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NO. COA13-398

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v.

BRITTANY MARIE TOMLINSON

Edgecombe County
Nos. 11 CRS 53674, 53677

Appeal by Defendant from judgments entered 29 August 2012 by Judge W. Russell Duke, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 25 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Glenn Gerding for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

Defendant Brittany Marie Tomlinson appeals from judgments entered upon her convictions for two counts each of resist, delay, or obstruct ("RDO") and assault on a government official. The evidence at trial, where Defendant appeared *pro se*, tended

to show the following: On 23 November 2011, Defendant, along with her four-year-old daughter, accompanied her brother to the clerk of court's office in the Nash County Justice Center in Rocky Mount to reschedule a court date he had missed earlier that week. As a result of the missed court date, a warrant had been issued for the brother's arrest, and the clerk's office called the police department.

Officer Jill Tyson[1] of the Rocky Mount Police Department ("RMPD") arrived to serve the warrant and informed Defendant's brother that he would be taken before a magistrate. Defendant's brother complied, putting his hands behind his back as requested by Tyson. However, Defendant objected to her brother's arrest, grabbed his arm, and pulled him away from Tyson. Tyson told Defendant that she would be removed if she continued to be disruptive, and Defendant left the building. Tyson took Defendant's brother through the building to the magistrate's office. Defendant entered the magistrate's office from an exterior door and told her brother not to say anything. The magistrate sent Defendant to the lobby where Defendant took out her cell phone and attempted to make a call. When the

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[1] At the time of her interaction with Defendant, Tyson's name was Jill Tyson Gilbert.

magistrate informed her of the "no cell phone" policy in the office and asked her to go outside, Defendant refused to leave, replying, "I ain't got to go nowhere." The magistrate then held Defendant in contempt and ordered Tyson to arrest her.

Defendant attempted to leave the magistrate's office at this point. When Tyson attempted to place handcuffs on Defendant, Defendant hit Tyson under the left eye with her fist. An altercation ensued during which Defendant punched, kicked, and scratched Tyson. Tyson declined to use her Taser to subdue Defendant because of the presence of Defendant's young daughter. Instead, Tyson called for backup, and RMPD Officer Victoria Phillips responded. Defendant also fought back when Phillips attempted to handcuff her. Eventually, at least five officers arrived on the scene, and Defendant was handcuffed and taken into custody. Phillips then took Defendant, now under arrest and handcuffed, to the lobby and instructed her sit on a bench while they awaited transport to the magistrate's office in Tarboro.[2] Defendant remained noncompliant with Phillips's instructions and instead kicked Phillips in the leg.

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[2] Because she had witnessed Defendant's assault on Tyson, the magistrate in Rocky Mount instructed Phillips to have another magistrate handle Defendant's processing.

Defendant was tried in the district court, convicted on all charges, and appealed to superior court for a jury trial. After the jury returned guilty verdicts on all four misdemeanors, the trial court found that Defendant had at least five prior convictions, which resulted in a prior conviction level III for misdemeanor sentencing purposes. The court imposed two consecutive sentences of 150 days each with one day credit for time served. Defendant appeals.

Discussion

On appeal, Defendant argues that the trial court (1) lacked jurisdiction to try her because the warrants as to her assault on Tyson were fatally flawed, (2) erred in failing to find a fatal variance between the allegations in the warrant as to the assault on Phillips and the evidence at trial, (3) committed plain error in instructing the jury on assault on a government official, and (4) erred in determining her prior conviction level. We vacate Defendant's conviction for RDO as to Tyson, but find no error in the remainder of her trial. We also vacate her sentence and remand for recalculation of her prior conviction level and resentencing based thereupon.

On 16 April 2013, Defendant filed a motion for appropriate relief ("MAR") with this Court, which was referred to this panel

by order dated 1 May 2013. Defendant's MAR raises arguments regarding her prior conviction level and credits for pretrial time served. We allow her motion in part and dismiss without prejudice in part.

I. Sufficiency of warrants re: Officer Tyson

Defendant first argues that the warrants for RDO and assault on a government officer in case number 11 CRS 53677 (the charges involving Tyson) were fatally defective. We agree in part and disagree in part.

A charging instrument must

> provide sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy. It must include all the facts necessary to meet the elements of the offense. If it does not, the trial court lacks jurisdiction over the defendant and subsequent judgments are void and must be vacated.
>
> N.C. Gen. Stat. § 14-223 provides, "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." An indictment fails under N.C. Gen. Stat. § 14-223 if it does not describe the duty the named officer was discharging or attempting to discharge.

State v. Ellis, 168 N.C. App. 651, 655, 608 S.E.2d 803, 806 (2005) (citations, date, and some quotation marks omitted).

In contrast, "[t]he essential elements of a charge of assault on a government official are: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties." *State v. Noel*, 202 N.C. App. 715, 718, 690 S.E.2d 10, 13 (citation omitted), *disc. review denied*, 364 N.C. 246, 699 S.E.2d 642 (2010).

> [I]n the offense of assaulting a government official, the *assault* on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. Accordingly, the specific duty the officer was performing while being assaulted is not an essential element of assault on a government official, as defined in N.C. Gen. Stat. § 14-33(c)(4), and is not required to be set out in the indictment.

Id.[3] at 720, 690 S.E.2d at 14-15 (citations and quotation marks omitted; emphasis in original).

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[3] We acknowledge Defendant's observation that this Court in *State v. Caldwell*, 21 N.C. App. 723, 725, 205 S.E.2d 322, 323 (1974), asserted that the charge of assault on a government official "requires all the essential elements of a charge under [section] 14-223[.]" However, *State v. Kirby*, an earlier case from this Court, explicitly held that the specific duty a government official is performing when assaulted need not be specified to properly charge that offense. 15 N.C. App. 480, 488, 190 S.E.2d 320, 325, *appeal dismissed,* 281 N.C. 761, 191 S.E.2d 363 (1972).

> There is a distinction between the two offenses: In the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense, while in the offense of assaulting a public officer in the performance of some duty, the *assault* on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. The legislative intent appears to be that if a public officer is assaulted in performing or attempting to perform *any* duty of his office, the provision of [section] 14-33(c)(4) is applicable.

Kirby, 15 N.C. App. at 488, 190 S.E.2d at 325 (emphasis in original). In sum, a warrant or indictment charging RDO requires that the duty an officer was performing or attempting to perform be specified, while an instrument charging assault on a government official does not.

Here, Defendant contends that the warrants as to Tyson are fatally flawed because they fail to allege the specific duty

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Where there is a conflicting line of cases, we follow the older of those two lines. *See In re R.T.W.*, 359 N.C. 539, 542 n.3, 614 S.E.2d 489, 491 n.3 (2005), *superseded by statute on other grounds*, Act of Aug. 23, 2005, ch. 398, sec. 12, 2005 N.C. Sess. Laws 1455, 1460-61 (amending various provisions of the Juvenile Code).

being discharged by Tyson when Defendant allegedly resisted and assaulted her. Both warrants specify the duty of Tyson's office as being "TO SERVE AND PROTECT[,]" which Defendant contends is merely an allegation of "the general duties of a police officer" and "too abstract and non-specific" to comport with the constitutional requirements discussed *supra*. We agree.

The State notes that Tyson was attempting *to serve* a warrant on Defendant's brother at the time of the offense, and thus contends the warrant *did* describe Tyson's specific duty at the time of Defendant's offense. We are not persuaded that this is a reasonable reading of the phrase "TO SERVE AND PROTECT" as used in the warrant. We take judicial notice of the fact that the phrase "to protect and to serve" became the official motto of the Los Angeles Police Department ("LAPD") in 1963 and has since become associated with and often considered an "unofficial motto" for law enforcement agencies across the nation.[4] While this phrase may accurately describe the noble aspirations and

[4] The phrase "to Protect and to Serve" first won an internal police department contest held in 1955, but apparently was not officially adopted as the LAPD motto until 1963, after which time it began to appear on department patrol cars among other locations. *See* The Origin of the LAPD Motto, http://www.lapdonline.org/history_of_the_lapd/content_basic_view/1128 (lasted visited 7 September 2013).

goals of our police and other law enforcement officers in the most general manner, we hold that it does not adequately describe the *particular* duty Tyson was attempting to perform at the time of Defendant's actions. The warrant alleging RDO was thus fatally defective, and accordingly, we vacate that conviction and arrest the judgment entered thereupon. *See State v. Harris*, __ N.C. App. __, __, 724 S.E.2d 633, 636 (2012).

However, as noted *supra*, a warrant alleging assault on a government official does not require identification of the officer's specific duty at the time of the assault. The warrant charging Defendant with that offense alleged that she

> unlawfully and willfully did assault and strike [Tyson], a government officer of the [RMPD] by STRIKING IN THE FACE IN THE HEAD [sic] AND KICKED IN LEG SCRATCHED NECK ON LEFT SIDE [sic] AND STRIKE IN LIP [sic] AND ABOUT THE BODY. At the time, the officer was discharging and attempting to discharge a duty of that office, TO SERVE AND PROTECT.

This warrant alleges "(1) an assault (2) on a government official (3) in the actual or attempted discharge of h[er] duties[,]" *Noel*, 202 N.C. App. at 718, 690 S.E.2d at 13 (citation omitted), and was thus entirely sufficient to establish the trial court's jurisdiction. The reference to the specific duty being discharged is surplusage when charging this offense. *See Kirby*, 15 N.C. App. at 488, 190 S.E.2d at 325.

Accordingly, we overrule Defendant's argument as to her conviction for assault on a government official.

II. Variance between warrants and evidence re: Officer Phillips

Defendant next argues that a fatal variance existed between the allegations contained in the warrant and the evidence produced at trial as to her assault of Phillips. We disagree.

> A motion to dismiss for a variance is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.
>
> In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to the gist of the offense. This means that the defendant must show a variance regarding an essential element of the offense.

State v. Pickens, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (citation, quotation marks, and brackets omitted). At trial, Defendant did not move to dismiss the charges concerning Phillips on the basis of a fatal variance or any other ground. However, she asks this Court to review her argument in its discretion pursuant to Rule 2 of the Rules of Appellate Procedure. *See* N.C.R. App. P. 2. We elect to do so and conclude that Defendant's contentions lack merit.

"In order for a variance to warrant reversal, the variance must be material. A variance is not material and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citation omitted). Regarding assault on a government official, this Court has explicitly held that variations between a warrant and the evidence at trial about the specific duty being performed when a government official is assaulted is not material and thus may be disregarded. *Noel*, 202 N.C. App. at 721, 690 S.E.2d at 15. In *Noel*, the indictment alleged that the defendant spit on an officer who was taking the defendant into custody, while

> [t]he evidence adduced at trial tended to show that [the officer] was interrogating [the d]efendant when [the d]efendant spit on him. We agree there is [a] variance between the allegations in the indictment and the proof offered, but the variance is not material. The indictments alleged that [the official] was performing his duties as a government employee. Proof was offered to support the material allegation that [the official] was performing a government duty when he was spit upon. The additional allegation as to the exact duty being performed by [the official] was surplusage and must be disregarded. Accordingly, as there was no fatal variance between the indictments and the proof adduced at trial, and there was sufficient evidence that [the officer] was performing a government duty at

> the time of the offense, [the d]efendant's argument is overruled.

Id. (citation omitted).

Here, the warrant alleging Defendant's assault on Phillips specified that Phillips was "ASSISTING ANOTHER OFFICER IN HANDCUFFING DEFENDANT[,]" while the evidence at trial showed that, at the time Defendant kicked Phillips, Defendant had already been handcuffed and arrested. However, the evidence is clear that, when Defendant kicked her, Phillips was acting in the course of her duties as a government official, to wit, that Phillips was maintaining custody of Defendant while they awaited transport to another magistrate's office. As in *Noel*, we find the "exact duty being performed by [Phillips] was surplusage and must be disregarded. Accordingly, as there was no fatal variance between the [warrant] and the proof adduced at trial, and there was sufficient evidence that [Phillips] was performing a government duty at the time of the offense, Defendant's argument is overruled." *Id.*

III. Jury instructions on assault on a government official

Defendant also argues that the trial court committed plain error in instructing the jury on a theory of guilt which was not supported by the evidence at trial with regard to the assault on Phillips. We disagree.

Because Defendant did not object to the trial court's instructions at trial or otherwise preserve this alleged error, we review only for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. (citations, quotation marks, and brackets omitted). Moreover, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 517, 723 S.E.2d at 333 (citation, quotation marks, and brackets omitted).

Here, the trial court instructed the jury that Defendant was charged with assault on a government official, "two counts, two officers, while the officers were performing or attempting to perform a duty of their office." The court then instructed that the State must establish the four elements of the offense: (1) an assault (here, a kick or strike), (2) on a known law

enforcement officer, (3) while Tyson and Phillips "were making or attempting to make an arrest[,]" and (4) that the arrest was lawful.

On appeal, Defendant asserts that the evidence at trial showed that she had already been placed under arrest at the time she kicked Phillips and that the trial court's instruction thus allowed the jury to convict her on a theory not supported by the evidence. Defendant further contends that she was prejudiced by this erroneous instruction because the jury would likely have acquitted her of assaulting Phillips if they had been instructed to consider whether Phillips was still acting in the course of her official duties when Defendant kicked her. We are not persuaded. As Defendant herself concedes, when she kicked Phillips, the officer was in the process of transporting Defendant to the magistrate in Tarboro for further processing, an act which was clearly part of her duties as a police officer. Defendant cannot show any probability of a different verdict even had the trial court instructed the jury as she suggests, and accordingly, she cannot establish plain error. This argument is overruled.

IV. Determination of prior conviction level

Finally, Defendant argues that the trial court erred in calculating her prior conviction level, contending that the calculation did not comply with the requirements of N.C. Gen. Stat. § 15A-1340.14(f) (2011). Specifically, Defendant contends she did not stipulate to the prior convictions upon which her prior conviction level was calculated. In a related argument in her MAR, Defendant contends that, even if she had stipulated to certain convictions, her prior conviction level was incorrectly calculated. We agree that Defendant's prior conviction level was improperly calculated.

We begin by observing that section 15A-1340.14, entitled "Prior record level for felony sentencing," applies to felony sentencing, while Defendant was convicted of four misdemeanors. For felony sentencing, a defendant's prior record level is determined based upon her class of offense and the sum of points assigned to her prior convictions. *Id.* at (a),(b). However, "[t]he prior conviction level of a misdemeanor offender is determined by calculating the number of the offender's prior convictions . . . ." N.C. Gen. Stat. § 15A-1340.21(a) (2011). If a defendant has at least five prior convictions, she is a prior conviction level III offender for misdemeanor sentencing purposes. *Id.* at (b)(3). A defendant with "[a]t least 1, but

not more than 4 prior convictions[,]" has a prior conviction level of II. *Id.* at (b)(2).

Prior convictions may be proven, *inter alia*, by stipulation of the defendant. *Id.* at (c)(1). "While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (citation and quotation marks omitted). However, "a defendant need not make an affirmative statement to stipulate to . . . her prior [conviction] level . . . particularly if [she] had an opportunity to object to the stipulation in question but failed to do so." *Id.* at 829, 616 S.E.2d at 918.

Here, at sentencing, the State presented a prior conviction worksheet which listed ten purported prior convictions of Defendant, five of which occurred in 2012 and the remainder between 2005 and 2007. Defendant did not sign the stipulation section of the worksheet, instead writing "All Rights Resered [sic]" in the blank for her signature. The trial court reviewed the worksheet and the following colloquy occurred:

> THE COURT: All right. Well, you've heard a jury of your peers. They found you guilty

> of this. Now, you've been convicted it looks like of fictitious information [sic] giving fictitious information to an officer, harassing phone calls[,] and two counts of assault on a government official, [and] shoplifting. All that before now, right? Is that your record?
>
> [Defendant]: Yes, and that was when I was younger.
>
> THE COURT: Well, this is 2012. How much younger can you get?
>
> [Defendant]: Well, some of those charges are false.
>
> THE COURT: Oh, they are.
>
> [Defendant]: Yes.
>
> THE COURT: But you were convicted of them, is that right?
>
> [Defendant]: Yes, I didn't get a fair trial.

Although Defendant's agreement that she had been convicted of the charges listed by the trial court was sufficiently "definite and certain" to constitute a stipulation, *id.* at 828, 616 S.E.2d at 917, only one of the listed convictions was final. Four of the five convictions mentioned by the court occurred in 2012 and were on direct appeal from district to superior court at the time of Defendant's sentencing in this case. Thus, they were not prior convictions. *See* N.C. Gen. Stat. § 15A-1340.11(7)(a) (2011) (defining "prior conviction" as a conviction in district

court which has *not* been appealed to superior court). Only one conviction mentioned by the court, shoplifting, was final and thus could constitute a prior conviction for sentencing in this matter. While the other four pre-2012 convictions listed on the worksheet were prior convictions as defined in section 15A-1340.11(7), the trial court did not ask Defendant about them, and Defendant did not stipulate to them. Accordingly, we allow this portion of Defendant's MAR, vacate Defendant's sentence, and remand for resentencing as a prior conviction level II.

V. The remainder of Defendant's MAR

In her MAR, Defendant also contends that the superior court erred in crediting her with only one day of pretrial time served, noting that she received a total of twenty-two days of pretrial credit from the two district court judges who handled the cases. However, Defendant acknowledges that she did not request the superior court judge to allow her any additional credit for time served and the court therefore had no opportunity to make a ruling on this issue for our review. Accordingly, we dismiss without prejudice the portion of the MAR addressing Defendant's pretrial credit. *See State v. Cloer*, 197 N.C. App. 716, 721-22, 678 S.E.2d 399, 403 (2009) (noting this "approach makes sense given the reality that, in at least some

instances, factual issues will need to be resolved before a proper determination of the amount of credit to which a particular defendant is entitled can be made, and such issues are best addressed, as an initial matter, in the trial courts rather than in the Appellate Division”).

VACATED IN PART; NO ERROR IN PART; MOTION FOR APPROPRIATE RELIEF ALLOWED IN PART AND DISMISSED IN PART.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).