NO. COA01-230

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

STATE OF NORTH CAROLINA

v. Stokes County
Nos. 99 CRS 4651
00 CRS 274

DONALD WESTMORELAND

Appeal by defendant from judgments entered 5 October 2000 by Judge William H. Freeman in Stokes County Superior Court. Heard in the Court of Appeals 14 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

R. Michael Bruce, P.A., by R. Michael Bruce for defendant-appellant.

BRYANT, Judge.

Defendant was found guilty as charged of felonious breaking or entering, felonious larceny and status of habitual felon. The trial court consolidated the convictions of felonious breaking or entering and larceny and sentenced defendant to 150-189 months. By separate judgment, the court sentenced defendant as a habitual felon to a term of 150-189 months. The court ordered the sentences to run consecutively.

The two assignments of error brought forward by defendant are without merit.

First, he contends the court erred by failing to dismiss the charge of habitual felon because the underlying convictions are not under the same name. Specifically, the indictment charging defendant with habitual felon status charged him under the name of "Donald Westmoreland." The certified judgments of the prior convictions are under the names of "Donnie G. Westmoreland" or "Donnie Westmoreland."

The governing statute, N.C.G.S. § 14-7.4 (1999), provides:

> In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

In construing this statute, we have held that absolute identity of names is not required. *State v. Petty*, 100 N.C. App. 465, 470, 397 S.E.2d 337, 341 (1990). Any discrepancies in the judgments go to the weight of the evidence and not its admissibility. *Id.*

In the case at bar, Detective Jason Tuttle of the Stokes County Sheriff's Department testified that he knew defendant by the name of "Donnie Westmoreland" and that he heard defendant's counsel during the course of trial refer to defendant by that name many times. Indeed, our review of the record discloses that defendant's

counsel did refer to defendant by the name of Donnie Westmoreland several times during the course of trial. Other witnesses also identified defendant by that name. We hold the foregoing evidence is sufficient to permit a finding that Donald Westmoreland and Donnie or Donnie G. Westmoreland are one and the same person.

Second, defendant contends the court impermissibly expressed an opinion by telling defendant's counsel to "sit down and shut up." A trial judge must refrain from any conduct or statements which tends to prejudice the accused's cause in the eyes of the jury, including remarks which tend to belittle and humiliate counsel. *See State v. Holden*, 280 N.C. 426, 429, 185 S.E.2d 889, 892 (1972). But not every questionable remark or statement is harmful error. *Id.* at 430, 185 S.E.2d at 892. The conduct or statement must be viewed in light of the attendant circumstances and unless it is apparent the statement or conduct had a prejudicial effect on the result of trial, the error will be considered harmless. *Id.* at 430, 185 S.E.2d at 892.

While we do not approve of the court's choice of words in addressing counsel, we conclude that they could not have affected the outcome. The record shows that the prosecutor objected to direct examination by defendant and as counsel stood to argue against the objection, the court made the challenged statement as it overruled the objection. The court interrupted counsel and directed the witness to answer the question of defendant's counsel, which the witness did. Notably defendant's counsel neither contemporaneously objected to the court's remark nor moved for a

mistrial. Under these circumstances, we fail to discern any prejudice to defendant.

We do find error, however in defendant's sentencing. Although this argument was not raised by the parties, we exercise our discretion pursuant to N.C. R. App. P. 2 to review this issue. Succinctly stated, it is error to sentence defendant in a separate judgment and commitment for being a habitual felon because there is no such crime. *See State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 722 (1988) (holding that being a habitual felon is a status, not a crime and therefore it is error to sentence defendant in a separate judgment and commitment). The judgment entered in case number 00 CRS 274 is therefore vacated and the judgment entered in case number 99 CRS 4651 is remanded for resentencing in accordance with *Penland*.

Remanded for resentencing.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).