IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-855

Filed: 7 July 2020

Johnston County, No. 16 CRS 56584-85

STATE OF NORTH CAROLINA

v.

THOMAS ALLEN HUNT

Appeal by defendant from judgments entered 15 April 2019 by Judge C. Winston Gilchrist in Johnston County Superior Court. Heard in the Court of Appeals 9 June 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Marilyn Fuller, for the State.

Law Office of John P. O'Hale, P.A., by John P. O'Hale and Frank B. O'Hale, for defendant-appellant.

TYSON, Judge.

Thomas Allen Hunt ("Defendant") appeals from judgments entered upon a jury's verdicts finding him guilty of assault on a law enforcement officer and simple assault. We find no prejudicial error.

I. Background

Johnston County Sheriff's Deputy Chris Southerland received an "unknown type call" around midnight on 15 October 2016 to respond to a residence located at 3016 Equine Lane in Clayton. Upon arrival, Deputy Southerland noticed several vehicles parked in the driveway. No one was observed outside. As Deputy Southerland approached the residence, he heard "shouting and loud noises coming from inside." A visitor, Jennie Rae, answered the door. Deputy Southerland briefly spoke with her and entered inside of Defendant's residence. Rae seemed panicked to Deputy Southerland.

Deputy Southerland observed Defendant coming out of a back bedroom and approached him. Deputy Southerland checked Defendant for weapons upon his person. Due to loud noises inside the residence, Deputy Southerland requested that he and Defendant step outside near Deputy Southerland's patrol car to talk. Defendant complied. Deputy Southerland noticed Defendant appeared to be intoxicated and asked Defendant to remain outside near the patrol car, while he returned to the residence to calm the remaining individuals inside. Defendant was not placed under arrest.

Deputy Southerland re-entered Defendant's residence went into a bedroom and spoke with Defendant's girlfriend, Lillian Daroach. While Deputy Southerland was inside the residence, Deputy James Gatlin arrived on the scene. Deputy Gatlin observed Defendant standing outside the residence beside Deputy Southerland's

patrol car. Deputy Gatlin approached Defendant and began questioning him. Defendant appeared intoxicated and was slurring his speech. Deputy Gatlin entered the residence trying to find Deputy Southerland. Defendant followed Deputy Gatlin into the residence.

While he was speaking with Daroach, Deputy Southerland heard Deputy Gatlin's voice and Defendant yelling. Deputy Southerland told Daroach to remain in the bedroom. He stepped into the hallway to see what was happening at the front of the house. Deputy Gatlin noticed Defendant approaching him with his hand "balled up and at his side." Deputy Gatlin instructed Defendant to back up so they could try to talk further.

Deputy Southerland noticed Defendant's "hand start to rear back . . . as if he was going to strike at Deputy Gatlin." Deputy Southerland approached Defendant and locked arms with Defendant's arms, purportedly to keep Defendant from punching Deputy Gatlin. Defendant began to struggle. Deputy Southerland dropped and took Defendant onto the floor with him. Once upon the floor, Defendant reportedly "turn[ed] his head toward [Deputy Southerland's gloved] left hand, at which time he grabbed onto [his] index finger with his teeth."

When Deputy Southerland tried to remove his index finger from Defendant's mouth, Defendant "clinched it even tighter." Defendant began to "grit" his teeth on Deputy Southerland's finger. Deputy Southerland felt Defendant's teeth "through

[his] glove." Deputy Southerland screamed for Defendant to let go of his finger, but Defendant allegedly continued to bite down on Deputy Southerland's finger.

Deputy Southerland and Deputy Gatlin together attempted to free Deputy Southerland's finger from Defendant's mouth. Deputy Southerland employed a "hard hand technique" with his free hand to attempt to free his finger. Deputy Gatlin unsuccessfully applied pressure to Defendant's mandibular angle on the side of his face. Next, Deputy Gatlin manipulated Defendant's jaw. After several strikes from Deputy Southerland and Deputy Gatlin manipulating Defendant's jaw, Deputy Southerland was able to free his finger from Defendant's mouth.

Defendant then bit Deputy Gatlin's right forearm. As Deputy Gatlin pulled his right forearm from Defendant's mouth, Defendant bit his left forearm. Deputy Southerland and Deputy Gatlin continued to struggle with Defendant for a few minutes and were unable to secure Defendant into custody.

Defendant refused to comply with the deputies' commands. Deputy Gatlin deployed his taser, but there was insufficient spread between the probes for effect. Deputy Gatlin then used his taser to deliver a "dry stun." The dry stun caused Defendant to be incapacitated and allowed the deputies to take him into custody. Deputy Southerland and Deputy Gatlin placed Defendant into handcuffs and leg shackles.

Sheriff's Lieutenant Steven Amaon was called to assist Deputy Southerland and Deputy Gatlin at the residence. Lt. Amaon arrived to find Defendant handcuffed and shackled. Lt. Amaon and another unnamed deputy escorted Defendant outside to his patrol car and transported Defendant to jail.

Deputy Southerland's finger was bleeding from Defendant's bite. Deputy Southerland presented at the hospital to have his finger cleaned and wrapped, but the wound did not require stitches. Deputy Gatlin also presented to the hospital. He had injuries to both arms, but the only injury that broke the skin was on his right arm. Deputy Gatlin had his arms cleaned and wounds bandaged. Deputy Southerland and Deputy Gatlin returned to work to finish their shifts following their treatment.

Defendant was indicted for two counts of felony assault on a law enforcement officer inflicting serious injury. At trial, Defendant testified he had no recollection of the events that led to the charges. Defendant recalled making a pizza with Daroach and then his next conscious memory was being in the hospital chained to a bed and sitting beside a law enforcement officer.

A jury found Defendant guilty of assault on a law enforcement officer inflicting physical injury of Deputy Gatlin and guilty of simple assault of Deputy Southerland. Defendant received a suspended sentence of 4-14 months and was placed on 18

months' supervised probation with special terms and conditions requiring him to undergo a mental health assessment and complete any recommended treatment.

For the simple assault conviction, Defendant was sentenced to a 30 days' term, suspended, and placed on probation with the same length, terms, and conditions as his assault on a law enforcement officer inflicting physical injury sentence. Defendant gave written notice of appeal. Contemporaneous with Defendant's brief, Defendant also filed a motion for an initial hearing *en banc*, which was denied by our Court. *See* N.C. R. App. P 31.1(c).

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court: (1) lacked jurisdiction to enter judgments for assault on a law enforcement officer inflicting physical injury and simple assault; (2) improperly admitted the deputies' prior statements into evidence; and, (3) erred in denying Defendant's request for a jury instruction on "willfully?"

IV. Insufficient Indictment

Defendant argues the trial court lacked jurisdiction to enter judgment for assault on a law enforcement officer inflicting physical injury and simple assault

because the indictment failed to allege Defendant's knowledge that Deputy Southerland and Deputy Gatlin were law enforcement officers.

A. Standard of Review

A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in criminal cases. *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008). This Court reviews the sufficiency of an indictment *de novo*. *Id.* (citation omitted).

B. Analysis

An indictment is legally sufficient if it sets forth the charge in a "plain, intelligible, and explicit manner" and "shall not be quashed . . . by reason of any informality or refinement if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." N.C. Gen. Stat. § 15-153 (2019).

"A defendant must be convicted, if at all, of the particular offense charged in the indictment" and "[t]he State's proof must conform to the specific allegations contained in the indictment." *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985) (citations omitted).

This reserved right and preserved protection "insure[s] that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002).

The indictment for the assault on Deputy Gatlin avers:

> [D]efendant . . . unlawfully, willfully and feloniously did assault Deputy Sheriff James Gatlin, a law enforcement officer of Johnston County Sheriff's Office, and inflict physical injury, biting him and leaving bite marks on both forearms that broke through the skin. At the time of this offense the officer was discharging a duty in his office: Investigating a disturbance call.

The indictment for the assault of Deputy Southerland avers:

> [D]efendant . . . unlawfully, willfully and feloniously did assault Deputy Sheriff Chris Southerland, a law enforcement officer of Johnston County Sheriff's Office, and inflict physical injury, biting him and leaving bite marks on left index finger that broke through the skin. At the time of this offense the officer was discharging a duty of his office: Investigating a disturbance call.

Both indictments list the applicable statute as "G.S. No. 14-34.7," which provides:

> Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person assaults a law enforcement officer, probation officer, or parole officer while the officer is discharging or attempting to discharge his or her official duties and inflicts serious bodily injury to the officer.

N.C. Gen. Stat. § 14-37.7(a) (2019).

Assault on a law enforcement officer causing serious injury is a statutory offense in North Carolina. *See id.* "[A]n indictment for a statutory offense is generally sufficient when it charges the offense in the language of the statute." *State v. McKoy*, 196 N.C. App. 650, 654, 675 S.E.2d 406, 410 (2009).

Our Court examined a similar issue in *State v. Thomas*, 153 N.C. App. 326, 335, 570 S.E.2d 142,147 (2002), wherein the defendant was charged with assault on a law enforcement officer with a firearm. The indictment alleged the defendant "unlawfully, willfully, and feloniously" committed the assault. *Id.* at 335, 570 S.E.2d at 147. The indictment did not assert the defendant knew the victim was a law enforcement officer. *See id.*

This Court reasoned he " 'willfully' committed an assault on a law enforcement officer, which, as with the term 'intentionally,' indicates defendant knew that the person he was assaulting was a law enforcement officer." *Id.* at 336, 570 S.E.2d at 148 (citations omitted). This Court held the indictment in that case was not fatal because it was "properly couched in the language of [the statute][;] was sufficient to identify the offense of assault on a law enforcement officer with a firearm; to protect defendant from double jeopardy; to enable defendant to prepare for trial and present a defense; and to support the judgment in the case." *Id.* Nowhere has the Court held the words "willful" and "knowing" are interchangeable.

Defendant argues *Thomas* was incorrectly decided and seeks this Court to disavow *Thomas,* citing *In re L.E.M.*, 372 N.C. 396, 831 S.E.2d 341 (2019). Defendant asks this court to use *In re L.E.M.* to overrule our Court's prior decision in *Thomas.* Defendant's argument is misplaced. The reasoning in *In re L.E.M.* is contrary to Defendant's point. The Supreme Court of North Carolina admonished this Court to

follow the appellate rules and procedures when faced with a no-merit brief in a termination of parental rights case. *Id.* at 402, 831 S.E.2d at 345.

Both the Supreme Court of North Carolina and this Court have recognized "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). The holding in *In re L.E.M.* does not provide any guidance or precedential value, nor does it supersede *In re Civil Penalty*. "We are without authority to overturn the ruling of a prior panel of this Court on the same issue." *Poindexter v. Everhart*, __ N.C. App. __, __, 840 S.E.2d 844, 849 (2020) (citation omitted).

Defendant further argues our Supreme Court has superseded *Thomas* in its ruling in *State v. Rankin*, 371 N.C. 885, 887, 821 S.E.2d 787, 791 (2018). Nowhere in *Rankin* does our Supreme Court disavow or overrule *Thomas*. The indictment in *Rankin* was overturned because the complete statutory elements were not set out in the averments. *Id.*

Here, the indictment "properly couched" the language of the statute. *Thomas*, 153 N.C. App. at 336, 570 S.E.2d at 148. Defendant's indictment enabled him to prepare his defense and was sufficient to protect him from double prosecution. *Norman*, 149 N.C. App. at 594, 562 S.E.2d at 457.

Finally, Defendant argues *Thomas* conflicts with the rule of lenity. The indictment contains the words used in the statute and is not construed over-expansively to impose a greater burden upon Defendant. *Id.* Defendant's argument is overruled.

V. Sheriff's Deputies' Reports

Defendant argues the officers' prior statements were erroneously admitted as improper corroborating evidence and amounted to improper vouching.

A. Standard of Review

"A trial court's determination that evidence is admissible as corroborative evidence is reviewed for abuse of discretion." *State v. Cook*, 195 N.C. App. 230, 243, 672 S.E.2d 25, 33 (2009) (citation omitted).

B. Analysis

The trial court admitted the officers' prior written reports and statements as corroborative evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 801 (2019). "In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely related to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986) (citations omitted). "[I]f the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. Such variations

affect only the credibility of the evidence which is always for the jury." *State v. Warren*, 289 N.C. 551, 557, 223 S.E.2d 317, 321 (1976) (citations omitted).

Prior consistent statements may be admissible even though they contain new or additional information "so long as the narration of events is substantially similar to the witness' in-court testimony." *State v. Moore*, 236 N.C. App. 642, 646, 763 S.E.2d 561, 564 (2014) (quoting *State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001)). "Only if the prior statement contradicts the trial testimony should the prior statement be excluded." *Id.* at 645, 763 S.E.2d at 563. Defendant does not point to any portion of Deputy Southerland's or Deputy Gatlin's testimonies that "contradicts" their prior written reports.

In *Ramey*, our Supreme Court articulated when prior statements are corroborative evidence:

> Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. However, the witness's prior statements as to facts not referred to in his trial testimony and not tending to add weight or credibility to it are not admissible as corroborative evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

Ramey, 318 N.C. at 469, 349 S.E.2d at 573-74 (citations, emphasis, and footnote omitted).

"However, while a witness may corroborate herself, she may not do so with the 'extra-judicial declarations of someone other than the witness purportedly being corroborated.'" *State v. Freeman*, 93 N.C. App. 380, 387, 378 S.E.2d 545, 550 (citations omitted), *disc. review denied*, 325 N.C. 229, 381 S.E.2d 787 (1989).

Both Deputy Southerland and Deputy Gatlin testified and described in detail their interactions with Defendant, the other occupants inside the house, Defendant's alleged assaults, and their actions in response. Defendant has not identified any specific portion of either deputies' statements that fails to corroborate their testimony at trial. Each officer only corroborated their own testimony.

Defendant argues the police reports are inadmissible hearsay. However, these prior statements were not admitted to prove the truth of the matter asserted. These prior statements were offered to corroborate Deputy Southerland's and Deputy Gatlin's own testimonies. *See Moore*, 236 N.C. App. at 646, 763 S.E.2d at 564; N.C. Gen. Stat. § 8C-1, Rule 801.

Defendant further argues the introduction of this testimony was improper self-vouching or bolstering. Defendant asserts the officers were effectively allowed to vouch for their own credibility when their reports were introduced and published to the jury. A prior consistent statement is a hearsay statement that is consistent with a witness's testimony given during the trial. *See State v. Taylor*, 344 N.C. 31, 48, 473 S.E.2d 596, 606 (1996). A "witness' prior consistent statements may be admitted to

corroborate the witness' sworn trial testimony but prior statements admitted for corroborative purposes may not be used as substantive evidence." *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340, (citation omitted), *cert denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000).

The trial court provided a limiting instruction as requested by Defendant and as required by our rules of evidence and precedents. The witnesses were subject to cross-examination to any statements made in those reports and to their testimonies at trial. *See State v. Alston*, 307 N.C. 321, 330-32, 298 S.E.2d 631, 638 (1983).

The practice of corroboration with the safeguards noted above has long been allowed by our precedents, rules, and procedures. *See Ramey*, 318 N.C. at 469, 349 S.E.2d at 573; *see also Warren*, 289 N.C. at 557, 223 S.E.2d at 321. Defendant's argument is overruled.

VI. Jury Instructions

Defendant argues the trial court erred by denying his requested instruction on "willfully" and asserts the actual instruction provided failed to describe the requisite *mens rea*. During the charge conference, Defendant tendered and requested an instruction on "willfully." The trial court denied the request:

> I'm instructing the jury they've got to find knowledge beyond a reasonable doubt. Knowledge or reason to know beyond a reasonable doubt for the two - - for either of the assault on a law enforcement officer options. . . . "Willfully" does the job as far as the indictment is concerned. But

> willfully is not an element of the offense. Knowing or having reason to know he is, and I'm instructing on that.

The trial court instructed the jury it must find Defendant's knowledge that the person assaulted was a law enforcement officer beyond a reasonable doubt to elevate and convict him for the charges of assault on a law enforcement officer inflicting physical injury.

A. Standard of Review

Arguments "challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted).

B. Analysis

Our Supreme Court has held "all substantive and material features of the crime with which a defendant is charged must be addressed in the trial court's instructions to the jury." *State v. Bogle*, 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989). A trial judge is required to give a requested instruction "if it is a correct statement of the law and supported by the evidence." *State v. Corn*, 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982) (citation omitted).

The trial court's instructions were not erroneous. The jury was instructed and reached its verdicts based upon the same elements of the same statute. *See State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986). The jury was instructed on assault of a law enforcement officer inflicting serious bodily injury. Defendant was

convicted of a general intent crime. The trial court properly denied his requested instruction because it was not a "correct statement of the law." *Corn*, 307 N.C. at 86, 296 S.E.2d at 266. Defendant's argument is overruled.

VII. Conclusion

Defendant's indictments properly alleged his knowledge of Deputy Southerland and Deputy Gatlin being law enforcement officers to confer jurisdiction to enter judgment. Deputy Southerland's and Deputy Gatlin's prior statements were properly admitted into evidence, not for the truth of the matter asserted, but as corroborative statements with proper limiting instructions. Both witnesses were subject to cross examination concerning the reports and their testimony at trial. As related to the alleged assault against Deputy Southerland, the jury rejected the State's evidence of the felonious assault on a law enforcement officer inflicting serious injury and convicted Defendant of the lesser-included crime of misdemeanor simple assault.

The trial court did not err in denying Defendant's request for a jury instruction on "willfully." Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no prejudicial or reversible errors to award a new trial. *It is so ordered.*

NO ERROR.

Judges STROUD and COLLINS concur.

Report per Rule 30(e).