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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1181

Filed: 4 June 2019

Mecklenburg County, Nos. 15 CRS 231863, 231865, 231868-231874, 231879-231881,
16 CRS 1677

STATE OF NORTH CAROLINA

v.

LOVELESS DECARLOS HOSKINS

Appeal by defendant from judgments entered 6 December 2017 by Judge Carla
N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals
7 May 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L.
Liles, for the State*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling
Rozear, for defendant*

ARROWOOD, Judge.

Loveless Decarlos Hoskins (“defendant”) appeals from judgment finding him
guilty of being a habitual felon. For the following reasons, we affirm.

I. Background

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On 21 September 2015, defendant was indicted for five counts of possession with the intent to sell or deliver a controlled substance, five counts of delivery of a controlled substance, five counts of sale of a controlled substance, four counts of possession of drug paraphernalia, one count of first degree kidnapping, one count of misdemeanor hit and run, and one count of reckless driving. On 19 January 2016, defendant was indicted for one count of having attained the status of a violent habitual felon and five counts of having attained the status of a habitual felon. Prior to trial, the State elected not to proceed on the charges of possession of drug paraphernalia, misdemeanor hit and run, and reckless driving.

Defendant was tried at the 6 March 2017 session of Mecklenburg County Criminal Superior Court before the Honorable Nathaniel J. Poovey. On 13 March 2017, defendant was found guilty of two counts of possession with the intent to sell or deliver a controlled substance, one count of sale of a controlled substance, and one count of delivery of a controlled substance. Defendant was found not guilty of one count of sale of cocaine, one count of delivery of cocaine, and one count of first-degree kidnapping. The court declared a mistrial for nine of the charges because the jury could not reach a unanimous verdict. The trial court arrested judgment on one charge of delivery of cocaine.

Following these verdicts, the State chose to proceed on only one of the habitual felon charges. The habitual felon indictment listed the following felonies: (1) “the

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felony of Discharging a Firearm into Occupied Property[;]” (2) “the felony of Assault with a Deadly Weapon with Intent to Inflict Serious Injury[;]” and (3) “the felony of Malicious Conduct by Prisoner[.]” The indictment also listed the dates the crimes were committed (6 September 1997, 9 June 2001, 19 September 2006), the name of the state against whom the felonies were committed (“North Carolina”), the dates the offenses were convicted (24 May 1999, 12 April 2002, 13 March 2008), as well as the name of the court where the convictions took place (“Superior Court of Mecklenburg County”).

On 13 March 2017, following a hung jury, the trial court declared a mistrial on the habitual felon charge. On 6 November 2017, the Mecklenburg County Grand Jury issued a superseding habitual felon indictment against defendant. This indictment corrected the name of the second felony listed from “the felony of Assault with a Deadly Weapon with Intent to Inflict Serious Injury” – which is not a felony recognized in North Carolina – to “the felony of Assault with a Deadly Weapon Inflicting Serious Injury.”

The habitual felon charge was again tried during the 4 December 2017 session of Mecklenburg County Criminal Superior Court before the Honorable Carla N. Archie. At the close of the State’s evidence, defendant moved to dismiss on the grounds that the superseding indictment contained a substantive alteration and was issued after his trial on the substantive offenses. The motion was denied. On

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6 December 2017, the jury found defendant was a habitual felon. Defendant was sentenced to consecutive terms of 67 to 93 months and 77 to 105 months in prison. Defendant gave notice of appeal in open court. The State dismissed the remaining charges in December 2017.

II. Discussion

The sole issue raised by defendant on appeal is whether the trial court erred by adjudicating and sentencing defendant as a habitual felon based on a superseding indictment that corrected the name of one of the underlying felonies. “On appeal, we review the sufficiency of an indictment *de novo*.” *State v. Ross*, 221 N.C. App. 185, 188, 727 S.E.2d 370, 372 (2012) (citations and quotation marks omitted).

Defendant contends that by altering the title of one of the substantive offenses listed in the original indictments the State was curing a jurisdictional defect by replacing a misdemeanor charge with a felony charge. Defendant further contends that by making this change the State failed to provide him with proper notice of the felonies on which the State would base its habitual felon prosecution. We disagree.

The North Carolina Habitual Felons Act in pertinent part provides:

Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon and may be charged as a status offender pursuant to this Article.

. . . .

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An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. §§ 14-7.1, 14-7.3 (2018).

While typically, bills of indictment cannot be amended, we have held that:

[N.C. Gen. Stat. § 15A-923(e) (2009)] has been interpreted to prohibit only those changes which would substantially alter the charge set forth in the indictment. A change in an indictment does not constitute an amendment where the variance was inadvertent and [the] defendant was neither misled nor surprised as to the nature of the charges.

State v. Taylor, 203 N.C. App. 448, 457, 691 S.E.2d 755, 763 (2010) (citations and quotation marks omitted) (alteration in original). We have further held:

The purpose of an habitual felon indictment is to provide a defendant with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge, and not to provide the defendant with an opportunity to defend himself against the underlying felonies.

State v. Briggs, 137 N.C. App. 125, 130, 526 S.E.2d 678, 681 (2000) (citations and quotation marks omitted).

In this case, the original 19 January 2016 indictment contained the four statutory elements required under N.C. Gen. Stat. § 14-7.3: (a) the dates on which the prior felony offenses were committed (6 September 1997, 9 June 2001,

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19 September 2006); (b) the name of the state against whom the felonies were committed (“North Carolina”); (c) the dates when the defendant was convicted (24 May 1999, 12 April 2002, 13 March 2008); and, (d) the identity of the court where the convictions took place (“Superior Court of Mecklenburg County, North Carolina”). In addition, the indictment listed the titles of the felonies. While the indictment incorrectly names one of the substantive felony offenses as “Assault with a Deadly Weapon with Intent to Inflict Serious Injury” instead of “Assault with a Deadly Weapon Inflicting Serious Injury” – the name of the offense is not a requirement per the statute.

Defendant argues that by altering the indictment to list the correct title of the prior felony conviction the State failed to provide adequate notice of the specific felonies it would base its prosecution upon, particularly because this change was made after defendant pled and was tried on the substantive offenses. Defendant relies primarily on *State v. Little*, 126 N.C. App. 262, 484 S.E.2d 835 (1997). In *Little*, a habitual felon indictment was filed prior to the time the defendant pled not guilty. *Id.* at 264-65, 484 S.E.2d at 837. After obtaining convictions on the substantive felonies, the State then obtained a superseding habitual felon indictment which replaced one of the felonies in the original indictment with a different felony. *Id.* at 266, 484 S.E.2d at 837. This Court held that changing the felony convictions relied on by the State to support the habitual felon charge was a substantial change. *Id.* at

269-70, 484 S.E.2d at 840. “[T]he defendant is entitled to rely, at the time he enters his plea on the substantive felony, on the allegations contained in the habitual felon indictment in place at that time in evaluating the State’s likelihood of success on the habitual felon indictment.” *Id.* at 270, 484 S.E.2d at 840. This Court held that defendant did not have sufficient notice and thus ordered that defendant’s habitual felon adjudication be vacated and the case remanded for new sentencing. *Id.*

This case is distinguishable from *Little*. Here defendant contends that the incorrectly listed conviction – “Assault with a Deadly Weapon with Intent to Inflict Serious Injury” – is not a felony recognized by North Carolina statutes, and is “[a]t best . . . a prior misdemeanor conviction for assault with a deadly weapon.” Defendant argues that changing the title of the crime is an attempt by the State to change the entire conviction to a felony from a misdemeanor charge – such as assault with a deadly weapon or assault inflicting serious injury, which are punished as Class A1 misdemeanors. Unlike in *Little*, there was no substitute of a different conviction. There was only a correction of the name of the conviction alleged, which is not an element required to be alleged in the indictment.

In addition, there is no evidence in the record to show that defendant had been convicted of the misdemeanor he now says the original indictment alleged. The record *does* show that defendant had a conviction on the date alleged in Mecklenburg

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County, North Carolina for felony assault with a deadly weapon inflicting serious injury in violation of N.C. Gen. Stat § 14-32(b).

The case *sub judice* is more analogous to the facts this Court addressed in *Briggs, supra*. In *Briggs* the habitual felon indictment listed one of the felonies as “the felony of breaking and entering buildings in violation of [N.C. Gen. Stat. § 14-54]”. *Id.* at 130-31, 526 S.E.2d at 681. N.C. Gen. Stat. § 15-54 covers both felony and misdemeanor breaking and entering. *Id.* at 131, 526 S.E.2d at 682. Defendant contended that because the statute encompassed both felony and misdemeanor the indictment was insufficient. *Id.* at 130, 526 S.E.2d at 681. The Court held that the presence of the word “felony” in the title of the charge, as well as the presence of the dates the felony was committed and convicted, the court in which the defendant was convicted, and the number assigned to the case, allowed the court to find the defendant had proper notice. *Id.* at 131, 526 S.E.2d at 682.

Similarly, in the instant case, while the incorrect title of the crime in the original indictment is not a felony, the word “felony” in the title and the other identifying information about the conviction is sufficient information to provide defendant with the proper notice of the charges against him to prepare an adequate defense to the charge.

In a similar vein, our Supreme Court has upheld a conviction despite an incorrect name being listed on the indictment, so long as the indictment, “contains all

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of the information required by [N.C. Gen. Stat.] § 14-7.3 and provides defendant with adequate notice of the bases for the State's contention that defendant had attained habitual felon status." *State v. Langley*, 371 N.C. 389, 395-96, 817 S.E.2d 191, 196 (2018) (finding for the State when the indictment incorrectly listed an offense of a higher degree because the greater offense charged included the lesser offense).

Furthermore, this Court has upheld indictments which lacked even some of the statutorily required elements but still provided adequate notice to the defendant. *See State v. Lewis*, 162 N.C. App. 277, 284-85, 590 S.E.2d 318, 323-24 (2004) (allowing a correction to a habitual felon indictment with an incorrectly stated date and county of conviction when the type of offense for which defendant was convicted and the date of that offense were correct); *State v. Montford*, 137 N.C. App. 495, 500-501, 529 S.E.2d 247, 251 (2000) (finding that an indictment sufficiently indicated the state against whom the prior felonies were committed when "State of North Carolina" appeared at the top of the indictment, but does not appear again when the felonies are being laid out); *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994) (allowing a date in an habitual felon indictment to be changed because the date is "neither an essential nor a substantial fact as to the charge").

In the present case, defendant had sufficient notice of which felonies the State would be using because the convictions charged did not change between the first and the superseding indictment. All of the statutorily required information remained the

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same: the dates on which the offense was committed; the court where the conviction took place; the dates on which defendant was convicted; and the name of the state against whom the offense was committed. The only alteration was the language in the felony's title, which is an element not statutorily required in this statute. It is clear that the original and superseding indictments were referring to the same conviction and there was no jurisdictional defect with the first indictment. Therefore, the trial court did not err in denying the motion to dismiss.

III. Conclusion

For all the forgoing reasons, we conclude the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges Tyson and Inman concur.

Report per Rule 30(e).