NO. COA01-570

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Gaston County
Nos. 98 CRS 27531-27532,
99 CRS 7177, 26771

KIMLA ANN ELDERS

Appeal by defendant from judgment entered 25 August 1999 by Judge Raymond A. Warren in Gaston County Superior Court. Heard in the Court of Appeals 20 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Marc D. Bernstein, for the State.

David Childers for defendant-appellant.

WALKER, Judge.

On 9 September 1998, Waverly Bradshaw and defendant entered an Eckerd Drug store in Gastonia. With the assistance of defendant, Mr. Bradshaw began concealing merchandise in his clothing. Because store personnel were aware of Mr. Bradshaw and defendant, the manager alerted the Gastonia City Police and trained a security camera on them. Upon arrival, Leo Williams, a detective with the police department, entered the store and the security office where he could monitor both the store and the security cameras from a booth. He viewed the images of Mr. Bradshaw and defendant from the

security cameras and also watched them through the tinted glass of the booth.

Philip Firantello, a sergeant with the police department, arrived at the scene but remained outside of the store. When defendant exited the store, Sergeant Firantello attempted to detain her. As defendant was approaching her vehicle, Sergeant Firantello called out, "Police, I need to speak with you." Defendant responded by increasing her pace. She quickly entered her vehicle, locked the doors, and started the engine. Sergeant Firantello approached the driver's side door, knocked on the window, displayed his badge in front of the vehicle and said, "Police. Shut off the vehicle. Get out of the vehicle."

When defendant acted as if she would flee the scene, Sergeant Firantello repositioned himself in front of the vehicle, leaning against the bumper and over the hood, and again displayed his badge. Several times he repeated, "police, police, shut off the vehicle, get out of the vehicle." Defendant put the vehicle into gear and started to move forward. Sergeant Firantello felt pressure on his legs as the vehicle moved up against him. He then drew his weapon, aimed it at the hood of the vehicle, and repeated his demands to shut off the vehicle and get out. Defendant revved the engine and "pushed [Sergeant Firantello] considerably with the vehicle, it was kind of a constant pressure kind of push, push."

After he realized that defendant was continuing forward, Sergeant Firantello rolled off the hood of the car and radioed for assistance. The manager of the Eckerd Drug store punctured one of

the tires of defendant's vehicle as she was leaving. Defendant was subsequently stopped and arrested.

On the same day, warrants were issued against defendant for assault with a deadly weapon on a government officer, resisting, delaying, or obstructing a public officer, and misdemeanor larceny. On 4 January 1999, the grand jury returned indictments against the defendant on these charges. The indictment for assault with a deadly weapon on a government officer charged that:

> the defendant named above unlawfully, willfully and feloniously did assault P.P. Firantello, a law enforcement officer of The Gastonia City Police Department, with a motor vehicle, by attempting to move said vehicle when officer was standing in front of it. At the time of the assault, the officer was performing the following duty of his office: attempting to question the defendant in reference to larceny.

On 27 January 1999, defendant waived arraignment on the charges. On 1 March 1999, defendant was indicted as an habitual felon and waived arraignment on the charge on 31 March 1999. On 2 August 1999, the grand jury issued a superseding indictment for the assault with a deadly weapon on a government officer charge which stated:

> the defendant named above unlawfully, willfully and feloniously did assault P.P. Firantello, a law enforcement officer of The Gastonia City Police Department, with a motor vehicle, a deadly weapon, by attempting to strike the officer with the motor vehicle, when he was standing in front of it. At the time of the assault, the officer was performing the following duty of his office: attempting to question the defendant in reference to a larceny.

On 23 August 1999, the State dismissed the 4 January indictment and proceeded to trial on the superseding indictment and the other charges. The jury found defendant guilty of all charges.

Defendant first claims the trial court erred in denying her request to read a portion of one of the indictments to the jury where she contends the indictment differed from the testimony used to support her conviction. N.C. Gen. Stat. § 15A-1221(b)(1999) states, "At no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury." The purpose of the statute "is to prevent jurors from receiving a distorted view of the case." *State v. Richardson*, 346 N.C. 520, 539, 488 S.E.2d 148, 159 (1997), *cert. denied*, 522 U.S. 1056, 239 L. Ed. 2d 652 (1998)(*citing State v. Rogers*, 52 N.C. App. 676, 279 S.E.2d 881 (1981)).

While our Courts have allowed a trial judge to draw from or read selections of indictments for the purpose of informing the jury of the charges pending against a defendant, it is impermissible for defense counsel to read an indictment to the jury. *See State v. Knight*, 340 N.C. 531, 459 S.E.2d 481 (1995); *Richardson, supra.* The prohibition against reading an indictment to the jury does not hamper or prohibit defense counsel from arguing "fully the charges against the defendant and [urging] that the State had not proven the elements of these crimes." *Richardson*, 346 N.C. at 539, 488 S.E.2d at 159.

Sergeant Firantello testified that he was standing in front of defendant's vehicle attempting to detain and question her regarding

the larceny from the Eckerd Drug store. She was shown Sergeant Firantello's badge and he repeated many times that he was a policeman. Defendant then revved the engine and moved the vehicle forward pressing against Sergeant Firantello's legs and pushing him backward. Sergeant Firantello testified that, for his own safety, he rolled over the hood of the vehicle as he was being pushed backward.

Sergeant Firantello was cross-examined regarding the language used in the warrant and the indictment. He was also cross-examined with regard to the assault charge. Defendant argued to the jury that her actions did not constitute assault and that no deadly weapon was used. The judge submitted to the jury both assault with a deadly weapon on a government official and the lesser-included offense of assault on a government official. The trial court did not err in denying the defendant's request to read the indictments to the jury. Defendant was not denied an opportunity to fully argue that she was not guilty of the charges or that the State had not met its burden of proving the elements of the crimes charged.

Defendant also claims the trial court erred in denying defendant's motion to dismiss the habitual felon indictment. Defendant contends that she was not given sufficient notice of her habitual felon status because the habitual felon indictment was obtained after her arraignment on the underlying felony. She contends the superseding indictment does not cure the defect because she was not arraigned on that charge.

Our Supreme Court has held:

> One basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony as a recidivist. Failure to provide such notice where the state accepts a guilty plea on the substantive felony charge may well vitiate the plea itself as not being knowingly entered with full understanding of the consequences.... Since the statute makes no distinction between guilty pleas and jury verdicts of guilt the same notice requirement prevails in either event.

State v. Allen, 292 N.C. 431, 436, 233 S.E.2d 585, 588 (1977) (*citations omitted*). Thus, the indictment of defendant as being an habitual felon must come either before a guilty plea or before a jury verdict of guilty.

Here, on 1 March 1999, defendant was indicted as being an habitual felon, to which she waived indictment on 31 March 1999. On 2 August 1999, an indictment was issued on the charge of assault with a deadly weapon on a government officer which superseded the previous indictment. On 23 August 1999, the State proceeded to trial on the 2 August 1999 indictment and the other pending charges. Prior to the time she could have plead guilty to the 2 August 1999 felony indictment or to the time of a guilty verdict, defendant had notice of the habitual felon indictment against her. Thus, the trial court did not err in denying defendant's motion to dismiss the habitual felon indictment.

In summary, there was no error in the indictment, trial, and sentencing as an habitual felon of the defendant for the charges of assault with a deadly weapon on a government official, resisting, delaying, or obstruction of a public officer, and misdemeanor larceny.

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).