or the sufficiency of the indictment to allege common law robbery.

The State argues larceny from the person is a lesser-included offense of common law robbery. Defendant asserts that a lesser-included offense must have all of the essential elements of the greater offense. *White*, 305 N.C. at 513-14, 369 S.E.2d at 816-17. Specifically, Defendant argues "*White* does not squarely address the question of whether a trial court has jurisdiction over larceny where the common law robbery indictment failed to identify the owner of the property." We read *Young* to address this question and the Supreme Court's opinion in *White* to reaffirm the holding in *Young*. *Id.* at 517, 369 S.E.2d at 819.

3. State v. Brooks and State v. Bennett

This reasoning was also applied by this Court with similar fact patterns in two unpublished cases: *State v. Brooks*, 231 N.C. App. 714, 754 S.E.2d 258, 2014 WL 47078 (2014) (unpublished); and *State v. Bennett*, 175 N.C. App. 592, 624 S.E.2d 430, 2006 WL 91359 (2006) (unpublished).

In *Brooks*, the defendant was indicted for common law robbery and convicted of the lesser-included larceny charge. In *Brooks*, the indictment for common law robbery alleged:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 17th day of November 2011, in Wake County, the defendant named above [did] unlawfully, willfully, and feloniously steal, take and carry away, three female skirts, having a value of $27.97 in US currency, from the person and presence of Tahsin Haopshy by means of an assault upon him consisting of the forcible and violent taking of the property. This was done in violation of N.C.G.S. § 14-87.1.

Brooks, 2014 WL 47078 at *2.

Defendant's indictment for common law robbery herein alleged:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 5th day of June 2017, in Mecklenburg County, Isiah Boyd, did unlawfully, willfully, and feloniously steal, take, and carry away another's personal property, Nintendo 3DS gaming system, of value, from the person and presence of Sean Patterson, by means of an assault upon him consisting of the forcible and violent taking of the property.

In *Brooks*, the defendant therein argues the indictment was factually defective because it failed to identify the owner of the property. *Id.* This Court upheld the indictment, even though it did not allege the owner of the property. *See id*.

In *Bennett*, the defendant was indicted for common law robbery of a package of cigarettes. The indictment did not allege the ownership of the property. *Bennett*,

2006 WL 91359 at *1. The defendant's conviction for the lesser-included larceny charge was upheld by this Court. "We conclude that the trial court could properly try defendant on the charge of larceny from the person based on the indictment for common law robbery." *Id.*

"While an unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority[,] N.C. R. App. P. 30(e)(3), we find the Court's analysis [in *Brooks* and *Bennett*] persuasive and adopt it here." *State v. Burrow*, 248 N.C. App. 663, 670 n.1, 789 S.E.2d 923, 929 n.1 (2016) (citations, quotations, and alterations omitted).

4. State v. Wilson

Defendant cites *State v. Wilson*, where this Court found a trial court lacked jurisdiction for a fatally deficient indictment. *State v. Wilson*, 128 N.C. App. 688, 690, 497 S.E.2d 416, 418 (1998). The indictment charged the defendant with kidnapping and the trial court issued an instruction on a lesser-included offense of felonious restraint. *Id.* The defendant was convicted on the felonious restraint charge. *Id.* On appeal, the defendant argued the trial court lacked jurisdiction over felonious restraint because the indictment failed to allege all the essential elements of felonious restraint. This Court in *Wilson* recognized our General Assembly stated: "Felonious restraint is considered a lesser included offense of kidnapping." N.C. Gen. Stat. § 14-43.3 (1995). However, this Court found the General Assembly's proclamation did not

"relieve the State of its duty to allege" all the essential elements. *Wilson*, 128 N.C. App. at 696, 497 S.E.2d at 422.

The decision of larceny from the person being a lesser-included offense of common law robbery is contained in our Supreme Court's decisions in both *Young* and *White*. *Young*, 305 N.C. at 392, 289 S.E.2d at 375; *White*, 322 N.C. at 517 n.1, 369 S.E.2d at 819 n.1. We are bound by our Supreme Court's decisions until otherwise instructed. *See Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985). Defendant's argument is overruled.

V. Attempted Larceny Instructions

Defendant argues the trial court erred by not instructing the jury on attempted larceny because he never possessed the Nintendo.

A. Standard of Review

Defendant acknowledges he did not request an instruction on attempted larceny and this issue is reviewed for plain error.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is *specifically and distinctly* contended to amount to plain error." N.C. R. App. P. 10(a)(4) (emphasis supplied).

To constitute plain error, Defendant carries the burden to show "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Plain error should only be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted).

B. Analysis

Defendant argues the trial court plainly erred by not instructing the jury on attempted larceny. Defendant asserts he never possessed the Nintendo, therefore he never "secured possession." During Defendant's interview with officers, he stated when he ran the contents of the bag fell out and he "didn't have nothing." Defendant further supports this contention by asserting the Nintendo was never recovered from the park nor from his residence.

"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 deprive the owner of the property permanently." *State v. Osborne*, 149 N.C. App. 235, 242-43, 562 S.E.2d 528, 534 (2002) (citations and quotation marks omitted). Defendant argues the testimony does not support the first or second elements of taking and carrying away.

Defendant's argument misapplies our precedent. Our Supreme Court "has defined taking in this context as the severance of the goods from the possession of the owner. Thus, the accused must not only move the goods, but he must also have them in his possession, or under his control, even if only for an instant." *State v. Carswell*, 296 N.C. 101, 104, 249 S.E.2d 427, 429 (1978) (internal citations and quotations omitted).

"A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away." *Id.* at 103, 249 S.E.2d at 428 (internal citations and quotations omitted). "An attempt charge is not required if the State's evidence tends to show completion of the offense." *State v. Broome*, 136 N.C. App. 82, 88, 523 S.E.2d 448, 453 (1999).

During the interview with officers, Defendant admitted he had taken Patterson's property from him by force and ran off, but later dropped or lost it. Defendant did not know the location of where he had dropped the Nintendo. This testimony, along with Patterson's testimony, satisfies the asportation requirement of *Carswell* and that Defendant took and carried away Patterson's property to complete the larceny. The trial court did not err by failing to give an instruction on the lesser-included offense of attempted larceny where the evidence did not merit its inclusion. *See id.* Defendant's argument is without merit and is overruled.

VI. Conclusion

The indictment was not fatally defective and supports the felony larceny conviction. The trial court did not commit error and no plain error in omitting a jury instruction on attempted larceny.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant's argument under plain error review is without merit. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges HAMPSON and BROOK Concur.

Report per Rule 30(e).

Appendix 14

NO. COA13-663
NORTH CAROLINA COURT OF APPEALS

Filed: 7 January 2014

STATE OF NORTH CAROLINA

v. Wake County
No. 11 CRS 228136

BERVIN LAQUINT BROOKS

Appeal by Defendant from judgment entered 16 January 2013 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 19 November 2013.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Bradley, for the State.

Irving Joyner for Defendant.

McGEE, Judge.

The State's evidence tended to show that on 17 November 2011, Tahsin Haopshy ("Haopshy") was working as a Loss Prevention Officer at the Rugged Warehouse, a retail clothing store in Raleigh ("the store"). At approximately 2:25 p.m., while monitoring the store's security cameras, Haopshy noticed a man, later identified as Bervin Laquint Brooks ("Defendant"), in the ladies' department carrying several girls' skirts, and a

men's jacket. Haopshy observed Defendant push the skirts down the front of his pants while attempting to use the jacket to cover his actions.

In order to confront Defendant, Haopshy left the cameras and saw Defendant leaving the store. Haopshy followed Defendant from the store into the parking lot where he approached Defendant and said: "Sir, I am with loss prevention for the store; I need you to stop and talk about the merchandise you have down your pants." Defendant did not respond, so Haopshy called out again. Defendant then turned toward Haopshy and held an electric stun device threateningly in the direction of Haopshy, who was about three feet from Defendant and moving toward Defendant. Haopshy then heard "the sound of electricity crackling" and saw "an arc" when the stun device was activated. Haopshy testified that Defendant repeated: "Back off, back away," as Defendant pointed the stun device at Haopshy "and lunged towards [him] with it." Haopshy testified: "I backed off[,]" and Defendant "took off to his car." Haopshy noted the make and model of the vehicle in which Defendant drove away, and noted that the vehicle had a temporary North Carolina tag.

Defendant was subsequently arrested and identified as the man in the surveillance videos, and as the man Haopshy had confronted in the parking lot. Defendant was indicted for

common law robbery on 20 February 2012 and, following a jury trial, was found guilty on 16 January 2013. Defendant was sentenced to an active sentence of twelve to fifteen months. Defendant appeals.

I.

In Defendant's first argument, he contends the trial court erred by refusing to dismiss the charge of common law robbery at the close of all the evidence. We disagree.

The standard the trial court applies when a defendant moves to dismiss a charge is as follows:

> "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." "Whether the evidence presented constitutes substantial evidence is a question of law for the trial court." Evidence is deemed "substantial" if the evidence is "existing and real, not just seeming or imaginary." In reviewing
>
> > "the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty."
>
> In making its determination, the trial court

> must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.

State v. Rose, 339 N.C. 172, 192-93, 451 S.E.2d 211, 222-23 (1994) (citations omitted). We review *de novo* the trial court's ruling on a motion to dismiss. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). Robbery is a common law offense, which is generally described as: "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982) (citations omitted).

A.

Defendant first argues that the indictment was fatally defective. Defendant contends that the indictment failed to properly allege the owner of the personal property – the skirts – that Defendant was charged with taking. The challenged indictment reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 17th day of November 2011, in Wake County, the defendant named above [did] unlawfully, willfully, and feloniously steal, take and carry away, three female skirts, having a value of $27.97 in US currency, from the person and presence of Tahsin Haopshy by means of an assault upon him consisting of the forcible and violent taking of the property. This

was done in violation of N.C.G.S. § 14-87.1.

Defendant argues that, because larceny is a lesser included offense of common law robbery and a larceny indictment must allege the owner of the stolen property, this indictment for common law robbery, which does not state the owner of the skirts, is fatally defective. Though Defendant is correct in stating that larceny is a lesser included offense of common law robbery, *State v. White*, 322 N.C. 506, 514, 369 S.E.2d 813, 817 (1988), and that the general rule is that a greater offense must have all the essential elements of a lesser included offense, *Id.* at 513-14, 369 S.E.2d at 816-17, our Supreme Court has decided that this requirement does not apply for larceny and common law robbery. *Id.* at 517, 369 S.E.2d at 819, *see also Id.* at 519, 369 S.E.2d at 820 (Justice Webb dissenting).

Concerning indictments for common law robbery, our Supreme court has held that

> it is not necessary that ownership of the property be laid in a particular person in order to allege and prove . . . robbery. The gist of the offense of robbery is the taking by force or putting in fear. An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property.

State v. Spillars, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972) (citations omitted). Defendant's indictment for common law

robbery was not defective because it failed to properly identify the owner of the property, and the trial court did not err in refusing to dismiss the common law robbery charge.

B.

Defendant further argues that there was not sufficient evidence presented at trial that "Haopshy was ever placed in fear and apprehension or was, otherwise, the victim of a forcible and violent taking of the property[.]" The evidence at trial, taken in the light most favorable to the State, showed that, after observing Defendant conceal skirts belonging to the store in Defendant's pants, Haopshy followed Defendant out to the parking lot. Haopshy confronted Defendant about the stolen merchandise concealed in Defendant's pants, and Defendant "turned around and pulled a device out of his pocket, out of his hoody pocket, and pointed it at [Haopshy]." Haopshy heard the device crackle and saw electricity arcing from the end of the device and recognized it as a stun device. Haopshy testified that Defendant said: "Back off." Haopshy further testified that Defendant "just repeated that same thing, [b]ack off, back away, as he pointed this device at me and lunged towards me with it." Haopshy retreated and Defendant "took off" to his car with the stolen merchandise.

We hold that this evidence was sufficient to show the non-consensual taking of personal property from the presence of another by means of fear. *Smith*, 305 N.C. at 700, 292 S.E.2d at 270. The fact that the use of the stun device occurred after Defendant took the merchandise from the store is of no moment on these facts. *See State v. Gaither*, 161 N.C. App. 96, 100, 587 S.E.2d 505, 508 (2003) (citations omitted) ("A defendant's threatened use of his gun is deemed concomitant with and inseparable from his robbery attempt where the evidence shows that (1) the gun was used to facilitate the defendant's escape, and (2) the taking of property coupled with the escape constitutes one continuous transaction. This standard applies even if there is no evidence that defendant used force or intimidation before the taking of property."). Defendant's first argument is without merit.

II.

In Defendant's second argument, he contends the trial court improperly charged the jury on the crime of common law robbery. We disagree.

Defendant contends the trial court improperly attempted to correct a fatal deficiency in the indictment by instructing the jury that, in order to convict on common law robbery, the jury must find that Defendant "carried away property of [the store]"

when the indictment fatally failed to identify to whom the property belonged. Defendant's argument is predicated on his erroneous contention that establishing ownership of the property taken was an essential element of common law robbery. Because identifying the owner of the property was not an element of the charge of common law robbery, Defendant's second argument fails.

III.

In Defendant's final argument, he contends the trial court erred by instructing the jury on flight. We disagree.

As Defendant acknowledges, "jury instructions relating to the issue of flight are proper as long as there is 'some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.'" *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (citations omitted). According to Haopshy, after Defendant threatened him with the stun device, causing Haopshy to retreat, Defendant "took off to his car" and drove away. We hold this testimony constituted "'some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.'" *Id.* As our Supreme Court has noted, "'[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be

some evidence that defendant took steps to avoid apprehension.'" *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625-26 (2001) (citation omitted). Defendant's use of a stun device to prevent Haopshy from detaining him satisfies this requirement. Defendant's final argument is without merit.

No error.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).

NO. COA04-1686

NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2006

STATE OF NORTH CAROLINA

v.

Anson County
Nos. 03 CRS 2797, 50709, 50753

DOUGLAS B. BENNETT

Appeal by defendant from judgment entered 5 February 2004 by Judge Mark E. Klass in Anson County Superior Court. Heard in the Court of Appeals 9 January 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel D. Addison, for the State.

Eric A. Bach for defendant-appellant.

CALABRIA, Judge.

Douglas B. Bennett ("defendant") was indicted for common law robbery and for attaining the status of an habitual felon. At trial the State presented evidence showing: on 27 April 2003, Corteasha Smith ("Smith") worked as a cashier at the Markette No. 12 ("Markette") in Wadesboro, North Carolina. Smith testified that at approximately 11:30 p.m. defendant entered the store. Defendant walked to the counter and asked for two cartons of Newport cigarettes and one carton of Winston cigarettes. Smith was suspicious as customers ordinarily did not buy three cartons of

cigarettes, so she laid them on the counter but kept her hands on them. Smith rang up the cigarettes and the total came to $68.00. Defendant stated he wanted to inspect the cigarettes since he was purchasing them for someone else. Smith affirmed they were correct, but defendant insisted on seeing them. When another customer entered the Markette, defendant grabbed two boxes of the cigarettes and exited the store. Smith observed defendant get into a "dark looking purple Lumina" and drive away "toward [Highway] 109." Defendant was convicted of felonious larceny from the person and pled guilty to attaining the status of an habitual felon. Defendant was sentenced to a term of 122 months to 156 months in the custody of the North Carolina Department of Correction and defendant appeals.

Defendant first argues that the trial court erred by denying both his pretrial motion to dismiss as well as his motion to dismiss for insufficiency of the evidence. Defendant contends that the indictment for common law robbery was inadequate to charge him with the offense of larceny from the person because it did not allege ownership of the stolen cigarettes. Additionally, defendant claims that the trial court should have dismissed the case for insufficiency of the evidence because the State failed to prove ownership of the cigarettes.

As to the indictment, there was no defect and the trial court properly tried defendant rather than dismiss the charge against him. "Our courts have consistently considered robbery to be merely an aggravated larceny and thus have held that *a defendant may be*

properly convicted of larceny from the person upon an indictment for common law robbery." *State v. Young*, 305 N.C. 391, 392, 289 S.E.2d 374, 375 (1982) (citations omitted) (emphasis added); *see also State v. White*, 142 N.C. App. 201, 204, 542 S.E.2d 265, 267 (2001) (explaining that "[l]arceny from the person is a lesser included offense of common law robbery.") Thus, we conclude that the trial court could properly try defendant on the charge of larceny from the person based on the indictment for common law robbery.

As to defendant's claim regarding insufficiency of the evidence, the trial court properly denied his motion to dismiss. A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "[I]f the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's

innocence." *State v. Grigsby*, 351 N.C. 454, 456-57, 526 S.E.2d 460, 462 (2000) (quoting *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979)). "[C]ontradictions and discrepancies in the evidence presented are for the jury to resolve and do not warrant dismissal of a case." *State v. Jarrell*, 133 N.C. App. 264, 268, 515 S.E.2d 247, 250 (1999).

The elements of larceny include: "(1) taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002); *Accord State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983). The State illustrated through the testimony of Smith that she retrieved the cigarettes from behind the counter and kept her hand firmly upon them as she did not trust defendant. It was only when another patron entered the Markette that defendant grabbed the cigarettes from Smith and exited the store. This evidence was more than sufficient to withstand a motion to dismiss by demonstrating that defendant took and carried away cigarettes belonging not to him but to the owner of the Markette ("owner"), without the owner's consent and with the intent to deprive the owner of them permanently. This assignment of error is overruled.

Defendant next argues that the trial court erred by admitting evidence of a store theft not sufficiently similar to the theft in the instant case thereby contravening North Carolina Rule of Evidence 404(b). Rule 404(b) prohibits the admission of evidence

of other crimes or acts in order to prove the character of the person or to show he acted in conformity with past conduct. N.C. Gen. Stat. § 8C-1, Rule 404 (2003). "[Rule 404(b)] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

The theft in the instant case and the evidence of the theft committed after the defendant was charged were sufficiently similar to warrant the inclusion of such evidence. Both thefts took place at Markette stores in Wadesboro. Both thefts involved the defendant asking for both Winston and Newport cigarettes in cartons. Both thefts involved the defendant eventually grabbing the cartons and exiting the store once the cashier became distracted. The second theft occurred merely nine days after the theft for which defendant was tried in the instant case. In short, both thefts were sufficiently similar in accordance with Rule 404(b), *supra*, to warrant the inclusion of each theft. This assignment of error is overruled.

The record on appeal contains additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6)(2005), we deem them abandoned.

No error.

Judges WYNN and JACKSON concur.

Report per Rule 30(e).