

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-111

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v.

Rutherford County
Nos. 01 CRS 691-92

CHRIS JIMMERSON

Appeal by defendant from judgment entered 7 September 2001 by Judge James U. Downs in Superior Court, Rutherford County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Leslie C. Rawls for defendant-appellant.

WYNN, Judge.

Defendant was found guilty of possession of cocaine with intent to sell or deliver and sale and delivery of cocaine, based on evidence that on 13 April 2001, he sold \$100 worth of crack cocaine to a deputy sheriff working undercover for the Forest City Police Department. In a separate proceeding, the jury found defendant to be an habitual felon. By judgment entered 7 September 2001, the trial court consolidated defendant's offenses and sentenced defendant as an habitual felon with a Prior Record Level of III from 116 to 149 months imprisonment. Defendant appealed.

In his first assignment of error, defendant claims the trial

court erred in denying his request for a specific jury instruction on the issue of identity at the habitual felon proceeding. The State sought to prove defendant's prior felony convictions by introducing certified copies of judgments reflecting convictions for felony breaking and entering in 1989, possession of cocaine in 1995, and robbery with a dangerous weapon in 1997. Defendant asked that the jury be apprised of the State's burden to prove his identity as the "Chris Jimerson" listed on these judgments. The trial judge replied that he would simply give the pattern instruction. The trial court ultimately charged the jury as follows:

For you to find the defendant guilty of being an habitual felon the State must prove these three things beyond a reasonable doubt. First, that on the 18th of May of 1989 *the defendant* was convicted of felonious breaking and entering in Superior Court of Rutherford County, North Carolina

Second, the State must prove beyond a reasonable doubt within the Superior Court of Rutherford County . . . that on February 27, 1995, *the defendant* was convicted of felonious possession of cocaine

. . . Third, the State must prove beyond a reasonable doubt that on the 21st of July of 1997 *the defendant* in Rutherford County Superior Court was convicted of the felony of robbery with a dangerous weapon

(emphasis added).

We find the trial court's actions proper in all respects. Defendant did not propose any specific language for the instruction and did not tender his request to the trial court in writing. See *State v. McNeil*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997)

(citing *State v. Martin*, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988)), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). Moreover, while not invoking the issue of "identity," the trial court instructed the jury on the State's burden to prove beyond a reasonable doubt that defendant had been convicted of the three prior felonies. "These instructions adequately informed the jury that the State had to prove that defendant was the perpetrator. Any error in the failure to give the requested instruction thus was harmless beyond a reasonable doubt." *State v. Penland*, 343 N.C. 634, 656, 472 S.E.2d 734, 746-47 (1996) (citations omitted), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997).

Although not assigned as error in the record on appeal, defendant has identified a clerical error on the judgment entered by the trial court. At sentencing, the prosecutor represented to the trial court that defendant had a Prior Record Level of III, based on six prior record points. The prosecutor tendered a worksheet in support of these findings. The worksheet contained an alternative calculation which assigned defendant thirteen prior record points and a Prior Record Level of IV. This calculation included points for the prior felonies used to charge defendant with habitual felon status. Because the jury had found defendant to be an habitual felon, these prior convictions were excluded from his prior record for sentencing purposes. See N.C. Gen. Stat. § 14-7.6 (2001) ("In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used.").

Upon the parties' agreement that defendant was a Prior Record Level III, the trial court announced its intention to sentence defendant as a Class C felon and a Prior Record Level III, and imposed a sentence within the applicable presumptive range. See N.C. Gen. Stat. § 15A-1340.17 (2001). On the written judgment, however, defendant is given thirteen prior record points and a Prior Record Level of IV. It appears that in reducing the judgment to writing, the trial court mistakenly relied upon the alternative figures from prior record worksheet.

Defendant was not prejudiced by the clerical error. Nevertheless, we deem it appropriate to remand the judgment to the trial court for the limited purpose of correcting the prior record level and prior record points reflected thereon. See *State v. Hilbert*, 145 N.C. App. 440, 446, 549 S.E.2d 882, 886 (2001) (citing *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)).

The record on appeal contains additional assignments of error not addressed in defendant's appellate brief. They are deemed abandoned. See N.C.R. App. P. 28(b)(6) (2002).

No prejudicial error; remanded for correction of judgment.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).