NO. COA12-1130
NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2013

STATE OF NORTH CAROLINA

v. Halifax County
No. 10 CRS 53124

HENRY FERTONDO RICHARDSON

Appeal by defendant from judgment entered 30 March 2012 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 13 March 2013.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.

Guy J. Loranger for Defendant.

ERVIN, Judge.

Defendant Henry Pertondo Richardson appeals from a judgment sentencing him to a term of 30 to 45 months imprisonment based upon his conviction for assault with a deadly weapon inflicting serious injury. On appeal, Defendant contends that the trial court lacked jurisdiction over the subject matter of this case because the indictment returned against him by the Halifax County grand jury failed to name the weapon that he used during the alleged assault and that the trial court erred by allowing

the jury to convict Defendant on the basis of the acting in concert doctrine. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Several weeks before Independence Day in 2010, Defendant and his friends got into an altercation with Howard Pitchford, III, and a friend of Mr. Pitchford's at a racetrack. The fight in question occurred because Toncellis Marshall, a friend of Mr. Pitchford, defeated Defendant in a motorcycle race. Although he initially paid the money that he owed as a result of losing the race, Defendant subsequently decided that he wanted his money back. After Mr. Marshall refused to return the money as requested, Defendant threw a punch at Mr. Marshall, leading to a multi-participant fight. Subsequently, Mr. Pitchford had a hostile encounter with Defendant and four of his friends at a local store.

The next time that Mr. Pitchford saw Defendant was at an Independence Day party which was held at the residence of Kathy Mills beginning on Saturday, 3 July 2010. Mr. Pitchford arrived

at the party between 12:15 and 12:30 a.m., accompanied by the same friends who had been with him at the racetrack. At the time of his arrival, Mr. Pitchford saw Defendant and his friends, who had been at the party since around 11:20 p.m., staring him down.

At some point during the evening, Mr. Pitchford entered the dance floor, on which approximately forty other people were situated. At that point, Defendant and three other males, including Michael "Bird" Richardson, Defendant's uncle, approached, surrounded, and attacked Mr. Pitchford. Both Mr. Pitchford and Mr. Marshall testified that Defendant stabbed Mr. Pitchford in the chest with a razor or a box cutter during the scuffle. On the other hand, David Hardy, a friend of Mr. Pitchford, testified that, after Defendant struck Mr. Pitchford in the chest with what looked to be a knife or a box cutter, Michael Richardson hit Mr. Pitchford on his back right side with what Mr. Hardy believed to be a knife. In addition, Mr. Marshall claimed to have seen an individual named David Brown with a knife in his hand while in close proximity to Mr. Pitchford. The trial testimony presented by the State did not clearly establish whether the object which Defendant used to assault Mr. Pitchford was a razor, a knife, a box cutter, or some other sharp object. Although investigating officers

searched the area after the altercation, they were unable to recover any box cutters, razors, or firearms.

After he stabbed Mr. Pitchford, Defendant ran away, leaving Mr. Pitchford lying on the ground and holding his stomach. Mr. Marshall went after Defendant and caught up with him near the edge of a road. At that point, Defendant pointed a gun straight into the air and fired. After gun shots rang out, the crowd began to disperse.

As a result of his injuries, Mr. Pitchford was taken to the porch of Ms. Mills' home, where he awaited the arrival of medical assistance. Mr. Pitchford was taken to the hospital, where he received fifty-eight stitches and fifty-nine staples for the purpose of closing his wound. Mr. Pitchford spoke with investigating officers while at the hospital and informed them that Defendant had stabbed him. After Mr. Pitchford had been taken to the hospital, Mr. Marshall received multiple phone calls from Defendant in which the latter stated that he had meant to cut Mr. Marshall rather than Mr. Pritchard.

2. Defendant's Evidence

The evidence adduced on Defendant's behalf at trial indicated that Defendant simply hit Mr. Pitchford in the face with his fist and that Michael Richardson, rather than Defendant, was probably responsible for stabbing Mr. Pitchford.

More specifically, Defendant's cousin, Dennis McGee, testified that, as Defendant's friends walked past Mr. Pitchford, he laughed at Defendant, who then hit him in the eye. As Mr. Pitchford fell, Mr. McGee saw an individual in a brown coat run up to Mr. Pitchford, strike him below his stomach, and run through the crowd. Similarly, Latasha Taylor, another of Defendant's cousins, testified that, after the group which included Defendant walked past Mr. Pitchford, she heard a laugh and then saw Defendant and Mr. Pitchford swinging beer cans at each other. After Defendant hit Mr. Pitchford above the nose with his closed fist and after Defendant had left the immediate area, Ms. Taylor saw Michael Richardson, who was wearing a brown coat, emerge from the crowd, get on top of Mr. Pitchford, hit him in the abdominal area, and run away. Finally, Delvin Silver, one of Defendant's friends, testified that he saw Defendant strike Mr. Pitchford in the face with a closed fist, that Defendant's friends joined the fight, and that Michael Richardson came over when the fight started with a box cutter or razor in his hand. None of Defendant's witnesses ever saw Defendant in possession of a weapon.

B. Procedural History

A warrant for arrest charging Defendant with assault with a deadly weapon with the intent to kill inflicting serious injury

was issued on 4 July 2010. On 11 October 2010, the Halifax County grand jury returned a bill of indictment charging Defendant with assault with a deadly weapon with intent to kill inflicting serious injury. The charge against Defendant came on for trial before the trial court and a jury at the 26 March 2012 criminal session of the Halifax County Superior Court. On 30 March 2012, the jury returned a verdict convicting Defendant of assault with a deadly weapon inflicting serious injury. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment sentencing Defendant to a term of 30 to 45 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Substantive Legal Analysis

A. Sufficiency of the Indictment

In his first challenge to the trial court's judgment, Defendant contends that the bill of indictment returned against him was fatally defective and that the trial court erred by entering judgment against him on the basis of such a defective indictment. More specifically, Defendant argues that the indictment returned against him in this case failed to describe the deadly weapon with which he allegedly assaulted Mr. Pitchford with sufficient specificity to permit the trial court

to enter judgment against him. We do not find Defendant's argument persuasive.

1. Standard of Review

"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.'" *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)). For that reason, a defendant is "not required to object to the indictment defect at trial in order to preserve the issue;" "[a] motion for arrest of judgment based upon the insufficiency of an indictment may be made for the first time on appeal." *State v. Kelso*, 187 N.C. App. 718, 723, 654 S.E.2d 28, 32 (2007), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008). "On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (citing *State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981)), *disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

2. Validity of the Indictment

According to N.C. Gen. Stat. § 15A-924(a)(5), a valid indictment must contain "[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 of the conduct which is the subject of the accusation." As a result, "an indictment must allege every essential element of the criminal offense it purports to charge," *State v. Billinger*, __ N.C. App. __, __, 714 S.E.2d 201, 206 (2011) (quoting *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)), although it "need only allege the ultimate facts constituting each element of the criminal offense." *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995). "[T]he chief policies underlying the indictment requirement are (1) 'to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense' and (2) 'to enable the court to know what judgment to pronounce in case of conviction.'" *State v. Jones*, 359 N.C. 832, 837, 616 S.E.2d 496, 499 (2005) (quoting *State v. Sills*, 311 N.C. 370, 375-76, 317 S.E.2d 379, 382 (1984)). "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient if the offense is charged in the words of the statute, either literally or substantially, or in equivalent

words." *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953). An indictment "seeking to charge a crime in which one of the elements is the use of a deadly weapon" is sufficient if it "name[s] the weapon" and "either . . . state[s] expressly that the weapon used was a 'deadly weapon'" or "allege[s] 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).

The indictment returned against Defendant in this case alleges, in pertinent part, that Defendant "unlawfully, willfully and feloniously did ASSAULT HOWARD PITCHFORD III with a SHARP UNKNOWN OBJECT, a deadly weapon, with the intent to kill and inflicting serious injury." In seeking to persuade us that the indictment failed to describe the weapon with which Defendant allegedly assaulted Mr. Pitchford with sufficient specificity, Defendant places principal reliance upon the Supreme Court's decision in *Palmer* and this Court's decision in *Moses*, which held that an indictment alleging that the defendant "unlawfully, willfully and feloniously did assault [the victim] with a deadly weapon" was fatally defective because it failed to "name the deadly weapon allegedly used." *Moses*, 154 N.C. App. at 335-36, 572 S.E.2d at 226. We believe that Defendant's reliance upon these decisions is misplaced.

As an initial matter, the Supreme Court's decision in *Palmer* does not stand for the proposition that a valid indictment must identify the weapon used in an assault with a considerable degree of specificity. On the contrary, *Palmer* specifically overruled the Supreme Court's prior decision in *State v. Porter*, 101 N.C. 713, 716, 7 S.E. 902, 903-04 (1888), in which the Court had held that the object utilized in an assault had to be both named and specifically described. *Palmer*, 293 N.C. at 635, 239 S.E.2d at 408 (stating that "the decision in *Porter* should no longer be considered authoritative, and the decision is consequently overruled"). Although the Supreme Court had held in *Palmer* that an indictment alleging that the defendant used "a stick, a deadly weapon" "failed to charge an assault with a deadly weapon," *Id.* at 634-35, 239 S.E.2d at 407-08, it concluded that this language was sufficient to charge the use of a deadly weapon despite the absence of additional language describing the length, width, shape, and size of the stick in question. Thus, *Palmer* simply holds that there must be some description of the item which the defendant allegedly utilized in assaulting the victim, not that the item in question needs to be described with minute specificity.

Secondly, as we have already noted, the language of the indictment at issue in *Moses* simply indicated that the defendant

assaulted the victim "with a deadly weapon." *Moses*, 154 N.C. App. at 335, 572 S.E.2d at 226. Although the record before the Court in *Moses* clearly indicated that the defendant utilized a bottle to assault his victim, the indictment returned against him was completely devoid of any language describing the weapon which the defendant allegedly utilized to assault the victim. The indictment returned against Defendant in this case, however, alleges that Defendant utilized a "sharp object" and that this object was a deadly weapon, thereby, unlike the indictment at issue in *Moses*, eliminating the possibility that the weapon which Defendant utilized was a firearm, club, rock, or some other object. As a result, given that the indictment returned against Defendant indicated that the weapon in question was one capable of inflicting a stabbing or slash-like wound, we conclude that the allegations of the charging instrument utilized in this case were sufficiently specific to put Defendant on "notice of the charge against him," to allow Defendant to assert any available double jeopardy defense, and to allow the trial court to properly enter judgment. *Jones*, 359 N.C. at 837, 616 S.E.2d at 499.

Thus, neither of the reported decisions upon which Defendant relies supports a determination that the indictment returned against him in this case failed to adequately describe

the weapon which Defendant allegedly used while assaulting Mr. Pitchford. The indictment included an allegation which encompassed all of the information apparently available to the State about the object with which Defendant allegedly assaulted Mr. Pitchford, which is all that can be reasonably expected. As a result, we conclude that the allegation that Defendant utilized a sharp object to assault Mr. Pitchford and that this object was a deadly weapon describes the weapon which Defendant allegedly utilized during the assault upon Mr. Pitchford with the required degree of specificity, so that Defendant's challenge to the sufficiency of the indictment which had been returned against him in this case is without merit.

B. Acting in Concert Instruction

Secondly, Defendant contends that the trial court erred by instructing the jury that it could convict Defendant on the basis of the acting in concert doctrine. More specifically, Defendant contends that the trial court erred by instructing the jury concerning the acting in concert doctrine because the record developed at trial did not support a finding that he acted in concert with anyone else at the time that Mr. Pitchford was assaulted. Instead, Defendant contends that "the evidence tended to show that [he] either committed the crime himself or that another party committed it independently and not as part of

a common plan or purpose." We do not believe that Defendant's contention has any merit.

1. Standard of Review

When a dispute arises challenging the propriety of jury instructions given by a trial court, we review the issue *de novo*. *State v. McLean*, 205 N.C. App. 247, 252, 695 S.E.2d 813, 817 (2010). Under a *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)) (internal quotation marks omitted).

2. Appropriateness of the Acting in Concert Instruction

Jury instructions are intended to provide guidance for the jury and should consist of "a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (quoting *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971)). Jury instructions that do not have some reasonable support in the evidentiary record are erroneous and should not be delivered. *State v. Buchanan*, 287 N.C. 408, 421, 215 S.E.2d

80, 88 (1975), *overruled on other grounds in State v. Leach*, 340 N.C. 236, 242, 456 S.E.2d 785, 789 (1995). For that reason, a trial court should not instruct the jury concerning a possible basis for a finding of guilt which lacks evidentiary support. *See State v. Baskin*, 190 N.C. App. 102, 111, 660 S.E.2d 566, 573, *disc. review denied*, 362 N.C. 475, 666 S.E.2d 648 (2008). "To determine if an instruction should be given, the court must consider whether there is any evidence in the record which might convince a rational trier of fact to convict defendant of the offense" on the basis of the theory embodied in that instruction. *State v. Moore*, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253 (citing *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)), *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985). For that reason, if a trial judge "give[s] instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence" and the delivery of those instructions prejudices the defendant, he or she is entitled to a new trial. *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973). The "burden of showing such prejudice is on [the] defendant." *McLean*, 205 N.C. App. at 252, 695 S.E.2d at 817.

A determination that a defendant committed an assault with a deadly weapon inflicting serious injury requires proof beyond

a reasonable doubt of "(1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citing N.C. Gen. Stat. § 14-32(b)). An individual may be convicted of committing a criminal offense on the basis of the acting in concert doctrine if he or she, "act[ing] together, in harmony or in conjunction . . . with another pursuant to a common plan or purpose," committed the offense in question. *State v. Joyner*, 297 N.C. 349, 358, 225 S.E.2d 390, 395 (1979) (citing *Webster's Third New International Dictionary* 470 (1971)). "Where the State seeks to convict a defendant using the principle of concerted action, [testimony tending to show] that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crime's commission." *Id.* at 356-57, 255 S.E.2d at 395. However, it is not necessary for the State to prove that the defendant personally committed acts constituting the elements of the underlining crime; instead, he may be convicted of committing a criminal offense under the acting in concert doctrine as "long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common

plan or purpose to commit the crime." *Id.* at 357, 255 S.E.2d at 395.

In spite of Defendant's contention to the contrary, the record contained ample evidentiary support for the trial court's decision to allow the jury to consider whether Defendant should be convicted of assaulting Mr. Pitchford with a deadly weapon inflicting serious injury on the basis of the acting in concert doctrine. As the record clearly shows, Defendant and his friends had a history of animosity with Mr. Pitchford and his friends. A number of the State's witnesses testified that Defendant and his friends approached Mr. Pitchford and attacked him on a simultaneous basis. During the assault, Mr. Pitchford was stabbed with a sharp object variously described as a knife, razor blade, box cutter, or some other sharp object. Although the record does not contain any evidence tending to show that Defendant had any sort of explicit agreement with his friends to attack Mr. Pitchford, such evidence is not a necessary prerequisite for a finding of guilt on the basis of the acting in concert doctrine so long as the existence of such a plan can be reasonably inferred from the record evidence. Similarly, the fact that the State contended that Defendant, as compared to one of his friends or allies, actually committed the assault upon Mr. Pitchford does not preclude a finding of guilt on the basis

of the acting in concert doctrine, given that jury instructions should be based upon the record considered in its entirety, *see generally Moore*, 75 N.C. App. at 546, 331 S.E.2d at 253, and given that the record contained evidence tending to show that Mr. Pitchford's injuries stemmed from the actions of one of Defendant's associates rather than solely from Defendant's conduct or someone acting entirely independently of him. Although Defendant argues that the record concerning the activities of both Michael Richardson and David Brown indicates that they acted after the infliction of a wound by Defendant, we fail to find this argument persuasive given that the jury could have concluded on the basis of the evidence contained in the record that Mr. Pitchford's injuries resulted from the conduct of Michael Richardson or David Brown rather than Defendant. As a result, the record contained ample evidence tending to show that Defendant was guilty of assaulting Mr. Pitchford with a deadly weapon inflicting serious injury on the basis of the acting in concert doctrine, a fact which establishes that the trial court correctly overruled Defendant's timely objection to the delivery of an acting in concert instruction.

III. Conclusion

Thus, for the reasons stated above, we conclude that neither of Defendant's challenges to the trial court's judgment

has any merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

AFFIRMED.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).