

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1076

Filed: 17 July 2018

Wayne County, No. 16 CRS 52707

STATE OF NORTH CAROLINA

v.

PHILLIP ANDREW KIRBY

Appeal by defendant from judgments entered 21 March 2017 by Judge Jay D. Hockenbury in Wayne County Superior Court. Heard in the Court of Appeals 16 July 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Guy J. Loranger for defendant-appellant.

DAVIS, Judge.

Phillip Andrew Kirby (“Defendant”) appeals from his convictions for robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. On appeal, he contends that the trial court erred in instructing the jury that it could find that the State satisfied the weapon element of the robbery and assault charges if it determined that Defendant beat the victim with one statuette — rather than two,

as alleged in his indictment — during the commission of the offenses. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: On 23 June 2016, Wiley Williamson was working in his store in Goldsboro, North Carolina, when Defendant entered the shop. Williamson recognized Defendant because Williamson had purchased a television and other items from him the day before. Defendant spoke to Williamson and asked to look at various items. At some point when Williamson was looking away, Defendant hit him “upside the head with two 6 pound weights” that Williamson kept under his desk. Williamson and Defendant fought for approximately 30 minutes, during which time Defendant beat him around the face, neck, chest and arms with the “weights.” Eventually, Defendant stopped attacking Williamson, removed \$700 from his wallet, and ran out of the store.

On 3 January 2017, Defendant was indicted by a Wayne County grand jury for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. The indictment alleged that the offenses were committed with “two statuettes.” A jury trial was held beginning on 20 March 2017 in Wayne County Superior Court before the Honorable Jay D. Hockenbury.

STATE V. KIRBY

Opinion of the Court

At trial, Williamson identified two “Christmas ornaments” as the “6 pound weights” that Defendant used to commit the robbery and assault. He stated that Defendant took the ornaments from a curio cabinet located next to Williamson’s desk. His son, Anderson Williamson (“Anderson”), testified that after being informed of the attack he visited his father in the hospital. At the hospital, his father told him that he had been hit in the head with an ornament. Anderson testified that his father kept an entire cabinet of ceramic ornaments in his store.

After leaving the hospital, Anderson went to his father’s store to look around. Upon arriving at the store, he saw ceramic “angels” on the ground, and “knew right then” that these were the ornaments to which his father had referred. Anderson placed the ornaments in a bag and stored them in the back of his truck before giving the ornaments to a detective from the Goldsboro Police Department. Williamson identified the ornaments at trial as having been used by Defendant to commit the assault.

At the close of all the evidence, the trial court instructed the jury that Defendant was alleged to have committed the charged offenses with “two statuettes,” and it was for the jury to determine whether these statuettes constituted a dangerous weapon. Defendant did not object to these instructions. During deliberations, the jury asked the court whether a single statuette could be considered a deadly weapon, and further inquired whether the assault charge could be considered with only one

STATE V. KIRBY

Opinion of the Court

statuette. The trial court proposed to instruct the jury in the affirmative with regard to both questions. Defendant objected to the court's proposed instructions. The trial court noted his objection and instructed the jury as follows:

THE COURT: My answer is yes, under the sixth element of robbery with a dangerous weapon, if you find beyond a reasonable doubt that the Defendant had in his possession a dangerous weapon at the time he obtained the property and that the dangerous weapon was a statuette, that would satisfy the requirement of that element. If you do not so find, then the State has not proved this element, sixth, beyond a reasonable doubt.

Next question. Can the assault charges be considered with only one statuette?

My answer: Yes. If you find that the Defendant assaulted the alleged victim with one statuette beyond a reasonable doubt, that would satisfy the element describing what the Defendant used to strike the victim, the alleged victim. If you do not so find, then the State has failed to prove this beyond a reasonable doubt.

On 21 March 2017, the jury convicted Defendant of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. The trial court sentenced Defendant to consecutive terms of 52 to 75 months and 22 to 39 months imprisonment. Defendant gave timely notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court erred by instructing the jury that it could find the State satisfied the weapon element of the robbery and assault charges if it determined that Defendant used only one statuette during the

commission of the charged offenses. He contends that both the indictment and the State's theory of guilt at trial were dependent upon the allegation that Defendant used "two statuettes." Defendant further asserts that by instructing the jury otherwise, the trial court set forth a theory of guilt that differed from that of the indictment, thus depriving him of adequate notice of the charges against him. We disagree.

This Court has stated as follows:

A trial court, generally, commits prejudicial error when it permits a jury to convict upon some abstract theory not supported by the bill of indictment. As a result, trial courts should not give jury instructions which present possible theories of conviction either not supported by the evidence or not charged in the bill of indictment. It is well established that a defendant must be convicted, if at all, of the particular offense charged in the indictment and that the State's proof must conform to the specific allegations contained therein.

When allegations asserted in an indictment fail to conform to the equivalent material aspects of the jury charge, . . . a fatal variance is created, and the indictment is insufficient to support that resulting conviction. Furthermore, for a variance to warrant reversal, the variance must be material, meaning it must involve an essential element of the crime charged.

State v. Glidewell, __ N.C. App. __, __, 804 S.E.2d 228, 231-32 (2017) (internal citations, quotation marks, brackets, and ellipsis omitted).

In the present case, Defendant was charged with two offenses as to which the use of a deadly weapon constituted an essential element. *See* N.C. Gen. Stat. § 14-

32(b) (assault with a deadly weapon inflicting serious injury) and § 14-87 (robbery with a dangerous weapon) (2017). Our Supreme Court has stated that

it is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a “deadly weapon” or to allege such facts as would necessarily demonstrate the deadly character of the weapon.

State v. Palmer, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1977).

Defendant argues that the indictment’s description of “two” statuettes was integral to convey the deadly nature of the objects. Consequently, he contends, the number of statuettes was not mere surplusage. *See State v. White*, 202 N.C. App. 524, 529, 689 S.E.2d 595, 598 (2010) (“Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.” (citation and quotation marks omitted)).

However, the indictments alleged that the statuettes were used to “viciously, and repeatedly” beat Williamson “about his head and body.” We are unpersuaded that a material difference exists between the use of one statuette or two given that the same legal significance attaches to either scenario. *See State v. Roman*, 203 N.C. App. 730, 734, 692 S.E.2d 431, 434 (2010) (“A variance will not result where the allegations and proof, although variant, are of the same legal significance. If a variance in an indictment is immaterial, it is not fatal.” (citation and quotation marks omitted)).

STATE V. KIRBY

Opinion of the Court

Moreover, even assuming *arguendo* that a variance existed between the indictment and the trial court's instructions to the jury, Defendant has failed to demonstrate that he was prejudiced by any such variance. *See State v. Hines*, 166 N.C. App. 202, 206, 600 S.E.2d 891, 895 (2004) ("[W]hen a variance exists between the bill of indictment and the jury charge, the [c]ourt must inquire whether the variance was prejudicial error[.]" (citation omitted)). The four recognized purposes of an indictment are "(1) to identify the crime with which defendant is charged, (2) to protect defendant against being charged twice for the same offense, (3) to provide defendant with a basis on which to prepare a defense, and (4) to guide the court in sentencing." *Id.* at 206-07, 600 S.E.2d at 895 (citation omitted). We hold that none of these purposes were thwarted by any purported variance between the indictment and the trial court's instructions to the jury. Therefore, Defendant suffered no prejudice.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges CALABRIA and BERGER concur.

Report per Rule 30(e).