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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-346

Filed: 3 November 2020

Orange County, Nos. 15 CRS 53533, 18 CRS 43

STATE OF NORTH CAROLINA

v.

RAMONE ALSTON, Defendant.

Appeal by defendant from judgments entered 31 May 2018 by Judge Rebecca W. Holt in Orange County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General I. Faison Hicks, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

YOUNG, Judge.

Where the State's motion to amend the indictment to remove reference to a specific firearm was not prejudicial to defendant's defense, the trial court did not err in granting the State's motion to amend. We find no error.

I. Factual and Procedural Background

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On 25 December 2015, Ramone Alston (defendant), driving his automobile, picked up his associate, Pierre Moore (Moore), and the two drove to Trinity Court Apartments to confront Jaylen McNair (McNair), against whom defendant held a grudge. Upon entering the neighborhood, defendant located McNair. Shots then rang out from defendant's vehicle. As a result of this shooting, 14-month-old M.W.¹ was struck and killed.

After the shooting, defendant and Moore fled the scene. No firearms were recovered from defendant or Moore, nor was the bullet that struck M.W. The only physical evidence relating to the weapon or weapons involved in the shooting were seven spent shell casings found on the ground at the scene. An SBI expert testified that they had all been fired from a 9mm firearm.

Dr. Claude McFarlane (Dr. McFarlane) testified that multiple 9mm handguns, as well as a .357 caliber revolver, were stolen from his home several months prior. Penelope Hernandez (Hernandez) testified that she and an associate had stolen the guns from Dr. McFarlane's home, and that her associate later gave or sold the guns to defendant.

The Orange County Grand Jury indicted defendant for the first-degree murder of M.W. Subsequently, the Grand Jury also indicted defendant for discharging a weapon, specifically a 9mm handgun, into occupied property. After the

¹ A pseudonym is used to protect the minor victim and her family.

commencement of trial, during the State's case in chief, the State moved to amend the charge of discharging a weapon into occupied property to remove the "9mm" description of the handgun. Over objection, the trial court allowed the motion.

The jury returned a verdict finding defendant guilty of discharging a weapon into occupied property. The jury also returned a verdict finding defendant not guilty of first-degree murder based on premeditation and deliberation, but guilty of first-degree murder based on the felony murder rule, with discharging a weapon into occupied property being the underlying felony. The trial court sentenced defendant to life imprisonment for first-degree murder and arrested judgment on the charge of discharging a weapon into occupied property.

Defendant appeals.

II. Standard of Review

"We review the trial court's granting of the State's motion to amend the indictment *de novo*." *State v. Avent*, 222 N.C. App. 147, 148, 729 S.E.2d 708, 710, *writ denied, review denied*, 366 N.C. 411, 736 S.E.2d 176 (2012).

III. Motion to Amend the Indictment

In his sole argument on appeal, defendant contends that the trial court erred in granting the State's motion to amend the indictment. We disagree.

Our General Statutes provide, in no uncertain terms, that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2019). Our Supreme

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Court has held this to preclude “any change in the indictment which would substantially alter the charge set forth in the indictment.” *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). “[T]he primary purpose of an indictment is to enable the accused to prepare for trial.” *State v. Silas*, 360 N.C. 377, 382, 627 S.E.2d 604, 607 (2006) (citations and quotations omitted). Thus, an alteration is substantial when the indictment is changed “in such a manner that the defendant can no longer rely upon” it. *Id.* That is, an amendment is substantial when it prejudices the defendant’s ability to mount a defense against the charges against him.

Defendant contends that the State’s case was premised upon the use of the 9mm guns stolen from Dr. McFarlane, as only 9mm shell casings were found at the crime scene. He contends that his defense, therefore, was that no witness saw him using a 9mm firearm. He further argues that, by amending the pleading to remove reference to the 9mm firearm, it prejudiced his defense, as it allowed the jury to find him guilty on some other basis. He contends that, by initially charging defendant with specifically using a 9mm firearm, the State was limiting its options for prosecuting defendant to that weapon alone.

Notwithstanding defendant’s argument, however, the question before us is one of prejudice. The jury was instructed that it could find defendant guilty of discharging a weapon into occupied property either as a principal, or by acting in

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concert with Moore. Even assuming *arguendo* that the evidence was insufficient to show that defendant at any time fired a 9mm weapon, and that such weapon or weapons were used exclusively by Moore, the evidence was clear that defendant and Moore drove to the Trinity Court Apartments neighborhood together, in defendant's car, with the stolen firearms in the vehicle, that one or both of them discharged those weapons into an occupied dwelling, and that the two then fled together. Defendant does not dispute this sequence of events; rather, he merely contends that the State should not have been permitted to charge him under any theory save that he used a 9mm weapon.

We are not convinced that this alteration is substantial. By way of illustration, in *State v. Joyce*, 104 N.C. App. 558, 410 S.E.2d 516 (1991), the defendant was initially charged with robbery with a dangerous weapon, to wit, a knife. The trial court permitted the State to amend the charge to replace "knife" with "firearm." On appeal, this Court held that

The change made in this case from "knife" to "firearm" does not alter the burden of proof or constitute a substantial change which would justify returning the indictment to the grand jury. Defendant also cannot demonstrate how he suffered any prejudice due to this amendment.

Id. at 573, 410 S.E.2d at 525. Certainly, if the change from "knife" to "firearm" is not a substantial change, we are not convinced that the change from "9mm firearm" to "firearm" is a substantial change.

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Moreover, it is clear that no matter who actually used a 9mm firearm, one was used in the crime charged, and the evidence clearly demonstrates defendant's involvement, if not as principal, then acting in concert with Moore. And again, the trial court instructed the jury on acting in concert, and defendant does not contend on appeal that such instruction was error. Defendant cannot show that, had the indictment remained in its original form and the State's motion been denied, a different result would have been reached at trial. As such, he cannot show that the amendment prejudiced his defense.

Because this amendment did not prejudice defendant's case, it was not a substantial alteration, and was not barred by N.C. Gen. Stat. § 15A-923(e). Accordingly, we hold that the trial court did not err in granting the State's motion to amend the indictment.

NO ERROR.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).