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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-144

Filed: 3 October 2017

Edgecombe County, Nos. 14 CRS 51551-52

STATE OF NORTH CAROLINA

v.

KONRAD CHRISTOPHER BUTLER, Defendant.

Appeal by Defendant from judgments entered 7 January 2016 by Judge Walter H. Godwin, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 25 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Geeta N. Kapur, for Defendant-Appellant.

MURPHY, Judge.

Konrad Christopher Butler (“Defendant”) appeals from judgments entered upon his conviction for two counts of assault with a firearm on a law enforcement officer. On appeal, Defendant argues the trial court erred by allowing the State to substantially alter the indictment. We arrest judgment in part and find no error in part.

Background

On 13 October 2014, Defendant was charged with two counts each of attempted first-degree murder and assault with a deadly weapon on a law enforcement officer. In the first indictment, File No. 14 CRS 51551, the victim for both the attempted murder charge and the assault charge was listed as Joseph Palmer. In the second indictment, File No. 14 CRS 51552, the victim for the attempted murder charge was listed as Angela Spell, but the victim for the assault charge was listed as Joseph Palmer.

Defendant entered a not guilty plea to all four charges, and a jury was empaneled on 5 January 2016. After the opening statements, the State moved to amend the second charge in the indictment in File No. 14 CRS 51552 to reflect that the victim of the assault was Angela Spell, and not Joseph Palmer, as found by the Grand Jury. The prosecutor characterized the error as a “clerical error on the State’s part,” as it was “cut and pasted from the first indictment[.]” Defendant objected to the amendment on the ground that it changed the substance of the indictment, but the trial court allowed the amendment.

The jury found Defendant guilty of both assault with a firearm charges, but not guilty of both attempted first-degree murder charges. The trial court imposed two consecutive active sentences of 25 to 42 months. Defendant gave notice of appeal in open court.

Analysis

Defendant argues, and the State concedes, that the trial court erred in allowing the State to amend the indictment in File No. 14 CRS 51552 to allege an assault against Angela Spell rather than Joseph Palmer. Defendant asserts that the trial court violated N.C.G.S. § 15A-923(e) (2015), because the amendment substantially altered the charged offense. *See State v. Stephens*, 188 N.C. App. 286, 291-92, 655 S.E.2d 435, 438-39, *disc. review denied*, 362 N.C. 370, 662 S.E.2d 389-90 (2008). For the following reasons, we agree.

“We review a trial court’s ruling permitting amendment of an indictment *de novo*.” *State v. Frazier*, ___ N.C. App. ___, ___, 795 S.E.2d 654, 655, *disc. review denied*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2017) (citing *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

Section 15A-923(e) of our General Statutes mandates that “[a] bill of indictment may not be amended.” N.C.G.S. § 15A-923(e). “This provision has been interpreted to mean that a bill of indictment may not be amended in a manner that substantially alters the charged offense.” *Stephens*, 188 N.C. App. at 288, 655 S.E.2d at 437 (internal quotation marks and citations omitted). This Court has held that

changes to correct spelling or other minor errors regarding a victim's name do not substantially alter the charge and therefore are not prohibited by N.C.G.S. § 15A-923(e). *See, e.g., State v. McNair*, 146 N.C. App. 674, 676-77, 554 S.E.2d 665, 668 (2001) (“[A] change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges.” (brackets, internal quotation marks, and citations omitted)). Nonetheless, “[w]here an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal.” *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994) (citation omitted). In *Abraham*, our Supreme Court held that the change of a victim's name from Carlose Antoine Latter to Joice Hardin substantially altered the indictment and, therefore, was fatal. *Id.* at 339, 451 S.E.2d at 143.

Here, the indictment was altered to change the victim's name from Joseph Palmer to Angela Spell, two entirely different people. Pursuant to *Abraham*, this constitutes a substantial alteration to the indictment, which is prohibited by N.C.G.S. § 15A-923(e). Therefore, the trial court erred by allowing the State to amend the indictment, and we must arrest the trial court judgment's in File No. 14 CRS 51552.

Defendant has not raised any arguments regarding the trial court's judgment in File No. 14 CRS 51551, and we, therefore, deem any appeal of that conviction to be abandoned. *See* N.C. R. App. P. 28(b)(6) (2016).

Conclusion

For the reasons stated above, we arrest the trial court's judgment in File No. 14 CRS 51552 and find no error in the trial court's judgment in File No. 14 CRS 51551.

JUDGMENT ARRESTED IN PART; NO ERROR IN PART.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).