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NO. COA03-1674

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA

v.

GERALD ERNEST MANNING

Forsyth County

No. 02CRS26859

No. 02CRS58703

No. 02CRS58759

Appeal by defendant from judgments entered 27 March 2003 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 12 October 2004.

*Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for the State.*

*Eric A. Bach for defendant-appellant.*

THORNBURG, Judge.

Gerald E. Manning ("defendant") was arrested on 2 August 2002 for possession of a stolen vehicle and possession of stolen goods. Defendant was held overnight at the Forsyth County Law Enforcement Detention Center. At trial, Sergeant R.E. Slater of the Forsyth County Sheriff's Office testified that on the morning of 3 August 2002 he conducted a search of defendant and found a four inch cylinder in defendant's jumpsuit. Dr. Shirley Brinkley, an expert in the field of forensic toxicology, testified that residue within the cylinder contained cocaine. On 27 March 2003, a jury found

defendant guilty of possession of a controlled substance in a local confinement facility, possession of drug paraphernalia, and of being an habitual felon. Defendant pled guilty to possession of a stolen vehicle and possession of stolen goods.

On appeal, defendant argues that the trial court erred by 1) entering judgment pursuant to the superseding habitual felon indictment, 2) admitting evidence of defendant's previous drug conviction, 3) sentencing defendant using six criminal history points, and 4) failing to instruct the jury on the lesser included offense of possession of cocaine. For the reasons stated herein, we find no prejudicial error.

Defendant first argues that the trial court erred by entering judgment pursuant to the superseding habitual felony indictment because this indictment made substantive changes to the original indictment and defendant received no notice of the superseding indictment until midway through the habitual felon trial.

The initial habitual felon indictment was returned on 7 October 2002 and given the file number 02 CRS 27809. On 21 October 2002 the grand jury returned a superseding habitual felon indictment, also labeled 02 CRS 27809. The difference between the initial and the superseding indictments was that the second underlying felony was changed from breaking and entering a motor vehicle to possession of a stolen auto. Finally, another indictment numbered 02 CRS 26859 was returned as a true bill on 27 January 2003. This final indictment, the "ancillary indictment," was identical to the superseding indictment except that the date of

the underlying offense was changed from 2 August 2002 to 3 August 2002.

A review of the transcript indicates that judgment was entered pursuant to the ancillary indictment, rather than to the superseding indictment, and that defendant's objection was to lack of notice of the ancillary indictment. Notice of the ancillary indictment was not required to be served on defendant because he was represented by counsel when the bill of indictment was returned by the grand jury. N.C. Gen. Stat. § 15A-630 (2003); see *State v. Carson*, 320 N.C. 328, 334, 357 S.E.2d 662, 666 (1987) ("There was no requirement that [the] defendants be served with copies of the superseding indictments . . . since it is clear from the record . . . that the defendants were represented by counsel at the time those indictments were returned by the grand jury."). As there was no requirement to serve the indictment, the trial court was required to arraign defendant pursuant to the indictment only upon written request of defendant pursuant to N.C. Gen. Stat. § 15A-941(d) (2003). The record does not reflect that defendant made this request. Thus, we conclude that defendant has pointed to no prejudicial error in the trial court's entering judgment based on the ancillary habitual felon indictment. This assignment of error is overruled.

Defendant's next argument is that the trial court abused its discretion by admitting evidence pertaining to defendant's previous drug conviction in violation of Rules 403 and 404(b) of the North

Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 404(b) provides in part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). Rule 404(b) is a rule of inclusion of relevant evidence of prior bad acts unless the only reason the evidence is offered is to show the defendant's propensity to commit a crime of the nature of the act charged. *State v. Barnett*, 141 N.C. App. 378, 389, 540 S.E.2d 423, 430-31 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 527, 549 S.E.2d 552 (2001), *aff'd per curiam*, 354 N.C. 350, 554 S.E.2d 644 (2001) (citation omitted).

The evidence to which defendant objected tended to show that approximately one month before his arrest for the conduct underlying the instant charges, defendant was found in possession of cocaine and three crack pipes. A review of the record indicates that this evidence was offered to show defendant's knowledge of cocaine and drug paraphernalia. Thus, the trial court did not err by concluding that this evidence could be admitted for a proper purpose within Rule 404(b).

Nor do we find merit in defendant's contention that the admission of this testimony was prejudicial error under *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5 (Wynn, J., dissenting), *dissent adopted per curiam*, 356 N.C. 418, 571 S.E.2d 583 (2002).

The *Wilkerson* dissent emphasized that the admission under Rule 404(b) of the bare fact of a defendant's prior conviction where the defendant does not testify is prejudicial, reversible error. *Id.* at 328-29, 559 S.E.2d at 16-17. In the case at bar, the objections made at trial and brought forward on appeal were in reference to evidence underlying defendant's prior arrest for possession of drugs and drug paraphernalia, not to testimony concerning the bare fact of defendant's prior conviction. Indeed there is no reference to defendant's conviction on these charges in the testimony at issue; nor does defendant argue that his actual conviction on these charges was entered into evidence. Therefore, we do not find any violation of *Wilkerson*. This argument fails.

We likewise find no merit in defendant's argument that this evidence should have been excluded as more prejudicial than probative under Rule 403. See *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991) (ultimate test of admissibility is whether the prior incident is sufficiently similar and not too remote in time). Accordingly, we conclude that the trial court did not abuse its discretion in admitting the evidence at issue. This assignment of error is overruled.

Defendant next contends that the trial court erred in calculating defendant's prior criminal history points for sentencing. However, defendant stipulated three separate times during the sentencing hearing that he would be sentenced at prior history level IV. Moreover, defendant's argument that an offense cannot be used for sentencing level purposes if a separate, but

factually related offense, was used for habitual felon status purposes is not supported by our case law. See *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996) (holding that "nothing in [the relevant] statutes . . . prohibit[s] the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another separate conviction obtained the same week to determine prior record level"). This assignment of error fails.

Defendant's final argument is that the trial court erred by failing to submit the lesser included offense of simple possession of cocaine to the jury as a possible verdict. "A trial judge is required to instruct upon a lesser included offense, even absent a special request therefor, if there is some evidence in the record which supports the less serious criminal charge." *State v. Oxendine*, 305 N.C. 126, 131, 286 S.E.2d 546, 549 (1982). In the case at bar, defendant argues that because he was searched coming back from the visitation area in the detention center, that the jury could have questioned whether the visitation area was still part of the detention center. However, the evidence at trial established that the visitation area is part of the detention center. This argument is without merit.

No error.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).