

SUPREME COURT OF NORTH CAROLINA

State v. Silas, 360 N.C. 377

627 S.E.2d 604 (2006) · No. No. 171PA05 · Decided April 7, 2006

SUMMARY

The Supreme Court of North Carolina held that an indictment for felonious breaking or entering need not specifically allege the felony the defendant intended to commit. However, when an indictment does specify the intended felony, the State may not later amend that allegation because doing so can substantially alter the charge and prejudice the defendant. The court overruled State v. Vick to the extent inconsistent with this holding and affirmed the remedy of entering judgment for misdemeanor breaking or entering.

CASE DETAILS

COURT	Supreme Court of North Carolina
WRITING FOR THE COURT	Brady, Justice
JURISDICTION	North Carolina
DECIDED	April 7, 2006
DOCKET	No. 171PA05
DISPOSITION	affirmed
PROCEDURAL POSTURE	The State appealed to the Supreme Court of North Carolina after the Court of Appeals arrested defendant's judgment for felonious breaking or entering and remanded for entry of judgment on misdemeanor breaking or entering. The State also challenged the Court of Appeals' reasoning concerning the indictment amendment.
STANDARD OF REVIEW	De novo review of the legal sufficiency and permissible amendment of the indictment under N.C.G.S. § 15A-923(e), including whether the amendment substantially altered the charged offense and prejudiced defendant.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of North Carolina
PARTIES	State of North Carolina v. James Emanuel Silas

TOPICS

criminal procedure

statutory interpretation

appellate procedure

preservation of error

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

QUESTIONS PRESENTED

1. Whether an indictment for felonious breaking or entering must specifically allege the felony the defendant intended to commit inside the building.
2. Whether, when an indictment specifically alleges an intended felony, the State may orally amend that allegation after the close of the evidence to substitute a different felony.
3. Whether the amendment prejudiced defendant and required entry of judgment for misdemeanor rather than felonious breaking or entering.

HOLDINGS

1. An indictment for felonious breaking or entering need not specifically identify the felony intended to be committed inside the building; it is sufficient to allege that the defendant intended to commit a felony or larceny therein, along with the other required elements.
2. When an indictment for felonious breaking or entering specifically alleges the intended felony, the State may not amend that allegation to substitute a different intended felony because the amendment substantially alters the indictment and is prohibited by N.C.G.S. § 15A-923(e).
3. Because the indictment properly charged misdemeanor breaking or entering but the amendment could not support the felonious offense, the proper remedy was to affirm the arrest of judgment on the felony conviction and remand for entry of judgment on misdemeanor breaking or entering.

KEY QUOTATIONS

“There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony; only a general averment that defendant intended to commit a felony upon breaking or entering is required.” (608)

“However, if an indictment does specifically allege the intended felony, N.C.G.S. § 15A-923(e) mandates such allegations may not be amended.” (608)

FACTUAL BACKGROUND

After becoming angry with his estranged wife, defendant went to her apartment, forced open a latched door, and shot her twice. He later fired repeatedly at Jasper Herriott and into Herriott's occupied apartment. The original indictment charged felonious breaking or entering with intent to commit murder, but after the evidence closed the State orally amended it to identify assault offenses as the intended felony. Defendant had prepared his defense on the theory that the State would have to prove an intent to commit murder.

PROCEDURAL HISTORY

A jury convicted defendant of multiple offenses, including felonious breaking or entering. During the charge conference, after the close of the evidence, the trial court permitted the State to orally amend the indictment by changing the specifically alleged intended felony from murder to assault offenses. The Court of Appeals arrested judgment on the felonious breaking or entering conviction and remanded for entry of judgment on misdemeanor breaking or entering, while also remanding for resentencing on a separate prior-record-level issue. The Supreme Court did not review the sentencing issue because the State did not seek review of it, but it modified and affirmed the Court of Appeals' decision on the indictment issue.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

On remand, the trial court shall enter judgment on misdemeanor breaking or entering rather than felonious breaking or entering. The separate remand for resentencing based on the prior-record-level issue remained undisturbed.

CASES CITED

- State v. Snyder, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)
- State v. Hunt, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003), cert. denied, 539 U.S. 985 (2003)
- State v. Greer, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)
- Apprendi v. New Jersey, 530 U.S. 466, 478-79, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)
- State v. Vick, 70 N.C. App. 338, 319 S.E.2d 327 (1984)
- State v. Worsley, 336 N.C. 268, 279-81, 443 S.E.2d 68, 73-74 (1994)
- State v. Faircloth, 297 N.C. 388, 255 S.E.2d 366 (1979)
- State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923)
- State v. Freeman, 314 N.C. 432, 436-37, 333 S.E.2d 743, 745-46 (1985)
- State v. Wilkinson, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996)

OPINION

BRADY, J.

627 S.E.2d 604 (2006) STATE of North Carolina v. James Emanuel SILAS. No. 171PA05. Supreme Court of North Carolina. April 7, 2006. Roy Cooper, Attorney General, by William P. Hart, Senior Deputy Attorney General, for the State-appellant. Thomas K. Maher, Chapel Hill, for defendant-appellee. *605 BRADY, Justice. At the close of all evidence, the trial court allowed the assistant district attorney to orally amend defendant's felony breaking or entering indictment by changing the specifically alleged intended felony to conform to the evidence presented at trial.

Because we find this alteration of the indictment was prejudicial error for a reason other than that found by the Court of Appeals, we modify and affirm the opinion of the Court of Appeals.

FACTUAL BACKGROUND On 9 July 1999, defendant James Emanuel Silas became angry with Rhonda Silas, his estranged wife from whom he had been separated for approximately one month.

Mrs. Silas had recently obtained a domestic violence restraining order against defendant, and defendant was upset about his wife's relationship with Jasper Herriott. Defendant drove to Mrs. Silas's apartment and upon arriving, forced open a latched door. When defendant entered the kitchen, he found Mrs. Silas, her daughter, and Mrs. Silas's niece present. Defendant and his wife exchanged words, whereupon defendant pulled out a .380 semiautomatic handgun and shot Mrs. Silas twice in the left thigh.

Mrs. Silas escaped to an upstairs bedroom, and defendant departed the crime scene, eventually heading toward Herriott's apartment. Upon arriving at Herriott's apartment building, defendant observed Herriott standing in front of the doorway. Defendant exited his vehicle and proceeded to fire his handgun numerous times at Herriott. Herriott quickly returned to his apartment, locked the door, and telephoned law enforcement.

Meanwhile, defendant continued to fire his weapon into Herriott's apartment. On 2 August, 8 October, and 29 November 1999, the grand jury of Mecklenburg County returned true bills of indictment against defendant for: (1) assault of Rhonda Silas with a deadly weapon with intent to kill and inflicting serious injury; (2) assault of Jasper Herriott with a deadly weapon with intent to kill; (3) discharging a weapon into property occupied by Herriott; (4) possession of a firearm by a felon; and (5) felonious breaking or entering a building occupied by Rhonda Silas.

At trial, the State presented evidence which tended to show the above facts. Defendant testified on his own behalf and asserted he was angry with Herriott and Mrs. Silas, but his intent was to harm them, not kill them. During the charge conference the assistant district attorney orally moved to amend the felonious breaking or entering indictment to conform to the evidence and the anticipated jury instructions, and the trial court allowed the motion.

After instruction by the trial court, the jury deliberated and returned verdicts of guilty on all charges except for the assault of Rhonda Silas, for which the jury returned a verdict of guilty on the lesser included offense of assault with a deadly weapon inflicting serious injury.

After finding defendant had a prior record level of IV, the trial court sentenced defendant in the presumptive range to consecutive terms of ten to twelve months, fifteen to eighteen months, and three terms of forty to fifty-seven months.

The Court of Appeals found, inter alia, the manner in which the trial court determined defendant's prior record level was error and unanimously remanded the case to the trial court for resentencing. The State did not seek review of this sentencing issue. **THE AMENDMENT TO THE**

FELONIOUS BREAKING OR ENTERING INDICTMENT The issue which gives rise to this appeal concerns the State's oral amendment of the felonious breaking or entering indictment.

The indictment prepared by the State and returned by the grand jury reads: *606 THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 9th day of July, 1999, in Mecklenburg County, James Emanuel Silas unlawfully and wilfully did feloniously break and enter a building occupied by Rhonda Silas, used as a residence, located at... Charlotte, North Carolina, with the intent to commit a felony therein, to wit: murder.

During the charge conference, the trial court notified the parties it intended to instruct the jurors they must find defendant intended to commit the felony of assault with a deadly weapon with intent to kill inflicting serious injury or the felony of assault with a deadly weapon inflicting serious injury in order to convict defendant of felonious breaking or entering.

Because such an instruction deviated from the original indictment, which identified the felony defendant allegedly intended to commit as "murder," the assistant district attorney orally moved to amend the indictment to conform to the evidence presented at trial and the anticipated instructions of the trial court.

Although the trial court expressed the opinion that such an amendment was unnecessary, it allowed the State's motion over defendant's opposition. Defendant appealed his convictions and sentences to the Court of Appeals, which arrested judgment on defendant's felonious breaking or entering conviction and remanded to the trial court with orders to enter judgment on misdemeanor breaking or entering.

See *State v. Silas*, 168 N.C.App. 627, 609 S.E.2d 400 (2005). We affirm the Court of Appeals, but our reasoning differs from the rationale articulated by that court. ANALYSIS In enacting Chapter 15A of the General Statutes, the Criminal Procedure Act, the General Assembly provided that "[a] bill of indictment may not be amended." N.C.G.S. § 15A-923(e) (2005).

This Court has interpreted that provision to mean a bill of indictment may not be amended in a manner that substantially alters the charged offense. See *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). In determining whether an amendment is a substantial alteration, we must consider the multiple purposes served by indictments, the primary one being "to enable the accused to prepare for trial." *State v. Hunt*, 357 N.C.

257, 267, 582 S.E.2d 593, 600 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)), cert. denied, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003); see also *Apprendi v. New Jersey*, 530 U.S. 466, 478-79, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (brief discussion of the historical use and requirements of indictments). Relying on *State v. Vick*, 70 N.C.App.

338, 319 S.E.2d 327 (1984), the Court of Appeals held the alteration to defendant's indictment for felonious breaking or entering was a substantial alteration because an indictment for felonious breaking or entering is insufficient unless it alleges the particular felony which is the basis for the required element of "intent to commit any felony or larceny therein."

N.C.G.S. § 14-54(a) (2005). The State argues the Court of Appeals' reliance on Vick was misplaced and Vick should be overruled consistent with this Court's opinion in *State v. Worsley*, 336 N.C. 268, 279-81, 443 S.E.2d 68, 73-74 (1994).

The State's arguments at the appellate level have been inconsistent. At the Court of Appeals, the State argued the amendment was not a substantial alteration because assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury are both lesser included offenses of the offense of first-degree murder.

The Court of Appeals rejected this argument, noting our research has not revealed a case specifically stating assault with a deadly weapon with intent to kill inflicting serious injury or assault with a deadly weapon inflicting serious injury is a lesser included offense of first degree murder.

We also note that the State has not cited any authority stating assault with a deadly weapon is a lesser included offense of first degree murder. *Silas*, 168 N.C.App. at 634 n. 1, 609 S.E.2d at 405 n. 1. Before issuance of the mandate at the Court of Appeals, the State submitted additional authority to that court which casts doubt on whether felonious breaking or entering *607 indictments must allege the intended felony.

Now, the State has "changed mounts in midstream," abandoning its argument presented to the Court of Appeals and instead arguing to this Court that Vick should be overruled. Despite these inconsistent theories, we agree with the State that Vick is contrary to *Worsley* and must be overruled.

In Vick the Court of Appeals relied on *State v. Faircloth*, 297 N.C. 388, 255 S.E.2d 366 (1979) and *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923), in analogizing the offense of felonious breaking or entering to the offense of burglary. See Vick, 70 N.C.App. at 339-40, 319 S.E.2d at 328.

In Allen, this Court noted indictments for burglary were insufficient unless they alleged the underlying felony which was intended to be committed within the dwelling by the defendant. Allen, 186 N.C. at 305-06, 119 S.E. at 505-06.

However, as this Court noted in *Worsley*, all of this Court's opinions requiring these specific allegations "were decided prior to the enactment of N.C.G.S. § 15A-924(a)(5)... and are no longer controlling on this issue." 336 N.C. at 279, 443 S.E.2d at 73. This Court continued by explaining the pleading requirements of the Criminal Procedure Act are "more liberal" than the "ancient

strict pleading requirements of the common law." Id. at 280, 443 S.E.2d at 74 (quoting *State v. Freeman*, 314 N.C.

432, 436, 333 S.E.2d 743, 746 (1985)). Therefore, this Court held in *Worsley* an indictment for first-degree burglary was sufficient "even though it [did] not specify the felony the defendant intended to commit when he entered [the] apartment." Id. at 280, 443 S.E.2d at 74.

Because of the similarities between the elements and nature of felonious breaking or entering and burglary, we hold an indictment for felonious breaking or entering is not required to allege with specificity the felony a defendant intended to commit inside the building. It is sufficient for the indictment to allege, along with the other required elements of breaking or entering, that the defendant intended to commit a felony or larceny inside the building.

The State could have simply sought in the original indictment allegations that defendant intended to commit a felony or larceny inside the building. Alternatively, the State could have sought a superseding indictment, after the return of the original indictment by the grand jury but before the commencement of the trial, which made only those general allegations required.

See N.C.G.S. § 15A-646 (2005). Accordingly, we overrule *Vick* insofar as it is inconsistent with our holding today. This, however, does not end our analysis. The State would have us reverse the Court of Appeals because the language in the indictment describing the specific intended felony was nothing more than surplusage; therefore, any amendment to this surplusage is not a substantial alteration of the indictment.

We disagree. As noted earlier, the primary purpose of an indictment is "to enable the accused to prepare for trial." *Hunt*, 357 N.C. at 267, 582 S.E.2d at 600 (quoting *Greer*, 238 N.C. at 327, 77 S.E.2d at 919). When the prosecution amends an indictment for felonious breaking or entering in such a manner that the defendant can no longer rely upon the statement of the intended felony in the indictment, such an amendment is a substantial alteration and is prohibited by N.C.G.S. § 15A-923(e).

The State relies on *State v. Freeman* in making the argument the amendment was made to "mere harmless surplusage" contained in the indictment and was therefore not a substantial alteration. In *Freeman*, this Court stated, "[t]he additional '[r]ape or [r]obbery' language in the indictment is mere harmless surplusage and may properly be disregarded in passing upon its validity."

314 N.C. at 436, 333 S.E.2d at 745-46. However, the issue in *Freeman* was the sufficiency of an indictment which alleged alternative underlying felonies for first-degree kidnapping. There was no allegation the defendant lacked notice of the prosecution's theory in *Freeman*, as the prosecution proceeded on a theory that the kidnapping was for the purpose of facilitating a rape and a robbery.

See *id.* at 433-34, 333 S.E.2d at 744-45. This Court noted the surplusage in Freeman was harmless to the defendant, as he was informed of the charge and if he needed further clarification, the remedy would have been to request a bill of particulars. *Id.* at *608 436-37, 333 S.E.2d at 745-46 (citing N.C.G.S. § 15A-925).

In the case sub judice, the indictment served as notice to defendant apprising him of the State's theory of the offense. The subsequent alteration prejudiced defendant as he relied upon the allegations in the original indictment to his detriment in preparing his case upon the assumption the prosecution would proceed upon a theory defendant intended to commit murder.

In its brief, the State concedes its trial theory was clearly stated in the original indictment: "The State's theory and proof was that defendant intended to kill, not assault..." Because the indictment alleged defendant intended to commit murder after breaking and entering into Mrs. Silas's residence, defendant prepared his case and the theory of his defense, including his decision to testify on his own behalf, to discredit the allegation that he intended to kill Mrs. Silas.

By doing so, defendant could hope to be acquitted of the charges alleged in the felonious breaking or entering indictment, or at least be convicted of the lesser included offense of misdemeanor breaking or entering. Defendant's preparation resulted in the jury being unable to find beyond a reasonable doubt he intended to kill Mrs. Silas, as evidenced by the jury returning a guilty verdict of assault with a deadly weapon inflicting serious injury instead of assault with a deadly weapon with intent to kill inflicting serious injury.

The trial court gave the State a second bite of the apple by permitting the assistant district attorney to orally amend the indictment after the close of all evidence, when there was no further opportunity for defendant to prepare or present contrary evidence. It is the State that draws up the indictment and crafts its language before submitting the indictment to the grand jury.

If the State seeks an indictment which contains specific allegations of the intended felony, the State may not later amend the indictment to alter such allegations. Moreover, in felonious breaking or entering cases, as in burglary cases, "when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged."

See *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996). Because the State sought to indict defendant for felonious breaking or entering based upon a theory of intended murder, the State was required to prove defendant intended to commit murder upon breaking or entering Mrs. Silas's apartment; therefore, the amendment to the original indictment was a substantial alteration.

This amendment prejudiced defendant as to the one element of felony breaking or entering that differs from misdemeanor breaking or entering: The "intent to commit any felony or larceny therein." N.C.G.S. § 14-54(a). Nonetheless, there is no question the indictment properly charged defendant with misdemeanor breaking or entering.

Therefore, the Court of Appeals' remedy was proper, and upon remand to the trial court judgment should be entered on misdemeanor breaking or entering. In sum, we hold: (1) There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony; only a general averment that defendant intended to commit a felony upon breaking or entering is required.

We therefore overrule *State v. Vick* insofar as it is inconsistent with this opinion. (2) However, if an indictment does specifically allege the intended felony, N.C.G.S. § 15A-923(e) mandates such allegations may not be amended.

Because the amendment to the indictment was a substantial alteration which prejudiced defendant, we modify and affirm the opinion of the Court of Appeals. **MODIFIED AND AFFIRMED.**