NO. COA05-1409

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 04-CRS-19668;69
04-CRS-30727

TONY VERNARD JONES,

Defendant.

Appeal by Defendant from judgment entered 1 April 2005 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Ebony J. Pittman, for the State.

James N. Freeman, Jr., for Defendant-Appellant.

STEPHENS, Judge.

Defendant was indicted on 29 March 2004 on one count of sale of a controlled substance and one count of possession with intent to sell or deliver a controlled substance. Subsequently, Defendant was indicted for being an habitual felon on 17 May 2004. At a trial held in Mecklenburg County Superior Court between 28 March and 30 March 2005, the evidence tended to show the following:

Charlotte-Mecklenburg Police Street Crimes Officer Robert Wise testified that on 19 January 2004, he and Officer Eben Nesbitt were conducting an undercover "campaign" operation to buy drugs at the Piedmont Courts housing development. When Officer Wise arrived that afternoon at the housing development, he was flagged down by an unknown individual. After inquiring of this individual where he could find two rocks of crack cocaine, Officer Wise was approached by Defendant, who told him that he had "a Dub," street vernacular for a twenty-dollar rock of crack cocaine. Defendant produced the rock of crack cocaine from his mouth and exchanged it for a twenty-dollar bill from Officer Wise.

After the exchange, Officer Wise left the scene and immediately contacted Officer Nesbitt with a description of Defendant. Officer Nesbitt, in uniform, then arrived and approached Defendant about a probation violation. Defendant denied that he was on probation and freely gave Officer Nesbitt his name and date of birth. While Officer Nesbitt was speaking with Defendant, Officer Wise drove by and confirmed Defendant's identity. Officer Wise testified that he was able to identify Defendant by sex, race, approximate age, and the type of clothing he was wearing. Pursuant to the "campaign[,]" Officer Nesbitt did not search Defendant or arrest him at that time. Distinguishing this operation from a routine "buy/bust[,]" Officer Nesbitt testified that an arrest was not made immediately after the drug transaction because the purpose of these campaigns was to enable

the officers to return at a later date and make additional drug purchases without arousing suspicion in the area.

On 22 January 2004, Officer Wise again confirmed the identity of Defendant by a photograph contained in the police department's mainframe database. Defendant was not arrested until the campaign was complete and the Grand Jury returned indictments against him.

After the trial, the jury returned verdicts finding Defendant guilty of both crimes charged, and finding his status as an habitual felon. Upon those verdicts, the trial court entered judgment on 1 April 2005, sentencing Defendant within the presumptive range to a minimum term of 101 months and a maximum term of 131 months. From this judgment, Defendant appeals. For the reasons set forth below, we find that Defendant received a fair trial, free of prejudicial error.

Defendant makes the following arguments on appeal: (1) his trial counsel's failure to object to any questions posed or evidence presented by the prosecution, and failure to ask but one question during jury *voir dire*, constituted ineffective assistance of counsel; (2) the trial court committed plain error in allowing the testimony of Officers Wise and Nesbitt concerning their locating Defendant in the police department's computer database, as such testimony was highly prejudicial; and, (3) the trial court lacked jurisdiction to sentence Defendant as an habitual felon because the indictment purporting to charge him as such was facially invalid.

First, we address Defendant's argument that trial counsel's failure to object to the prosecutor's questions or exhibits and failure to pose sufficient questions to the jury during *voir dire* amounted to ineffective assistance of counsel. Specifically, Defendant argues that his trial counsel's failure to object to testimony or exhibits regarding the existence of information about Defendant in the police department's mainframe database, and counsel's lone question to potential jurors of whether "they could be fair[,]" could not have reflected any defense theory or trial strategy, and consequently, constituted ineffective assistance of counsel.

Effective assistance of counsel in a criminal trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Sections 19 and 23 of the North Carolina Constitution. *State v. Durham*, 74 N.C. App. 201, 328 S.E.2d 304 (1985). The burden to prove that performance by counsel fell short of the required standard is a heavy burden for a defendant to bear. In part, this is because we presume that "trial counsel's representation is within the boundaries of acceptable professional conduct." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted).

To successfully establish ineffective assistance of counsel, a defendant must show that his "counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *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)). To meet this burden, a defendant must satisfy a two-part test established by the United States Supreme Court and adopted by our Supreme Court in *Braswell*.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*"

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). It is not enough for Defendant to show only that the "errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test[.]" *Strickland*, 466 U.S. at 693, 80 L. Ed. 2d at 697 (citation omitted). Error does not warrant reversal "'unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.'" *State v. Cummings*, ___ N.C. App.___, ___, 622 S.E.2d 183, 186 (2005) (quoting *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

Assuming *arguendo* that Defendant's trial counsel erred in allowing, without objection, the officers' testimony regarding their locating Defendant's information in the department's mainframe database, or in allowing Defendant's picture from the

database to be admitted in evidence without objection, or that trial counsel should have more actively participated during jury *voir dire*, because of the amount and nature of the evidence against Defendant, he fails to demonstrate prejudice, and thus, does not meet the second prong of the *Strickland* test.

Both officers involved in the campaign testified to their identification of Defendant based on their personal observation and interaction with him. Officer Wise unequivocally described his purchase of a twenty-dollar rock of crack cocaine from Defendant and testified that subsequent to the drug purchase, he drove by and confirmed Defendant's identity while Officer Nesbitt and Defendant were conversing. Moreover, both officers could identify Defendant by age, sex, race, and the distinctive clothing he wore at the time. Additionally, on 22 January 2004, Officer Wise again confirmed Defendant's identity by viewing his picture in the police department's mainframe database.

Based on the overwhelming evidence against Defendant, it is inconceivable that the jury would have reached a different result, even if trial counsel had asked additional questions during jury *voir dire* and even if he had successfully secured exclusion of the officers' comments regarding the police department's computer database. Therefore, we hold that Defendant was not prejudiced by any alleged errors committed by his trial counsel. This assignment of error is overruled. *See, e.g., State v. Adams*, 156 N.C. App. 318, 326, 576 S.E.2d 377, 383, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 698 (2003) (finding no prejudice from alleged error

because "there was such overwhelming evidence of defendant's guilt").

Defendant next contends the trial court committed plain error in allowing the testimony of Officers Wise and Nesbitt concerning their locating Defendant in the police department's mainframe database, where information on persons previously arrested was stored, as such testimony was an improper and highly prejudicial comment on Defendant's prior arrest record.

As a general rule, failure to object to alleged errors in the admission of evidence during trial precludes raising those errors on appeal. N.C. R. App. P. 10(b)(1). Defendant has waived appellate review of these issues by his failure to object to the testimony at trial; he therefore now asks this Court to review the issue for plain error. N.C. R. App. P. 10(c)(4).

Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.)(footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). In order for Defendant to successfully demonstrate plain error on the part of the trial court, he must "'convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.'" *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697

(1993)(citation omitted)), *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). Plain error

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings[.]"

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002 (footnotes omitted)). Based upon a thorough review of the complete transcript of the proceedings herein, we are satisfied that this case does not meet the standard for plain error reversal.

At trial, the following exchange, concerning Defendant's information in the police department's mainframe database, occurred between the Assistant District Attorney (Ms. Sumwalt) and Officer Wise:

> Q. Okay. And, Officer Nesbitt (sic), at some point in this investigation, did you further your investigation by trying to do another means of confirming your identification of the Defendant?
>
> A. Yes, ma'am. What is routinely done by an undercover officer once we get back to the office and do our paperwork, either that day or a couple days later we will always pull up a picture to see if there is a picture in our data base [sic], just to see if there is one, and in this case there was.
>
> . . . .

MS. SUMWALT: Well, Your Honor, if I could approach with State's Exhibit Number 9?
COURT: You may.
Q. Officer Wise, I want you to take a moment and look at what has been marked as State's Exhibit 9.
Q. Do you recognize that photograph?
A. Yes, I do.
Q. And is that the photograph that you looked at to further your investigation in this case?
A. Yes, ma'am. It is.
Q. And is that a photograph that you pulled up when you searched the name of Tony Vernard Jones?
A. That is correct.

. . . .

Q. And did you take a look at that photograph?
A. Yes, I did.
Q. And did you recognize a person in that photograph?
A. Yes, ma'am.
Q. And who did you recognize that photograph to be of?
A. This is the same person that sold me the drugs on January 19 -- that's the one.
Q. And, Officer Wise, obviously you had seen Officer Nesbitt talking to the person that sold drugs to you, correct?
A. That is correct.
Q. So, that was one of the identification processes on the scene on January 19, is that correct?
A. Yes, ma'am. That is correct.
Q. So, this was sort of another second means of corroborating that identification?
A. Yes, ma'am. That is correct.
Q. And do you recall when you printed out that photograph, or when that particular photograph was printed out?
A. Yes, ma'am. This was printed out on January the 22nd, 2004[.]
Q. So, that was within a few days of the actual incident where you purchased the cocaine from the Defendant?
A. Yes, ma'am. That is correct.

After this exchange, the photograph of Defendant that was printed from the police department's database was admitted in evidence. Later in the trial, Officer Nesbitt was also questioned by Assistant District Attorney Sumwalt regarding the photograph of Defendant:

> Q. And, Officer Nesbitt, when you -- after you received the Defendant's name and date of birth and you verified that through the computer, did you at some point go look up a picture of the Defendant?
> A. I didn't find the picture. I mean, I didn't look up the picture, but I saw the picture that Officer Wise pulled up...
> Q. Okay.
> A. ...two or three days later, and I ID'ed him from that picture at that time.

Officer Nesbitt then confirmed that the picture of Defendant previously admitted in evidence was the same picture that he used to identify Defendant several days after the drug transaction. On cross-examination, Officer Nesbitt testified regarding the database he used to check Defendant's information when he confronted Defendant regarding an alleged parole violation:

> Q. When you question people like this and ask them their name ...
> A. Uh-huh (yes).
> Q. ...do people give you false names?
> A. It has been done, but if you have ever been arrested in Mecklenburg County, your name is in that mainframe and if you give me a false name and it comes back, then I can right quick tell you, you know, that you gave me a bad name. . . .

Defendant contends the testimony of the officers and the exhibit of his photograph from the mainframe were admitted in violation of N.C. Gen. Stat. § 8C-1, Rule 404(a). Rule 404(a) provides that,

with limited exceptions, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2005). Specifically, Defendant argues that the officers' testimony and the picture of Defendant impermissibly provided evidence which allowed the jury to infer that because Defendant had previously been arrested, he must have committed the crime for which he is currently charged.

Based on the testimony provided, Defendant's argument that Rule 404(a) was violated is not persuasive. The testimony of Officer Wise in no way directs or even infers a relationship between Defendant's information in the database and a prior arrest record. Moreover, Officer Nesbitt's testimony regarding the database that he used to check Defendant's information was elicited on cross-examination, and there was not a sufficient connection made between the database used by Officer Wise to that used by Officer Nesbitt. Therefore, the link between the testimony of the officers or the photograph of Defendant and any Rule 404(a) violation is tenuous at best.

However, even assuming *arguendo* that this evidence was admitted in violation of Rule 404(a), Defendant has failed to show that the alleged error affected his fundamental rights, that there was a miscarriage of justice, or that absent the alleged error, the jury probably would have reached a different result. On the contrary, we find no plain error in the admission of the evidence because, as we have previously stated, the evidence establishing

Defendant's guilt is overwhelming. It is incomprehensible that, even without the alleged erroneously admitted evidence, the jury would have reached a different result. *See, e.g., State v. Melton*, ___ N.C. App. ___, ___, 625 S.E.2d 609, 613 (finding no plain error when "there was overwhelming evidence of defendant's guilt"), *appeal dismissed*, 360 N.C. 542, ___ S.E.2d ___ (2006). We therefore overrule this assignment of error.

By his final argument, Defendant contends that the trial court did not have jurisdiction to sentence him as an habitual felon because the indictment purporting to charge him as such was facially invalid. On 17 May 2004, the Grand Jury indicted Defendant for being an habitual felon, relying in part "that on or about January 17, 1992, [Defendant] did commit the felony of possession of firearm by felon, in violation of N.C.G.S. 14-415, and that on or about February 11, 1992, [Defendant] was convicted of the felony of possession of firearm by felon[.]"

Defendant asserts that possession of a firearm by a felon is a "status" conviction, and use of this type of conviction to enhance Defendant's status to that of an habitual felon violates his constitutional rights. Defendant concedes that this Court has held that possession of a firearm by a felon is a substantive offense under North Carolina law, but asks the Court to reconsider its prior rulings. We decline to do so.

Under North Carolina law,

> [i]t shall be unlawful for any person who has been convicted of a felony to purchase, own,

> possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).
> Every person violating the provisions of this section shall be punished as a class G felon.

N.C. Gen. Stat. § 14-415(a)(2003). This Court has held that N.C. Gen. Stat. § 14-415(a) creates a "substantive criminal offense, complete and definite in its description." *State v. Bishop*, 119 N.C. App. 695, 698, 459 S.E.2d 830, 832 (citing *State v. McNeill*, 78 N.C. App. 514, 337 S.E.2d 172 (1985), *disc. review denied*, 316 N.C. 383, 342 S.E.2d 904 (1986)), *appeal dismissed and disc. review denied*, 341 N.C. 653, 462 S.E.2d 518 (1995). Further, it is well settled that convictions for possession of a firearm by a felon may be used as a predicate for habitual felon status. *State v. Glasco*, 160 N.C. App. 150, 585 S.E.2d 257, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003).

"Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). Therefore, we may not reconsider this issue. Accordingly, we hold that the trial court did not err when it imposed an enhanced sentence based on Defendant's status as an habitual felon.

NO PREJUDICIAL ERROR.

Judges WYNN and GEER concur.

Report per Rule 30(e).