

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1081

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

Chatham County
No. 04 CRS 4266

MYRON T. FARRAR

Appeal by defendant from judgment entered 17 March 2005 by Judge J.B. Allen, Jr. in Superior Court, Chatham County. Heard in the Court of Appeals 24 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Brian C. Wilks, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant.

McGEE, Judge.

Myron T. Farrar (defendant) was convicted of assault with a deadly weapon inflicting serious injury and sentenced to forty-six to sixty-five months in prison on 17 March 2005. The indictment charging him with this offense stated:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did assault Eddie Junior Williams with a metal pipe, a deadly weapon, inflicting serious injury.

The State's evidence at trial tended to show that Eddie

Williams (Mr. Williams) agreed to assist a woman with burning some trash on 24 May 2004. When Mr. Williams was in the process of bending over to light the wood to burn the trash, defendant "eased up behind [him] through the woods and hit [Mr. Williams] in the back of the head." Mr. Williams testified that defendant continued to beat him on his back and head five or six times with an object he could not see, but believed was a piece of wood. He further testified the object made a "little tinkling" sound, that sounded like a pipe.

At the close of the State's evidence, the State moved to amend the indictment to identify the weapon used in the assault from "a metal pipe" to "a stick or metal pipe." Over defense counsel's objection, the trial court granted the motion.

Defendant argues the trial court erred in: (I) allowing the State's motion to amend the indictment; (II) failing to dismiss the charge of assault with a deadly weapon inflicting serious injury at the close of the State's evidence due to an alleged fatal variance between the indictment and the evidence at trial; (III) instructing the jury on a theory of guilt allegedly not set forth in the indictment; and (IV) defendant contends he received ineffective assistance of counsel. We find no error.

I. State's Motion To Amend The Indictment

Defendant first argues the trial court erred in granting the State's motion to amend the indictment charging defendant with assault with a deadly weapon inflicting serious injury. Under N.C. Gen. Stat. § 15A-923(e) (2005), an indictment may not be amended

"if the 'change in the indictment . . . would substantially alter the charge set forth in the indictment[.]'" *State v. Brady*, 147 N.C. App. 755, 758, 557 S.E.2d 148, 151 (2001) (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478, *disc. review denied*, 294 N.C. 737, 244 S.E.2d 155 (1978)). However, a "non-essential variance is not fatal to the charged offense," and any "averment unnecessary to charge the offense . . . may be disregarded as inconsequential surplusage." *State v. Grady*, 136 N.C. App. 394, 396-98, 524 S.E.2d 75, 77-78 (holding that a change in address on indictment for maintaining a dwelling for the use of a controlled substance was not a substantial alteration), *appeal dismissed and disc. review denied*, 352 N.C. 152, 544 S.E.2d 232 (2000). "This is so because an inadvertent variance neither misleads nor surprises the defendant as to the nature of the charges." *Brady*, 147 N.C. at 758-59, 557 S.E.2d at 151 (citing *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999)).

The facts in this case are substantially similar to those in *State v. Joyce*, 104 N.C. App. 558, 410 S.E.2d 516 (1991), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992). In *Joyce*, the defendant argued the trial court erred in allowing the State's motion to amend the indictment charging him with robbery with a dangerous weapon. *Id.* at 573, 410 S.E.2d at 525. The trial court allowed the State to change the weapon used from "knife" to "firearm." *Id.* Finding no error, our Court held the change to the indictment did not "alter the burden of proof or constitute a

substantial change which would justify returning the indictment to the grand jury." *Id.*

As in *Joyce*, defendant here argues the trial court erred in allowing the State's motion to amend the indictment charging him with assault with a deadly weapon to change the weapon used from "a metal pipe" to "a stick or metal pipe." Under *Joyce*, we conclude the trial court did not err in allowing the amendment, because the amendment did not alter the burden of proof or otherwise constitute a substantial change.

Because the amendment was allowed immediately before the State rested its case, defendant also argues his due process and confrontation rights were violated as he was not allowed the opportunity to shape his cross-examinations of the witnesses regarding the altered allegation. We disagree. Defense counsel cross-examined Mr. Williams about being hit with a "stick" and not a "metal pipe." Further, State witness Dr. Woodward Burgert testified Mr. Williams was treated at the emergency room as a result of an assault with a "stick," and defense counsel cross-examined him about this issue. Defendant, thus, has failed to demonstrate how he suffered any prejudice due to the amendment. Accordingly, we overrule this assignment of error.

II. Defendant's Motion To Dismiss

Defendant argues the trial court erred in denying his motion to dismiss at the close of the State's evidence. In support, defendant argues there was a fatal variance between the indictment and the evidence presented at trial. Defendant's argument,

however, relies on the unamended version of the indictment. Because we determined the trial court did not err in allowing the amendment to the indictment and the evidence presented at trial did not vary from the amended indictment, this assignment of error is without merit.

III. Trial Court's Jury Instructions

Defendant argues the trial court erred by erroneously instructing the jury on a theory of guilt not set forth in the indictment. In particular, defendant argues the trial court erred by instructing the jury that it could find defendant guilty if he used a "stick or metal pipe." As with defendant's second argument, this argument relies on the unamended version of the indictment. Because we determined the trial court did not err in allowing the amendment, we find this assignment of error likewise is without merit.

IV. Ineffective Assistance Of Counsel

_____Defendant argues his trial counsel was ineffective. When a defendant attacks a conviction on the basis that defense counsel was ineffective, the defendant must show that defense counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)). To meet this burden, a defendant must satisfy a two-part test:

"First, the defendant must show that counsel's performance was deficient. This requires

showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a *trial whose result is reliable*. (Emphasis added)."

Braswell at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

In this case, Mr. Williams had been convicted of second-degree rape more than ten years prior to defendant's trial. During the State's case-in-chief, defense counsel wanted to cross-examine Mr. Williams about the conviction. Defense counsel argued the conviction was admissible on the following two issues because defendant raised a claim of self-defense: "One, whether or not the victim [wa]s the aggressor in this particular case; and two, what was going through [defendant]'s mind at the time that this happened to cause him to apprehend for his own safety[.]" The trial court was not inclined to allow defense counsel to cross-examine Mr. Williams about the prior conviction during the State's case-in-chief because, if Mr. Williams testified that he had previously been convicted of second-degree rape and defendant later decided not to testify as to self-defense, then the admission of such evidence would be highly prejudicial to the State. The trial court informed defense counsel that "it would be appropriate for me to rule on this after the defendant testifies." Defense counsel informed the trial court that he would not cross-examine Mr. Williams about the conviction.

Because defense counsel allegedly acquiesced and subsequently did not call Mr. Williams as a witness in defendant's case-in-chief, defendant argues his trial counsel was ineffective. Assuming, *arguendo*, defendant was able to establish that trial counsel erred, it is unclear whether the trial court would have allowed defense counsel to question Mr. Williams about the prior conviction, as the trial court informed counsel it would wait to rule on the issue until after defendant testified. Further, defendant has failed to establish he was prejudiced as a result of counsel's action. Defendant testified that he knew of Mr. William's reputation in the community for violence and that "[h]e has been known to carry guns and been in confrontations, shooting, things like that[, and he] brutally raped an elderly lady." The jury thereby learned about Mr. William's prior crime through defendant's testimony. Accordingly, we conclude defendant has failed to show he was prejudiced by his trial counsel's alleged deficient performance to such a degree "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. This assignment of error is overruled.

No error.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).