NO. COA06-36

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Alamance County
Nos. 04 CRS 56834-35

KEVIN LEVANT PHILLIPS,
Defendant.

Appeal by defendant from judgments entered 29 July 2005 by Judge Orlando F. Hudson in Alamance County Superior Court. Heard in the Court of Appeals 16 October 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon, for defendant-appellant.

BRYANT, Judge.

Kevin Levant Phillips (defendant) was found guilty by a jury of robbery with a dangerous weapon, assault with a deadly weapon inflicting serious injury, and assault by pointing a gun. In a separate proceeding, the jury found defendant to have attained the status of a violent habitual felon. The trial court consolidated defendant's two felony convictions and sentenced him as a violent habitual felon to life imprisonment. *See* N.C. Gen. Stat. § 14-7.12 (2005). The court imposed a consecutive 150-day sentence for the misdemeanor assault. Defendant gave notice of appeal in open court from judgments entered 29 July 2005.

Defendant raises two issues on appeal[1], whether the trial court erred: (I) by denying defendant's motion for a mistrial in light of a pretrial newspaper article released during jury selection; and (II) by allowing the State to amend a date on defendant's habitual felon indictment.

I

Defendant first claims the trial court abused its discretion by denying his motion for mistrial due to the jury venire's exposure to an "inflammatory and prejudicial article" published during jury selection on the front page of the local newspaper, the *Times-News*, on the morning of 26 July 2005. In denying the motion, the court noted it had instructed the prospective jurors not to read any news accounts of the case, and that there was no indication that any member of the venire had read the article. Therefore, rather than declaring a mistrial, the court allowed defense counsel to ask the members of the venire if any of them had been exposed to the article and to question any member so exposed on *voir dire*, as follows:

> THE COURT: I think what you do, . . . I guess you have a right to ask the people in the box.
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: And I would ask that you find out by way of a show of hands if someone had read it.

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[1]The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C. R. App. P. 28(b)(6), we deem them abandoned.

> [DEFENSE COUNSEL]: Yes, sir.
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> THE COURT: And then the way we can isolate those jurors and then you may have to question them individually. That's the best way to do it. Just have to find a place to separate the jurors, and those who have indicated that they did read something, I think you have a right to question them.
>
> But the best way to do it would be to conduct individual *voir dire* which I think the case law supports that in that kind of situation when you're trying to determine if jurors have read about the case and what it is they've read.
>
> [DEFENSE COUNSEL]: That's all.
>
> THE COURT: I'm not going to prevent you from proceeding in that fashion, but make sure you preface it so if somebody does raise their hand, we'll take the names as we always do and then we'll do individual voir dire on that.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

The subsequent jury selection proceedings are not included in the stenographic trial transcript. An "[a]ppellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made." N.C. R. App. P. 9(c)(2). Here, the record on appeal does not include the transcript of the portion of the proceedings defendant assigns as error. Accordingly, we have no basis on which to review the trial court's denial of defendant's motion for a mistrial. *See State v. Talley*, 110 N.C. App. 180, 190, 429 S.E.2d 604, 609 (1993) (assignment of error overruled where there was no basis – either documents reflecting the proceedings or verbatim transcript – on which to review the

trial court's dismissal of defendant's motion).

We review the trial court's denial of a mistrial in these circumstances only for abuse of discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991); *State v. Cameron*, 283 N.C. 191, 196-97, 195 S.E.2d 481, 485 (1973). "[I]n the absence of any showing of prejudice, no abuse of discretion is shown. Error will not be presumed." *State v. McVay*, 279 N.C. 428, 433, 183 S.E.2d 652, 655 (1971) (citations omitted). We find no abuse of discretion here. Although defendant now asserts that "[t]he trial court denied defense counsel the ability to question the jurors" about the offending article, his claim is contradicted by the portion of the transcript excerpted above. Moreover, "[t]he record does not indicate that any prospective juror had read the newspaper article[] or had seen or heard any other news releases pertaining to [this] case[.] Nothing in the record shows that any juror had been influenced in any manner by this publicity." *State v. Mitchell*, 283 N.C. 462, 465, 196 S.E.2d 736, 738 (1973). Accordingly, defendant's assignment of error is overruled.

II

Defendant next raises two related arguments challenging the trial court's decision to allow the prosecutor to amend the violent habitual felon indictment at the conclusion of the evidence to reflect the correct date of conviction of one of the two prior violent felonies alleged therein. Over objection, the State was allowed to alter the alleged date of defendant's conviction of second-degree murder in 89 CRS 23556 from "on or about" 13 February

1990 to 7 February 1990. Citing the statutory proscription against amended indictments, N.C. Gen. Stat. § 15A-923(e) (2005), defendant first avers he was "surprised, misled and prejudiced in his preparation in defense of the habitual felon indictment." In his second argument, defendant contends that the altered date of the prior conviction was a substantive change to the charge against him and amounted to the issuance of a "*de facto*" superseding indictment. He claims he was denied his right to an arraignment on the superseding indictment, *see* N.C. Gen. Stat. § 15A-941 (2005), and his right not to be tried in the same week as the arraignment, *see* N.C. Gen. Stat. § 15A-943 (2005).

We find no error by the trial court. Although N.C. Gen. Stat. § 15A-923(e) provides that "[a] bill of indictment may not be amended[,]" our courts have interpreted this provision to forbid only those changes "which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). "A change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735, *disc. rev. denied*, 351 N.C. 111, 540 S.E.2d 370 (1999).

In *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994), this Court held that a change in the date of a prior conviction alleged in an habitual felon indictment does not substantially alter the charge so as to constitute an "amendment" to the indictment proscribed by N.C. Gen. Stat. § 15A-923(e).

Rather, we found that "it was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment." *Id.*; *accord State v. Lewis*, 162 N.C. App. 277, 284-85, 590 S.E.2d 318, 324 (2004). Although defendant was indicted as a violent habitual felon under N.C. Gen. Stat. § 14-7.7 (2005), rather than an habitual felon under N.C. Gen. Stat. § 14-7.1 (2005), we see no basis to distinguish *Locklear* based on this difference. In each case, it is the fact and nature of the prior convictions, rather than their specific dates, which form the gravamen of the charge. *See id.* Accordingly, the change allowed by the court did not "amend" the indictment for purposes of N.C. Gen. Stat. § 15-923(e). *Id.* Moreover, inasmuch as the change did not "substantially alter" the charge alleged in the violent habitual felon indictment, defendant's assertion of a right to a new arraignment on the "superseding" charge is without merit.

To the extent defendant claims surprise or a lack of notice of the charge based on the altered date of his prior conviction for second-degree murder, we observe that the indictment as originally issued accurately alleged the offense and county of the conviction, the superior court file number, and the date he committed the offense. Moreover, it identified the date of conviction as "on or about" 13 February 1990, by no means excluding the amended conviction date of 7 February 1990. On these facts, we hold that the indictment "sufficiently notified defendant of the particular conviction that was being used to support his status as a[violent] habitual felon." *Lewis*, 162 N.C. App. at 284-85, 590 S.E.2d at

324.

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).