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NO. COA 06-18

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 04 CRS 24257, 24263

MICHAEL ANTONIO MCWHITE,
Defendant.

Appeal by defendant from a judgment entered 17 June 2005 by Judge Henry E. Frye, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 30 October 2006.

Attorney General Roy Cooper, by Special Counsel Caroline Farmer, for the State.

Allen W. Boyer for defendant-appellant.

BRYANT, Judge.

Michael Antonio McWhite (defendant) was convicted following a jury trial of the Class H felony of habitual misdemeanor assault. The conviction was based on the jury's verdict of guilty on the charge of misdemeanor assault on a female and defendant's stipulation during the trial to the prior misdemeanor convictions alleged in the special indictment charging him with habitual misdemeanor assault in 04 CRS 24257. See N.C. Gen. Stat. §§ 14-33.2, 15A-928(c) (2005). Defendant then pleaded guilty to having obtained habitual felon status and was sentenced to an active prison term of 115 to 147 months. He gave notice of appeal in open

court.

Facts

At trial, the State introduced evidence that defendant threatened and attacked his pregnant girlfriend, Janet Brown, on 7 April 2004, throwing her to the floor, kicking her in the stomach, and punching her in the face. In addition to sustaining a black eye in the assault, Brown experienced vaginal bleeding and went into pre-term labor.

Having presented its evidence of the charge of assault on a female, the prosecutor asked the trial court to arraign defendant on the charge of habitual misdemeanor assault, in order to determine if the State would need to offer additional evidence of defendant's prior misdemeanor convictions. See N.C. Gen. Stat. § 15A-928(c) (2005). Defense counsel informed the court that "if we reach that point, he will agree to the habitual misdemeanor assault." Notwithstanding counsel's concession, the court formally arraigned defendant, advising him of the habitual misdemeanor assault charge and reciting the five prior misdemeanor convictions alleged in the indictment.¹ The court then engaged defendant in the following colloquy:

THE COURT: . . . If you admit [the prior

¹Defendant was indicted on 7 June 2004, prior to the 1 December 2004 effective date of the legislative amendments to N.C. Gen. Stat. § 14-33.2 enacted in 2004 N.C. Sess. Laws 2004-186, sec. 10.1 and 10.2. The statute governing his offense provided, "A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34, and has been convicted of five or more prior misdemeanor convictions, two of which were assaults." N.C. Gen. Stat. § 14-33.2 (2003).

misdemeanor convictions], then for purposes of trial the jury is not going to be informed of these admissions. Only they will be submitted on whether you're guilty or not guilty of assault on a female. However, if you deny [the convictions] or remain silent of it, then [the] State has to prove these matters before the jury and they have to hear that evidence at some point during this trial. . . . [D]o you want to admit these elements as far as the five convictions that they allege? Do you want to admit those, deny those, or what?

[DEFENDANT]: I'll admit those.

THE COURT: . . . Let the record reflect that for purposes of this trial pursuant to 15A-928 subsection (c)[, the] statute indicates if the defendant admits the previous convictions, that element of the offense charged in the indictment or information is established. No evidence in support thereof may be adduced by the State. . . . [F]or purposes of this trial the jury will only be submitted the charge and one count of assault on a female.

Upon defendant's admission, the prosecution rested its case.

The jury found defendant guilty of assault on a female. Based on defendant's admission to the misdemeanor convictions alleged in the second count of the indictment, the trial court announced that "the conviction is elevated to a conviction of habitual misdemeanor assault, Class H felony."

The trial court then turned its attention to the habitual felon indictment in 04 CRS 24863. After defendant's counsel indicated his intention to admit the charge, the trial court recited the three prior felony convictions alleged in the indictment and asked defendant directly if he admitted them. When defendant affirmed his admission, the court instructed the prosecutor that "there still has to be a plea arrangement" on the

charge. The court conducted a plea hearing in full accordance with N.C. Gen. Stat. § 15A-1022(a) (2005), which included the following exchange with defendant:

THE COURT: [Defendant], you understand that you are pleading guilty to two charges - habitual misdemeanor assault, a Class H felony; and habitual felon, which is a Class C felony, which could carry up to 261 months in prison. . . . Do you understand that?

[Defendant]: Yes, sir.

Although defendant purported to plead guilty to both habitual misdemeanor assault and habitual felon status, his guilty plea to habitual misdemeanor assault was superfluous, inasmuch as he had already been convicted of this charge at the jury trial.

The court accepted defendant's guilty plea and sentenced him as an habitual felon. The judgment entered by the court on 16 June 2005 records convictions for both habitual misdemeanor assault and assault on a female, in addition to habitual felon status.

I

In his first assignment of error on appeal, defendant claims the trial court erred by accepting his admission to the five prior misdemeanors used to support his habitual misdemeanor assault conviction without engaging in the full colloquy required for a guilty plea under N.C. Gen. Stat. § 15A-1022(a). Because the procedures for entry of guilty plea under N.C. Gen. Stat. § 15A-1022(a) do not apply to an admission of the recidivist element of habitual misdemeanor assault, we disagree. See *State v. Artis*, 174

N.C. App. 668, 679-80, 622 S.E.2d 204, 211-12 (2005), *disc. review denied*, 360 N.C. 365, 630 S.E.2d 188 (2006).

"The criminal law of this State contains two distinct types of 'habitual' classifications." *State v. Burch*, 160 N.C. App. 394, 396, 585 S.E.2d 461, 462 (2003). The first type, which creates the crimes of habitual impaired driving and habitual misdemeanor assault, treats the fact of defendant's prior convictions as an element of the substantive offense. *Id.* at 396, 585 S.E.2d at 462-63 (citing N.C. Gen. Stat. §§ 14-33.2, 20-138.5 (2001)). Under N.C. Gen. Stat. § 15A-928(b), the State must file a "special indictment or information" charging defendant as an habitual offender. N.C. Gen. Stat. § 15A-928(b) (2005). Before the State rests its case at trial, the court must arraign defendant on the special indictment or information, allowing him the opportunity to admit the "habitual" element of the offense, thereby withholding the fact of his previous offenses from the jury. N.C. Gen. Stat. § 15A-928(c) (2005). If the defendant admits the prior convictions, the State may not present evidence thereof. N.C. Gen. Stat. § 15A-928(c)(1) (2005). Moreover, the jury is not informed that defendant is charged as an habitual offender and instead enters a verdict on the misdemeanor offense charged in the principal pleading. *Id.*

The second type of "habitual" classification appears in this state's Habitual Felon Act. See N.C. Gen. Stat. §§ 14-7.1, -7.7 (2005) (defining certain repeat offenders as habitual felons, and violent habitual felons). These provisions treat the defendant's

recidivism as a status distinct from the predicate felony which must be charged in a separate indictment. *Burch*, 160 N.C. App. at 396, 585 S.E.2d at 462 (citing *State v. Penland*, 89 N.C. App. 350, 365 S.E.2d 721 (1988)); N.C. Gen. Stat. §§ 14-7.3, -7.9 (2001). The procedures for a prosecution of these status offenses are as follows:

The defendant must first be tried before a jury on the principal felony. During the trial on the principal felony, it may not be revealed to the jury that the defendant is being charged as a habitual felon. Only in the event that the jury finds a defendant guilty of the principal felony will the habitual felon indictment be presented to the jury.

Trials involving habitual felons and violent habitual felons are bifurcated, with two separate trials before the same jury; the first on the principal felony and the second on the habitual felon status. *The defendant may not stipulate to habitual felon status, but must either plead guilty or be found guilty by a jury.*

Id. (citations omitted) (emphasis added).

Here, the trial court fully complied with N.C. Gen. Stat. § 15A-928(c) in trying defendant on the charge of habitual misdemeanor assault. Before the close of the State's case, the court arraigned defendant on the special indictment, accepted his admission to the prior convictions alleged therein, and submitted only the charge of assault on a female to the jury. Defendant's admission was a binding stipulation of fact as to a single element of the charged offense. See *Artis*, 174 N.C. App. at 680, 622 S.E.2d at 212 ("A stipulation by defense counsel that defendant has been convicted of the prior misdemeanors alleged in an indictment

charging habitual misdemeanor assault is sufficient to establish the prior conviction element of that charge[.]"); *Burch*, 160 N.C. App. at 397, 585 S.E.2d at 463. Contrary to his claim on appeal, defendant did not plead guilty to habitual misdemeanor assault but was found guilty by the jury.

After defendant's conviction for the felony of habitual misdemeanor assault, the court proceeded to the second stage of the bifurcated proceedings contemplated by the Habitual Felon Act. In accepting defendant's guilty plea to violent habitual felon status, the court followed the applicable procedures detailed in N.C. Gen. Stat. § 15A-1022(a). Accordingly, we find no error in defendant's conviction or his guilty plea.

II

In his second argument, defendant asserts that his sentence of 115 to 147 months is so grossly disproportionate to his prior and instant crimes as to violate the Eighth Amendment's ban on cruel and unusual punishment. He notes that his five prior misdemeanors included only two prior assaults and were recorded on a single date, 11 April 1996. Defendant further observes that the maximum sentence for his instant offense of assault on a female is 150 days, and that he committed the three prior felony convictions alleged in the habitual felon indictment between 1995 and 1997.

This Court has previously considered an Eighth Amendment challenge to a sentence imposed for the offense of habitual misdemeanor assault committed by a defendant who had obtained the status of habitual felon. *State v. McDonald*, 165 N.C. App. 237,

241-42, 599 S.E.2d 50, 52-53, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 60-61 (2004), *cert. denied*, 544 U.S. 988, 161 L. Ed. 2d 748 (2005). Finding no violation of the constitutional prohibition of cruel and unusual punishment, we rejected the defendant's argument that his punishment bore no reasonable proportion to the assault which was the basis of his conviction:

In light of the repetitive nature of defendant's offense and his lengthy criminal history, the sentence imposed was not grossly disproportionate to his crime. . . . Here, defendant was not sentenced to 120 to 153 months in prison solely because of his one assault Defendant was sentenced based on his history of repeated assaults, misdemeanor convictions, and his prior felony convictions, all of which occurred within a fifteen year time span. Defendant's assignment of error is overruled.

Id. (internal citation omitted). We discern no meaningful distinction between defendant's criminal history and that of the defendant in *McDonald*. Despite the fact that defendant's conviction date for five misdemeanor charges was the same, the offenses took place over the course of three years and the misdemeanor assaults were committed two years apart, in 1992 and 1994. Moreover, defendant was convicted as an habitual felon, having been convicted of three prior felonies. Because of defendant's history of repeated assaults, misdemeanor convictions and prior felonies, and based on the reasoning in *McDonald*, we hold the trial court's sentence was not grossly disproportionate to his crime. This assignment of error is overruled.

III

Although the issue is not raised by defendant, we note that

the judgment entered in this cause reflects defendant's convictions for two substantive offenses: (1) habitual misdemeanor assault and (2) assault on a female. As discussed above, defendant's misdemeanor offense was an element - or lesser included offense - of the greater substantive offense of habitual misdemeanor assault. See generally N.C. Gen. Stat. § 14-33.2 (2005) (setting forth elements of habitual misdemeanor assault); cf. *State v. Williams*, 153 N.C. App. 192, 194-95, 568 S.E.2d 890, 892 (2002) ("The absence of any indictment alleging violation of N.C.G.S. § 14-33.2, habitual misdemeanor assault, renders the principal indictment in this case one which charged defendant with only the misdemeanor of assault on a female."), *disc. review improvidently allowed*, 357 N.C. 45, 577 S.E.2d 618-19 (2003). Therefore, we vacate the conviction for assault on a female. See *State v. Sanderson*, 60 N.C. App. 604, 610, 300 S.E.2d 9, 14 (holding that where defendants were convicted of both the greater and lesser included offenses, "convictions for the lesser included offenses should be vacated"), *disc. review denied*, 308 N.C. 679, 304 S.E.2d 759 (1983). The cause is remanded to the trial court for resentencing on defendant's substantive felony of habitual misdemeanor assault, as enhanced by his habitual felon status. See *State v. Hunter*, 107 N.C. App. 402, 413, 420 S.E.2d 700, 707 (1992), *cert. denied*, 333 N.C. 347, 426 S.E.2d 711-12 (1993), *overruled in non-pertinent part*, *State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994).

No error as to conviction for habitual misdemeanor assault and habitual felon status; vacated as to conviction for assault on a

female; remanded for resentencing.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).