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NO. COA05-494

NORTH CAROLINA COURT OF APPEALS

Filed: 2 May 2006

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 03 CRS 37633, 62847

TINA LEIGH SIMMONS

Appeal by defendant from judgment entered 7 September 2004 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 8 December 2005.

Attorney General Roy Cooper, by William M. Polk, Director, Victims and Citizens Services, for the State.

Eric A. Bach, for defendant-appellant.

LEVINSON, Judge.

Defendant Tina Simmons appeals from judgments entered upon her plea of guilty to two charges of assault with a deadly weapon, inflicting serious injury, in violation of N.C. Gen. Stat. § 14-32(B) (2005). For the reasons that follow, we reverse.

The record evidence generally establishes the following: On 1 November 2003 defendant was injured in an affray with Renee Kistler and a third party. Later that day, defendant and her boyfriend, Michael Richardson, sought out Kistler and her boyfriend, Scott DeBoard. In revenge for defendant's earlier

injuries, Richardson and defendant attacked and seriously injured Kistler and DeBoard. This appeal arises from assault charges brought against defendant following this incident.

Indictments were returned on 9 February 2004, charging defendant with assault with a deadly weapon inflicting serious injury (AWDWISI) against DeBoard, in case No. 03CRS 62847; and with assault with a deadly weapon intending to kill, inflicting serious injury (AWDWIKISI) against Kistler, in case No. 03CRS 37633. On 6 July 2004 the State obtained a superceding indictment in case 03CRS 37633. On 7 September 2004 defendant entered a plea of guilty to AWDWISI in 03CRS 62847, for the assault on DeBoard, and pled guilty in 03CRS 37633 to a reduced charge of AWDWISI for the assault against Kistler. Defendant's guilty pleas were accepted by the trial court, and she received an active prison sentence of nineteen to twenty months in 03CRS 37633, and a sentence of twenty-nine to forty-four months in 03CRS 62847 for the assault on DeBoard, to be served at the expiration of the other sentence. From this judgment and order, defendant appeals.

Defendant argues first that the trial court erred by entering judgment against her, on the grounds that the indictments charging her with the subject offenses failed to adequately allege that the offenses were committed by means of a deadly weapon. We agree.

"By knowingly and voluntarily pleading guilty, an accused waives all defenses other than the sufficiency of the indictment. Nevertheless, when an indictment is alleged to be facially invalid,

thereby depriving the trial court of jurisdiction, the indictment may be challenged at any time. 'Our Supreme Court has stated that an indictment is fatally defective when the indictment fails on the face of the record to charge an essential element of the offense.'" *State v. McGee*, __ N.C. App. __, __, 623 S.E.2d 782, 784 (2006) (quoting *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003); and citing *State v. Hughes*, 136 N.C. App. 92, 97, 524 S.E.2d 63, 66 (1999)). In *McGee*, this Court entertained defendant's challenge to the facial validity of the indictment under which he pled guilty.

"A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony[.]" *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (citations omitted). Under N.C. Gen. Stat. § 15A-924(a) (5) (2005), a criminal indictment must include:

[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.

"An indictment is constitutionally sufficient if it identifies the offense with enough certainty 1) to enable the accused to prepare his defense, 2) to protect him from being twice put in jeopardy for the same offense, and 3) to enable the court to know what judgment to announce in the event of conviction." *State v. Morris*, 156 N.C. App. 335, 338, 576 S.E.2d 391, 393 (2003).

Regarding the requisites for an indictment charging an assault with a deadly weapon, the North Carolina Supreme Court has held that:

[I]t is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would necessarily demonstrate the deadly character of the weapon.

State v. Palmer, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1977) (emphasis added). In *Palmer*, the indictment was held to sufficiently name the deadly weapon where it alleged that defendant "unlawfully and wilfully did feloniously assault [the victim] with a stick, a deadly weapon[.]"

Other appellate decisions have followed *Palmer*, in not applying a hypertechnical approach to judging the degree of specificity by which a deadly weapon must be described. Thus, an indictment charging that the defendant "did assault [the victim] with his fists, a deadly weapon, by hitting [the victim] over the body with his fists and slamming his head against the cell bars and floor" has been held "sufficient to allege that both the fists of defendant and the cell bars and floor were deadly weapons." *State v. Brinson*, 337, N.C. 764, 767, 769, 448 S.E.2d 822, 824, 825 (1994). In another case, an indictment asserting that defendant assaulted the victim "with a table leg, a deadly weapon," was not deemed invalid when trial evidence indicated the victim was actually assaulted with a *footstool* leg. *State v. Everhardt*, 96 N.C. App. 1, 384 S.E.2d 562 (1989).

However, to be sufficient an indictment charging assault with a deadly weapon must name the weapon. In *State v. Moses*, 154 N.C. App. at 335-36, 572 S.E.2d at 226, the defendant was charged with AWDWISI, in indictments stating that "on or about the date of offense shown and in Forsyth County the defendant named above unlawfully, willfully and feloniously did assault Mateo Mendez Jimenez with a deadly weapon. The assault resulted in the infliction of a serious injury, knocking out his teeth." This Court held this was insufficient to charge defendant with AWDWISI, as it "clearly [did] not name the deadly weapon allegedly used by defendant in his assault on Jimenez and therefore violates the requirements set forth in *Brinson*, *Palmer* and *Hinson*."

In the instant case, defendant was charged in indictments alleging, in pertinent part that:

03 CRS 62847: . . . [the defendant] unlawfully, willfully and feloniously did assault William Scott DeBoard with an unknown object, which the defendant used as a deadly weapon by repeatedly striking the victim about the lower extremities with said object and as a result, inflicted serious injury to the victim; to wit: breaking the leg of said victim.

03 CRS 37633 . . . [the defendant] unlawfully, willfully and feloniously did assault Tina Renee Kistler with an unknown object, a deadly weapon, with the intent to kill and inflicting serious injury.

In neither indictment is the deadly weapon named or identified; under *Palmer*, *Moses*, and other cases, both indictments are therefore fatally defective. Accordingly, defendant's convictions must be vacated.

Defendant also argues that the trial court failed to inform her of the maximum sentence for the subject offenses. As this issue is unlikely to recur on remand, we do not address it.

As discussed above, the judgments against defendant are Vacated

Judges HUDSON and TYSON concur.

Report per Rule 30(e).