NO. COA02-1395

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STATE OF NORTH CAROLINA

v. Martin County
No. 00 CRS 2932

GENE ARCHER DICKENS, JR.,

Defendant.

Appeal by defendant from judgment entered 16 April 2002 by Judge W. Russell Duke, Jr. in Martin County Superior Court. Heard in the Court of Appeals 11 June 2003.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen for the defendant-appellant.

ELMORE, Judge.

Gene Archer Dickens, Jr. (defendant) attacked the victim, a woman with whom he'd had a relationship, by beating her and shooting her in the leg. He attempted to shoot her a second time but the gun jammed. The defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury, and found guilty in a jury trial. The trial court sentenced him as a prior record level V within the presumptive range to 151-191 months active time. Defendant appeals.

I.

Defendant first assigns error to the trial court's assignment of a prior record level (PRL) of V, and sentence of 151-191 months active, on grounds of insufficient evidence.

The standard of review "[w]hen a defendant assigns error to the sentence imposed by the trial court . . . is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.'" *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)). The only evidence given was the State's evidence and the defendant's stipulation. That evidence supported the trial court's sentence.

Section 15A-1340.14(f) of our General Statutes governs the criteria for determining prior offenses for the PRL. That section states:

> (f) Proof of Prior Convictions. — A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.
>
> The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. . . .The prosecutor shall make all feasible efforts to obtain and present to the court the offender's

> full record. Evidence presented by either party at trial may be utilized to prove prior convictions. ...If asked by the defendant in compliance with G.S. 15A-903, the prosecutor shall furnish the defendant's prior criminal record to the defendant within a reasonable time sufficient to allow the defendant to determine if the record available to the prosecutor is accurate. . . .

N.C. Gen. Stat. § 15A-1340.14(f) (2003).

We note at the outset that the defendant's counsel, after conferring with the defendant, did not object to the PRL worksheet at the sentencing hearing. The following exchange occurred between the trial court and defendant's counsel at the sentencing hearing:

> THE COURT: Ms. Edwards, have you been over the Work Sheet and prior record with the defendant?
> MS. EDWARDS: Yes, sir, Your Honor.
> THE COURT: And do you find that in order?
> MS. EDWARDS: I conferred with my client, reviewd [sic] the back side, the record presented by the district attorney, and no objections were indicated to me.

Defendant argues on appeal that this did not constitute a stipulation of the prior record. However, such a statement is sufficiently definite and certain to constitute a stipulation. *See State v. Mullican,* 95 N.C. App. 27, 381 S.E.2d 847 (1989). This is unlike cases where counsel remained silent and did not stipulate. *State v. Bartley*, 156 N.C. App. 490, 501-02, 577 S.E.2d 319, 326 (2003); *State v. Riley*, ___ N.C. App. ___, ___, 583 S.E.2d 379, 387 (2003). On the facts before us, defendant's counsel represented to the trial court that he had reviewed the worksheet with his client in its entirety and that there were no objections. This

constitutes a stipulation. A stipulation is sufficient proof of a prior conviction under the statute.

With the stipulation before the trial court, the State had no reason to offer more evidence to support the convictions. Although the burden of proving the convictions rests with the State, when the defense counsel does not object, the record remains undeveloped. The State in this case stipulated in the record on appeal that there is "no physical record, evidence, docket sheet, or criminal file" establishing the convictions. That is so because the convictions were proven by stipulation.

A."Record check"

The first error defendant argues is the trial court's reliance on a "record check." The trial court may decide to rely on this evidence. Some evidence, more than an unverified assertion that a defendant was convicted of the prior crimes listed on the PRL worksheet, is needed for the State to have met its burden. A prior offense record or a stipulation by the defendant would satisfy the statute. *See, e.g., State v. Rich*, 130 N.C. App. 113, 116, 502 S.E.2d 49, 51 (computerized printout containing record of defendant's criminal history as maintained by the Division of Criminal Information sufficiently reliable to prove defendant's prior convictions), *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998); *State v. Ellis*, 130 N.C. App. 596, 598, 504 S.E.2d 787, 789 (1998) (certified computer printout from Administrative Office of the Courts sufficiently reliable to prove defendant's prior conviction), *cert. denied,* 352 N.C. 151, 544 S.E.2d 231 (2000). A

record check of the type used here, even if not of the official kinds enumerated in the statute, may be sufficient if the trial court deems it reliable under N.C. Gen. Stat. § 15A-1340.14(f)(4). In addition, because the record was bolstered by the defendant's stipulation, sufficient evidence existed to prove the prior convictions.

B. H convictions

Defendant next argues that there is insufficient evidence of two convictions labeled as H felonies on the PRL worksheet. The State stipulates in the record on appeal that there is no evidence that these convictions occurred. The worksheet is blank as to the file number of these two convictions. However, this worksheet was before the defendant and his counsel, and counsel stipulated to the trial court that the information was correct. That is enough to satisfy the statute's requirement of proof. We discern no error.

C. Offense committed while on parole, etc.

Defendant also contends that an extra point was assessed in error for the offense being committed while the defendant was on probation. However, even if this was error, it was harmless. Defendant was assigned sixteen points for a prior record level of V, which includes those with fifteen to eighteen points. With one less point, defendant would remain at level V. Because this is harmless error, we do not consider this argument.

II.

Defendant next assigns error to the trial court's determination of restitution on grounds of insufficient evidence

and that defendant's income is exempt because it is social security disability.

We note that the defendant cannot argue insufficient evidence when there was no objection at trial, and no other way for the court to be alerted to defendant's position that the determination was wrong. *See State v. Canady,* 330 N.C. 398, 410 S.E.2d 875 (1991) (court allowed argument on appeal that aggravating factor was in error even without objection when defendant had argued for the minimum sentence, thus alerting the judge that he didn't want the aggravating factor). Although federal law prohibits the garnishment of social security income under 42 U.S.C. § 407, there was no showing that the trial court garnished defendant's social security disability payments. We find no error in the determination of restitution.

III.

Defendant next assigns error to the jury instructions on reasonable doubt and direct and circumstantial evidence. We review this assignment under a plain error standard since defendant did not object at trial.

The instructions were as follows:

> A reasonable doubt is not a mere possible doubt. For most things that relate to human affairs are open to some possible or imaginary doubt. But rather a reasonable doubt is a fair doubt based on reason and common sense and growing out of some of the evidence or lack of evidence in the case.

This is the exact language which this court has upheld in *State v. Hunt*, 339 N.C. 622, 643, 457 S.E.2d 276, 288 (1994). The

defendant acknowledges this on appeal but argues that the combination of errors in the charge conference constitute prejudicial error nonetheless. We discern no such error.

The defendant argues that the trial court also erred in the instruction on direct and circumstantial evidence. The trial court instructed the jury as follows:

> There are two types of evidence from which you may find the truth as to the facts of a case - direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain or group of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case.

This follows the pattern jury instruction, but fails to include the last sentence, which admonishes the jury that "after weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty." The defendant argues that the omission of that sentence combined with the instruction from *Hunt* above did not adequately inform the jury that they must find guilt beyond a reasonable doubt.

In the rest of the jury charge, the trial court explained each element of the charge and what facts would satisfy the individual elements. At the end of the explanation of each element, the trial court charged the jury that if they found the relevant facts it would be their duty to return a verdict of "guilty", but "if you do

not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of 'not guilty.'" After being so charged, the jury retired to deliberate. The transcript shows that they returned four minutes after receiving the verdict sheet with a unanimous verdict of "guilty."

We determine that the trial court adequately charged the jury concerning reasonable doubt.

IV.

The defendant lastly assigns error to the trial court's ruling to admit evidence of a threatening telephone call to the victim when she was in the hospital.

In the absence of a contemporaneous objection, we review for plain error. *State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003). Because defendant has not asserted plain error, this review is waived. *See id.* However, even assuming *arguendo* that defendant properly preserved plain error review and that the trial court committed some error in admitting the testimony, we do not discern that the alleged error arises to the level of plain error. *See id*. The testimony was not unduly prejudicial to the defendant.

Assignments of error number 3-4, 7-8, and 11-12 were not argued in respondent's brief and are therefore deemed waived under the North Carolina Rules of Appellate Procedure, Rule 28(a).

No error.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).