NO. COA01-1185

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Henderson County
Nos. 99 CRS 54422-23, 54425;
GEORGE SMITH 00 CRS 2162-63

Appeal by defendant from judgment entered 7 December 2000 by Judge Zoro J. Guice, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 22 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

David W. Rogers for defendant-appellant.

WALKER, Judge.

On 10 January 2000, the Henderson County grand jury indicted defendant on charges of possession of crack cocaine with intent to sell or deliver, possession of marijuana, and possession of drug paraphernalia. Defendant was subsequently charged with being an habitual felon. On 6 December 2000, a jury found defendant guilty of the three substantive offenses and of having attained the status of an habitual felon. The trial court consolidated the substantive offenses for judgment and sentenced defendant as an habitual felon to a term of 133 to 169 months in prison. From the trial court's judgment, defendant appeals.

Defendant's counsel brings forward no questions on appeal and presents no arguments in defendant's brief. He states that "[a]fter a thorough study of the transcript and of the record, counsel for the Defendant is unable to find any error that might have substantially affected the Defendant's rights" and "submits the record and transcript of the trial to the Court of Appeals and requests that they examine same."

Defendant's counsel states he has informed defendant that, in his opinion, there was no error in defendant's trial and that defendant could file his own arguments in this Court if he so desired. Copies of the transcript, the record, and the brief filed by counsel were sent to defendant. On 27 December 2001 and on 11 February 2002, defendant filed arguments in this Court.

We hold that defendant's counsel has substantially complied with the holdings in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967) and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). Pursuant to *Anders* and *Kinch*, we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous. Upon review of the entire record, the assignments of error noted in the record, and defendant's arguments, we find the appeal to be wholly frivolous.

Defendant raises several contentions in his *pro se* briefs regarding the denial of his motion for a voice analyst expert, and he argues the trial court failed to consider his need for an expert. In ruling upon a motion for an expert witness, a "trial court has discretion to determine whether a defendant has made an adequate

showing of particularized need." *State v. Page*, 346 N.C. 689, 697, 488 S.E.2d 225, 230 (1997), *cert. denied,* 522 U.S. 1056, 139 L. Ed. 2d 651 (1998). Here the trial court concluded "defendant will suffer no prejudice as a result of the denial of the said motion[,]" and our review of the record reveals no abuse of discretion by the trial court in denying defendant's motion for a voice analyst expert. Having failed to show an abuse of discretion by the trial court in denying his motion, defendant's related contention that he was denied due process as a result of the denial is without merit.

Defendant next asserts he was denied effective assistance of counsel because his counsel failed to timely file a motion for a voice analyst expert. In order to establish ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). He asserts the tape recordings "allegedly contained conversations involving drug transactions at the residence of" defendant's mother. However, the individual in the first recording, whom several witnesses testified did not sound like defendant, did not discuss any drug transactions. Instead, the individual asked the confidential informant to bring marijuana when she came to the residence. Although those same witnesses testified the male voice in the second recording did sound like defendant, that conversation contained no reference to drugs. While the minimal probative value of both recordings was simply to establish defendant's presence in his mother's residence, testimony of police

surveillance and documents found in a bedroom provided substantial evidence of defendant's presence there.

Defendant claims he was prejudiced by his trial counsel's stipulation as to the authenticity of the recordings because "counsel should have known that under the rules of authentication proof of the speakers[']identities must be made." However, "[u]nder Rule 901, testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible if it was legally obtained and contains otherwise competent evidence." *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991). Furthermore, "a tape [recording] should not be excluded merely because parts of it are inaudible if there are other parts that can be heard." *Searcy v. Justice and Levi v. Justice*, 20 N.C. App. 559, 565, 202 S.E.2d 314, 318, *cert. denied*, 285 N.C. 235, 204 S.E.2d 25 (1974). Whether a tape is sufficiently audible to be admitted is in the trial court's discretion and will not be reversed absent an abuse of that discretion. *State v. Womble*, 343 N.C. 667, 689, 473 S.E.2d 291, 303 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719 (1997). Defendant here has failed to show an abuse of discretion by the trial court in admitting the recordings. He also has failed to show how his defense was prejudiced by the admission of the two recordings. Therefore, this issue is without merit and is overruled.

In his *pro se* reply brief, defendant mistakenly argues the State's failure to address two of his arguments in its brief means

"persuant [sic] to the Appellate Rules [the] State has abandon[ed] and admitted unanswered matters." Rule 28(b)(6) states that "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6)(2001)(content of appellant's brief). Defendant, as the appellant, is subject to Rule 28(b)(6) while the State, as the appellee, is not required to respond to defendant's arguments. *See* N.C.R. App. P. 28(c)(content of appellee's brief). We have reviewed defendant's additional arguments in support of the issues discussed above, and we find them to be without merit. We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).