

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-212

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

STATE OF NORTH CAROLINA

v.

Wake County
No. 09 CRS 40318

MICHAEL LEWIS WHITE

Appeal by defendant from judgments entered 1 October 2009 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

Ryan McKaig, for defendant-appellant.

STEELMAN, Judge.

Where the indictment clearly stated all of the elements of the crime of assault with a firearm on a law enforcement officer, an incorrect statutory reference was not fatal. The trial court did not abuse its discretion in admitting evidence of defendant's gang membership and participation in the making of a rap CD, since this evidence was relevant to the element of defendant's intent under the assault and attempted murder charges. This Court will not conduct an *in camera* review of sealed records that have not been forwarded to this Court.

I. Factual and Procedural History

On 4 April 2008, Officers Boyce and Greenwood ("Greenwood") (collectively "the officers") of the Raleigh Police Department gang unit were patrolling in a marked police car on Crosslink Road. At the intersection of Crosslink Road and Garner Road the officers saw the occupants of a white Ford Expedition ("the vehicle") throw a CD or DVD from the vehicle. When the police officers came to a stop behind the vehicle at a stoplight a second CD or DVD was thrown from the vehicle. The officers decided to stop the vehicle for littering. As the stoplight turned green the officers activated their blue lights and siren, but the vehicle "accelerated at a high rate of speed." A chase ensued, and the officers pursued the vehicle into Schenley Square Mobile Home Park on Disco Lane.

The vehicle finally came to a stop, and the patrol car stopped fifteen to twenty feet behind the vehicle. Michael Lewis White ("defendant") exited the vehicle and ran away, carrying a gun in his right hand. The officers were familiar with defendant as a member of the Nine Trey Bloods gang, and also as one of the producers and performers on a rap CD that included a derogatory song about the Raleigh Police Department gang unit, specifically mentioning Greenwood. Greenwood exited the patrol car, called to defendant by name, and ran after defendant. During the chase something fell from defendant's pocket or shirt, which was later determined to be the magazine from defendant's gun. As the chase neared an area where individuals were standing around, Greenwood decided to try and stop defendant. Greenwood drew his weapon, and pushed defendant's left shoulder in an attempt to bring him down.

Defendant did not fall, but moved towards Greenwood and extended his gun. Greenwood fired two shots into the ground. Defendant turned towards Greenwood and pointed his gun at Greenwood's chest. Greenwood fired three shots, two of which struck defendant, bringing him to the ground.

Defendant was indicted for attempted first-degree murder, and assault with a deadly weapon on a government officer. The case was tried before Judge Hight. The jury found defendant not guilty of attempted first-degree murder, but guilty of assault with a firearm on a law enforcement officer. On 1 October 2009, the trial court entered a judgment sentencing defendant to an active term of 46 to 65 months imprisonment, to be served at the expiration of a federal sentence that he was already serving for possession of a firearm by a felon. At sentencing, the trial court specifically referred to N.C. Gen. Stat. § 14-34.5 (2009) and recited the conviction to be a Class E felony. Also on 1 October 2009, the trial court entered a second judgment, sentencing defendant to an active term of 46 to 65 months imprisonment for the crime of assault with a deadly weapon on a government officer under N.C. Gen. Stat. § 14-34.2 (2009), a Class F felony.

Defendant appeals.

II. Sufficiency of Indictment

In his first argument, defendant contends that the trial court committed error in instructing the jury on assault on a law enforcement officer with a firearm, and erred in entering judgment

for assault on a law enforcement officer with a firearm where the defendant had not been indicted on that charge. We disagree.

A. Standard of Review

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 340 (2000) (citation omitted), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000); *See State v. Sturdivant*, 304 N.C. 293, 307-08, 283 S.E.2d 719, 729-30 (1981). We review the sufficiency of the indictment *de novo*. *See Id.*

B. Analysis

N.C. Gen. Stat. § 15A-924(a)(5) (2009) requires that a criminal pleading contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

In the instant case, the indictment on the assault charge was captioned as assault with a deadly weapon on a government officer, and the crime was recited to be in violation of N.C. Gen. Stat. § 14-34.2. The jury was charged and returned a verdict finding defendant guilty of assault with a firearm on a law enforcement officer, a Class E felony. N.C. Gen. Stat. § 14-34.5. The indictment charging defendant with assault stated:

The jurors for the State upon their oath present that on or about April 4, 2008, in Wake County, the defendant unlawfully, willfully, and feloniously did assault Officer B.D. Greenwood, a law enforcement officer of the Raleigh Police Department, with a Glock .40 caliber semi-automatic handgun, which is a firearm, by leveling the firearm and pointing it at Officer Greenwood's chest and torso area. At the time of the assault, the officer was performing a duty of his office: attempting to apprehend this defendant after he fled from a vehicle that this officer stopped for a criminal investigation. The defendant's actions were in violation of N.C.G.S. 14-34.2.

N.C. Gen. Stat. § 14-34.5(a), defines the crime of assault with a firearm on a law enforcement officer, as follows: "[a]ny person who commits an assault with a firearm upon a law enforcement officer, probation officer, or parole officer while the officer is in the performance of his or her duties is guilty of a Class E felony." This Court has held that "although an indictment may cite to the wrong statute, when the body of the indictment is sufficient to properly charge defendant with an offense, the indictment remains valid and the incorrect statutory reference does not constitute a fatal defect." *State v. Mueller*, 184 N.C. App. 553, 574, 647 S.E.2d 440, 455 (2007) (citation omitted), *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007).

Despite citing to the wrong statute, the body of the indictment was "sufficient to properly charge defendant with" assault with a firearm on a law enforcement officer. *Id.* The indictment "asserts facts supporting every element of [assault with a firearm on a law enforcement officer] and the defendant's commission thereof." N.C. Gen. Stat. § 15A-924(a)(5). Defendant

assaulted Greenwood with a firearm while Greenwood was performing his duties as a law enforcement officer. In his brief, defendant concedes "that the body of the indictment states all the elements of the crime of assault with a firearm on a law enforcement officer."

In addition to the language in the indictment itself, the fact that defendant was on notice that he was being tried for assault with a firearm on a law enforcement officer is apparent from statements made by defendant's counsel at trial. Defendant's counsel referenced the charge of assault with a firearm on a law enforcement officer in his closing argument. References were made throughout the trial by defendant's counsel, counsel for the State, and the trial court to the offense of assault with a firearm on a law enforcement officer. One of the main purposes of an indictment is to put the defendant on notice of the charges against him and afford him an opportunity to defend himself. *State v. Jones*, 110 N.C. App. 289, 291, 429 S.E.2d 410, 411-12 (1993). Defendant was clearly on notice that he was being tried for the offense of assault with a firearm on law enforcement officer. The indictment against him for this crime was valid, and the trial court did not err in charging the jury on this offense.

C. Judgments

The record in this case is devoid of any information as to why the trial court entered a second judgment for a Class F felony in this case. We can only surmise that this was done out of an abundance of caution, given the similarity of the elements required

for conviction under N.C. Gen. Stat. § 14-34.2 and § 14-34.5. As noted above, the indictment was sufficient to support a conviction under N.C. Gen. Stat. § 14-34.5. Therefore, the judgment under § 14-34.2 is mere surplusage, and is ordered arrested.

III. Admission of Evidence of Defendant's Gang Membership and

Rap CD

In his second argument, defendant contends that the trial court abused its discretion in allowing the state to present evidence of defendant's gang membership and a rap song that defendant produced that named the police officer who was the victim in this case. We disagree.

A. Standard of Review

On appeal, we review the trial court's evidentiary rulings for abuse of discretion. *State v. Cook*, 193 N.C. App. 179, 181, 666 S.E.2d 795, 797 (2008). An abuse of discretion is a ruling "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006)).

B. Analysis

Rule 403 of the North Carolina Rules of Evidence states, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2009). "Necessarily, evidence which is probative in the

State's case will have a prejudicial effect on the defendant; the question, then, is one of degree." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986).

At trial, defendant was charged with two offenses: (1) attempted first-degree murder; and (2) assault with a firearm on a law enforcement officer. The State introduced evidence that defendant was a member of the Nine Trey Bloods, a street gang, and that he had produced a rap song entitled, "F_ _ _ the Gang Unit" which repeatedly says "F_ _ _ Greenwood." Defendant concedes that the evidence of the rap song was relevant to the charge of attempted first-degree murder, but contends that its probative value was outweighed by its prejudicial effect. N.C. Gen. Stat. § 8C-1, Rule 403. He further asserts that his gang membership was not relevant for any purpose as to either of the two charges.

Since the rap song expressly referred to the police "gang unit" and referenced the arresting officer by name, evidence of the song and defendant's gang affiliation are inexorably intertwined and should be reviewed together. This evidence clearly demonstrated an animosity on the part of defendant toward the "gang unit" and specifically against Greenwood. This evidence was relevant under Rule 401 of the Rules of Evidence to show defendant's intent under both charges. N.C. Gen. Stat. § 8C-1, Rule 401 (2009).

While the evidence certainly was prejudicial to the defendant, the trial court did not abuse its discretion in holding that its

probative value was not outweighed by the danger of undue prejudice to the jury under Rule 403 of the Rules of Evidence.

This argument is overruled.

IV. Personnel Files

In his third argument, defendant requests that we conduct an *in camera* review of the police personnel files of Greenwood, which were reviewed *in camera* by the Superior Court and then placed under seal. We dismiss this argument.

"It is incumbent upon the appellant to see that the record on appeal is properly made up and transmitted to the appellate court. The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects appeal to dismissal." *Fortis Corp. v. Northeast Forest Products*, 68 N.C. App. 752, 754, 315 S.E.2d 537, 538-39 (1984) (citations omitted). Defendant has failed to cause the sealed personnel files of Greenwood to be brought before this Court.

This argument is dismissed.

NO ERROR in part; JUDGMENT ARRESTED in part; DISMISSED in part.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).