

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-431

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Tyrrell County
Nos. 04 CRS 50113
05 CRS 617

MARK EARL BELL

Appeal by defendant from judgment entered 29 November 2005 by Judge William C. Griffin, Jr. in Tyrrell County Superior Court. Heard in the Court of Appeals 16 November 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John F. Oates, Jr., for the State.

Thomas R. Sallenger, for defendant-appellant.

JACKSON, Judge.

On 6 March 2004, Deputy Leigh Ann Schreckengost ("Schreckengost") of the Tyrrell County Sheriff's Department observed Mark Earl Bell ("defendant") come out of a house and approach a car parked on the street. Defendant handed the driver of the car a carton of cigarettes and a bottle of soda, and then went back into the house. Shortly thereafter defendant returned to the car with a case of beer and got into the passenger seat. Schreckengost followed the car as it drove away. After following the car for a short distance, she observed the car slow down, at

which time defendant jumped out of the car before it came to a complete stop. Schreckengost yelled for defendant to stop, but he ran behind some houses. After stopping the car and talking briefly with the driver, Schreckengost pursued defendant. She called for defendant to come and speak to her, to which defendant responded by initially turning and walking away from her. Schreckengost started to run towards defendant, at which time defendant stopped walking and spoke to her.

Deputy Saxon Baker ("Baker") and Probation Officer Joey Elliott ("Elliott") arrived at the scene to assist Schreckengost. Elliott recognized defendant as one of the individuals whom he supervised on probation. Having visited defendant at his home several times prior, Elliott knew where defendant lived, and pursuant to the conditions of defendant's probation, Elliott decided to conduct a warrantless search of defendant's home. Elliott asked Baker and Schreckengost to assist him in the search of defendant's home.

Defendant resided with another individual in a mobile home. Upon entering defendant's home, Baker conducted a search of the couch in the living room prior to letting defendant sit on it. While searching the couch, Baker found three small bags of what appeared to be crack cocaine under one of the cushions. Defendant stated the cocaine did not belong to him. Elliott and Baker then searched defendant's bedroom and the kitchen. In defendant's bedroom, the officers searched a black duffle bag which defendant said belonged to him. Inside the bag, the officers found a .25

caliber pistol and a knife, which defendant stated did not belong to him. The officers also found a small metal "crack pipe" in defendant's bedroom. Upon searching the kitchen, the officers found several plastic sandwich bags with the corners cut out of them. At trial, Schreckengost testified that the bags of cocaine found under the couch cushion looked like small pieces of sandwich bags which had been knotted up.

Defendant was charged with knowingly and intentionally keeping and maintaining a dwelling that was used for keeping and selling cocaine, possession with the intent to sell or deliver cocaine, possession of drug paraphernalia, and resisting, delaying and obstructing a police officer. Defendant also was charged with being a habitual felon. Defendant's case came on for trial before a jury on 28 November 2005. The charge of resisting, delaying and obstructing a police officer was dismissed following a motion to dismiss made by defendant. On 29 November 2005, the jury found defendant guilty of knowingly and intentionally keeping and maintaining a dwelling that was used for keeping and selling cocaine, possession with the intent to sell and deliver cocaine, and possession of drug paraphernalia. At the close of evidence on the habitual felon portion of defendant's case, defendant made a motion to dismiss the habitual felon charge based upon a variance between the indictment and the evidence presented. Defendant's motion was denied, and the jury subsequently found him guilty of being a habitual felon. Defendant then was sentenced to a term of one hundred and sixteen months to one hundred and forty-nine months

imprisonment with the North Carolina Department of Correction. Defendant appeals from his conviction.

Defendant first contends the trial court erred in denying his motion to dismiss the charge of habitual felon based upon a variance between the indictment and the evidence presented at trial. Defendant's habitual felon indictment listed three prior convictions, one of which was his 4 September 1980 conviction for felony robbery with a dangerous weapon. This conviction was in criminal case number 80 CRS 1869 in Bertie County Superior Court. Defendant's indictment listed the date of the underlying offense for this conviction as occurring "on or about July 30, 1980." At trial, the Clerk of Court for Bertie County testified that the records for defendant's prior conviction in case 80 CRS 1869, including the indictment and judgment, listed the date of the offense as 31 July 1980.

North Carolina General Statutes, section 15A-924(a) (5) (2005) requires that an indictment must set forth "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." *Id.* While an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.

[I]t is not the function of an indictment to bind the hands of the State with technical

rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.

State v. Sturdivant, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981).

This Court has held that

“Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill. The failure to state accurately the date or time an offense is alleged to have occurred does not invalidate a bill of indictment nor does it justify reversal of a conviction obtained thereon.”

State v. Locklear, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994) (quoting *State v. Cameron*, 83 N.C. App. 69, 72, 349 S.E.2d 327, 329 (1986)). With respect to a habitual felon indictment, the primary issue is whether another felony was in fact committed, not the specific date of the prior felony. *Id.*; *State v. McBride*, 173 N.C. App. 101, 108-09, 618 S.E.2d 754, 759-60, *disc. review denied*, 360 N.C. 179, __ S.E.2d __ (2005).

In the instant case, all of the evidence concerning defendant's prior conviction for felony robbery with a dangerous weapon, other than the specific date of the prior offense, was consistent with the allegations in defendant's habitual felon indictment. The indictment and evidence presented both listed the same case number, name of the defendant, offense committed, statute violated, date of conviction, and county in which the conviction

occurred. In addition, the indictment stated that the prior offense occurred "on or about July 30, 1980." (emphasis added). Defendant therefore was given sufficient notice of the prior conviction which was to serve as an underlying offense for the habitual felon charge. As the evidence at trial did not vary substantially from the information presented in defendant's indictment, we hold the trial court did not err in denying defendant's motion to dismiss the habitual felon charge. Defendant's assignment of error is overruled.

Defendant next contends the trial court erred in submitting a verdict sheet to the jury which effectively prevented the jury from being able to consider finding defendant guilty of the lesser-included misdemeanor offense of keeping a dwelling for the purpose of keeping and selling controlled substances.

Defendant's verdict sheet stated the following:

1. We the jury by unanimous verdict as to the charge of knowingly and intentionally keeping a dwelling for the keeping and selling of controlled substances find the defendant is:

___ guilty as charged

OR

___ **not** guilty of keeping a dwelling for the purpose of keeping and selling controlled substances

OR

___ not guilty

(Emphasis added). The State, while conceding that defendant's verdict sheet improperly listed the lesser-included misdemeanor offense by stating "not guilty of keeping a dwelling for the purpose of keeping and selling controlled substances," argues that defendant failed to object to the verdict sheet at trial and therefore our review of this issue should be for plain error only. We agree. Defendant failed to object to the verdict sheet at trial, and thus "where the defendant appeals based on the content of the verdict sheet but failed to object when the verdict sheet was submitted to the jury, any error will not be considered prejudicial unless the error is fundamental." *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003) (citing *State v. Gilbert*, 139 N.C. App. 657, 672-74, 535 S.E.2d 94, 103-04 (2000)), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004). As defendant failed to object to the verdict sheet at trial, our review is limited to plain error. *Gilbert*, 139 N.C. App. at 672-74, 535 S.E.2d at 103-04.

Plain 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.'"

State v. Augustine, 359 N.C. 709, 717, 616 S.E.2d 515, 523 (2005) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)) (emphasis in original), *cert. denied*, __ U.S. __, 165 L.

Ed. 2d 988 (2006). Under a plain error standard of review, "a defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result.'" *Id.* (quoting *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002)).

In the instant case, the trial court properly instructed the jury, without objection by defendant, on both the felony offense of knowingly and intentionally keeping and maintaining a dwelling that was used for keeping and selling a controlled substance, and the lesser-included misdemeanor offense of keeping a dwelling for the purpose of keeping and selling a controlled substance. The trial court properly instructed the jury that if it did not find defendant guilty of the felony offense, then it should consider his guilt of the lesser-included misdemeanor offense. The jury, which did not ask for clarification from the trial court on either the instructions or the verdict sheet, found defendant guilty of the felony offense as charged.

Following the jury's pronouncement of its verdict on defendant's habitual felon charge, the jury was polled on all of the verdicts. Each juror then assented to the guilty verdicts for each charge as read by the foreman. "The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered." *State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 402 (1991); see also *State v. Tirado*, 358 N.C. 551, 584, 599 S.E.2d 515, 537 (2004) (jury polls "enable the court and the parties to ascertain with

certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented” (citation omitted) (emphasis in original)), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Therefore, each juror confirmed to the trial court that they unanimously agreed with the guilty verdict for defendant on the felony charge of knowingly and intentionally keeping and maintaining a dwelling that was used for keeping and selling a controlled substance.

After thorough review of the verdict sheet, as well as the transcript of the trial court’s jury instructions regarding the charge of knowingly and intentionally keeping and maintaining a dwelling that was used for keeping and selling a controlled substance and the lesser-included misdemeanor offense, defendant has failed to demonstrate that absent the perceived error, the jury probably would have reached a different verdict. We hold the error on defendant’s verdict sheet, when coupled with the trial court’s proper instructions and the jury poll, does not amount to a fundamental error and does not rise to the level of plain error. Defendant’s assignment of error is overruled.

Defendant’s final arguments contend the trial court erred in submitting three of defendant’s four charges to the jury, as there was an insufficiency of the evidence to prove the crimes charged. At the close of evidence, defendant made a motion to dismiss only the charge of resisting, delaying and obstructing a police officer. The trial court granted defendant’s motion as to this offense only.

At no time did defendant make a motion to dismiss the charges of knowingly and intentionally maintaining a dwelling that was used for keeping and selling of controlled substances, possession with the intent to sell and deliver cocaine, or possession of drug paraphernalia. We decline to address these assignments of error, as defendant has failed to properly preserve the issues for appellate review.

Rule 10(b)(3) of our appellate rules provides that “[a] defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial.” N.C. R. App. P. 10(b)(3) (2006). Defendant attempts to argue that a plain error standard of review should apply to these assignments of error. “Plain error, however, only applies to jury instructions and evidentiary matters in criminal cases. While this is a criminal case, defendant’s failure to [move] to dismiss does not trigger a plain error analysis.” *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004) (internal citation omitted); see also *State v. Richardson*, 341 N.C. 658, 676-77, 462 S.E.2d 492, 504 (1995) (plain error analysis unavailable where the defendant failed to properly preserve the issue of sufficiency of the evidence); *State v. Bartley*, 156 N.C. App. 490, 494, 577 S.E.2d 319, 322 (2003) (“Defendant’s attempt to invoke plain error review is inappropriate as this assignment of error concerns the sufficiency of the evidence, not an instructional error or an error concerning the admissibility of evidence.”). Defendant’s assignments of error therefore were not properly preserved and are dismissed.

No error.

Judges GEER and LEVINSON concur.

Report per Rule 30(e).