NO. COA10-43

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

STATE OF NORTH CAROLINA

v. Forsyth County
No. 07CRS53442

BRIANA LADONN JONES

Appeal by Defendant from judgment entered 12 August 2009 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 19 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas R. Miller, for State.

Paul F. Herzog, for Defendant.

BEASLEY, Judge.

Briana L. Jones (Defendant) appeals from a judgment entered on her convictions of assault with a deadly weapon inflicting serious injury and possession of a weapon of mass death and destruction. Defendant's sole argument on appeal is that the indictment was fatally defective in that it failed as a matter of law to properly charge her with possession of a weapon of mass death and destruction, and thus the trial court lacked jurisdiction to try

Defendant for the offense. We conclude the indictment was sufficient because it properly laid out the essential elements of that crime and put Defendant on notice of the charge. As such, we hold there was no error.

On 4 June 2007, a Forsyth County Grand Jury returned a four-count bill of indictment charging Defendant with robbery with a dangerous weapon, possession of a weapon of mass death and destruction, assault with a deadly weapon inflicting serious injury, and conspiracy to commit robbery with a dangerous weapon. A superceding indictment was issued on 3 August 2009, modifying the first charge from robbery with a dangerous weapon to attempted robbery with a dangerous weapon. Count II of the superceding indictment, which is at issue here, remained unaltered and alleged "that on or about the date of [the] offense shown and in Forsyth County the defendant named above unlawfully, willfully and feloniously did possess a weapon of mass death and destruction, to wit a rifle with a modified barrel."[1]

The indictment arises out of Defendant's attempted robbery of The Loop Pizza Grill (The Loop) restaurant in Winston-Salem on 7

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[1] During pre-trial proceedings, the State moved to amend Count II of the superseding indictment to reflect the facts of this case by replacing the word "rifle" with "shotgun." Defendant expressly agreed that the substitution did not substantially alter the charge and does not revisit the trial court's granting of the State's motion on appeal.

April 2007. At around 11:15 p.m. that evening, Defendant entered the restaurant armed with a sawed-off bolt action shotgun. An altercation ensued between the restaurant manager, Paul Vick, who subdued Defendant, which enabled another employee, Jarman Rolle, to wrestle the gun from Defendant. Still carrying the firearm, Rolle went to a neighboring restaurant to ask the employees there to call 911 and then laid the shotgun on the shopping center sidewalk before returning to The Loop. In the interim, another perpetrator, Marceno Land, had entered The Loop wielding a knife and had joined the altercation. When police arrived, they found Defendant, Land, and Vick struggling on the floor, with Vick having sustained major damage to his back, arm, and tendons from several knife wounds. The responding officers recovered the shotgun, and both Land and Defendant were taken into custody. Winston-Salem Police Department Officer Chris Bullard transported Defendant to the Public Safety Center, at which time Defendant admitted that the firearm she had during the incident was a sawed-off shotgun and belonged to her. At the Public Safety Center, Defendant was interviewed twice by detectives regarding her role in the attempted robbery and gave two recorded statements. Detective Robert Cozart examined Defendant's gun recovered from the scene and identified it as "a Marlin 12 gauge bolt action shotgun," which had been "sawed off" with a resulting barrel length of eight and one-half inches.

The action was heard at the Criminal Session of Superior Court in Forsyth County from 10 August to 12 August 2009. After the State presented the evidence detailed above, Defendant declined to present evidence and the jury rendered a verdict of guilty on all four counts. The trial court consolidated the charges of attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon, imposing an active sentence of 64 to 86 months. The charges of possession of a weapon of mass death and destruction and assault with a deadly weapon inflicting serious injury were also consolidated, and Defendant received an additional suspended sentence of 20 to 33 months, with 36 months of supervised probation. Defendant gave notice of appeal in open court on 12 August 2009.

Defendant assigned as error: (1) the invalidity of the indictment and (2) the trial court's failure to dismiss the charge of attempted robbery with a dangerous weapon. Because Defendant abandons her second assignment of error, we only address whether count II of the superseding indictment for possession of a weapon of mass death and destruction pursuant to N.C. Gen. Stat. § 14-288.8 fails to charge the named offense as a matter of law and is therefore fatally defective.

"[O]ur Constitution requires a bill of indictment, unless

waived, for all criminal actions originating in the Superior Court, and a valid bill is necessary to vest the court with authority to determine the question of guilt or innocence." *State v. Bissette*, 250 N.C. 514, 515, 108 S.E.2d 858, 859 (1959); *see also State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) ("A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, and to give authority to the court to render a valid judgment." (internal quotations omitted)). Although Defendant raises this issue for the first time on appeal, "[D]efendant was not required to object to the indictment defect at trial in order to preserve the issue." *State v. Kelso*, 187 N.C. App. 718, 723, 654 S.E.2d 28, 32 (2007). For, "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). The issue of a fatal defect in a bill of indictment is a question of jurisdiction and should be reviewed *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008).

The purpose of an indictment is two-fold:

(1) to give the defendant notice of the charge

> against him in plain intelligible and explicit language so that he may prepare his defense and be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; and (2) to enable the [trial] court to pronounce judgment in the event of a conviction.

State v. Blythe, 85 N.C. App. 341, 343-44, 354 S.E.2d 889, 890 (1987). To meet these purposes, a sufficient indictment "must allege every element of an offense in order to confer subject matter jurisdiction on the court." *Kelso*, 187 N.C. App. at 722, 654 S.E.2d at 31. "[A]n indictment 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." *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008), *aff'd*, 363 N.C. 251, 675 S.E.2d 333 (2009). The indictment will be deemed to have sufficiently put Defendant on notice "if it apprise[d] [her] of the charge against [her] with enough certainty to enable [her] to prepare [her] defense[.]" *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). Furthermore, the notice is sufficient if the illegal act alleged in the indictment is "clearly set forth so that a person of common understanding may know what is intended." *Id.* at 435, 323 S.E.2d at 346. An indictment should track the statutory language so as to "'expressly charge the described offense on the defendant'" by incorporating the material words the legislature has selected in describing the

crime. *State v. Martin*, 97 N.C. App. 19, 23-24, 387 S.E.2d 211, 213 (1990) (quoting *Blythe*, 85 N.C. App. at 344, 354 S.E.2d at 891). "'Allegations beyond the essential elements of the crime sought to be charged are . . . surplusage.'" *Bollinger*, 192 N.C. App. at 246, 665 S.E.2d at 139 (quoting *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996)).

The statute in question, N.C. Gen. Stat. § 14-288.8, reads in pertinent part,

> (a) Except as otherwise provided in this section, it is unlawful for any person to . . . possess . . . any weapon of mass death and destruction.
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> . . . .
>
> (c) The term "weapon of mass death and destruction" includes:
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> . . . .
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> (3) Any firearm capable of fully automatic fire, any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches, any rifle with a barrel or barrels of less than 16 inches in length or an overall length of less than 26 inches, any muffler or silencer for any firearm, whether or not such firearm is included within this definition.

N.C. Gen. Stat. § 14-288.8 (2009).

Defendant's argument addresses the "essential elements" and "material words" of § 14-288.8 and whether the superceding indictment sufficiently alleges those elements. Defendant contends

that the superceding indictment is insufficient because it alleges only that she possessed "a [shotgun] with a modified barrel," which is not specifically listed as a "weapon of mass death and destruction" in § 14-288.8(c). Defendant further claims that for the indictment to have been sufficient, it must have specifically alleged that she possessed a "shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches." N.C. Gen. Stat. § 14-288.8(c)(3). We disagree.

The proscribed conduct establishing the elements of the actual offense is set forth in § 14-288.8(a), which criminalizes: (1) the possession (2) of any weapon of mass death and destruction. That statutory language contained in subsection (c) does not add any element to the crime described in subsection (a) but, rather, merely defines a term used therein. *See State v. Fennell*, 95 N.C. App. 140, 146, 382 S.E.2d 231, 234 (1989) (distinguishing § 14-288.8(c) from the actual charge of unlawful possession of a weapon of mass death and destruction as "merely defin[ing] what weapons qualify as weapons of mass death and destruction"). This Court in *Fennell* held that the State did not charge the defendant under the wrong section of the statute by indicting him for a violation of § 14-288.8 rather than § 14-288.8(c)(4) specifically. *Id.* Implicit in this Court's holding is that the essential elements of the crime are laid out in N.C. Gen. Stat. § 14-288.8(a). Thus, in

order to charge a defendant with possession of a weapon of mass death and destruction, the indictment should track the statutory language of subsection (a).

In the case *sub judice*, the superceding indictment stated that Defendant "unlawfully, willfully and feloniously did possess a weapon of mass death and destruction." The essential elements of "possession" and a "weapon of mass death and destruction," contained in § 14-288.8(a) are present, and the indictment uses the "material language" of the statute itself.

Defendant further argues that the superceding indictment was insufficient to "apprise[] . . . [her] of the charge against [her] with enough certainty to enable [her] to prepare [her] defense[.]" *Coker*, 312 N.C. at 434, 323 S.E.2d at 346. Defendant contends that there are various ways to modify a shotgun barrel which are not criminalized by the statute, such that "[i]t is impossible for anyone reading count two of the 'superceding' indictment' . . . to tell . . . whether it had been modified in such a way as to violate N.C. Gen. Stat. § 14-288.8." This argument is unavailing. The superceding indictment alleges Defendant was in violation of § 14-288.8 by possessing "a [shotgun] with a modified barrel," describing the weapon of mass death and destruction referenced in the charge. Police found Defendant with only one weapon on her person, the sawed-off shotgun with a barrel of only eight and

one-half inches. A "person of common understanding" would likely have little difficulty in understanding that the superceding indictment's reference to "a [shotgun] with a modified barrel" pertained to the sawed-off gun in her possession at the time of the attempted robbery. *Cf. State v. Blackwell*, 163 N.C. App. 12, 20, 592 S.E.2d 701, 707 (2004) ("[A]ny person of common understanding would have understood that he was charged with possessing the sawed-off shotgun that he used to shoot the victim on the night alleged" where indictment charged violation of N.C.G.S. § 14-288.8(a) by possession of a "Stevens 12 gauge single-shot shotgun."). Furthermore, Defendant had indicated to both Officers Bullard and Cozart following her apprehension that she had been armed with a sawed-off shotgun and that the weapon belonged to her. It should therefore have been apparent to Defendant that the indictment, alleging an illegal change or modification of a shotgun barrel, would come under subsection (c)(3), describing a shotgun barrel length under 18 inches.

For the foregoing reasons, we hold Count II of the indictment was sufficient to charge Defendant with possession of a weapon of mass death and destruction and to sustain a conviction thereof.

No Error.

Judges GEER and JACKSON concur.

Report per Rule 30(e).