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NO. COA02-393

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v.

Lenoir County
Nos. 00 CRS 50957, 00 CRS 9560

GREGORY ALLEN GANT

Appeal by defendant from judgments entered 1 August 2001 by Judge W. Allen Cobb, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 13 November 2002.

Attorney General Roy Cooper, by Assistant Attorney General Clinton C. Hicks, for the State.

Everett & Hite, L.L.P., by Kimberly A. Swank, for defendant-appellant.

EAGLES, Chief Judge.

Gregory Allen Gant ("defendant") appeals his conviction of three counts of robbery with a dangerous weapon and three counts of being an habitual felon.

The evidence tends to show the following. On 10 August 2000, Denire Hodges drove defendant and defendant's nephew Terrell Gant to buy marijuana at a house owned by Robert Gray in Kinston. Hodges, Terrell Gant and defendant were all armed with handguns. Hodges and Terrell Gant went inside Gray's house immediately. Gray, Scotty Moore and Dustin Moore ("Dusty") were already inside

Gray's house. Scotty and Dusty Moore were identical twin brothers. Defendant entered the house approximately ten minutes later.

Defendant testified that he went to Gray's house to buy marijuana. After discussion regarding the amount of drugs Gray had in the house, defendant decided that Gray did not have the amount of marijuana that he wanted to buy. Defendant testified that Terrell Gant decided to keep the marijuana offered by Gray. Terrell Gant did not pay Gray for the baggie of marijuana he took. Defendant stated that when Terrell Gant left the house, Gray, Dusty, and Scotty reached for nearby rifles. Defendant testified that he grabbed a .22 rifle from the counter and backed out the door in order to protect himself.

Hodges testified that defendant pulled out a gun almost immediately after entering Gray's house. Defendant forced either Scotty or Dusty Moore to kneel and took a chain necklace off that man's neck. Hodges did not know which of the twins had the necklace taken by defendant. Hodges testified that defendant took a ring from Scotty, then took Gray's wallet and a rifle.

Gray testified that after Hodges, Terrell, and defendant entered his house, Hodges began hitting him in the head with a gun. Meanwhile, defendant was holding Dusty and Terrell was threatening Scotty. Hodges demanded Gray's money. Someone's gun discharged, but no one was injured.

Dusty Moore testified that after defendant entered Gray's house, Terrell Gant put a gun to the back of Dusty Moore's neck. Defendant was behind Scotty Moore and Hodges was behind Gray.

Terrell Gant began to "walk [Dusty] back around" the kitchen table. Dusty Moore testified that one of the guns discharged and that defendant took two necklaces from Dusty's neck.

Scotty Moore testified that defendant pulled out a gun after defendant came into the house. Defendant told Scotty and Dusty Moore and Hodges to "get on the ground." Then defendant took two necklaces and a ring from Scotty Moore.

The police were called to Gray's house shortly after the incident. Police located Terrell Gant and Hodges at a nearby house and arrested defendant later that night. A bag of marijuana and a ring belonging to Dusty Moore were found outside the house where Terrell Gant and Hodges were arrested. The police found a .22 rifle in defendant's home that matched the description given by Gray of the stolen rifle.

Defendant was charged with three counts of robbery with a dangerous weapon and three counts of being an habitual felon. Upon his conviction on these charges, defendant was sentenced to two consecutive terms of 116 to 149 months of imprisonment. Defendant appeals.

I.

Defendant argues that the trial court erred by failing to dismiss the robbery charges. Defendant contends that a fatal variance existed between the indictment and the evidence presented at trial. We disagree.

On a motion to dismiss, the trial court must "consider the evidence in the light most favorable to the State," and "the State

is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982). A trial court must "determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998), *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 548 (2001).

A defendant may challenge an indictment on appeal that is insufficient to support defendant's conviction, even if defendant failed to challenge the indictment on this basis at trial. *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419, *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998). "A variance occurs where the allegations in an indictment . . . do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002).

The essential elements of the offense of robbery with a dangerous weapon are:

- (1) the unlawful taking or attempted taking of personal property from another,
- (2) the possession, use, or threatened use of firearms or other dangerous weapon, implement or means,
- and (3) danger or threat to the life of the victim.

State v. Donnell, 117 N.C. App. 184, 188, 450 S.E.2d 533, 536 (1994); see G.S. § 14-87 (2001). Here, the indictment alleges that defendant took personal property from Gray, namely, his wallet, a .22 rifle, money and credit cards. The indictment further alleges that defendant also stole two necklaces, two rings and a watch from Dusty Moore, as well as necklaces and rings from Scotty Moore. The

indictment states that defendant committed these acts while possessing a firearm and threatening the lives of Gray, Dusty Moore and Scotty Moore.

The testimony at trial tended to show that defendant entered Gray's house armed with a handgun. Hodges testified that defendant took Gray's rifle and wallet. Gray testified that his wallet contained credit cards and cash. Dusty Moore testified that defendant took two chains from his neck and a ring. Scotty Moore offered testimony that defendant took his two necklaces and his rings, after pointing a gun at Scotty's head. Viewing the evidence in the light most favorable to the State, we hold that the allegations in the indictment conform to the evidence presented at trial.

We reject defendant's contention that the absence of an additional allegation in the indictment that defendant stole marijuana produces a fatal variance. The evidence regarding the marijuana merely established the reason for defendant's presence at Gray's home. The State's evidence does not indicate that the allegedly stolen marijuana formed the basis of defendant's robbery convictions. As a result, the evidence presented at trial corresponds with the allegations in the indictment that were essential to prove defendant committed robbery with a dangerous weapon. Accordingly, this assignment of error is overruled.

Defendant further assigns error to the trial court's refusal to submit a charge of common law robbery and larceny to the jury. We disagree.

Common law robbery and larceny are lesser-included offenses of the crime of robbery with a dangerous weapon. "The trial court is required to submit a lesser included offense to the jury only when there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Donnell*, 117 N.C. App. 184, 188-89, 450 S.E.2d 533, 536 (1994). Defendant admits that he possessed a firearm during the incident on 10 August 2000, specifically when defendant was on his way out of the house with a gun that did not belong to him. Several other witnesses testified that defendant had a handgun before he entered the home and throughout the incident. The trial court was not required to submit a charge to the jury on the lesser included offenses of robbery with a dangerous weapon because the defendant's use of a firearm during the exchange was not disputed. Only the timing of defendant's firearm possession was in dispute at trial. We hold that the trial court correctly instructed the jury and overrule this assignment of error.

III.

Defendant next argues that the trial court erred in sentencing him as an habitual felon. We disagree.

Defendant did not raise this issue at trial. However, we may review this assignment for plain error pursuant to Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure. See N.C.R. App. 10

(c) (4) (2000). ("In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.") Plain error is error so fundamental that it amounts to a miscarriage of justice or an error that probably resulted in the jury reaching a different verdict than it otherwise would have reached. See *State v. Reilly*, 71 N.C. App. 1, 9, 321 S.E.2d 564, 569 (1984), *aff'd per curiam*, 313 N.C. 499, 329 S.E.2d 381 (1985).

Here, defendant failed to state within the assignment of error relied upon in his argument that the trial court's judgment regarding his habitual felon status was plain error. Because he did not "specifically and distinctly" denominate the trial court's action as plain error as required by N.C.R. App. Pro. 10(c) (4), defendant has failed to take steps necessary to preserve this Court's review of that assignment of error. In our discretion, we elect to consider the issue.

In order for defendant to be convicted as an habitual felon, the State must prove that defendant had been convicted of three prior felonies. See G.S. § 14-7.1 (2001). ("Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon.") From the record on appeal, we observe that the State introduced evidence of defendant's three prior felony convictions: a conviction for

possession of stolen goods on 3 March 1998, a conviction for possession of cocaine on 14 February 1994, and a conviction for common law robbery 14 January 1991. Since the State showed that defendant had three prior felony convictions as required under the Habitual Felon Act, we find no error in defendant's conviction. We hold that defendant has failed to demonstrate that the trial court committed plain error in convicting him as an habitual felon. Accordingly, this assignment of error is overruled.

IV.

Defendant next contends that the trial court erred in sentencing him under the Structured Sentencing Act as having a prior record level III. Defendant argues that the trial court improperly found that he had eight prior record points. Defendant contends there was insufficient evidence to enhance his sentence because the State failed to prove his prior convictions as required by G.S. § 15A-1340.14(f) (2001). We agree.

The relevant portion of the Structured Sentencing Act provides that:

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.

G.S. § 15A-1340.14(f) (2001). The State bears the burden of proof to show that a prior conviction exists. *Id.* The State must also prove that the defendant in each case is the same person named in

the prior conviction. *Id.* Originals or copies of court records constitute *prima facie* evidence of a prior conviction. G.S. § 15A-1340.14(f).

Here, defendant correctly states that neither party stipulated to the alleged prior convictions for forgery and uttering. However, defendant admitted that he was convicted of two counts of forgery and two counts of uttering in January 2001. The trial court is prohibited from using prior convictions relied upon in establishing habitual felon status to determine defendant's prior record level. See G.S. § 14-7.6 (2001); see also *State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996). The trial court convicted defendant as an habitual felon based upon his convictions for possession of stolen goods in 1998, for felony possession of cocaine in 1994, and common law robbery in 1991. The trial court improperly used the same three felonies to calculate defendant's prior record level under the Structured Sentencing Act. Accordingly, we vacate the judgment and remand the cause for re-sentencing.

V.

Finally, defendant argues that the use of the Habitual Felons Act in combination with the Structured Sentencing Act violates double jeopardy by twice enhancing his sentence. We disagree.

These statutes are structured to guarantee defendants that "prior convictions will not be used to simultaneously enhance punishment" under both Acts. See *State v. Brown*, 146 N.C. App. 299, 301, 552 S.E.2d 234, 235, *disc. rev. denied*, 354 N.C. 576, 559

S.E.2d 186 (2001), *cert. denied*, __ U.S. ___, 152 L. Ed. 2d 1061 (2002). G.S. § 14-7.6 "specifically prohibits the State from using those prior 'convictions used to establish a person's status as an habitual felon' to determine a defendant's prior record level for structured sentencing." *Brown*, 146 N.C. App. at 301, 552 S.E.2d at 235 (quoting *Bethea*, 122 N.C. App. at 626, 471 S.E.2d at 432); see also G.S. § 14-7.6 (2001). In addition, the North Carolina Supreme Court has declared that the Habitual Felons Act conforms with the "constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection and privileges and immunities." *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985).

While we hold that the trial court properly determined defendant's status as an habitual felon, the trial court incorrectly calculated his prior record level for structured sentencing purposes. However, neither structured sentencing nor the Habitual Felons Act was used to punish defendant for his prior convictions. Instead, the provisions of each law were used to enhance defendant's punishment for his current offense. Therefore, we hold that the Habitual Felons Act as used in conjunction with the Structured Sentencing Act in this case did not violate defendant's double jeopardy protections. Accordingly, we find defendant's enhanced sentence under the Habitual Felons Act appropriate. However, we remand this case for re-sentencing under the Structured Sentencing Act.

No error in part; remanded for re-sentencing.

-11-

Judges MCGEE and HUDSON concur.

Report per Rule 30(e).