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NO. COA09-1322

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 07 CRS 212994, 08 CRS 22550

JONATHAN GLENDALE DENTON
Defendant

Appeal by Defendant from judgment entered 1 May 2009 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 March 2010.

Attorney General Roy Cooper, by E. Burke Haywood, Special Deputy Attorney General, for the State.

William B. Gibson, for defendant.

ERVIN, Judge.

Defendant Jonathan Denton appeals from a judgment entered by the trial court based on a jury verdict convicting Defendant of possession of cocaine and Defendant's plea of guilty to having attained the status of an habitual felon in which the trial court sentenced Defendant to a minimum of 136 months and a maximum of 173 months imprisonment in the custody of the North Carolina Department of Correction. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and

the applicable law, we find no error in the proceedings leading to the entry of the trial court's judgment.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On 20 March 2007, Officers James McCarthy and Dacron Neely of the Charlotte-Mecklenburg Police Department were "looking for several individuals," including Defendant, who had outstanding arrest warrants. Officers McCarthy and Neely drove to the Brookhill apartment complex, where Officer Neely saw Defendant sitting in a lawn chair in a common area. Officers McCarthy and Neely arrested Defendant on the outstanding warrants. During the arrest process, Defendant volunteered that there was marijuana in his sock. As a result, Officer McCarthy searched Defendant and found a small bag of marijuana in his right sock, a plastic bag containing "three small rocks" of crack cocaine in his left sock, and \$693 in cash. Defendant never told Officers McCarthy and Neely that he possessed cocaine.

2. Defendant's Evidence

Defendant testified that he was 41 years old, owned a tire business, and worked at a Charlotte restaurant. Defendant admitted that he had been a drug addict "all [his] life" and that he used marijuana, cocaine, and alcohol. Defendant had grown up "on the streets." Defendant was familiar with the "arrest process" because he'd "been arrested so many times from back when I was in a foster home, from the Willie M program all the way through." However, after his 20 March 2007 arrest, Defendant stopped using drugs and began working steadily. Defendant described himself as a

"recovering addict" and stated that he was in "a program" for the purpose of helping him stop taking drugs.

In March, 2007, Defendant was staying at the Brookhill apartment complex. Defendant knew that there were outstanding warrants for his arrest, a fact that made him scared because he had "been to prison so many times." On the night of 19 March 2007 Defendant hid in his apartment, smoked crack with a friend, and got so high that he could not remember what happened. Defendant and his friend stayed up all night smoking crack cocaine.

On 20 March 2007, Defendant smoked marijuana in the common area. When Defendant saw the law enforcement officers approaching him, he put his marijuana in his sock. Although Defendant usually did not keep drugs in his sock, he was "paranoid" that day and he hid it. At the time that he was arrested, Defendant told Officer McCarthy about the marijuana in his sock because he did not "want anymore trouble." When asked if he had told the officer about the crack in his sock Defendant testified:

No, because I didn't know. I didn't know at that time about no crack. I knew I had smoked it that day. That's all I knew; I didn't know I had smoked it all, that's what I knew.

According to Defendant, people who use crack cocaine often become "paranoid" and hide things, including drugs. As a general proposition, a person smoking crack would hide things "anywhere that we can just because you're paranoid." Defendant did not recall hiding crack on 19 March 2007 or remember if he had crack cocaine left over on 20 March 2007. Although Defendant did not

remember where or if he hid cocaine, he testified that it was common for people to hide drugs in their shoes.

According to Defendant, Officer McCarthy took his "rent money." Defendant expressed "concern[] about my money because I knew how long it took to get the money." However, when asked about the \$693 that was in his possession at the time of his arrest on cross-examination, Defendant testified that he had been collecting money for the man who was washing cars at the Brookhill apartments and that the money belonged to this man, whose name he did not know. Defendant explained that he had said the money was his "rent money" in order to get the police to return it to him.

Defendant admitted that he had been a "wild" young man who "took to the streets" and recalled the following convictions:

. . . [S]tolen goods was my first charge[.] .
. . . The first time I went through prison was
when . . . I got a common law robbery. . . .
After . . . that I got a common law robbery,
after that I got some other charges like
possession, possession with intent to sell and
deliver[.] . . . There's so many of them
because I was getting them back to back[.]

Defendant also admitted that he had been convicted of possessing drug paraphernalia and possession of cocaine with intent to sell and deliver cocaine.

B. Procedural History

On 20 March 2007, a warrant for arrest was issued charging Defendant with possession of cocaine. On 7 April 2008, the Mecklenburg County grand jury returned bills of indictment charging Defendant with possession of cocaine and having attained the status of an habitual felon. On 15 December 2008, the Mecklenburg County

grand jury returned a superceding indictment charging Defendant with being an habitual felon.

The charges against Defendant came on for trial before the trial court and a jury at the 27 April 2009 criminal session of Mecklenburg County Superior Court. After both parties presented evidence, the jury convicted Defendant of possession of cocaine. Following the acceptance of the jury's verdict, the trial court convened a sentencing hearing. Defendant admitted to having attained the status of an habitual felon. In addition, he stipulated that he had eighteen prior record points and should be sentenced as a Level 5 offender. Based upon the jury's verdict and Defendant's admissions, the trial court sentenced Defendant to a minimum of 136 months and a maximum of 173 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Impeachment Using Convictions More Than Ten Years Old

First, Defendant argues that the trial court erred by denying his motion to exclude evidence of several criminal convictions that were more than ten years old. According to Defendant, the trial court failed to adhere to the requirements of N.C. Gen. Stat. § 8C-1, Rule 609, in admitting evidence of these older convictions. Although we conclude that the trial court erred by failing to make the findings required by N.C. Gen. Stat. § 8C-1, Rule 609(b), we also believe that the trial court's error was harmless.

According to N.C. Gen. Stat. § 8C-1, Rule 609 (2009):

- (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.
- (b) Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction . . . unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

"Like other evidentiary rules that control the introduction of evidence of prior conduct reflecting upon a witness' truthfulness, N.C. [Gen. Stat.] § 8C-1, Rule 608 (1988), or upon motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistaken, or accident, N.C. [Gen. Stat.] § 8C-1, Rule 404(b) (1988), N.C. [Gen. Stat.] § 8C-1, Rule 609(b) requires the trial court to engage in a balancing of the probative value of the evidence against its prejudicial effect." *State v. Carter*, 326 N.C. 243, 249-50, 388 S.E.2d 111, 116 (1990). "In conducting this critical balancing process it is important to remember that the only legitimate purpose for introducing evidence of past convictions is to impeach the witness's credibility." *State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 165 (1991) (citing *State v. Tucker*, 317 N.C. 532, 543, 346 S.E.2d 417, 423 (1986)). "To enable the reviewing court to determine whether the trial court properly allowed admission of the old conviction evidence, the trial court's findings must set out the 'specific facts and

circumstances which demonstrate the probative value outweighs the prejudicial effect' of the evidence in question." *State v. Shelly*, 176 N.C. App. 575, 581, 627 S.E.2d 287, 294 (2006) (quoting *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985)), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986). Accordingly, "[f]or the trial court to merely state that the probative value of a prior conviction outweighs its prejudicial effect in the interests of justice is insufficient under Rule 609(b)." *Id.* (citing *Ross*, 329 N.C. 108, 405 S.E.2d at 15.

[This Court has] identified the following considerations as factors to be addressed by the trial court when determining if conviction evidence more than ten years old should be admitted: (a) the impeachment value of the prior crime, (b) the remoteness of the prior crime, and (c) the centrality of the defendant's credibility. It logically follows that findings on each of these factors should be included in the trial court's determination.

Id. at 582-83, 627 S.E.2d at 294, (Internal citations omitted) (citing *State v. Holston*, 134 N.C. App. 599, 518 S.E.2d 216 (1999), *cert. denied*, 353 N.C. 389, 547 S.E.2d 216 (1999)).

On 12 November 2008, the State notified Defendant of its intention to present evidence of criminal convictions that were more than ten years old. On 27 April 2009, Defendant filed a motion *in limine* seeking the exclusion of such evidence. At a pretrial hearing held with respect to Defendant's motion *in limine*, the State indicated the intention of seeking to have evidence of Defendant's 1993 conviction for assault with a deadly weapon with intent to kill inflicting serious injury, Defendant's two 1988

convictions for common law robbery, Defendant's 1988 conviction for armed robbery, and Defendant's 1986 conviction for possession of stolen goods admitted into evidence. After excluding evidence of Defendant's aggravated assault conviction, the trial court ruled that:

The defendant's motion *in limine* as to the possession of stolen goods and the common law robbery and robbery with a dangerous weapon at this time is denied. But I'll have to conduct a weighing of that when we reach that point in the trial.

At the close of the State's evidence, Defendant renewed his motion *in limine* and asked the trial court for a ruling concerning which convictions would be admissible. The trial court concluded that:

[S]ubject to further consideration as to balancing called for by the context in which the questions arise, I'm denying the motion *in limine* as to the possession of stolen goods, common law robbery and robbery with a dangerous weapon.

On direct examination, defendant's trial counsel questioned Defendant about his prior convictions, including those he had moved to exclude.¹ In addition, Defendant failed to object to the prosecutor's questions concerning these convictions on cross-examination.² On appeal, Defendant argues that the court erred by

¹ Defendant did not waive his objection to the admission of these convictions by testifying about them on direct examination. See *Ross* at 117, 405 S.E.2d at 163 (stating that, "[b]ecause the trial court denied defendant's motion *in limine* to exclude evidence regarding defendant's prior . . . conviction, defendant did not 'open the door' to cross-examination on that subject by testifying about the conviction on direct examination.").

² In its brief, the State contends that Defendant has not properly preserved this issue for appellate review since he did not object at the time that evidence of the older convictions was

admitting evidence of convictions that were more than ten years old without making findings as to "specific facts and circumstances" that justified their admission. We agree.

A trial judge errs by admitting evidence of convictions that are more than ten years old without making the findings required by N.C. Gen. Stat. § 8C-1, Rule 609(b):

The trial court's determination that defendant's convictions [from more than ten years earlier] . . . were admissible was erroneous. Specific facts and circumstances supporting the probative value of this evidence are neither apparent from the record nor recounted by the trial court.

State v. Artis, 325 N.C. 278, 307, 384 S.E.2d 470, 486 (1989), judgment vacated on other grounds, 494 U.S. 1023, 108 L. Ed. 2d 604, 110 S. Ct. 1466 (1990). Since the trial court does not appear to have made the findings required by N.C. Gen. Stat. § 8C-1, Rule 609(a) at the time that it admitted evidence concerning Defendant's older convictions, we conclude that the trial court erred by admitting the disputed evidence.

Although the State asserts that "the trial judge complied with the balancing test required by the rule and determined, in his discretion, that the probative value of the convictions outweighed their prejudicial effect," it has not cited us to any transcript excerpts that support this contention and we have not identified

presented. Although "[a] motion in limine is insufficient to preserve for appeal the question of admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial," *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, cert. denied, 516 U.S. 884, 133 L. Ed. 2d 153, 116 S. Ct. 223 (1995), we elect to address Defendant's claim on the merits pursuant to N.C.R. App. P. 2.

any support for this contention during our own examination of the record. In addition, the State's argument that the trial court adequately complied with N.C. Gen. Stat. § 8C-1, Rule 609(b) by finding "that the probative value of the convictions outweighed their prejudicial effect" misstates the applicable law, which requires the trial court to determine that the "probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." (emphasis added). Finally, the State contends that the trial court "specifically stated for the record that he had applied the balancing test required by the rule." However, the trial court's only reference to the application of the required balancing test occurred at the time of its ruling denying Defendant's motion *in limine* "subject to further consideration as to balancing called for by the context in which the questions arise." Although the State appears to argue that the trial court's reference to "further" balancing suggests that "previous" balancing had already occurred, the record clearly reflects that the trial court did not make any findings of the type required by N.C. Gen. Stat. § 8C-1, Rule 609(b). As a result, since "[t]here are no findings of specific facts and circumstances in the record to support the trial court's determination that the evidence was more probative than prejudicial," "[t]he trial court's admission of defendant's prior convictions beyond ten years was error and we now examine whether defendant was prejudiced." *State v. Smith*, 155 N.C. App. 500, 509, 573 S.E.2d 618, 624 (2002), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 287 (2003).

Pursuant to N.C. Gen. Stat. § 15A-1443(a):

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

Thus, "erroneous admission of evidence 'will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.'" *State v. McMillian*, 169 N.C. App. 160, 165, 609 S.E.2d 265, 268-69 (2005) (quoting *Smith*, 155 N.C. App. at 508, 573 S.E.2d at 624). On appeal, Defendant does not argue that admission of these convictions prejudiced his chances for a more favorable outcome at trial, and our own review of the evidence convinces us that the trial court's error was not prejudicial. We reach this conclusion for several reasons.

First, the record contains substantial evidence of Defendant's guilt. In order to convict a defendant for knowingly possessing a controlled substance, "the State must offer sufficient evidence that (1) the substance was controlled and (2) defendant knowingly possessed the substance." *State v. Barron*, ___ N.C. App. ___, ___, 690 S.E.2d 22, 26 (2010) (citing *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985)). "The 'knowingly possessed' element of the offense . . . may be established by showing that . . . defendant had actual possession." *State v. Alston*, 193 N.C. App. 712, 715, 668 S.E.2d 383, 386 (2008) (citing *State v. Diaz*, 155

N.C. App. 307, 313, 575 S.E.2d 523, 528 (2002), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271 (2003), and *State v. Reid*, 151 N.C. App. 420, 428, 566 S.E.2d 186, 192 (2002)), *affirmed*, 336 N.C. 367, 677 S.E.2d 455 (2009). A defendant "has actual possession of a controlled substance if it is on his person, he is aware of its presence, and . . . he has the power and intent to control its disposition or use." *Id.* (citing *Reid*, 151 N.C. App. at 428-29, 566 S.E.2d at 192).

Defendant does not dispute that crack cocaine was found "on his person," but argues that he did not "knowingly possess" the cocaine found in his sock. The record contains no evidence tending to suggest that anyone other than Defendant had access to his sock or that Defendant lacked the ability to perceive the presence of objects in his sock. In addition, Defendant admitted during his trial testimony that he used crack cocaine in March 2007; that he and a friend smoked crack cocaine all night on 19 March 2007 and into the morning on 20 March 2007; that people who smoke crack become "paranoid" and hide their drugs; that it is common for crack users to hide drugs in their shoes; and that, despite Defendant's contention that he did not know that he had crack cocaine on his person at the time of his arrest, he knew that he had smoked crack cocaine that day. Thus, Defendant admitted that he used, and therefore possessed, crack cocaine "on or about the 20th of March 2007," which was the date of offense charged in the indictment. As a result, the record is replete with evidence of Defendant's guilt, much of which Defendant provided during his trial testimony.

Secondly, the essence of Defendant's defense was that he was so impaired by his drug use on 19 and 20 March 2007 that he did not remember the details of the events that occurred on the morning of his arrest. Assuming, without in any way deciding, that such voluntary intoxication is a defense to knowing possession of a controlled substance and that Defendant presented sufficient evidence to permit jury consideration of this issue, the successful assertion of such a defense would require a jury to conclude that Defendant did not know that he had cocaine in his sock. Any jury determination to that effect would necessarily hinge on a finding that Defendant was a credible witness. We conclude, however, that the record evidence aside from that relating to Defendant's older convictions undermined Defendant's credibility to such a degree that it is highly unlikely that the jury would have credited his defense.

Although Defendant argues that, after the trial court denied his motion *in limine*, he was "compelled" to introduce evidence of his prior convictions, including those that had occurred more than ten years ago, Defendant's testimony concerning his past was not restricted to the bare fact of prior convictions. Other parts of Defendant's testimony that probably damaged his credibility with the jury are readily identifiable. For example, Defendant told the jury that he grew up "on the streets;" that he had been a drug addict for decades; that he had been in prison many times; and that he had "been arrested . . . many times from back when I was in a foster home, from the Willie M. program all the way through."

Defendant repeatedly described his familiarity with illegal drug use and the habits of drug users. In addition, Defendant testified that he hid from the police on 19 March 2007 to avoid being served with outstanding warrants and stayed up all night on 19 March 2007 using illegal drugs, so that, by 20 March 2007, he was unable to remember what happened. As a result, this testimony concerning Defendant's past, none of which needed to be presented in order to take the "sting" out of the trial court's denial of his motion *in limine*, undoubtedly impaired the jury's perception of Defendant's credibility.

Furthermore, Defendant testified on direct examination that the police took his "rent money" at the time of his arrest and that he was concerned about the loss of this money because it had been difficult to accumulate. On cross-examination, however, Defendant admitted that the money belonged to someone else and that he had lied about its origin in the hopes of getting the money returned. As a result, Defendant testified falsely under oath, a development that could not have helped his credibility with the members of the jury.

Finally, the record contains evidence that Defendant had been convicted of a number of offenses within the last ten years. In addition to providing an independent basis for challenging Defendant's credibility, the existence of such more recent convictions provides a further basis for our conclusion that the admission of evidence that Defendant had been convicted of various offenses more than ten years ago did not work extensive additional

harm to Defendant's chances for a more favorable outcome at trial. Thus, the jury is unlikely to have credited Defendant's testimony for this reason as well.

As a result, given the undisputed nature of the State's evidence that Defendant actually possessed cocaine, the inherent implausibility of Defendant's contention that he did not know that he had cocaine in his possession at the time of his arrest, and the numerous reasons for questioning Defendant's credibility, we conclude that, on the facts of this case, there is no reasonable possibility that Defendant would have been acquitted if the trial court had excluded evidence of Defendant's older convictions. Thus, Defendant is not entitled to appellate relief on the basis of the trial court's error.

B. Trial Court's Response to Jury Inquiry

Secondly, Defendant argues that the trial court erred by "overrul[ing] Defendant's objection to the inadequate manner in which the court answered the question posed by the jurors during their deliberations." In its final charge to the jury, the trial court noted that Defendant was charged with possession of crack cocaine and stated that the State was required to prove that "the defendant knowingly possessed crack cocaine, a controlled substance," beyond a reasonable doubt. In addition, the trial court informed the jury that:

A person possesses a controlled substance when he is aware of its presence and has . . . the power and the intent to control the disposition or use of that substance.

So then, if you find from the evidence in this case that on or about the alleged date of March 20th, 2007, the defendant knowingly possessed crack cocaine, then it would be your duty to return a verdict finding the defendant guilty of possession of cocaine.

Defendant lodged no objection to this instruction, which tracks N.C.P.I.-260.10, and does not challenge its correctness on appeal. During the course of its deliberations, the jury inquired of the trial court: "Is his knowledge of possession based just on the time of arrest?" The trial court responded to the jury's question by repeating its original instructions concerning the possession issue. After the trial court reinstructed the jury, defendant's trial counsel argued that the trial court's response "le[ft] open the possibility" that the jury might convict Defendant based on his "possession of the cocaine from the night before, which he is not charged with." On appeal, Defendant reiterates this contention, arguing that it was "prejudicial error" for the trial court to "refuse[] to provide crucially important additional guidance to this jury in order to clarify their task[.]" We disagree.

As an initial matter, despite Defendant's contention that the trial court failed to "comply with the mandates of [N.C. Gen. Stat.] § 15A-1234(a)(1) and (3)," neither of those statutory provisions "mandate" that the trial court take any particular course of action. Instead, N.C. Gen. Stat. § 15A-1234(a)(1) (2009) and N.C. Gen. Stat. § 15A-1234(a)(3) (2009) simply provide that a trial court "may" give the jury additional instructions, not that it invariably must do so. However, since the trial court did provide additional instructions to the jury in response to its

inquiry, we need not address the question of whether the trial court would have erred by failing to make any answer to the jury's question.

"The law presumes that jurors follow the court's instructions." *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004) (citing *Parker v. Randolph*, 442 U.S. 62, 73, 60 L. Ed. 2d 713, 723 (1979)), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285, 125 S. Ct. 1600 (2005). After carefully reviewing the instruction that the trial court gave in response to the jury's question, we conclude that its instruction concerning knowing possession was not ambiguous, constituted a correct statement of the applicable law, and did not allow the jury to convict Defendant on an improper basis. Instead, the trial court instructed the jury that, in order to convict Defendant, it had to find beyond a reasonable doubt that he knowingly possessed cocaine "on or about the alleged date of March 20th, 2007." As a result, the challenged instruction specifically required the jury to find beyond a reasonable doubt that Defendant knowingly possessed cocaine at the time specified in the indictment returned against him. We do not believe that the trial court's instructions were required to be more specific than the indictment upon which Defendant's prosecution was based.

In addition, Defendant testified that he possessed and used crack cocaine on 19 March 2007 and that he stayed up all night smoking crack, a fact that indicates that he smoked cocaine with his friend until some time on 20 March 2007. When questioned about the cocaine that had been seized from his sock, Defendant asserted

that he "knew he had smoked it that day" but "didn't know [if he] had smoked it all." As a result, Defendant admitted that he possessed crack cocaine "on or about the alleged date of March 20th, 2007," a fact which makes it difficult for us to see how any error in the trial court's instruction would have prejudiced Defendant. As a result, we conclude that the trial court did not commit prejudicial error in responding to the jury's inquiry.

C. Acceptance of Defendant's Habitual Felon Plea

Finally, Defendant argues that the trial court committed prejudicial error by failing to comply with N.C. Gen. Stat. §§ 15A-1022 and 15A-1026 at the time that it accepted Defendant's plea of guilty to having attained the status of an habitual felon. Once again, we disagree.

N.C. Gen. Stat. § 15A-1022(a) (2009) provides, in pertinent part, that the trial court may not accept a plea of guilty "without first addressing [the defendant] personally and:

- (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
- (2) Determining that he understands the nature of the charge;
- (3) Informing him that he has a right to plead not guilty;
- (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
- (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;

- (6) Informing him of the maximum possible sentence on the charge . . . and of the mandatory minimum sentence, if any, on the charge; and
- (7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation[.]

According to Defendant, the trial court violated N.C. Gen. Stat. § 15A-1022(a)(4), N.C. Gen. Stat. § 15A-1022(a)(6), and N.C. Gen. Stat. § 15A-1022(a)(7) by failing to inform him that, by entering his guilty plea, he waived his right to be "confronted by the witnesses against him" with respect to the issue of his habitual felon status; by failing to inform him of the mandatory minimum sentence to which his plea exposed him; and by failing to inform him that a guilty plea would subject a non-citizen to certain consequences.

As we have already discussed, a defendant must establish the existence of both legal error and prejudice in order to obtain appellate relief. As he candidly concedes, Defendant's status as a citizen of the United States precludes any finding that Defendant was prejudiced by any failure on the part of the trial court to advise him about the implications of a guilty plea for a non-citizen pursuant to N.C. Gen. Stat. § 15A-1022(a)(7). Similarly, the record demonstrates that Defendant stipulated to his criminal history and that there was no dispute about the nature and extent of his prior record, a fact that precludes a finding that Defendant was prejudiced by any failure on the part of the trial court to advise him of his right to confront the witnesses against him as required by N.C. Gen. Stat. § 15A-1022(a)(4). Finally, with

respect to any failure on the part of the trial court to inform Defendant of the mandatory minimum sentence to which he would be exposed as an habitual felon as required by N.C. Gen. Stat. § 15A-1022(a)(6), Defendant acknowledges that we have previously found the omission of this inquiry to be harmless error if the record demonstrates that the defendant's plea was knowingly and voluntarily entered. See, e.g., *State v. Richardson*, 61 N.C. App. 284, 289, 300 S.E.2d 826, 829 (1983), in which this Court stated that:

[T]his Court refuses to adopt a technical, ritualistic approach. Even though the trial judge accepted the defendants' pleas without informing them of the mandatory minimum sentence, we find that their ignorance of that fact could not have reasonably affected their decision to plead [guilty]. . . . [T]he trial judge questioned each defendant regarding the voluntariness of their pleas, and each stated their plea was given voluntarily. . . . [W]e hold the defendants' pleas were voluntarily and intelligently entered and the trial judge's failure to comply strictly [with] N.C. Gen. Stat. § 15A-1022(a)(6) was not prejudicial error.

In this case, as in *Richardson*, the trial court questioned Defendant several times about the voluntariness of his plea. Nothing in the present record provides any indication that Defendant's plea was anything other than free and voluntary. Thus, any failure on the part of the trial court to comply with N.C. Gen. Stat. § 15A-1022(a)(6) did not prejudice Defendant.

Defendant asserts, however, that the present case differs from cases such as *Richardson* because it presents "a substantial question" as to the knowingness and voluntariness of Defendant's

plea. Defendant bases this contention on a colloquy that occurred between himself and the trial court relating to his decision to testify at trial which took place after the trial court questioned Defendant about his proposed guilty plea. During this discussion, Defendant expressed dissatisfaction with his relationship with his trial counsel and with his trial counsel's advice that, if he rejected the State's plea offer, he would be incarcerated for a longer period of time. According to Defendant, the statements that he made during this colloquy constituted a "red flag" that should have caused the trial court to exercise "additional caution to insure that this Defendant knew what he was doing[.]" We do not find Defendant's argument persuasive. Although Defendant was clearly dissatisfied by the choices that were available to him, he does not contend that he received deficient representation from his trial counsel. In addition, Defendant's lack of enthusiasm about the available alternatives does not establish that his plea was not knowing and voluntary. Thus, we conclude that Defendant has failed to show any basis for questioning whether his plea was knowing and voluntary.

Defendant also contends that the trial court erroneously failed to comply with N.C. Gen. Stat. § 15A-1022(b) (2009), which requires the trial court to "determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of [N.C. Gen. Stat. § 15A-1021(b)]." Although the trial court did not make

the inquiry required by N.C. Gen. Stat. § 15A-1022(b), Defendant has not argued that he had a plea arrangement with the State or that the trial court's omission prejudiced him in any way. As a result, any failure on the part of the trial court to make the inquiry specified in N.C. Gen. Stat. § 15A-1022(b) provides no basis for an award of appellate relief.

Finally, Defendant argues that the trial court failed to comply with N.C. Gen. Stat. § 15A-1026 (2009), which provides that:

A verbatim record of the proceedings at which the defendant enters a plea of guilty . . . must be made and preserved. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses.

Although the questions posed and answers given during Defendant's plea colloquy did not appear on a transcript of plea form of the type made available by the Administrative Office of the Courts, the "verbatim record of the proceedings" required by N.C. Gen. Stat. § 15A-1026 can be found in the transcript of Defendant's trial and sentencing hearing. Once again, Defendant has failed to identify any prejudice stemming from the fact that his plea colloquy is preserved in this fashion, and we are unable to independently discern any prejudice to Defendant arising from the fact that a formal transcript of plea was not executed in this instance. For that reason, Defendant is not entitled to relief on appeal stemming from the fact that the questions and answers given during his plea colloquy are reflected in the trial transcript rather than in a formal transcript of plea. Therefore, none of Defendant's

arguments stemming from the manner in which his plea of guilty to the habitual felon allegation was taken entitle him to relief on appeal. However, we continue to "encourage caution by the trial bench in observing the requirements of [N. C. Gen. Stat.] § 15A-1022." *State v. Bozeman*, 115 N.C. App. 658, 663, 446 S.E.2d 140, 143 (1994).

III. Conclusion

We conclude that Defendant received a fair trial and sentencing hearing that was free from prejudicial error. As a result, the trial court's judgment should remain undisturbed.

NO PREJUDICIAL ERROR.

Judges MCGEE and GEER concur.

Report per Rule 30(e).