NO. COA09-1677

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Caswell County
No. 08 CRS 50814

ERICA LYNNETTE HUGHES

Appeal by Defendant from judgment entered 24 September 2009 by Judge W. Osmond Smith, III in Caswell County Superior Court. Heard in the Court of Appeals 19 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Tracy C. Curtner, for the State.

Richard Croutharmel, for Defendant.

BEASLEY, Judge.

Erica Lynnette Hughes (Defendant) appeals from judgment entered on her conviction of disorderly conduct by utterances and gestures. For the reasons stated below, we conclude there is no error.

On 15 October 2008, Defendant was charged with one count of disorderly conduct by fighting and one count of disorderly conduct by utterances and gestures. While the two offenses involved different officers at different times, they occurred on the same

day and were joined for trial on the basis that they arose from "a series of acts or transactions connected together or constitut[ing] parts of a single scheme or plan on the part of the defendant." This matter came on for trial at the 23 September 2009 session of Caswell County Superior Court.

At approximately 3:30 p.m. on 15 October 2008, Deputy Arnold Gwynn Brandon, Jr. of the Caswell County Sheriff's Department received a call about a fight on West Church Street in Yanceyville. Upon arrival at the scene, Brandon found Defendant yelling and screaming in the roadway. Brandon dispersed the crowd and then spoke to Defendant, who informed him that she had been involved in a confrontation with Tamara Lipscomb. Tamara, however, was not present at the time, and Brandon advised Defendant to seek an arrest warrant for Tamara. There had been no fight in progress when Brandon arrived, and this was the extent of the officer's involvement with Defendant at that time.

At around 5:30 p.m. that day, Brandon received another call regarding a fight at Teddy Bear's Video on Main Street. When he arrived, a large crowd was assembled around the area of Third Avenue. Brandon saw Defendant and Sanovia Lipscomb "actively swinging at each other" in the Teddy Bear's parking lot and Jerrod Simpson standing between the women to keep them from fighting. Brandon activated his lights, which prompted Defendant, Sanovia,

and Simpson to proceed across the street and vacate the area. At that point, Tamara emerged from the crowd and came into the street toward Defendant while "running her mouth." Tamara and Defendant, who "was quite comfortable with starting another confrontation right there in the street," began swinging at each other. After Brandon arrested the three women for disorderly conduct by fighting, they appeared before the magistrate and were released with written promises to appear in court.

Around 8:00 p.m. that evening, Sergeant Steven Foster responded to a report of a large disturbance in the area of Third Avenue and Main Street. When he arrived, there was a very large crowd in the area of Teddy Bear's, the houses on Main Street and Third Avenue, and Church Street. Defendant was standing alone on Third Avenue, "throwing her hands in the air, cursing, and yelling toward the Lipscombs," who were near the front steps of their residence. "[S]he was continuously yelling at them." Defendant was told to leave the area, and after initially obliging, Defendant returned [to] Third Avenue, "throwing her hands in the air[,] . . . cursing, still looking toward the Lipscombs, and . . . making threats towards them." Again, Foster informed her that she had been ordered to disperse and needed to leave the area, and Defendant again complied. Shortly thereafter, Foster left the scene on Third Avenue to respond to a large crowd that had gathered

on Church Street, where a subject had passed out. Defendant was also present at that location. When Foster arrived, most of the crowd acquiesced to orders to disperse and went back to their houses, but Defendant made no attempt to go inside any residence and was again yelling and cursing. At this point, Foster placed Defendant under arrest for disorderly conduct by making gestures and uttering challenges.

Defendant moved to dismiss both counts of disorderly conduct, and the trial court denied both motions. At the charge conference, the State had no objection to the trial court's proposed instructions, and defense counsel's request that the pattern instruction on disorderly conduct by fighting be limited to actual fighting was granted. His request for an instruction on self-defense, however, was denied. After the trial court charged the jury and the jury retired for deliberations, the trial court denied defense counsel's oral request for an additional instruction that utterances are verbal statements. On 24 September 2009, the jury found Defendant guilty of disorderly conduct by utterances and gestures and not guilty of disorderly conduct by fighting. The trial court imposed a sentence of forty-five days but suspended the sentence and placed Defendant on thirty-six months of supervised probation with a $100 fine, court costs, and attorney's fees. Defendant gave notice of appeal in open court.

The issues before us on appeal are: (1) whether the trial court committed reversible error by denying Defendant's motion to dismiss based on insufficiency of the evidence and (2) whether the trial court abused its discretion by refusing to grant Defendant's requested jury instruction clarifying the meaning of the word "utterance." We consider each contention in turn.

I.

Defendant first contends that the State failed to prove she violated N.C. Gen. Stat. § 14-288.4(a)(2) and that the trial court erred by denying her motion to dismiss the charge of disorderly conduct by utterances and gestures based on the insufficiency of the State's evidence. We disagree.

The denial of a motion to dismiss for insufficiency of the evidence is a question of law subject to *de novo* review by this Court. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). Evidence will be sufficient to survive a motion to dismiss and sustain a conviction when there is substantial evidence of each essential element of the offense charged. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate or would consider necessary to support a particular conclusion[.]" *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (internal citations omitted). We review a

motion to dismiss by viewing the evidence in the light most favorable to the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). In determining whether the evidence is sufficient to support the charged offense, we give the State the benefit of all reasonable inferences which may be drawn from the facts and circumstances, taken singly or in combination. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 919 (1993).

Our General Statutes define disorderly conduct as "a public disturbance intentionally caused by any person who . . . [m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C. Gen. Stat. § 14-288.4(a)(2) (2009). A "public disturbance" is defined as

> [a]ny annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access.

N.C. Gen. Stat. § 14-288.1(8) (2009). Defendant contests only the adequacy of evidence tending to prove the utterances and gestures upon which the charge was based; thus we limit our review to this essential element of the offense.

Defendant contends that she could not have been convicted based on any utterance "because the jury never heard what words

[she] spoke." She points out that Foster did not remember word for word what she said and testified only that her language was profane. Defendant argues the State thus failed to present sufficient evidence that her cursing and yelling were intended and plainly likely to provoke violent retaliation. In support of her position, Defendant suggests that "[a] conviction for creating a public disturbance by verbal statements necessarily requires that the criminal pleading and/or the evidence presented at trial set out the exact words spoken." Defendant, however, cites absolutely no authority for this proposition, nor are we aware of any. While several cases addressing the offense of disorderly conduct do, in fact, set out the utterance or abusive language that allegedly caused a breach of the peace, an explicit recitation thereof is not required by any North Carolina statute or precedent. In fact, in *State v. McLoud*, 26 N.C. App. 297, 300, 215 S.E.2d 872, 874 (1975), we approved the trial court's denial of motion for nonsuit without any reference to what exact words were actually spoken, where evidence that defendant "remonstrated in a loud and boisterous manner" and "directed profane, racist, and vulgar epithets at the officers" was sufficient to constitute disorderly conduct.

Defendant also argues that although the transcript reveals that Foster demonstrated Defendant's gestures for the jury, there is no record evidence of what exact movements the sergeant made to

illustrate his testimony. Defendant contends that this Court is accordingly precluded from conducting a *de novo* assessment of whether the evidence of her gesture was sufficient to permit a reasonable inference that she violated § 14-288.4(a)(2). Defendant is incorrect. For, Foster testified several times that Defendant had been "throwing her hands in the air" while "walking and shouting at the same time." In response to the prosecutor's request for a demonstration of "exactly how she was throwing her hands in the air," Foster explained that "she was holding her hands in the air like this, up and down, like that." We acknowledge the transcript's limitations in recording visual depiction of movement, but we reject Defendant's argument that "[f]or all this Court knows Sergeant Foster waived [sic] and smiled at the jury." Not only are we indeed able to discern what Foster showed the jury from his testimony, but the trial court also described his movements in detail on the record in addressing Defendant's motion to dismiss:

> The witness testified that the defendant was throwing her hands in the air and testified that she again later was continuing to throw her hands in the air. He demonstrated it by standing up; that is Trooper Foster, placing his arms down by his side and then raising them up both above his head. He testified she did that repeatedly while shouting and cursing, raising her hands up and down, cursing and yelling at them, using profane language in the street, going toward them in a threatening manner . . . .

This assessment of Foster's testimonial demonstration removes any uncertainty regarding the State's evidence of Defendant's gestures.

Moreover, the circumstances here are such that a reasonable juror could easily have found the evidence sufficient to prove Defendant's guilt of the offense without knowing exactly which words comprised her cursing and profanity or relying exclusively on the gesture. By the time Foster encountered Defendant, she had been involved in confrontations with various members of the Lipscomb family on at least two prior occasions that same day. Where the earlier altercations were either unresolved or interrupted, Foster found Defendant on this third occasion in front of the Lipscomb residence walking and shouting while raising her hands up and down. His testimony indicates that her continuous cursing, yelling, and arm motions were obviously directed at the Lipscombs, who were sitting outside their mobile home. While she initially appeared to vacate the area, Defendant disobeyed Foster's order to disperse by returning to the Lipscombs' home immediately thereafter, suggesting a motive or at least a concerted effort to instigate an adversarial encounter. Foster could not recollect Defendant's exact verbiage but noted that her cursing, while "still looking toward the Lipscombs," entailed threats, and the combination of her profanity and arm movements made it clear to the officer that Defendant was approaching the Lipscombs in "a

threatening manner." Foster testified that her cursing and gestures "left no doubt in [his] mind that she was going toward the Lipscombs." A word-for-word recitation of Defendant's loud, profane language is accordingly unnecessary where a rational juror could easily infer from Defendant's threatening language and movements that she willfully made utterances and gestures that were intended to challenge the Lipscombs and thereby provoke violent retaliation. *See State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) ("The trial court's function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged."). As such, we conclude that the State presented substantial evidence tending to prove that Defendant intentionally caused a public disturbance by willfully making an utterance or gesture, or a combination of utterances and gestures, intended and plainly likely to provoke violent retaliation.

II.

Defendant next contends the trial court abused its discretion by denying her oral request for a jury instruction regarding the definition of the word "utterance." We disagree.

During the charge conference, the trial court asked counsel for the State and Defendant separately whether either had written requests for instructions. Both replied in the negative. The

trial court then proposed the pattern jury instructions from which it would charge the jury. The State had no objection thereto, and at the close of the charge conference, Defendant's only objections were that the instructions on disorderly conduct by fighting "be limited to actual fighting"[1] and an instruction for self defense be given. The trial court agreed to limiting the instructions to actual fighting and denied the request for an instruction on self defense. Defense counsel acknowledged that he did not have proposed written instructions when he inquired whether the updated pattern instruction includes a definition of fighting but mentioned nothing about a definition of "utterances." In fact, defense counsel made no reference to the charge for disorderly conduct by utterances and gestures or to the proposed instructions therefor.

Prior to closing arguments, the trial court, without objection, provided the State and Defendant with the proposed written instructions on the substantive offenses of disorderly conduct by fighting and by utterances and gestures. The trial court charged the jury orally and provided written instructions, and at no time did Defendant object to any portion of the charge.

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[1] The pattern jury instruction for disorderly conduct by fighting is titled "Disorderly Conduct (Fighting or Other Violent Conduct)" and includes "fighting," "violent conduct," or "conduct creating the threat of imminent fighting or other violence." N.C.P.I. -- Crim. 236A.30 (1999).

After the jury retired to the jury room for deliberations, the trial court asked on the record whether there were "[a]ny additional objections to that charge or requests for corrections or additions from the [S]tate [and] . . . [D]efendant." At this point and for the first time, Defendant requested additional instructions to clarify that the word "utterances meant verbal statements." The trial court explained that the dictionary definition did not appear to limit utterances to verbal or oral expressions and denied the request.

Our Supreme Court has explained "that a trial court's ruling denying requested [special] instructions is not error where the defendant fails to submit his request for instructions in writing." *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997).

> At the close of the evidence . . . , any party may tender written instructions[,] and where a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance[.] However, such requested special instructions should be submitted in writing to the trial judge at or before the jury instruction conference. Accordingly, this Court has held that a trial court did not err where it declined to give requested instructions that had not been submitted in writing.

State v. Augustine, 359 N.C. 709, 729, 616 S.E.2d 515, 529-30 (2005) (internal quotation marks and citations omitted). Moreover, "[f]ailure to request or object to instructions before the jury

retires waives any objection to the instructions." *State v. Richardson*, 328 N.C. 505, 514, 402 S.E.2d 401, 407 (1991); *see also* N.C.R. App. P. 10(b)(2) ("A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ."). While the trial court may seek to clarify the charge, "[w]hether or not to give additional instructions [to the jury] rests within the sound discretion of the trial court and will not be overturned absent abuse of that discretion." *State v. Bartlett*, 153 N.C. App. 680, 685, 571 S.E.2d 28, 31 (2002).

Thus, where Defendant's objection seeking a clarification on the definition of utterances was "tantamount to a request for special instructions," *McNeill*, 346 N.C. at 240, 485 S.E.2d at 288, the trial court did not err in its denial because the requested instruction was never submitted in writing. Additionally, Defendant's request was untimely in that it was made not only after the charge conference but also after the trial court gave the proposed instructions and the jury had retired to conduct deliberations. *See, e.g.*, *State v. Phillips*, 328 N.C. 1, 22, 399 S.E.2d 293, 304 (1991) (holding trial judge did not err in failing to give special instructions which were not requested until after the court had charged jury and jury had been sent to jury room). Moreover, the jury requested neither a clarification of the

instructions nor a definition of the term utterances; thus, the condition upon which the trial court indicated it would reconsider Defendant's request never occurred. Absent a petition for clarification by the jury, the trial court did not abuse its discretion in denying Defendant's untimely, oral request for additional special instructions.

Lastly, Defendant contends that the trial court erred in instructing the jury that it must find Defendant made "utterances *and* gestures" in order to convict her of the respective offense. The statutory language, however, is couched in the disjunctive and requires only one form of the conduct listed therein to sustain a conviction. Thus, the trial court's conjunctive instruction actually inured to Defendant's benefit if it led the jury to believe that it could not return a guilty verdict unless both utterances and gestures had been proved beyond a reasonable doubt, where either would have been sufficient. As such, Defendant cannot show any prejudice resulting from the trial court's instruction.

Prior to concluding, although neither party raised the issue, we briefly address the variance between the charging document and the evidence the State introduced at trial to prove disorderly conduct by utterances and gestures. *See State v. McNair*, 146 N.C. App. 674, 683-84, 554 S.E.2d 665, 672 (2001) (addressing the issue of whether the indictment was fatally defective *sua sponte* "in the

interest of justice"). The trial court's jurisdiction over Defendant for this offense was premised upon the issuance of a warrant, which stated, in pertinent part, that the conduct giving rise to the charge "consisted of making gestures and uttering challenges towards Jonathan Lipscomb and family members." In reviewing the trial transcript, this Court notes that while Jonathan Lipscomb may have been mentioned in passing, the testimony elicited by the State on the specific elements of the offense was always described in terms of the conduct Defendant exhibited towards Tamara, Sanovia, or "the Lipscombs" generally, as recited above, but never towards Jonahtan Lipscomb, individually. We conclude, however, that the warrant upon which Defendant was tried was valid on its face. *See State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008) (noting a criminal pleading "is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all the essential elements of the crime"). Where no statute or North Carolina case requires that the victim of disorderly conduct be precisely named and where the State alleged each essential element of the crime as the statutory language of N.C. Gen. Stat. § 14-288.4(a)(2) details, the warrant sufficiently charged Defendant with disorderly conduct by utterances and gestures, was facially valid, and thereby properly conferred subject matter jurisdiction on the court. *See*

State v. Kelso, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007) (stating a sufficient indictment "must allege every element of an offense in order to confer subject matter jurisdiction on the court"). Moreover, the charging document clearly apprised Defendant of the charge against her, as exhibited by her failure to complain about any lack of understanding thereof and her ability to present her defense accordingly at trial. *See State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (holding an indictment will be deemed to have sufficiently put a defendant on notice "if it apprise[d] [her] of the charge against [her] with enough certainty to enable [her] to prepare [her] defense" and if the illegal act alleged therein is "clearly set forth so that a person of common understanding may know what is intended").

Accordingly, we hold that Defendant received a fair trial free from prejudicial error.

No Error.

Judges GEER and JACKSON concur.

Report per Rule 30(e).