IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-620

Filed: 16 October 2018

Hoke County, Nos. 14CRS051601, 14CRS051695-96

THE STATE OF NORTH CAROLINA

v.

OWEN P. WILLIAMS, Defendant.

Appeal by defendant from judgments entered 12 December 2016 by Judge Tanya Wallace in Hoke County Superior Court. Heard in the Court of Appeals 14 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Melissa H. Taylor, for the State.

Jeffrey William Gillette for defendant.

BERGER, Judge.

Owen Phillip Williams ("Defendant") was convicted on December 5, 2016 of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault inflicting serious bodily injury, robbery with a dangerous weapon, and first degree burglary. On appeal, Defendant contends that (1) his indictment for attempted first degree murder was insufficient to confer

jurisdiction on the trial court because it did not allege an essential element of that crime, and (2) the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon because the State did not introduce sufficient evidence that Defendant had the requisite intent to permanently deprive the lawful owner of her property. We agree with Defendant regarding his indictment and vacate and arrest judgment in part. We disagree with Defendant regarding his motion to dismiss and find no error in part.

Factual and Procedural Background

On September 24, 2014, Defendant ambushed his estranged wife, Regina Ann Williams ("Ms. Williams"), in her garage, shooting her multiple times with a .38-caliber revolver. Ms. Williams survived the attack and was able to provide testimony at trial.

The State's evidence tended to show that on the day of the attack, Ms. Williams was returning home from a first-aid class, and was on her cell phone with Tracy Bryant ("Bryant"). Ms. Williams backed her SUV into her garage and put the garage door down. She waited for the garage door to completely close and entered her home. Hearing the garage door go back up, Ms. Williams went to investigate, remaining on the phone with Bryant. As Ms. Williams reentered the garage, Defendant rose from a crouched position near her SUV and began shooting.

Defendant discharged six rounds from the revolver, which he had equipped with a homemade suppressor. Ms. Williams collapsed with wounds to her side, chest, face, and neck. Ms. Williams managed to put her cell phone to her ear and told Bryant that Defendant had shot her. As she lay bleeding on the garage floor, Ms. Williams saw her SUV move. Evidence later indicated that Defendant had slashed a tire, an action Ms. Williams believed was to prevent her from seeking help.

Defendant entered Ms. Williams's residence, but suddenly returned to where she was lying, took her cell phone from her hand, and went back into the residence. Defendant left the cell phone on the kitchen counter in the residence and fled the scene.

Bryant called law enforcement and reported what she had heard while on the phone with Ms. Williams. Ms. Williams was still conscious when police and emergency services arrived. She was transported to the hospital where she underwent emergency surgery to repair damage caused by the gunshots to her liver, a kidney, and one of her lungs. Further surgery was required to repair injuries to her face and shattered jaw. Two of the projectiles remain lodged in her back, and she continues to suffer from physical pain and emotional trauma.

A warrant for Defendant's arrest was issued on September 24, 2014 for assault with a deadly weapon with the intent to kill inflicting serious injury. On October 7, 2014, another arrest warrant was issued for attempted first degree murder and first

degree burglary. On November 16, 2015, Defendant was indicted for not only the crimes for which the arrest warrants were issued, but also robbery with a dangerous weapon and assault inflicting serious bodily injury.

At trial, Defendant moved to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence, arguing the State had not introduced sufficient evidence of his intent to permanently deprive Ms. Williams of her cell phone. After declining to introduce any evidence or testify on his own behalf, Defendant renewed his motion. Both motions were denied.

On December 5, 2016, Defendant was convicted of all charges. He was sentenced to terms of 157 to 201 months for attempted first degree murder and robbery with a dangerous weapon; 64 to 89 months for first degree burglary; 73 to 100 months for assault with a deadly weapon with intent to kill inflicting serious injury; and 16 to 29 months for assault inflicting serious bodily injury. After being sentenced, Defendant gave notice of appeal, and he also filed notice of appeal on December 21, 2016.

Analysis

On appeal, Defendant argues that the trial court did not have jurisdiction to try him for attempted first degree murder because the indictment failed to allege the necessary element of malice aforethought. Because the trial court lacked jurisdiction, Defendant specifically asks this Court to arrest judgment on the attempted first

degree murder conviction, and remand the case for entry of judgment and resentencing on attempted voluntary manslaughter. He argues this would be proper because the indictment at issue sufficiently alleged attempted voluntary manslaughter. We agree that Defendant's indictment was not sufficient to allege attempted first degree murder and vacate that conviction.

Defendant also argues that the trial court erred in denying his motion to dismiss the robbery with a dangerous weapon charge. He asserts that the State's evidence failed to show he had the requisite intent to permanently deprive Ms. Williams of her cell phone. On this argument, we disagree and conclude the trial court did not err.

I. Indictment

Defendant contends the indictment for attempted first degree murder was insufficient because it failed to allege malice aforethought, an essential element of the offense. Because of its failure to allege malice aforethought as required by N.C. Gen. Stat. § 15-144, the indictment did not confer jurisdiction on the trial court for it to try him for this crime. We vacate Defendant's attempted first degree murder conviction for this lack of jurisdiction. Defendant then argues the indictment sufficiently alleged the lesser-included offense of attempted voluntary manslaughter, and that this Court should remand for judgment and sentencing for attempted voluntary manslaughter. We disagree.

"We review the issue of insufficiency of an indictment under a *de novo* standard of review." *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). "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) (citation and quotation marks omitted). "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); *see State v. Brice*, 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017) ("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.").

A criminal pleading must generally contain: (1) the identification of the defendant; (2) a separate count for each offense charged; (3) the county in which the charged offense took place; (4) the date, or date range, during which the charged offense was committed; (5) a "plain and concise factual statement in each count which . . . 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;" and (6) the "applicable statute,

rule, regulation, ordinance, or other provision of law alleged therein to have been violated." N.C. Gen. Stat. § 15A-924(a) (2017).

To have a sufficient indictment for first degree murder, "the State is required to allege that the killing was committed feloniously, wilfully and with malice aforethought." *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984); N.C. Gen. Stat. § 15-144 (2017) ("[I]t is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed)."). To allege attempted first degree murder, an indictment is sufficient if it states that the defendant attempted the prohibited conduct using the same statutory language required for an indictment for murder. *State v. Jones*, 359 N.C. 832, 838-39, 616 S.E.2d 496, 500 (2005).

An indictment for attempted first degree murder must allege that the defendant committed the crime with malice aforethought because it is an essential element. *State v. Schalow*, ___ N.C. App. ___, ___, 795 S.E.2d 567, 572 (2016). Failure to allege this essential element will render an indictment for attempted murder insufficient to confer jurisdiction on the trial court. *Id.*; *see also State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (An indictment for murder is insufficient where "the indictment on its face fail[s] to include the essential element of 'malice aforethought' as required by Article I, Section 22 of the North Carolina

Constitution, N.C.G.S. § 15-144, and [*State v.*]*Bullock*[, 154 N.C. App. 234, 574 S.E.2d 17 (2002)].").

Here, the attempted first degree murder count of Defendant's indictment stated:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 24th day of September 2014, in the county named above the defendant named above *unlawfully, willfully, and feloniously did attempt to murder Regina Ann Williams by shooting her six times with a firearm*. This act was in violation of North Carolina General Statutes Section 14-17. (emphasis added).

This indictment properly identified Defendant, included a separate count for each offense charged, named the county in which the offenses allegedly took place, included the date of the charged offense, and provided the applicable statute alleged to have been violated. The indictment further alleged two essential elements of the crime of attempted first degree murder sufficiently: that Defendant (1) feloniously and (2) willfully attempted to murder the victim. However, the indictment did not include the phrase "with malice aforethought," and the inclusion of "unlawfully" does not suffice as a replacement. *State v. Arnold*, 107 N.C. 861, 861, 11 S.E. 990, 990 (1890) (stating "malice aforethought" cannot be exchanged for any other word, including "unlawfully"). s*ee also Schalow*, ___ N.C. App. at ___, 795 S.E.2d at 572; *Wilson*, 236 N.C. App. at 475, 762 S.E.2d at 896; *State v. Yang*, 174 N.C. App. 755, 763, 622 S.E.2d 632, 637 (2005), *disc. review denied*, 360 N.C. 296, 628 S.E.2d 12 (2006); *Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 23.

The State contends that by including the number of shots fired, malice aforethought may be inferred. However, the State relies on cases that allow the *jury* to infer malice based on the evidence presented at trial. *See State v. Hough*, 61 N.C. App. 132, 134, 300 S.E.2d 409, 411 ("[M]alice may be implied from the use of a deadly weapon."), *disc. review denied*, 308 N.C. 193, 302 S.E.2d 246 (1983). The State also contends that by alleging Defendant shot the victim six times, the indictment charged the element of malice aforethought with even more particularity than if the indictment had used the phrase "malice aforethought." However, we are bound by the language of Section 15-144 and our precedent, and the State's argument must fail.

Additionally, the State argues that Defendant was on notice of the charge against him, and therefore the indictment was constitutionally sufficient. It is true that "[a]n 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." *Moses*, 154 N.C. App. at 335, 572 S.E.2d at 226. The State argues that because Defendant did not challenge the indictment at trial and was able to mount a defense against the charge, the indictment was constitutionally sufficient. However, a defendant may challenge an indictment alleged to be invalid on its face for jurisdictional purposes for the first

time on appeal, as an invalid indictment would have never conferred jurisdiction upon the trial court. *Brice*, 370 N.C. at 249, 806 S.E.2d at 36 (distinguishing challenges to indictments in that some challenges, like those that call into question a trial court's jurisdiction, may be brought for the first time on appeal, but other challenges that object for form or minor defects should be brought before the trial court so as to preserve the challenge on appeal).

We remain bound by precedent that requires criminal indictments to allege every essential element of the offense in order to confer jurisdiction on the trial court. In *State v. Kelso*, we held,

> [The State] argues that the rule that a failure to allege each and every element of an offense is a jurisdictional defect is "antiquated" and followed by only a small minority of states. The State urges that we should reject the earlier rulings. We are, however, not free to do so, as this Court has no authority to overrule or otherwise disturb established precedent.
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> . . . .
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> An arrest of judgment is proper when the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty.

Kelso, 187 N.C. App. at 722, 654 S.E.2d at 31 (citations and quotation marks omitted). It is the legislature, not this Court that has "the power to prescribe the manner in which a criminal charge can be stated in a pleading to relieve the State of the common law requirement that every element of the offense be charged." *Coker*, 312 N.C. at 434, 323 S.E.2d at 346. Accordingly, we arrest judgment and vacate for the conviction

of attempted first degree murder because the indictment failed to allege every essential element of the offense charged.

While the indictment was insufficient for the charge of attempted first degree murder, we do not necessarily render indictments fatally defective and vacate the conviction if the indictment sufficiently alleged a lesser-included offense on which the trial court could have properly proceeded to judgment. N.C. Gen. Stat. § 15-153 (2017) ("[The indictment] shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment."); *Schalow*, ___ N.C. App. at ___, 795 S.E.2d at 572 ("[T]his Court does not favor dismissing indictments where the indictment is constitutionally sufficient to enable the court to proceed to judgment. . . . [T]he original indictment . . . was not fatally defective, it sufficiently alleged [a lesser-included offense].").

Attempted voluntary manslaughter is a lesser-included offense of attempted first degree murder. *State v. Rainey*, 154 N.C. App. 282, 283, 574 S.E.2d 25, 26, *disc. review denied*, 356 N.C. 621, 575 S.E.2d 520 (2002). "[I]t is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), . . . and any bill of indictment containing the . . . allegations herein named shall be good and sufficient in law." N.C. Gen. Stat. § 15-144. Where indictments for attempted first degree murder sufficiently allege

attempted voluntary manslaughter, we have arrested judgment on the attempted first degree murder conviction and remanded for entry of judgment and sentencing for attempted voluntary manslaughter. *See Wilson*, 236 N.C. App. at 474-75, 762 S.E.2d at 895-96; *Bullock*, 154 N.C. App. at 244-45, 574 S.E.2d at 23-24. *see also Schalow*, ___ N.C. App. at ___, 795 S.E.2d at 572-73.

The State argues the indictment was insufficient to allege attempted voluntary manslaughter because it did not use the "kill *and slay* [the victim]" language from Section 15-144. Rather, it alleged Defendant "did attempt to murder [the victim]." This Court has previously found the language used in Defendant's indictment to be sufficient to allege attempted voluntary manslaughter. *See Wilson*, 236 N.C. App. at 475, 762 S.E.2d at 896; *Yang*, 174 N.C. App. at 763, 622 S.E.2d at 637; *Bullock*, 154 N.C. App. at 244-45, 574 S.E.2d at 24. As such, we agree with Defendant that this indictment sufficiently alleged the offense of attempted voluntary manslaughter as a lesser-included offense of attempted first degree murder.

We must note, however, that our precedent states that " 'where the indictment does sufficiently allege a lesser-included offense, we *may* remand for sentencing and entry of judgment thereupon.' " *Wilson*, 236 N.C. App. at 475, 762 S.E.2d at 896 (quoting *Bullock*, 154 N.C. App. at 245, 574 S.E.2d at 24) (emphasis added). These cases indicate that we *may*, not that we *must*, remand for sentencing and judgment upon the lesser-included offense. *See State v. Cooke*, 248 N.C. 485, 488, 103 S.E.2d

846, 848 (1958) ("Since the conviction by a court without jurisdiction to hear and determine the guilt or innocence of defendants was a nullity and the sentence imposed void, defendants could thereafter be tried when properly charged in a court having jurisdiction. It is manifest there is here no double jeopardy." (citations omitted)), *rehearing denied*, 364 U.S. 856, 5 L. Ed. 2d 80 (1960); *State v. Price*, 15 N.C. App. 599, 600, 190 S.E.2d 403, 404 (1972) ("A former conviction by a court without jurisdiction will not support a plea of former jeopardy."); *State v. Jernigan*, 255 N.C. 732, 736, 122 S.E.2d 711, 714 (1961) ("[T]he State, if it so desires, may proceed against the defendant . . . upon a valid warrant. . . .Jeopardy attaches only when, *inter alia*, a defendant is tried upon a valid warrant or indictment.").

Here, however, the trial court could not have proceeded on an indictment for attempted voluntary manslaughter because Defendant was simultaneously indicted for the offense of assault with a dangerous weapon with intent to kill inflicting serious injury. Attempted voluntary manslaughter is a lesser-included offense of this charge. *Yang*, 174 N.C. App. at 762, 622 S.E.2d at 637 ("[W]here a felonious assault offense includes, as an element, the intent to kill, attempted voluntary manslaughter is a lesser included offense of the assault."). The trial court could not have proceeded on the charges of attempted voluntary manslaughter and assault with a dangerous weapon with intent to kill inflicting serious injury, as this would violate the prohibition against double jeopardy. *Schalow*, ___ N.C. App. at ___, 795 S.E.2d at

579 ("[W]hen one offense is a lesser-included offense of another, the two offenses are considered the same criminal offense."); Y*ang*, 174 N.C. App. at 762, 622 S.E.2d at 637 (quoting U.S. Const. amend. V) ("The Double Jeopardy Clause of the Fifth Amendment provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' ").

Although Defendant cannot be convicted of the offense he suggests, he can be prosecuted a second time for attempted murder if the State obtains a valid indictment. "A defendant is not subjected to double jeopardy when an insufficient indictment is quashed, and he is subsequently put to trial on a second, sufficient indictment." *State v. Oakes*, 113 N.C. App. 332, 340, 438 S.E.2d 477, 481, *disc. review denied*, 336 N.C. 76, 445 S.E.2d 43 (1994); *see State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) ("Even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same." (citation omitted)), *cert. denied sub nom. Queen v. North Carolina.*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Therefore, for the conduct for which Defendant was initially indicted for attempted first degree murder, "the state must seek a new indictment if it elects to

proceed again against the defendant." *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990).

II. Motion to Dismiss

Defendant next argues that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon because the State did not introduce substantial evidence of Defendant's intent to permanently deprive the victim of her property. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State,

drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

Pursuant to N.C. Gen. Stat. § 14-87(a), "the essential elements of robbery with a dangerous weapon are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." *State v. Gwynn*, 362 N.C. 334, 337, 661 S.E.2d 706, 707-08 (2008) (citations and brackets omitted); *see also* N.C. Gen. Stat. § 14-87(a) (2017) ("Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another."). "The intent required for [this] offense is the intent to permanently deprive the owner of the property at the time of the taking." *State v. Mann*, 355 N.C. 294, 303-04, 560 S.E.2d 776, 782, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). *See State v. Carswell*, 296 N.C. 101, 104-05, 249 S.E.2d 427, 429 (1978) (defining a "taking" as the "severance of the goods from possession of the owner," even if the perpetrator only possesses the goods for an instant and determining that prying property from its base and moving it "four to six inches" towards the door was sufficient to sever the owner's possession and place the property

under the defendant's control, even though defendant never removed the property from the motel premises (*quoting State v. Roper*, 14 N.C. 473, 474 (1832)).

Here, Defendant contends that his taking lacked the requisite intent of permanent deprivation of the property from the victim, and it therefore did not amount to larceny, and by extension, robbery. *See State v. Smith*, 268 N.C. 167, 169-70, 150 S.E.2d 194, 198 (1966) ("Robbery . . . is merely an aggravated form of larceny. . . . [However,] [i]f he takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of larceny."). *State v. Watts*, 25. N.C. App. 194, 196, 212 S.E.2d 557, 558 (1975) ("[L]arceny does not include every wrongful taking and carrying away of the personal property of another."). However, "the intent to permanently deprive need not be established by direct evidence but can be inferred from the surrounding circumstances." *State v. Kemmerlin*, 356 N.C. 446, 474, 573 S.E.2d 870, 889 (2002).

First, "the intent to permanently deprive an owner of his property could be inferred where there was no evidence that the defendant ever intended to return the property, but instead showed a complete lack of concern as to whether the owner ever recovered the property." *State v. Barts*, 316 N.C. 666, 690, 343 S.E.2d 828, 843-44 (1986). Additionally, "while temporary deprivation will not suffice, if the defendant did not ever intend to return the property and was totally indifferent as to whether

the owner ever recovered it, then that would constitute an 'intent to permanently deprive.' " *Watts*, 25 N.C. App. at 198, 212 S.E.2d at 559.

Here, the evidence tended to show that Defendant had no intention of returning the cell phone. Returning the phone would have hindered his ability to escape and reduced the likelihood that his effort to kill Ms. Williams would be successful. Furthermore, Defendant was not only indifferent to her ability to recover the cell phone, but he also took actions to ensure the cell phone remained out of Ms. Williams' possession as she succumbed to her multiple gunshot wounds. Therefore, the State introduced substantial relevant evidence that a reasonable mind might accept as adequate to support the conclusion that Defendant intended to permanently deprive Ms. Williams of her cell phone.

As such, we conclude the trial court did not err in denying Defendant's motion to dismiss the charge of robbery with a dangerous weapon.

Conclusion

Defendant's indictment for attempted first degree murder was insufficient to confer jurisdiction because it failed to allege the essential element of malice aforethought. Accordingly, we vacate Defendant's conviction for attempted first degree murder for lack of jurisdiction. In addition, the trial court did not err in denying Defendant's motion to dismiss the charge of robbery with a dangerous

weapon because the State introduced substantial evidence to support the inference that Defendant intended to permanently deprive Ms. Williams of her property.

VACATED IN PART; NO ERROR IN PART.

Judges HUNTER, JR. and INMAN concur.

Report per Rule 30(e).