NO. COA05-1357

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v.

JOSEPH LEE FORD

Wayne County
Nos. 03 CRS 60511,
04 CRS 50435,
04 CRS 1035,
04 CRS 3959

Appeal by defendant from judgments entered 26 January 2005 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 19 June 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, for the State.

Nora Henry Hargrove for defendant appellant.

McCULLOUGH, Judge.

Defendant Joseph Lee Ford was charged with two counts of obtaining property by false pretense, forgery of an instrument and uttering a forged instrument. By a separate bill of indictment, defendant was charged with attaining habitual felon status. The State's evidence tended to show that on 21 November 2003, defendant called Frema Motors and negotiated the purchase of a 2000 Oldsmobile Alera for approximately $8,000. Upon arriving at the dealership the next morning, defendant presented the Finance Manager of Frema Motors with a check in the amount of $8,215.

The check was payable to "Joseph L. Ford" and appeared to be drawn on the First Citizens Bank account of Carolina Finance Company, 2178 South Tarboro, Wilson, North Carolina. Defendant told the finance manager that Carolina Finance Company had made defendant a personal loan to pay for the vehicle. Defendant endorsed the check and handed it to the finance manager as payment for the Oldsmobile. After defendant was issued a temporary tag, he left the lot with the Oldsmobile.

On 26 November 2003, BB&T Bank notified Frema Motors that the $8,215 check it had deposited was counterfeit and was being returned. The finance manager subsequently called Directory Assistance and was told there was no Carolina Finance Company in Wilson. The finance manager also called Carolina Finance, Incorporated in Kinston and was informed "there was no company like that in Wilson." Frema Motors contacted the Goldsboro Police regarding defendant's counterfeit check.

Officer Patrick Carcieri went to defendant's residence, observed the Oldsmobile with its temporary tag and arrested defendant for obtaining property by false pretense. After being informed of his *Miranda* rights, defendant made a written statement that the check was given to him through the finance company and that he did not know the check was worthless. Upon further questioning, defendant informed Officer Carcieri that the Carolina Finance Company was located in Wilson on Kent Drive. Over defendant's general objection, Officer Carcieri testified at trial that the Wilson County Communications Center informed him that

"they [] do not have a Carolina Finance in Wilson." Detective Jackie Boykin testified that there are no businesses located on Kent Drive in Wilson and that there is no business at 2178 South Tarboro Street in Wilson.

After his arrest, defendant arranged a $5,000 bond with Universal Bail Bonding for his release. To pay for his $750 bonding fee, defendant told the bondsman that he had an insurance check at home for $710 and that defendant would pay the $40 difference later. Defendant's wife brought the check to the jail for defendant to endorse. The check, made payable to defendant, appeared to be drawn on a GMAC Insurance Company account at First Citizens Bank. The $710 check was later returned to the bonding company as counterfeit. Upon further investigation, it was determined that the account number printed at the bottom of the checks defendant gave to Universal Bail Bonding and Frema Motors was the account number for the Johnston County Sheriff's Department Inmate Trust Account.

A Wayne County jury convicted defendant of both counts of obtaining property by false pretenses, forgery of an instrument, and uttering a forged instrument. Defendant subsequently stipulated to his habitual felon status. The trial court sentenced defendant to three consecutive terms of 116 to 149 months' imprisonment. Defendant appeals.

Defendant first contends the trial court violated his constitutional right to confrontation by allowing Officer Carcieri to testify that when he asked the Wilson County Communications

Center about the whereabouts of the Carolina Finance Company, the Communications Center informed the officer that "we do not have a Carolina Finance in Wilson."

Defendant argues that the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), prohibits the admission of the statement from the Communications Center because defendant did not have an opportunity to cross-examine the declarant. In *Crawford*, the Court held that for testimonial evidence to be admitted against a defendant, the Confrontation Clause of the Sixth Amendment to the United States Constitution requires witness unavailability and a prior opportunity for cross-examination by the defendant. *Id.* "In considering whether a violation of a defendant's constitutional right constituted prejudicial error, [we] must determine whether the error was harmless beyond a reasonable doubt." *State v. Jolly,* 332 N.C. 351, 360-61, 420 S.E.2d 661, 667 (1992). Defendant, however, did not properly preserve this issue for appellate review.

Our appellate courts will only review constitutional questions raised and passed upon at trial. N.C. R. App. P. 10(b)(1) (2006); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Here, defendant only made a general objection to the admission of Officer Carcieri's testimony and did not object on constitutional grounds. Where a defendant fails to properly object at trial, he is limited to arguing plain error on appeal. N.C. R. App. P. 10(c)(4). Here, defendant has not asserted plain error, and has thus waived plain error review. *State v. Dennison*, 359 N.C. 312, 608 S.E.2d 756

(2005). Accordingly, defendant's constitutional argument is not properly before us.

Even if defendant properly preserved this argument, we conclude that the error, if any, in the admission of Officer Carcieri's statement was harmless beyond a reasonable doubt since the same information was introduced through the finance manager of Frema Motors and Detective Jackie Boykin. Detective Boykin testified that Kent Drive is a two-block residential apartment area, that "[t]here are no businesses in that area whatsoever[,]" and that no business exists at 2178 South Tarboro. The finance manager at Frema Motors testified that his research showed that no Carolina Finance Company existed in Wilson. Defendant does not challenge the admission of any of this testimony, thereby waiving appellate review of their admissibility. *See* N.C.R. App. P. 10(a) ("[R]eview on appeal is confined to . . . consideration of . . . assignments of error set out by the record on appeal . . . ." N.C.R. App. P. 28(b)(6) (2006) (Assignments of error not set out in the appellant's brief . . . will be taken as abandoned."). Where the same evidence is properly admitted through other testimony, any error in admission of a given statement is harmless beyond a reasonable doubt. *State v. Wiggins*, 159 N.C. App. 252, 259, 584 S.E.2d 303, 310 (2003), *cert. denied*, 541 U.S. 910, 158 L. Ed. 2d 256, *reh'g denied*, 541 U.S. 1038, 158 L. Ed. 2d 726 (2004). We conclude that "even if the evidence were improperly admitted, there was other evidence to the same effect . . . corroborating this testimony . . . and thus the error, if any, was harmless beyond a

reasonable doubt." *State v. Roper*, 328 N.C. 337, 360, 402 S.E.2d 600, 613 (1991). This assignment of error is overruled.

Defendant next contends the trial court erred by sentencing him as an habitual felon because this issue was not submitted to the jury and the record does not show that defendant pled guilty to the status of being an habitual felon. Defendant asserts that his stipulation to being an habitual felon was insufficient to establish that he understood the consequences of his admission. We agree.

To convict a defendant as an habitual felon, a defendant must be found guilty after submission of the issue to the jury or the defendant must enter a plea of guilty. *See* N.C. Gen. Stat. § 14-7.5 (2005); *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 699 (2001). A stipulation by a defendant as to his status as an habitual felon, "in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea." *Gilmore*, 142 N.C. App. at 471, 542 S.E.2d at 699; *see also State v. Edwards*, 150 N.C. App. 544, 550, 563 S.E.2d 288, 291-92 (2002) (reversing an habitual felon conviction because the trial court did not establish a record that defendant's admission was a guilty plea). This Court has held that a trial court must meet the requirements outlined in N.C. Gen. Stat. § 15A-1022(a) (2005) before accepting a defendant's guilty plea as an habitual felon. *See State v. Bailey*, 157 N.C. App. 80, 88-89, 577 S.E.2d 683, 689 (2003).

In the present case, the record shows that defendant

stipulated to his status as an habitual felon, but the trial court did not make the inquiries required by N.C. Gen. Stat. § 15A-1022(a). We are therefore bound by *Gilmore* and *Bailey* to reverse defendant's conviction of being an habitual felon and remand this case for a new habitual felon hearing. *Id.*; *Gilmore*, 142 N.C. App. at 471, 542 S.E.2d at 699.

In defendant's remaining two arguments, he contends the trial court erred in sentencing him as an habitual felon because it subjects him to double jeopardy and constitutes cruel and unusual punishment.

Defendant concedes that this Court has previously rejected these identical constitutional challenges and admits he raises these issues for preservation purposes only. *See State v. Brown*, 146 N.C. App. 299, 302, 552 S.E.2d 234, 236 (2001) (holding the "Habitual Felons Act used in conjunction with structured sentencing [does] not violate . . . double jeopardy protections"), *disc. review denied*, 354 N.C. 576, 559 S.E.2d 186, *cert. denied*, 535 U.S. 1102, 152 L. Ed. 2d 1061 (2002); *State v. Dammons*, 159 N.C. App. 284, 298, 583 S.E.2d 606, 615, *disc. review denied and appeal dismissed*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382 (2004) ("Sentence enhancement based on habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment"). Defendant, nevertheless, urges this Court to "re-examine its prior holdings[.]" In light of controlling precedent, these arguments are without merit.

No error at trial; reversed and remanded for a new habitual felon hearing.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).