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NO. COA06-1602

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2007

STATE OF NORTH CAROLINA

v.

Lincoln County
Nos. 05 CRS 53760;
06 CRS 30

MICHAEL DENNIS LONG

Court of Appeals

Appeal by defendant from judgment entered 28 June 2006 by Judge Beverly T. Beal in Lincoln County Superior Court. Heard in the Court of Appeals 17 September 2007.

Slip Opinion

Attorney General Roy Cooper, by Assistant Attorney General Christine A. Goebel, for the State.

Stubbs Cole Breedlove Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant.

CALABRIA, Judge.

Michael Dennis Long ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felony fleeing to elude arrest and attaining the status of an habitual felon. We find no error.

The habitual felon indictment referenced three of defendant's prior felony convictions: 1) 5 January 1998 conviction for a August 21, 1995 felonious breaking or entering of a motor vehicle in Lincoln County (95 CRS 4050); 2) 25 September

2000 conviction for a 3 May 2000 felonious breaking or entering of a motor vehicle in Lincoln County; and 3) 13 December 2001 conviction for a 23 July 2001 felonious possession of stolen goods/property in Lincoln County. On 28 June 2006, defendant was found guilty by a jury of both the fleeing charge as well as the habitual felon charge.

Defendant's sole assignment of error on appeal is that the trial court erred in denying his motion to dismiss the habitual felon indictment on the grounds that there was a fatal variance between the indictment and the evidence at trial. Specifically, defendant asserts the evidence at trial indicated the date of conviction for the 1995 breaking and entering offense was 21 August 1996 and not 21 August 1995. Defendant contends this date discrepancy was significant enough to warrant a new trial. We disagree.

As an initial matter, we note that the date variance cited by defendant is not supported by the record. While defendant states there is a variance in the year of *conviction* for the breaking and entering charge, the actual discrepancy is in the date the *offense was committed*. The date of conviction for this offense is listed as 5 January 1998 on both the indictment and the judgment for this offense which were admitted at trial. However, the commission date for this offense is listed as 21 August 1995 in the indictment but listed as 21 August 1996 in the judgment.

Further, a discrepancy between the offense date on the indictment and judgment for a conviction used to support a habitual

felon conviction is not sufficiently significant to warrant a new trial. See *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994) (holding that the date in an indictment is "neither an essential nor a substantial fact as to the charge of habitual felon"). Nevertheless, defendant's assertion that the evidence at trial was inconsistent with the indictment is wholly without merit.

The undisputed evidence presented by the State shows the offense date of 21 August 1995 on the indictment was the correct date and the year of 1996 listed on the corresponding judgment was only a typographical error. Specifically, the State presented the testimony of the Lincoln County Deputy Clerk of Superior Court, Kathy Kinner ("Kinner"), who had worked in the Clerk's office for over nineteen years. After reviewing the official court file for the subject conviction, Kinner testified the date of "August 21, 1996" on the judgment form appeared to be a clerical error. Her conclusion was based on the fact that: 1) the assigned case number started with "95" and so the offense would have happened in 1995; and 2) that the indictment, the arrest warrant, and the restitution worksheet in the file all listed the offense date as "August 21, 1995." Based on this testimony, we conclude defendant's argument that the indictment was inconsistent with the evidence at trial is without merit. Accordingly, defendant's assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).

