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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-398

Filed: 5 November 2019

Pitt County, Nos. 16 CRS 58475-76

STATE OF NORTH CAROLINA

v.

RONTRELL HOOKS

Appeal by defendant from judgment entered 11 June 2018 by Judge Marvin K. Blount III in Pitt County Superior Court. Heard in the Court of Appeals 15 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Hugh A. Harris, for the State.

Meghan Adelle Jones for defendant-appellant.

TYSON, Judge.

Rontrell Hooks ("Defendant") appeals from judgments entered after a jury found him guilty of felonious assault inflicting serious bodily injury, assault by pointing a gun, and possession of a firearm by a felon. We vacate one conviction in the judgment for assault inflicting serious bodily injury in 16 CRS 58475, and remand for resentencing.

I. Background

On 19 November 2016, Elliott Smith returned to his home at Cheyenne Court Apartments in Greenville and observed a group of people partying in an apartment located adjacent to his home. Smith noticed one man "throwing up over the balcony" of the apartment, onto the front porch of his neighbor and friend, Deondre Godwin. After Smith asked the man to clean up the vomit, the man cursed at him. Smith informed Godwin of the mess. Godwin asked the man to either clean it up, leave, or both.

Defendant came down from the apartment where the party was ongoing with a gun and pointed it at Smith. Three other men, including the man who vomited, came downstairs and backed up Defendant. Smith was trying to calm down the situation when one of the men hit him in the face. Smith heard a gunshot.

Smith telephoned his brother, who lived across the street, to come pick him up but he was not home at the time. He told Smith to go back upstairs, "[d]on't do nothing stupid," and wait for him. One of the men blocked Smith's path to his apartment and a fight ensued. Defendant held his gun aimed at Godwin so he would not interfere with or intervene in the fight.

After Smith fought the first man, Defendant handed the gun to another member of the group and began to fight Smith himself. As Smith and Defendant fought, Smith was hit from behind by "something hard, blunt, metal" and fell to the

ground. Smith feared for his life as the three men kicked and beat him. The beating continued until Smith's wife came outside and the men backed off. As Smith started to get up, he saw Defendant standing over him. Defendant reached his hand out, as if to help Smith get up, but then punched Smith again. Smith suffered a fracture near his eye that required surgery and a metal plate to be inserted in his face.

Defendant was charged with assault inflicting serious bodily injury, assault by pointing a gun at Smith and Godwin, and possession of a firearm by a felon. The indictment for "assault inflicting serious bodily injury" alleges, in its entirety: "The jurors for the State upon their oath present that on or about the 19th day of November, 2016, in the County named above the defendant named above unlawfully and willfully did assault Elliot Smith and inflict serious bodily injury; to wit."

The verdict sheet provided the jury the option of returning a verdict for either "Felonious assault inflicting serious bodily injury" or "Misdemeanor assault inflicting serious injury." On 30 May 2018, the jury found Defendant guilty of the felony assault, as well as the other two charges.

On 11 June 2018, the trial court entered judgment upon Defendant's conviction for assault inflicting serious bodily injury as a Class F felony, after determining Defendant's prior record level was III. Defendant was sentenced to an active term of 21 to 35 months' imprisonment for that conviction. The trial court also entered judgment upon the other two convictions and ordered the terms of imprisonment for

all three be served consecutively. Defendant gave oral notice of appeal in court after sentencing.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 15A-1444(a) and 7A-27(b) (2017).

III. Issue

Defendant argues the trial court lacked jurisdiction to enter judgment for felony assault inflicting serious bodily injury because the indictment did not allege "feloniously," nor did it cite the relevant statute, N.C. Gen. Stat. § 14-32.4 (2017).

IV. Standard of Review

"On appeal, this Court reviews the sufficiency of an indictment *de novo*. The purpose of an indictment is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused." *State v. Williams*, 242 N.C. App. 361, 369, 774 S.E.2d 880, 886 (2015) (citation and internal quotation marks omitted).

V. Analysis

"A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, 'and to give authority to the court to render a valid judgment.'" *State v. Moses*, 154 N.C.

App. 332, 334, 572 S.E.2d 223, 226 (2002) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)).

Our Supreme Court has held, "bills of indictment charging felonies, in which there has been a failure to use the word 'feloniously,' are fatally defective, unless the Legislature otherwise expressly provides." *State v. Whaley*, 262 N.C. 536, 537, 138 S.E.2d 138, 139 (1964). In 1969, the General Assembly expressly provided for such statutory identification of felonies. *State v. Blakney*, 156 N.C. App. 671, 673, 577 S.E.2d 387, 389 (2003) (citing N.C. Gen. Stat. § 14-1(4) (2017)).

> As such, subsection (4) affords any defendant notice of being charged with a felony as opposed to a misdemeanor, even without the use of the word "feloniously," provided the indictment gives notice of the statute denominating the alleged crime as a felony. Thus, while its inclusion is still the better practice, the word "feloniously" is not required for a valid felony indictment *if the indictment references the specific statute* making the *crime a felony*.

Id. (emphasis supplied).

In *Blakney*, the indictment charging the defendant with possession of marijuana referred to the specific statute making such possession a crime, but the indictment did not "state whether this crime is a felony or a misdemeanor." *Id.* The charge in the indictment did specify that defendant possessed "*more than one and one-half ounces of marijuana*[,] a *controlled substance* which is included *in Schedule VI* of the North Carolina Controlled Substances Act." *Id.* at 673, 577 S.E.2d at 389-390 (emphasis original). These facts referenced the specific statutory subsection that

would have identified the charged crime as a Class I felony. *Id.* at 673, 577 S.E.2d at 390.

This Court determined that inference did not save the indictment from being fatally defective:

> Although the indictment contains identifying words that would lead defendant reading section 90–95(d)(4) to conclude he had found the applicable section to the crime charged in this case, the words by themselves, without reference to the statute number, do not provide defendant with specific notice of the statute charging him with a felony. Accordingly, *the indictment in this case, having failed to either use the word "feloniously" or to state the statutory section indicating the felonious nature of the charge, is invalid as it does not provide notice of the felony charge against defendant*.

Id. at 674, 577 S.E.2d at 390 (emphasis supplied).

Here, the indictment Defendant challenges neither alleges the word "feloniously" nor states the statutory section indicating the felonious nature of the assault charge. *See* N.C. Gen. Stat. § 14-32.4. Under *Blakney*, the indictment Defendant challenges in this case is fatally defective. *Blakney*, 156 N.C. App. at 674, 577 S.E.2d at 390.

The State argues *Blakney* does not control the outcome here, because both the caption, "ASSAULT INFLICTING SERIOUS BODILY INJURY," and the text of the indictment reference the language of the correct statute. *See* N.C. Gen. Stat. § 14-32.4. The State cites *State v. Thomas* for the proposition that "an indictment must charge the essential elements of the alleged offense. . . . If the charge is a statutory

offense, the indictment is sufficient when it charges the offense in the language of the statute." *State v. Thomas*, 153 N.C. App. 326, 335, 570 S.E.2d 142, 147 (2002) (citations, alterations, and internal quotation marks omitted).

"Assault inflicting serious bodily injury requires proof of two elements: (1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4 (2002). This felony differs from assault inflicting serious injury, a Class AI misdemeanor, which lacks the word "bodily." *See* N.C. Gen. Stat. § 14-33(c)(1) (2017).

The State contends the indictment sufficiently charged a felony by stating language in both its caption and text, namely the word "bodily," which tracks the language of the statute and alleges the essential elements of the crime charged, without alleging the word "feloniously" or citing the applicable statute. *See Thomas*, 153 N.C. App. at 335, 570 S.E.2d at 147. The holding in *Thomas* does not control the issue before us.

The defendant in *Thomas* challenged an indictment charging him with assault on a law enforcement officer with a firearm, for failure to allege he knew or had reason to know his victim was a law enforcement officer. *Id.* This Court held the language of the indictment was sufficient, despite not explicitly alleging such knowledge, because the word "willfully" indicated the requisite knowledge to sufficiently charge that element of the crime. *Id.* at 336, 570 S.E.2d at 148.

Here, Defendant is not challenging the elements of a crime alleged in an indictment; he is challenging the denomination of the charged crime as a felony. *See Blakney*, 156 N.C. App. at 673, 577 S.E.2d at 389. The indictment in this case contains words tending to show the charge of felony assault inflicting serious bodily injury. Without allegation that Defendant's acts are felonious, the "indictment contain[ing] identifying words . . . by themselves, without reference to the statute number, do[es] not provide defendant with specific notice of the statute charging him with a felony." *Id.* at 674, 577 S.E.2d at 390.

The holding in *Blakney* is clear: without either explicit felonious allegation or a statutory citation that identifies the charge as a felony, an indictment is fatally defective to charge a felony. *Id.* The indictment in this case did not allege the defendant's acts were felonious or cite the statute, and was fatally defective. The trial court lacked jurisdiction to try Defendant under this indictment for a Class F felony.

Defendant concedes the allegations in the indictment support a conviction for assault inflicting serious injury, a Class A1 misdemeanor, and a lesser included offense.

> When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment.

State v. Banks, 295 N.C. 399, 415, 245 S.E.2d 743, 754 (1978), *overruled on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Defendant asks this Court to remand this matter to the trial court for entry of judgment and appropriate sentence on misdemeanor assault inflicting serious injury.

The indictment at issue also alleges one count of assault by pointing a gun at Smith and Godwin, and specifically cites N.C. Gen. Stat. § 14-34. The State clearly understood how to allege either the word "feloniously" or to cite the appropriate statute on the count Defendant challenges. The two warrants issued for Defendant's arrest in both 16 CRS 58475 and 16 CRS 58476 each used the word "feloniously" to describe Defendant's offenses. On the challenged assault indictment, the State did neither.

VI. Conclusion

The indictment contained neither an explicit felony allegation nor a statutory citation to identify the assault charge as a felony. The indictment was fatally defective in alleging that charge. *Blakney*, 156 N.C. App. at 674, 577 S.E.2d at 390. The trial court lacked jurisdiction to either try Defendant for Class F felony assault inflicting serious bodily injury or have the jury determine his guilt or innocence. The trial court also lacked the authority to render a valid judgment for that conviction. *See Moses*, 154 N.C. App. at 334, 572 S.E.2d at 226.

As Defendant acknowledges, the indictment is sufficient to allege and the jury's verdict supports a conviction for Class A1 misdemeanor of assault inflicting serious injury. The entry of judgment for a Class F felony assault inflicting serious bodily injury is vacated. This cause is remanded to the trial court for entry of a valid judgment for a Class A1 misdemeanor assault inflicting serious injury, and appropriate sentencing thereon with Defendant's other unchallenged convictions.

The Defendant's remaining convictions, for assault by pointing a gun and possession of a firearm by a felon, are unchallenged and remain undisturbed. *It is so ordered.*

VACATED IN PART AND REMANDED FOR RESENTENCING.

Judges BRYANT and BROOK concur.

Report per Rule 30(e).