IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-616

No. COA21-699

Filed 6 September 2022

Columbus County, Nos. 20 CRS 51455, 21 CRS 157

STATE OF NORTH CAROLINA

v.

MASON TROY NICKELSON

Appeal by defendant from judgment entered 25 May 2021 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 9 August 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant.

ARROWOOD, Judge.

¶ 1 Mason Troy Nickelson ("defendant") appeals from judgment finding him guilty of possession of a weapon by a prisoner. Defendant argues that the indictment was fatally defective; defendant also argues that the trial court erred in overruling his objections to witness testimony regarding whether the object at issue constituted a

weapon, and in denying his motion to dismiss for lack of insufficient evidence. For the following reasons, we conclude defendant received a fair trial free from error.

I. Background

¶ 2 On 6 July 2020, a warrant was filed in Columbus County alleging that defendant "unlawfully, willfully and feloniously did possess a deadly weapon, a shank, while an inmate at Columbus County Detention Center, . . . a local confinement facility[,]" in violation of N.C. Gen. Stat. § 14-258.2 On 12 August 2020, a grand jury indicted defendant for possession of a weapon by a prisoner. This indictment provided that defendant "unlawfully, willfully and feloniously did possess a deadly weapon, a shank, while an inmate at Columbus County Detention Center[,] . . . a local confinement facility." On 14 April 2021, defendant was indicted for being a habitual felon.

¶ 3 The matter came on for trial in Columbus County Superior Court, Judge Sasser presiding, on 24-25 May 2021. The State provided testimony from Officer Michael Anthony Danciel ("Officer Danciel"), Officer Shawn Buffkin ("Officer Buffkin"), and Deputy Andrew Worley ("Deputy Worley").

¶ 4 Officer Danciel testified that he worked as a "detention officer/corporal" for the Columbus County Sherriff's Office. On 2 July 2020, Officer Danciel "got called down to the master control," where his sergeant informed him that defendant "had a shank" and asked Officer Danciel to "go down there and assist bringing [defendant] out and

seeing if he had it." Officer Danciel, Officer Buffkin, and the sergeant walked together to a communal area within the detention center "and called [defendant] out."

¶ 5 When defendant presented himself, the officers "escorted him to the bathroom[,]" where Officer Danciel asked, " 'Do you have a shank?' " Defendant "stood there for a minute[,]" after which Officer Danciel stated, " 'Man, come on, give up the shank[.]' " Defendant then "reached down in his sock," pulled out a "shank," and provided it to Officer Buffkin. Defendant asked, " 'Well, how many days am I going to get in seg?' " Defendant was eventually punished internally by being placed in segregation.

¶ 6 Officer Danciel stated that the "shank" was not visible until defendant removed it from his sock, and that defendant did not have permission or authorization to have it. The following was then exchanged:

> Q. Would any inmate have permission to have a shank?
>
> A. No, sir.
>
> Q. This might sound like a dumb question, but why not?
>
> A. It's a weapon that can hurt either --
>
> [Defendant's counsel]: Objection. Calls for a conclusion of law.
>
> [The State]: Just asking the officer's opinion. He's been an officer there for 11 years.
>
> THE COURT: Overrule the objection.

Officer Danciel testified that the "shank" was a "security concern" for the safety of officers and other inmates.

¶ 7 The State offered an exhibit into evidence, which Officer Danciel recognized as the "[s]ame piece of metal that [defendant] pulled out of his sock." Officer Danciel was asked whether the object at issue "had been sharpened in any way[,]" to which the defense objected. The trial court then briefly dismissed the jury and had counsel approach the bench.

¶ 8 After the jury left the room, defendant's counsel explained he believed that "the item in evidence speaks for itself," that Officer Danciel was not qualified to describe it, and that it was for the jury to decide what the item in evidence was. The State then provided that it would not ask whether the item had been "changed or altered," but also that Officer Danciel should be allowed to "describe that object that he's holding to the jury." The trial court stated: "I will overrule the objection at this point. I'll allow the State to ask the officer his opinion as to give [sic] a description of the item at this point[,]" on the understanding that the State would not ask "whether something has been sharpened or not sharpened[.]" Then, the jurors were brought back into the court room.

¶ 9 Officer Danciel described the exhibit as "[a] piece of metal that's come to a point; it's about three inches long; gray paint on it; an edge on it that's reflecting from the light; hole in the end of it." Then, defendant's counsel made more objections:

Q. And you, as an officer, obviously had concerns, because you removed it from the defendant; is that correct?

[Defendant's counsel]: Objection.

THE COURT: Rephrase your question.

Q. Did you have any concerns that day?

A. Yes.

Q. What were your concerns?

A. We were told that the man had a shank.

[Defendant's counsel]: Objection, move to strike, "We were told." . . . . The answer was a hearsay answer . . . . He said, "We were told."

THE COURT: And sustained as to what he was told.

Q. What were your concerns as an officer that day?

A. My concerns as an officer that day was [sic] not getting hurt.

Q. Okay. How so?

[Defendant's counsel]: Objection.

THE COURT: Overruled.

. . . .

A. This is considered to be a weapon inside the jail.

Q. Could that hurt you?

A. Yes, it could.

Q. How could it hurt you?

> [Defendant's counsel]: Objection.
>
> THE COURT: Overruled.
>
> . . . .
>
> A. You can be stabbed with it, and it can hurt you. It can penetrate the skin, and it can hurt you. It can hurt anybody handled the right way.
>
> [Defendant's counsel]: Objection. Move to strike.
>
> THE COURT: Overruled. Denied.

The trial court then accepted the State's exhibit into evidence without objection.

¶ 10 Next, Officer Buffkin testified. Officer Buffkin stated that he worked as a detention officer for the Columbus County Detention Center. He also corroborated Officer Danciel's testimony and confirmed that the object defendant removed from his sock on 2 July 2020 was the State's exhibit.

¶ 11 Deputy Worley testified he had been a Columbus County sheriff's deputy for 17 years and was working at the time as a bailiff "at the courthouse." He had previously worked as, among other things, a detention officer, a sergeant "assisting the jail administrator[,]" and a "chief detention officer, which is the lieutenant position at the jail."

¶ 12 During Deputy Worley's testimony, defendant's counsel made a number of objections:

> Q. Are inmates allowed to have knives, shanks, anything like that, piece of metal?

> A. No, sir.
>
> Q. Why not?
>
> [Defendant's counsel]: Objection.
>
> THE COURT: Overruled.
>
> . . . .
>
> A. Because, sir, that's a dangerous weapon.
>
> Q. Okay. How so?
>
> A. How so? Because you could easily be cut or stabbed with that weapon.
>
> [Defendant's counsel]: Objection. Move to strike. May we approach?

At side bar conference, the trial court concluded it would "sustain the objection as to the officer's testimony that it's a dangerous weapon" as "[t]hat's a question of fact which the jurors must determine."

¶ 13 Direct examination of Deputy Worley continued. When Deputy Worley was asked, based on his training and experience, what he believed "that weapon [was] capable of[,]" defendant's counsel objected. The trial court overruled the objection, and Deputy Worley answered: "Inflicting serious bodily injury." When the State asked how so, defendant's counsel objected again, and was once again overruled. Deputy Worley answered: "[B]y how it appears, it could possibly cause lacerations or actually . . . be used for stabbing punctures."

¶ 14 Next, Deputy Worley testified about two jail calls that defendant had made on 6 July 2020 and 8 July 2020 to his aunt and his wife. Defendant's counsel asked for *voir dire*, and the jury was dismissed for lunch. Outside the presence of the jury, the State expressed its intention to introduce both calls into evidence and publish their recordings to the jury in their entirety. The State explained: "In both of those phone calls, [defendant] admits that he was caught with a knife. He talks about other things, such as 'I just got out of seg' and 'I just got out of the hole' for having the knife."

¶ 15 The trial court found that the first recording had "the risk of unfair prejudice, undue delay, and waste of time[,]" and thus denied the State's request to play it "under Rule 403." The trial court allowed for the second recording to be played for the jury for exactly two minutes and fifty-two seconds; in this portion, the defendant is heard referring to a knife and stating he used the knife to cut pickles. The trial court received the redacted recording into evidence as the State's second exhibit and published it to the jury.

¶ 16 After the State rested its case, the defense moved to dismiss for insufficient evidence of a dangerous weapon, arguing that the State had only shown that the item at issue could be used "to cut up pickles and sausages." The trial court noted that Deputy Worley's testimony claimed it "could be used to stab, slice[,]" and denied defendant's motion.

¶ 17 The defense did not present any evidence, and the jury was briefly dismissed for a break. Outside of the presence of the jury, the defense renewed its motion to dismiss, which the trial court denied. Then, in its instructions to the jury, the trial court referred to the object as "a piece of metal."

¶ 18 The jury returned a verdict of guilty of possession of a weapon by a prisoner. The defense moved to set aside the verdict "as contrary to the greater weight of the evidence," and the trial court denied the motion. Then, defendant pleaded guilty to reaching habitual felon status The trial court sentenced defendant to 103-to-136 months' imprisonment. Defendant gave oral notice of appeal in open court.

II. Discussion

¶ 19 On appeal, defendant argues that the indictment was fatally defective, that the trial court erred in overruling objections and allowing evidence as to whether the object at issue constituted a weapon, a determination which he contends was in the sole province of the jury, and that the trial court erred in denying his motion to dismiss.

A. Indictment

¶ 20 Defendant contends that the indictment for possession of a weapon by a prisoner was fatally defective in two ways: it "fails to allege the essential element that his possession was 'without permission or authorization[,]'[ ] and it describes the weapon element as 'a deadly weapon, a shank' wherein the statute states that what

is prohibited is 'a weapon capable of inflicting serious bodily injuries or death.' " "We review a challenge to the facial validity of an indictment *de novo*[.]" *State v. Edgerton*, 266 N.C. App. 521, 525, 832 S.E.2d 249, 253 (2019) (citation omitted).

¶ 21 Our General Statutes provide:

> A criminal pleading must contain . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2021).

¶ 22 "A constitutionally sufficient indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *Edgerton*, 266 N.C. App. at 525, 832 S.E.2d at 253 (citation and quotation marks omitted). "An indictment that fails to allege an essential element of the offense is facially invalid, thereby depriving the trial court of jurisdiction." *Id.* (citation omitted).

¶ 23 "Nevertheless, it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (citation omitted). "[W]e properly interpret charging

documents when we utilize normal definitions of the words in the document, even if they are not the exact same words as in the statute." *State v. Dale*, 245 N.C. App. 497, 504, 783 S.E.2d 222, 227 (2016). "This notice pleading has replaced the use of 'magic words' and allows for a less exacting standard, so long as the defendant is properly advised of the charge against him or her." *Id.*

¶ 24 In *State v. McCormick*, this Court stated, in the context of the crime of burglary, that "[o]ur case law does not require that this element"—that of lack of consent—"be specifically pled . . . ." *State v. McCormick*, 204 N.C. App. 105, 112, 693 S.E.2d 195, 199 (2010) (citation omitted). In our reasoning, we relied on *State v. Pennell*, in which we had previously "agree[d] with the State's contention that the language in the indictment, that the defendant 'unlawfully and wilfully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees,' implies that defendant did not have the consent of the Board of Trustees." *State v. Pennell*, 54 N.C. App. 252, 260, 283 S.E.2d 397, 402 (1981).

¶ 25 N.C. Gen. Stat. § 14-258.2 defines the crime of "possession of a dangerous weapon in prison" as follows:

> Any person while in the custody of the Section of Prisons of the Division of Adult Correction and Juvenile Justice, or any person under the custody of any local confinement facility as defined in G.S. 153A-217, who shall have in his possession without permission or authorization a weapon capable of inflicting serious bodily injuries or death, or who shall fabricate or create such a weapon from any source,

> shall be guilty of a Class H felony[.]

N.C. Gen. Stat. § 14-258.2(a) (2021).

¶ 26 Indeed, N.C. Gen. Stat. § 14-258.2(a) requires that the person charged be found in possession of a dangerous weapon "without permission or authorization"; here, the indictment charging defendant with violation of this statute stated that he "unlawfully, willfully and feloniously did possess a deadly weapon, a shank, while an inmate . . . ." Applying the same logic of *Pennell* and *McCormick*, we can be satisfied that the indictment's use of the words "unlawfully, willfully and feloniously" strongly implies, if not outright indicates, that defendant's possession of the shank was without permission or authorization of the Columbus County Detention Center. *See Pennell*, 54 N.C. App. at 260, 283 S.E.2d at 402. We will not deem the indictment defective for a lack of mirror-image "magic words." *See Dale*, 245 N.C. App. at 504, 783 S.E.2d at 227.

¶ 27 It thus follows that defendant's additional contention that the indictment is defective in that it uses the words "deadly weapon" rather than "a weapon capable of inflicting serious bodily injuries or death" is of no moment. Defendant claims that, "[b]y defining a 'shank' as a 'deadly weapon[,]' " the State "trespassed on the jury's authority to determine whether the 'piece of metal' was capable of inflicting serious bodily injuries or death." Not only does defendant fail to show how the language "a weapon capable of inflicting serious bodily injuries or death" would not in itself

"trespass[ ] on the jury's authority" to make such a determination, but "[t]he words in the charging document . . . fit within the definition for the behavior described in the statute and are thus sufficient to confer jurisdiction so that the trial could proceed." *See id*. at 505, 783 S.E.2d at 227.

¶ 28 Accordingly, the indictment was not fatally defective in any capacity.

B. Lay Opinion

¶ 29 Defendant argues the trial court erred in overruling several objections and in allowing Officer Danciel and Deputy Worley to testify that "the piece of metal is considered to be a weapon inside the jail" because it "invade[d] the function of the jury and embraces the ultimate issue to be decided by the trier of fact."

¶ 30 "[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Crandell*, 208 N.C. App. 227, 233, 702 S.E.2d 352, 357 (2010) (citation omitted). "But, [e]ven if the admission of [evidence] was error, in order to reverse the trial court, the appellant must establish the error was prejudicial." *State v. James*, 224 N.C. App. 164, 166, 735 S.E.2d 627, 629 (2012) (citation and quotation marks omitted) (alteration in original).

¶ 31 Per our General Statutes,

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear

> understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2021). "Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704.

¶ 32 "Rule 704 does allow admission of lay opinion evidence on ultimate issues, but to qualify for admission the opinion must be helpful to the jury." *State v. Elkins*, 210 N.C. App. 110, 124, 707 S.E.2d 744, 754 (2011) (citation and quotation marks omitted). Additionally, "while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness." *State v. Najewicz*, 112 N.C. App. 280, 293, 436 S.E.2d 132, 140 (1993) (citation omitted).

¶ 33 In *Najewicz*, the trial court did not allow the defendant's supervisor to answer the question: "In your opinion, with your knowledge of [the defendant], do you believe he's capable of raping anyone?" *Id.* at 291-92, 436 S.E.2d at 139. On appeal, this Court reasoned that "there [was] no foundation showing the opinion called for was rationally based upon the perception and observations of the witness, [the] defendant's supervisor." *Id.* at 293, 436 S.E.2d at 140. This Court also reasoned that " '[r]ape' is a legal term of art and accordingly [the witness]'s opinion testimony concerning whether [the] defendant was 'capable of rape' was properly excluded." *Id.*

(citation omitted). Thus, we concluded that the trial court did not commit error in this regard. *Id.*

¶ 34 Conversely, in our present case, there was a foundation showing that both Officer Danciel's and Deputy Worley's lay opinions were rationally based upon their respective perceptions and observations. Officer Danciel testified that he personally witnessed defendant remove the object from his sock after Officer Danciel and Officer Buffkin confronted him. Additionally, Officer Danciel had a second opportunity to observe the object in person in the form of the State's exhibit while testifying in open court.

¶ 35 As to Deputy Worley's lay opinion, although he did not personally confront defendant or witness him remove the object from his person, he too had the opportunity to observe it as an exhibit and describe it in open court. Additionally, Deputy Worley's testimony was based on his training and experience, which included 17 years of working as, among other things, a detention officer, an assistant to the jail administrator, and a chief detention officer; this background informed his opinion that the object appeared capable of causing "lacerations" or "stabbing punctures." Furthermore, the trial court did not allow Officer Worley to testify whether the object constituted a "dangerous weapon," the language specified in N.C. Gen. Stat. § 14-258.2, because that was a question of fact for the jury.

¶ 36 Assuming *arguendo* that the trial court erred in overruling defendant's objections, defendant has not shown that he was prejudiced by this. *See James*, 224 N.C. App. at 166, 735 S.E.2d at 629 (citation omitted). Indeed, even absent the opinions of Officer Danciel and Deputy Worley as to the dangerous properties of the object, the trial court heard testimony from Officer Danciel and Officer Buffkin about the day they personally witnessed defendant remove the object from his sock while detained, and both confirmed that the State's exhibit was that same object.

¶ 37 Accordingly, the trial court did not abuse its discretion in overruling defendant's objections and allowing Officer Danciel and Deputy Worley to testify as to the properties of the object.

C. Motion to Dismiss

¶ 38 Defendant contends the trial court erred by denying his motion to dismiss, arguing that "there was insufficient evidence to support his conviction of possession of a dangerous weapon by a prisoner" because "the alleged weapon, characterized as a 'shank' by the State, and as a 'piece of metal' by defense counsel and the judge in his jury instructions, is not something capable of inflicting serious bodily injuries or death." "Also, [defendant] offered a legitimate explanation for the piece of metal, i.e. cutting sausage and pickles."

¶ 39 "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the

defendant is the perpetrator." *State v. Draughon*, 281 N.C. App. 573, 2022-NCCOA-58, ¶ 29 (citation and quotation marks omitted). "Substantial evidence is [the] amount . . . necessary to persuade a rational juror to accept a conclusion." *Id.* (citation and quotation marks omitted) (alterations in original). "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State[.]" *Id.* (citation and quotation marks omitted).

¶ 40 "If the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* ¶ 30 (citation and quotation marks omitted). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss *de novo*." *Id.* (citation and quotation marks omitted).

¶ 41 Again, N.C. Gen. Stat. § 14-258.2 defines the crime of "possession of a dangerous weapon in prison" as follows:

> Any person *while in the custody* of the Section of Prisons of the Division of Adult Correction and Juvenile Justice, or any person under the custody of any local confinement facility as defined in G.S. 153A-217, who shall have in his possession *without permission or authorization a weapon capable of inflicting serious bodily injuries or death*, or who shall fabricate or create such a weapon from any source,

> shall be guilty of a Class H felony[.]

N.C. Gen. Stat. § 14-258.2(a) (emphasis added).

¶ 42 The evidence presented at trial reflected that, when confronted by Officer Danciel and Officer Buffkin, defendant, an inmate at the Columbus County Detention Center, retrieved a metal object concealed in his sock. Notably, defendant removed the object from his person after Officer Danciel asked him to "give up" a "shank," specifically. Testimony from Officer Danciel, Officer Buffkin, and Deputy Worley, directly and indirectly, illustrated that neither defendant nor any prisoner is allowed to possess a knife-like object while detained. Both Officer Danciel and Deputy Worley described the properties of the object introduced by the State as an exhibit in open court, which they believed could cause physical injury, such as punctures, penetrations, or lacerations to the skin. In addition, the metal object was introduced as an exhibit by the State, and the jury had the opportunity to evaluate the accuracy and credibility of the witnesses' descriptions of the object based upon their own observations.

¶ 43 The evidence here paints a clear picture. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

III. Conclusion

¶ 44 For the foregoing reasons, because we conclude that the indictment was not fatally defective, that the trial court did not err in allowing lay opinion as to the

properties of the object at issue, and that the trial court did not err in denying defendant's motion to dismiss for insufficient evidence, we find defendant received a fair trial free from error.

NO ERROR.

Chief Judge STROUD and Judge COLLINS concur.

Report per Rule 30(e).