NO. COA01-737

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v. Harnett County
Nos. 00CRS5573,
SAMONTANIE GERMIER BUTTS, 00CRS6943
Defendant

Appeal by defendant from judgments entered 6 February 2001 by Judge James M. Webb in Harnett County Superior Court. Heard in the Court of Appeals 18 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

McLeod & Harrop, by Donald E. Harrop, Jr., for defendant-appellant.

EAGLES, Chief Judge.

Defendant Samontanie Germier Butts was convicted by a jury of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. He was sentenced to consecutive terms of 103-133 and 34-50 months imprisonment, respectively. Defendant appeals.

Counsel appointed to represent defendant has filed an *Anders* brief indicating that he is unable to identify an issue with sufficient merit to support a meaningful argument for relief on

appeal. Consequently, defense counsel asks this Court to conduct its own review of the record for possible prejudicial error. Counsel has filed documentation with this Court showing that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with this Court and providing him with the documents necessary for him to do so.

In response, defendant filed two papers with this Court in which he raised some six *pro se* arguments. In his first filing, defendant presented the following arguments: (1) the conspiracy indictment was fatally defective and should have been dismissed because it was not signed by the grand jury foreman; (2) the trial court erred in denying his *pro se* motion to suppress the money that the police seized from his pants pockets after the robbery; (3) the trial court erred in admitting the hearsay testimonies of certain State's witnesses; and (4) he received ineffective assistance of counsel. In his second filing, defendant raised the following additional arguments: (1) the trial court erred in sentencing him in the aggravated range; and (2) there was insufficient evidence to prove that a conspiracy to commit a robbery existed.

As to defendant's first argument regarding the grand jury foreman's failure to sign the conspiracy indictment, G.S. § 15A-644(a)(5) provides that the grand jury foreman must sign an indictment to attest to the concurrence of twelve or more grand

jurors in the finding of a true bill of indictment. However, our Supreme Court has held that § 15A-644(a)(5) is merely directory. *See State v. House*, 295 N.C. 189, 244 S.E.2d 654 (1978). Here, substance is "paramount over form." *State v. Midyette*, 45 N.C. App. 87, 89, 262 S.E.2d 353, 354 (1980). Thus, a grand jury foreman's failure to sign a bill of indictment is a "clerical error" and "does not affect the substance of the bill." *State v. Colvin*, 92 N.C. App. 152, 156, 374 S.E.2d 126, 130 (1988). Accordingly, the absence of a grand jury foreman's signature on an indictment does not render the indictment fatally defective. *See State v. Parker,* 119 N.C. App. 328, 337, 459 S.E.2d 9, 14 (1995) (noting that the signature of a grand jury foreman pursuant to statute is merely directory and does not invalidate an indictment); *State v. Gary*, 78 N.C. App. 29, 33, 337 S.E.2d 70, 73 (1985) (absence of a grand jury foreman's signature does not render an otherwise valid indictment fatally defective); *State v. Avant*, 202 N.C. 680, 683, 163 S.E. 806, 807 (1932) (no error in failure of grand jury foreman to endorse a bill of indictment).

Generally, the record that the indictment was presented by the grand jury is sufficient in the absence of evidence to impeach it. *State v. Sultan*, 142 N.C. 569, 573, 54 S.E. 841, 842 (1906). Here, the record does not reveal any challenge to the indictment by defendant during his trial. In fact, it was the trial court that raised *ex mero motu* the issue of the unsigned indictment. Upon the court's inquiry, the Clerk of Court reviewed the grand jury minutes from the 12 June 2000 session. This review revealed that the grand

jury returned 162 true bills, and only one "not true bill[]." Additionally, the evidence tended to show that although the grand jury foreman had not signed the conspiracy indictment, the indictment was signed by the prosecutor, had the name of the witness listed, was denominated as a true bill, and was dated 12 June 2000. Significantly, the robbery with a dangerous weapon indictment, which was signed by the grand jury foreman, was returned on the same date, listed the same witness, and was signed by the same prosecutor as the conspiracy indictment.

In light of these facts, we conclude that the foreman in this case inadvertently failed to sign defendant's conspiracy indictment. This "clerical error" in no way affected the substance of the bill, defendant failed to impeach the validity of the bill, and therefore, this argument fails.

Defendant's second argument that the trial court erred in denying his *pro se* motion to suppress the money seized from his pockets also fails. Because defendant was represented by counsel prior to and at trial, he was not entitled to proceed on his *pro se* motion. *See State v. Williams*, 319 N.C. 73, 75, 352 S.E.2d 428, 430 (1987) (stating that a defendant may appear through counsel or *in propria persona*, but not both).

Nevertheless, the trial court allowed defendant to proceed with his motion. In so doing, the trial court heard extensive testimony on *voir dire* related to defendant's *pro se* motion to suppress; the court made findings of fact; and the court reached conclusions of law before denying the motion. Aside from his own

self-serving theory that he was "set up" by the police, defendant provided neither evidence nor law to support this argument. After a careful review of the record, we conclude that the trial court's findings are supported by the evidence; those findings support the court's conclusions; and in light of existing law, those conclusions are proper. Hence, the trial court did not err in denying defendant's *pro se* motion to suppress.

Defendant next challenges the testimony of the State's witnesses Frances Marino, April Dehart, Laura Norris, and Lee Francisco, as being inadmissible hearsay. Hearsay is defined as "a statement, *other than one made by the declarant while testifying at the trial or hearing*, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c) (emphasis added). Having thoroughly reviewed the testimony of each of these witnesses, we conclude that none of the subject testimony contains inadmissible hearsay. Furthermore, to the extent that defendant alleges that the contradictions or discrepancies in the witnesses' testimony bars its admission, this argument likewise fails. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) ("[c]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal").

Defendant's next argument is that he received ineffective assistance of counsel. We conclude that defendant has failed to make the requisite showing for an ineffective assistance of counsel claim under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S.

1267, 82 L. Ed. 2d 864 (1984), and adopted by this state in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). Accordingly, defendant's ineffective assistance of counsel argument fails.

Finally, we reject defendant's two arguments raised in his second filing as being wholly without merit. First, defendant was not sentenced within the aggravated range. For both convictions, defendant was sentenced "within the presumptive range of sentences under G.S. 15A-1340.17(c)." Second, the record provides plenary evidence to support defendant's conviction for conspiracy to commit a robbery with a dangerous weapon.

In sum, after examination of defendant's *pro se* arguments, we are unpersuaded. Having fully examined the record and transcript for possible prejudicial error, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).