

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1046

Filed: 7 April 2015

STATE OF NORTH CAROLINA

New Hanover County

v.

No. 13 CRS 1716

13 CRS 50340-43

13 CRS 50345

JACOB MARK SPIVEY

Appeal by Defendant from judgments entered 9 May 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 5 February 2015.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Brent D. Kiziah, for the State.*

*W. Michael Spivey, for the Defendant.*

DILLON, Judge.

Jacob Mark Spivey (“Defendant”) appeals from judgments entered upon a jury verdict finding him guilty of one count of assault with a deadly weapon inflicting serious injury, six counts of assault with a deadly weapon, one count of felony hit and run, one count of injury to real property, and one count of reckless driving to endanger. We find no error in all but one of these convictions, arresting judgment on the charge of injury to real property, vacating the conviction, and remanding the case for resentencing.

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I. Background

The evidence tended to show the following: In the evening hours of 11 January 2013, Defendant stepped outside of a bar, variously referred to at trial as “Katy’s,” “Katy’s Bar and Grill,” “Katy’s Grill and Bar,” and “Katy’s Great Eats.” Christina Short and another bar patron were already outside, talking with one another. Ms. Short began to tell jokes about President Obama, and turned to Defendant, who had been standing by himself nearby, and asked him which presidential candidate he voted for. Defendant replied that he had voted for President Obama. Ms. Short responded by laughing at Defendant and calling him “a stupid little f---er.” Defendant went back inside the bar.

A few minutes later, Defendant came back outside. As he was walking towards his car, Ms. Short asked him whether his daddy had bought him his car. Defendant responded by getting into his car, backing it up across the parking lot, and then driving it forward *into* the front of the bar, hitting Ms. Short, and injuring a number of people inside, including a man named Christian Gibbs.

Police apprehended Defendant nearby, and he confessed to intentionally driving his car into the bar but maintained that he intended only to injure Ms. Short and not to kill her.

Defendant was indicted on a variety of charges stemming from the incident. The matter came on for a jury trial. The jury found Defendant guilty of one count of assault with a deadly weapon inflicting serious injury (for injuries to Ms. Short), one

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count of injury to real property (for damage to the bar), six counts of assault with a deadly weapon (for injuries to six patrons inside the bar), and other charges.

The court entered four judgments in total sentencing Defendant to active time as well as probation with additional conditions upon his release. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes two arguments on appeal, which concern the adequacy of two of the indictments. As he raises no other arguments, any challenges to his remaining convictions are waived. *See* N.C. R. App. P. 10.

A. Injury to Real Property

Defendant argues that the trial court erred in denying his motion to dismiss the charge of injury to real property. Specifically, Defendant contends that the indictment – charging him with damaging the “real property, front patio, façade, and porch of the restaurant, the property of Katy’s Great Eats” – was invalid on its face because it failed to allege that “Katy’s Great Eats” was a legal entity capable of owning property. We agree. Accordingly, we arrest the judgment and vacate Defendant’s conviction for injury to real property.

A facially invalid indictment can be challenged at any time because it, as well as any trial or conviction that results from it, is a nullity. *State v. Call*, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208 (2001).

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It is a requirement that the indictment charging *certain* crimes involving property contain an allegation concerning the identity of the victim whose property was the subject matter of the crime. *See, e.g., State v. Price*, 170 N.C. App. 672, 673-74, 613 S.E.2d 60, 62 (2005) (injury to personal property); *State v. Phillips*, 162 N.C. App. 719, 720-21, 592 S.E.2d 272, 273 (2004) (larceny); *State v. Woody*, 132 N.C. App. 788, 789-90, 513 S.E.2d 801, 802-03 (1999) (conversion); *State v. Ellis*, 33 N.C. App. 667, 669, 236 S.E.2d 299, 301 (1977) (embezzlement). However, *other* crimes involving property do not have this requirement. *See, e.g., State v. Norman*, 149 N.C. App. 588, 592-93, 562 S.E.2d 453, 456-57 (2002) (breaking and entering with felonious intent to steal); *State v. Burroughs*, 147 N.C. App. 693, 696-97, 556 S.E.2d 339, 342 (2001) (attempted robbery with a firearm).

Our Court has held that the crime of injury to real property – for which Defendant was indicted and convicted – belongs to the former group, requiring that the indictment contain an allegation concerning the identity of the victim. *State v. Lilly*, 195 N.C. App. 697, 703, 673 S.E.2d 718, 722 (2009). *See also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

For crimes – such as injury to real property – where the name of the victim must be alleged, our Supreme Court has explained that “[t]he name of the owner of [the] property [] is not a material part of the offence charged in the indictment,” but is required to be alleged “to identify the transaction, so that the defendant, by proper plea may protect himself against another prosecution for the same offence.” *State v.*

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*Bell*, 65 N.C. 313, 314 (1871) (victim is a natural person); *see also State v. Grant*, 104 N.C. 908, 910, 10 S.E. 554, 555 (1889) (corporate victim). However, our Supreme Court has held that where the victim is not a natural person, the indictment *must* allege that the victim is a legal entity capable of owning property, and must separately allege that the victim is such a legal entity *unless* the name of the entity itself, as alleged in the indictment, imports that the victim is such a legal entity. *State v. Thornton*, 251 N.C. 658, 661-62, 111 S.E.2d 901, 903-04 (1960). In *State v. Patterson*, 194 N.C. App. 608, 671 S.E.2d 357 (2009), for example, we stated that if the victim is a corporation, the requirement of *Thornton* is satisfied either where the indictment expressly alleges that the corporation is an entity capable of owning property, or where the corporate name alleged indicates that the entity is a corporation, “through the use of the word ‘incorporated’ or the like[.]” *Id.* at 613, 671 S.E.2d at 360. In *Patterson*, we held that an indictment was invalid on its face where it merely identified the victim as “First Baptist Church of Robbinsville,” because the name stated in the indictment did not clearly allege that the church was a corporation, nor did the indictment further allege that the church was an entity capable of owning property. *Id.* at 614, 671 S.E.2d at 360. *See also Woody*, 132 N.C. App. at 791, 513 S.E.2d at 803 (holding that an indictment identifying the victim using the term “unlimited” or “association” was not sufficient).

In the present case, the indictment does not contain any allegation that the victim, “Katy’s Great Eats,” is a legal entity capable of owning property, and the name

“Katy’s Great Eats” does not otherwise import a corporation or other entity capable of owning property, as required. We, therefore, must conclude that the indictment charging Defendant with injury to real property is invalid on its face. Accordingly, we arrest the judgment on this charge and vacate Defendant’s conviction, remanding the matter for resentencing.

B. Assault with a Deadly Weapon

Defendant also argues that the evidence presented at trial varied fatally from one of the indictments charging him with assault with a deadly weapon and the trial court erred in allowing the State to amend this indictment. Specifically, Defendant contends that the court erred in allowing the State, after resting its case and over Defendant’s objection, to correct the victim’s name in the indictment from “Christina Gibbs” to “Christian Gibbs.” We disagree.

Amending an indictment is statutorily prohibited. N.C. Gen. Stat. § 15A-923(e) (2013). However, our Supreme Court has interpreted the term “amendment” as it is used in the statute to mean “any change in the indictment which would substantially alter the charge set forth in the indictment.” *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). Therefore, where the evidence varies from the charge in the indictment, “[a] change in [the] indictment does not constitute an amendment where the variance [is] inadvertent and [the] defendant [is] neither misled nor surprised as to the nature of the charges.” *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735 (1999). Furthermore, where the indictment

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does not vary *materially* from the evidence at trial, the indictment is not fatally defective even if it is never amended. *State v. Isom*, 65 N.C. App. 223, 226, 309 S.E.2d 283, 285 (1983). In either case, whether the variance is material depends upon whether the defendant was surprised, misled, or otherwise prejudiced *because of the variance*. See, e.g., *State v. Cameron*, 73 N.C. App. 89, 92-93, 325 S.E.2d 635, 637 (1985).

In numerous cases we have held that the correction of misspellings, the addition of omitted last names, and the switching of interposed names did not qualify as amendments within the meaning of the statutory prohibition. See, e.g., *State v. Holliman*, 155 N.C. App. 120, 126-27, 573 S.E.2d 682, 687 (2002) (one letter misspelled in the victim's name); *State v. McNair*, 146 N.C. App. 674, 676-77, 554 S.E.2d 665, 668 (2001) (one letter misspelled in the defendant's name); *State v. Marshall*, 92 N.C. App. 398, 401-02, 374 S.E.2d 874, 875-76 (1988) (omitted last name); *State v. Mason*, 222 N.C. App. 223, 227, 730 S.E.2d 795, 798-99 (2012) (interposed first, middle, and last name); *State v. Bailey*, 97 N.C. App. 472, 475-76, 389 S.E.2d 131, 133 (1990) (interposed first and last name). We have recognized these corrections as appropriate before trial or after the State rests its case as long as the defendant is not prejudiced. See *Holliman*, 155 N.C. App. at 126-27, 554 S.E.2d at 668; *McNair*, 146 N.C. App. at 676-77, 554 S.E.2d at 668.

In the present case, one of the indictments charging Defendant with assault with a deadly weapon mistakenly identified the victim as "Christina Gibbs" rather

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than “Christian Gibbs.” The State moved to amend the indictment to correct this mistake after resting its case. The trial court heard argument and allowed the amendment. On direct examination two days beforehand, Mr. Gibbs had testified that he was among those present inside the bar at the time of the collision, and further, that the fender of Defendant’s vehicle actually made contact with his leg when it came through the front of the building. Subsequently, Defendant’s counsel cross-examined Mr. Gibbs. As in *Bailey*, the mistake in the present case appears to have been inadvertent, and we do not believe Defendant was “misled or surprised as to the nature of the charges against him.” 97 N.C. App. at 476, 389 S.E.2d at 133. Therefore, we hold that the change did not qualify as an amendment within the meaning of the statutory prohibition.

Defendant cites our Supreme Court’s decision in *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), in support of his argument. We find the present case far more analogous to *Holliman* than *Abraham*. In *Holliman*, the victim’s name was misspelled. 153 N.C. App. at 126, 573 S.E.2d at 687. We reasoned that “the indictment sufficiently served the purpose of placing defendant on notice of the charge in order for him to prepare a defense,” concluding that there had been no error in correcting the misspelling. 155 N.C. App. at 126-27, 573 S.E.2d at 687. In the present case, the change did not name a completely different victim, as it had in

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*Abraham*.<sup>1</sup> See 338 N.C. at 339-40, 451 S.E.2d at 143-44. Instead, it inverted the letters “n” and “a” in the victim’s first name, correcting a misspelling. The present case is, therefore, distinguishable. Accordingly, this argument is overruled.

III. Conclusion

We arrest judgment on the charge of injury to real property and vacate the conviction, remanding the case to the trial court with instructions to resentence Defendant consistent with this opinion. We find no error in the challenged conviction of assault with a deadly weapon.

NO ERROR in part; VACATED AND REMANDED in part.

Judges GEER and STEPHENS concur.

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<sup>1</sup> We note that we have previously clarified that *Abraham* is not a “blanket prohibition on changing the name of the victim in a criminal indictment,” and is, therefore, not inconsistent with allowing for the “correct[ion] [of] inadvertent mistakes in an indictment[.]” *McNair*, 146 N.C. App. at 678, 554 S.E.2d at 669.