NO. COA06-735

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

STATE OF NORTH CAROLINA

v. Person County
No. 05CRS1799, 50985, 50992

JOSEPH CASEY MCGHEE,
Defendant.

Appeal by Defendant from judgment entered 19 January 2006 by Judge W. Osmond Smith, III, in Superior Court, Person County. Heard in the Court of Appeals 6 March 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M Manthei, for the State.

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

WYNN, Judge.

This appeal arises from Defendant Joseph Casey McGhee's convictions on the charges of possession of firearm by felon, possession of weapon of mass destruction, and being a habitual felon. We find no error in his trial.

The facts tend to show that during a license check point on 19 March 2005, Officer Angela Clay of the Roxboro Police Department recognized the tag number on a white Dodge Spirit from a stolen vehicle report filed by Defendant's wife. Officers Clay and Jason Stewart pursued the vehicle which eventually stopped, and Officer Stewart told Defendant to get out of the car with his hands up. Defendant complied. Officer Clay cuffed Defendant and placed him

in her vehicle whereupon she noticed a laceration on his lip and asked, "Who did that to your lip?" Defendant replied, "some guys."

Thereafter, as Officer Stewart prepared to search the vehicle, Officer Clay informed him that Defendant wanted to speak with him. Officer Stewart asked Officer Clay to hold on for a minute but Defendant persisted that he speak with Officer Stewart. Before speaking with Defendant, Officer Stewart saw a sawed-off shot gun and a box of ammunition on the passenger side of the vehicle. Afterwards, Defendant informed him that he had something in his vehicle "he [was] not suppose to have." Officer Stewart informed Defendant that they had already found what he was referring to, which was the sawed-off shotgun.

At trial, the trial court granted Defendant's motion to represent himself and appointed his trial counsel to serve as standby counsel. Defendant did not cross examine any of the State's witnesses, object to any of the State's evidence, nor make any motions. Defendant also waived opening and closing arguments. He was convicted of all charged offenses and sentenced as a habitual felon to a term of 93 months to 121 months imprisonment.

On appeal, we address Defendant's arguments that the trial court (I) committed plain error by allowing the officers to testify regarding their conversations with Defendant after he was in custody but before he was read his *Miranda* rights; (II) committed plain error by allowing Officer Jones to testify regarding his investigation and arrest of Defendant on an unrelated charge of possession of crack cocaine from 1998; and (III) erred by not

dismissing the indictment against defendant for being an habitual felon as one of its underlying felonies was the same felony used to convict Defendant of the underlying charge of possession of firearm by felon.

I.

Defendant first argues that the trial court committed plain error by allowing Officers Clay and Stewart to testify regarding their conversation with Defendant after he was in custody and before receiving his *Miranda* Rights. We disagree.

Preliminarily, we note that Defendant did not raise an objection to the testimonies of Officers Clay and Stewart or to the admission into evidence entered as a result of their statements. The failure to object to alleged errors precludes raising those errors on appeal. N.C. R. App. P. 10(b)(1)(providing that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"). Since Defendant did not object to this evidence at trial, he must show that "plain error" was committed by demonstrating that absent the error the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 37-38, 340 S.E.2d 80, 82-83 (1986); *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986).

It is well established that "*Miranda* warnings are required only when a defendant is subjected to custodial interrogation."

State v. Johnston, 154 N.C. App. 500, 502, 572 S.E.2d 438, 440 (2002)(*citing State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (2001). Under the *Miranda* decision, custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d ,694, 706 (1966)). Furthermore, the United States Supreme Court defined "interrogation" as "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect[.]" *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1690, 64 L. Ed.2d 297, 308 (1980). "Interrogation" for Miranda purposes does not include "words or actions . . . normally attendant to arrest and custody," and must consist of "a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300, 100 S. Ct. at 1689, 64 L. Ed.2d at 307-08 (holding that no Miranda warning was required for admissibility of confession, even where police talked to each other suggestively about the defendant's crime in his presence, because the defendant was not subjected to the "functional equivalent" of interrogation under such circumstances).

Here, while Defendant was in custody because he was cuffed and placed in the back of Officer Clay's vehicle, *see Johnston,* 154 N.C. App. at 503, 572 S.E.2d at 441, the statements by Defendant were not a product of an interrogation by the officers but were voluntary statements by Defendant. We determine the voluntariness

of a statement by looking at the totality of the circumstances, and considering the factors of: "whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant." *State v. Campbell*, 133 N.C. App. 531, 538, 515 S.E.2d 732, 737 (1999) (citation omitted).

Here, Defendant made several requests to speak with Officer Stewart. When Officer Stewart responded to Defendant's request, he stated "what's up, how can I help you, man?" Defendant replied, "I have something in the vehicle that I'm not supposed to have because some guys were after me." From this exchange, it is clear that Defendant initiated this conversation and based on the factors above, the statements were voluntary.

Because Defendant's statements were voluntary and not a product of interrogation by the officers, we hold the trial court did not err when it allowed the officers to testify as to Defendant's statements.

II.

Defendant next argues that the trial court erred by allowing Officer Jones to testify regarding his investigation and arrest of Defendant on an unrelated charge of possession of crack cocaine from 1998. He contends "this bad act testimony had no relevance

whatsoever to any of the exceptions outlined under Rule 404(b)." We disagree.

Under North Carolina law, the State was allowed to put on evidence to show that Defendant violated section 14-415.1(a) of the North Carolina General Statutes. *See State v. Leach*, 166 N.C. App. 711, 603 S.E.2d 831 (2004)(holding that the plain meaning of N.C. Gen. Stat. § 14-415.1 allows for the prosecution to admit into evidence the defendants prior record when charged with possession of a firearm by a felon).

Additionally, the State indicted Defendant as an habitual felon pursuant to section 14-7.1 of the North Carolina General Statutes. To prove Defendant is an habitual felon, the State must show that the Defendant was "convicted of or pled guilty to three felony offenses." N.C. Gen. Stat. § 14-7.1 (2005). In the indictment, the State listed three convictions which were the basis for the habitual felon indictment; and within those three convictions the State listed the 1998 possession of crack cocaine charge. Thus, Defendant's contention that this conviction was totally unrelated is without merit.

Moreover, the State must present substantial evidence of each element of the crime charged. *State v. Lindsey*, 118 N.C. App. 549, 553, 455 S.E.2d 909, 912 (1995). Therefore, the State had to present evidence to show that Defendant was convicted of possession of crack cocaine in 1998. Because the State was required to present evidence of Defendant's status as a felon, we hold that the trial court did not error by allowing the officer to

testify as to his investigation and arrest of Defendant for possession of crack cocaine.

III.

Defendant also argues that this Court should reconsider our holding in *Glasco* which allows the State to use the same prior felony as a basis for possession of firearm by a felon and to support an habitual felon indictment. *State v. Glasco*, 160 N.C. App. 150, 585 S.E.2d 257(2003). We do not have the authority to do so and, therefore, dismiss this assignment of error. *In re Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 297 (1989).

In sum, we find no error in these assignments of error, and we have examined Defendant's remaining contentions and find them to be without merit.

No error.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).