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NO. COA04-269

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2004

STATE OF NORTH CAROLINA

v.

Wake County  
No. 03 CRS 000069

BETH ELLEN BAILEY

Appeal by defendant from judgment entered 9 July 2003 by Judge Abraham P. Jones in Wake County Superior Court. Heard in the Court of Appeals 4 October 2004.

*Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.*

TYSON, Judge.

Beth Ellen Bailey ("defendant") appeals from judgment entered following a jury's verdict finding her guilty of assault with a deadly weapon inflicting serious injury. We vacate and remand.

I. Background

The State's evidence tended to show that in 1999, defendant and James Markey ("Markey") had a brief romantic relationship. After their relationship ended, the two remained friends. Defendant was hospitalized for a week in December 2002 and stayed at Markey's house upon release. Late one afternoon, a male friend of defendant came to visit her at Markey's house. Defendant and

her male friend engaged in sexual relations while Markey slept upstairs. When Markey woke up around 3:00 a.m., he heard the television on downstairs and decided to check on defendant. As Markey approached the last step, defendant jumped around the corner with a knife in her right hand. Startled, Markey fell back on the steps. Defendant stabbed Markey in his thigh, right shoulder, and buttocks. Markey pushed defendant away, ran upstairs, and called the police. Markey's wounds were bandaged by an emergency medical technician who arrived on the scene. After the State presented its evidence, defendant moved to dismiss the charge. The trial court denied the motion.

Defendant testified that when Markey came downstairs, he made sarcastic comments about her male friend and that Markey became aggressive towards her. Defendant, fearing for her safety, grabbed a knife from the kitchen and stabbed Markey. At the close of all the evidence, defendant renewed her motion to dismiss, arguing that the indictment failed to allege the "inflicting serious injury" element of the offense. Over defendant's objection, the trial court allowed the State to amend the indictment by inserting "inflicting serious injury" after the phrase "by stabbing him three times."

The trial court instructed the jury to return a verdict of either assault with a deadly weapon inflicting serious injury, the lesser included offense of misdemeanor assault with a deadly weapon, or not guilty. The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. The trial court

sentenced defendant to twenty-seven to forty-two months imprisonment. Defendant appeals.

## II. Issue

Defendant contends the trial court erroneously allowed the State to amend a fatally defective indictment for felony assault with a deadly weapon inflicting serious injury as the amendment constituted a substantial alteration in violation of N.C. Gen. Stat. § 15A-923(e). The State concedes to the merits of defendant's argument. We agree.

## III. Amending Fatally Defective Indictment

It is generally prejudicial error for a trial judge to permit a jury to convict on a theory not supported by the bill of indictment. *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). An indictment is insufficient if it does not accurately and clearly allege all of the essential elements of the charged offense. *State v. Perry*, 291 N.C. 586, 592, 231 S.E.2d 262, 266 (1977).

The elements of assault with a deadly weapon inflicting serious injury are (1) an assault (2) with a deadly weapon (3) inflicting serious injury and (4) not resulting in death. N.C. Gen. Stat. § 14-32(b) (2003); *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990).

The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used and serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that either a deadly weapon was

used or serious injury resulted, the offense is punishable only as a misdemeanor.

*State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 316 (2002).

In this case, the original indictment stated:

The jurors for the State upon their oath present that, on or about December 29, 2002, in Wake County, the defendant named above unlawfully, willfully, and feloniously did assault James Markey with a deadly weapon, to wit: a steak knife, by stabbing him three (3) times. This act was done in violation of N.C. Gen. Stat. § 14-32(b).

The indictment did not include the element "inflicted serious injury" and only charged misdemeanor assault with a deadly weapon pursuant to N.C. Gen. Stat. § 14-33. We conclude the indictment in the instant case did not allege every element of assault with a deadly weapon inflicting serious injury and failed to place defendant on notice that she might be tried for assault with a deadly weapon inflicting serious injury.

The trial court's allowing the State to amend the indictment to include the words "inflicting serious injury" did not cure the defect. N.C. Gen. Stat. § 15A-923(e) (2003) provides that "[a] bill of indictment may not be amended." Our Supreme Court has interpreted this provision to only prohibit amendments that substantially alter the charge set forth in the indictment. *State v. Holliman*, 155 N.C. App. 120, 125-26, 573 S.E.2d 682, 687 (2002). An amendment "which result[s] in a misdemeanor charge being elevated to a felony, substantially alter[s] the charge in the original indictment." *State v. Moses*, 154 N.C. App. 332, 338, 572 S.E.2d 223, 228 (2002).

Here, the original indictment charged defendant with assault with a deadly weapon, a misdemeanor under N.C. Gen. Stat. § 14-33. Adding the language "inflicting serious injury" substantially altered the charge in the original indictment by elevating the misdemeanor charge to a felony. Following *Moses*, we hold that adding the element of inflicting serious injury, in the instant case, was error. 154 N.C. App. at 340, 572 S.E.2d at 229.

#### IV. Conclusion

While the indictment here is not sufficient to support a conviction for assault with a deadly weapon inflicting serious injury, it does sufficiently allege assault with a deadly weapon under N.C. Gen. Stat. § 14-33. In addition, the evidence in the record is sufficient to support all of the elements of assault with a deadly weapon. Upon remand the trial court is instructed to enter judgment against defendant for assault with a deadly weapon and to resentence defendant accordingly.

Vacated and remanded for entry of judgment for assault with a deadly weapon and appropriate sentencing.

Judges WYNN and GEER concur.

Report per Rule 30(e).