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NO. COA11-455
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v.

Martin County
Nos. 09 CRS 50497, 50498, 50499

CLIFTON LEROY PERRY, JR.

Appeal by Defendant from judgments entered 30 November 2010 by Judge Clifton W. Everett, Jr. in Martin County Superior Court. Heard in the Court of Appeals 13 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Geoffrey W. Hosford, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Clifton Leroy Perry, Jr. ("Defendant") appeals from a jury verdict finding him guilty of robbery with a dangerous weapon, possession of firearm by a felon, assault with a deadly weapon with intent to kill, and second degree kidnapping. Defendant argues the trial court erred by (1) allowing the State to amend the name of the alleged victim from "James Bizzell" to "Carol Groves" in the indictment for assault with a deadly weapon with

intent to kill (the "Indictment") and (2) conducting the hearing to amend the Indictment outside the Defendant's presence. We agree the trial court erred in allowing the State to amend the victim's name in the Indictment and, therefore, vacate the trial court's judgment finding Defendant guilty of assault with a deadly weapon with intent to kill. Accordingly, we do not reach the merits of Defendant's second assignment of error.

I. Factual & Procedural Background

This case was heard during the 29 November 2010 criminal session of Martin County Superior Court on true bills of indictment for each charge. Immediately after the jury was empaneled, the State moved to amend the Indictment to read that Defendant assaulted "Carol Groves" and not "James Bizzell." Defendant was not present in the courtroom, but Defense counsel did not object to the amendment. The trial court granted the State's motion.

At trial, the State's evidence tended to show the following. In the evening of 22 April 2009 around 11:00 p.m., Defendant robbed a Wilco Hess convenience store. Immediately before the robbery, Carol Groves drove to the convenience store with her fiancé, James Bizzell, who waited outside while she went in to use the restroom and purchase some items. While Ms.

Groves was on her way to check out, Defendant entered the store wielding a gun in one hand. At the sight of Defendant's gun, Ms. Groves became frightened and attempted to run out the door of the convenience store but was caught by Defendant. Having observed this from the car, Mr. Bizzell exited the vehicle in an attempt to help Ms. Groves. However, upon seeing Defendant's gun, he realized there was nothing he could do.

Defendant dragged Ms. Groves back to the counter and told her not to move. Once more, Ms. Groves attempted to escape; this time, she succeeded, running out the door and jumping into the passenger's seat of her car. Ms. Groves yelled to Mr. Bizzell that a robbery was occurring and that they must leave. Mr. Bizzell ran around the rear of the car towards the driver's side of the vehicle. Defendant, who had chased Ms. Groves out of the convenience store, then fired a shot at Ms. Groves while she was seated in the passenger's seat of the vehicle. The bullet went through the passenger side window, but Ms. Groves was not hit. Defendant then fled the scene. Ms. Groves identified Defendant as the individual who had robbed the convenience store and shot at her.

During investigation of the shooting, a confidential informant tipped off police that Defendant had been involved.

Defendant voluntarily went to the police station for questioning and denied being at the convenience store during the robbery. After Defendant requested an attorney, he was arrested.

Defendant did not present any evidence at trial. At the close of the evidence, Defendant moved to dismiss the charge of conspiracy to commit robbery with a dangerous weapon. The trial court granted Defendant's motion. The jury returned a verdict finding Defendant guilty of robbery with a dangerous weapon, possession of a firearm by a felon, assault with a deadly weapon with intent to kill, and second degree kidnapping. The trial court sentenced Defendant to consecutive terms of imprisonment of 117 to 150 months for robbery with a dangerous weapon, 20 to 24 months for possession of a firearm by a felon, 46 to 65 months for assault with a deadly weapon with intent to kill, and 46 to 65 months for second degree kidnapping. Defendant gave notice of appeal in open court on 30 November 2010.

II. Jurisdiction

As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. §7A-27(b) (2009).

III. Analysis

Defendant contends the trial court erred in allowing the

State to amend the victim's name on the Indictment from "James Bizzell" to "Carol Groves." We agree. The subject matter jurisdiction of a trial court is a question of law, which this Court reviews *de novo*. *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004). Although Defendant did not object to the amendment of the Indictment at trial, the issue of subject matter jurisdiction may be raised at any time, even on appeal. See *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority. *State v. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377 (2005).

N.C. Gen. Stat. §15A-923(e) provides that a bill of indictment may not be amended. N.C. Gen. Stat. § 15A-923(e) (2009). Our Supreme Court "has interpreted prohibited amendments to mean 'any change in the indictment which would substantially alter the charge set forth in the indictment.'" *State v. Abraham*, 338 N.C. 315, 340-41, 451 S.E.2d 131, 144 (1994) (citation omitted). "Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal." *Id.* at 340, 451 S.E.2d at

144. "In such a case, 'the trial court should dismiss the charge stemming from the flawed indictment and grant the State leave to secure a proper bill of indictment.'" *Id.* at 341, 451 S.E.2d at 144 (citation omitted). In *Abraham*, the trial court allowed the State to amend the victim's name in the indictment from "Carlose Antoine Latter" to "Joice Hardin." *Abraham*, 338 N.C. at 340, 451 S.E.2d at 144. Our Supreme Court declared "such a variance [was] fatal," holding the trial court was without authority to allow such an amendment because it "depriv[ed] [the defendant] of the right to be tried only upon a bill of indictment returned by a grand jury." *Id.* at 339-40, 451 S.E.2d at 143-44; see also *State v. Call*, 349 N.C. 382, 424, 508 S.E.2d 496, 522 (1998) (arresting the trial court's judgment where the indictment inaccurately stated the name of the victim, "Gabriel Gonzalez," as "Gabriel Hernandez Gervacio"); *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962) (holding amendment of indictment to be a fatal variance where it listed the victim as "Frank E. Nutley" as opposed to "Frank E. Hatley," the actual victim as shown through proof during trial).

Here, like in *Abraham*, *Call*, and *Overman*, the amendment of the Indictment was a fatal variance and substantially altered the charge set forth in the indictment. The trial court should

not have permitted the amendment because it deprived Defendant of the right to be tried only upon a bill of indictment returned by a grand jury. Where Defendant originally prepared for a defense to assault with a deadly weapon with intent to kill James Bizzell in accord with the original indictment, he suddenly had to defend himself against assault with a deadly weapon with intent to kill Carol Groves.

The State contends this case is analogous to *State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990), and *State v. Marshall*, 92 N.C. App. 398, 374 S.E.2d 874 (1988). However, *Bailey* and *Marshall* are distinguishable from the case at bar because they involved changes to indictments to correct *inadvertent* mistakes. *Bailey*, 97 N.C. App. at 476, 389 S.E.2d at 133 (permitting amendment of victim's name from "Pettress Cebron" to "Cebron Pettress" on three indictments because the court found the inversion of the name to be inadvertent); *Marshall*, 92 N.C. App. at 401, 374 S.E.2d at 876 (permitting amendment of victim's name from "Regina Lapish" to "Regina Lapish Foster" because it was "clear that the rape indictment inadvertently omitted the last name of Regina Lapish Foster."). This Court has expressly permitted correction of inadvertent mistakes, reasoning the amendment neither misleads nor surprises

the defendant as to the nature of the charges. *State v. McNair*, 146 N.C. App 674, 676, 554 S.E.2d 665, 668 (2001).

Here, unlike in *Marshall* and *Bailey*, there is no indication that the entry of the victim's name in the Indictment as "James Bizzell" was inadvertent. This was not a spelling error or an unintentional exclusion of a portion of the actual victim's name. The victim's name is Carol Groves, not James Bizzell, as recorded in the Indictment. Furthermore, we cannot know whether Defendant was misled or surprised by such a change particularly because he was not present at the time the amendment occurred. One of the purposes of an indictment is "'to put the defendant on reasonable notice so as to enable him to make his defense.'" *State v. Leonard*, ___ N.C. App. ___, ___, 711 S.E.2d 867, 872 (2011) (quoting *State v. Gregory*, 223 N.C. 415, 420, 27 S.E.2d 140, 143 (1943)). Here, the trial court allowed the State to change the indictment after the jury had already been empanelled. Had Defendant known the trial court would allow the State to change the victim's name in the Indictment, Defendant could have prepared his defense accordingly. Defendant may have presented evidence instead of choosing to present none. Therefore, we hold Defendant was not put on reasonable notice to prepare and defend against a charge alleging the victim to be

Carol Groves.¹

Finally, in vacating Defendant's conviction, we note the importance of the role of a grand jury. "Whether or not to return a true bill of indictment is within the sole province of the grand jury." *Abraham*, 338 N.C. at 340-41, 451 S.E.2d at 144. An indictment containing a fatal variance cannot be amended before, during or after trial because it denies the defendant the right to be tried only upon an indictment returned by a grand jury. *Id.* at 340-41, 451 S.E.2d at 143-44. In discussing amendments to indictments, the United States Supreme Court has said that

[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Russell v. U.S., 369 U.S. 749, 770, 8 L. Ed. 2d 240, 254-55 (1962). Here, by allowing the State to amend the Indictment and change the victim's name where the mistake was not inadvertent, the trial court usurped the grand jury's purpose and stripped

¹ "Carol Groves" was listed on the indictment for second degree kidnapping, but this does not provide Defendant with adequate notice that Ms. Groves was also the victim in the Indictment for assault with a deadly weapon with intent to kill.

the power bestowed upon it by our Constitution. See N.C. Const. art. I, § 22 ("Except in misdemeanor cases. . . no person shall be put to answer any criminal charge but by indictment, presentment or impeachment."); see also *State v. Morris*, 104 N.C. 837, 839, 10 S.E. 454, 455 (1889) ("An indictment is a written accusation of an offense, preferred to, and presented upon oath as true, by a grand jury at the suit of the government."). A true grand jury of twelve indicted Defendant for assaulting Mr. Bizzell, not Ms. Groves. The trial court cannot allow the State to change the victim's name to "Carol Groves" in order to reach a favorable verdict. Accordingly, we find the trial court erred in allowing the State to change the victim on the indictment from "James Bizzell" to "Carol Groves."

IV. Conclusion

We, therefore, vacate Defendant's conviction for assault with a deadly weapon with intent to kill, 09 CRS 50499, without prejudice to the State's right to secure a proper bill of indictment. We further remand the matter to the trial court for resentencing consistent with this opinion.

Vacated and remanded.

Judges BEASLEY and THIGPEN.

Report per Rule 30(e).