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NO. COA07-1521

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v.

CHRISTOPHER MALACHI COWAN

Iredell County
Nos. 05 CRS 60613,
06 CRS 100,
06 CRS 54509,
06 CRS 55670-55673

Court of Appeals

Appeal by defendant from judgment entered 2 May 2007 by Judge Susan C. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 1 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Coburn, for the State.

Slip Opinion

M. Alexander Charns, for defendant-appellant.

TYSON, Judge.

Christopher Malachi Cowan ("defendant") appeals from judgment entered after a jury found him to be guilty of: (1) six counts of possession with intent to sell or deliver cocaine pursuant to N.C. Gen. Stat. § 90-95(a) and (2) six counts of sale of cocaine pursuant to N.C. Gen. Stat. § 90-95(a)(1). We hold there is no error in the jury's verdict or the judgment entered thereon.

I. Background

On 25 September 2006, defendant was indicted on six counts of possession of controlled substance with intent to sell and deliver,

six counts of sale of controlled substance, and attaining the status of being an habitual felon.

At trial on 30 April 2007, the State presented evidence, which tended to show defendant had sold undercover Statesville Police Department Narcotics investigators crack cocaine on six different occasions between 11 June to 11 October 2005. Defendant presented no evidence at trial.

On 2 May 2007, the jury found defendant to be guilty on the possession with intent to sell or deliver cocaine and sale of cocaine charges. Defendant pleaded guilty to attaining habitual felon status. The trial court found defendant to have a prior record level of V, consolidated defendant's convictions, and sentenced him to a minimum term of 151 and a maximum term of 191 months incarceration. Defendant appeals.

II. Issues

Defendant argues his constitutional rights were violated when he was: (1) not present during a stage of his trial and (2) forced to wear leg restraints throughout the trial. Defendant also argues he received ineffective assistance of counsel.

III. Constitutional Rights

Defendant argues his constitutional rights were violated when he was: (1) not present for an off-the-record discussion between the attorneys and the trial court and (2) forced to wear leg restraints throughout the trial.

"In 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." N.C.R. App. P. 10(b)(1) (2007). "[C]onstitutional error will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) (citation omitted); see also *State v. Haselden*, 357 N.C. 1, 11, 577 S.E.2d 594, 601 (citation omitted) ("The record reveals, and defendant concedes, that he voiced no objection at trial to being restrained by leg shackles. As such, defendant's assignment of error is procedurally barred."), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003); *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (citation omitted) ("[P]lain error analysis applies only to instructions to the jury and evidentiary matters."), *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000).

Defendant failed to object to or raise these constitutional issues during his trial and has failed to preserve either of them for appellate review. N.C.R. App. P. 10(b)(1); *Chapman*, 359 N.C. at 366, 611 S.E.2d at 822. These assignments of error are waived and dismissed.

IV. Ineffective Assistance of Counsel

Defendant argues he received ineffective assistance of counsel based on defense counsel's failure to request the recordation of jury selections, bench conferences, opening statements, and closing arguments. We disagree.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was

deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)), *cert. denied*, ___ U.S. ___, 166 L. Ed. 2d 116 (2006).

N.C. Gen. Stat. § 15A-1241(a) (2007) specifically exempts certain items from mandatory recordation including: (1) jury selection in noncapital cases; (2) opening and closing statements to the jury; and (3) arguments of counsel on questions of law. Our Supreme Court and this Court have repeatedly held a defense counsel's failure to request recordation of items exempted from the recording statute does not constitute ineffective assistance of counsel. See *State v. Hardison*, 326 N.C. 646, 661-62, 392 S.E.2d 364, 373 (1990) (defendant did not show defense counsel's failure to request recordation of the jury selection, the bench conferences, and the opening and closing arguments of counsel constituted ineffective assistance of counsel); *State v. Sutton*, 169 N.C. App. 90, 93-94, 609 S.E.2d 270, 273-74 (defense counsel's "failure to request recordation of jury selection, opening statements, and closing arguments, as well as . . . failure to request a limiting instruction regarding evidence that defendant was arrested for carrying a knife" did not constitute ineffective assistance of counsel), *disc. rev. denied*, 359 N.C. 642, 617 S.E.2d 658 (2005); see also *State v. Price*, 170 N.C. App. 57, 67, 611 S.E.2d 891, 898 (2005); *State v. Crawford*, 163 N.C. App. 122,

128-29, 592 S.E.2d 719, 723-24, *disc. rev. denied*, 358 N.C. 734, 601 S.E.2d 867 (2004). This assignment of error is overruled.

V. Conclusion

Defendant failed to properly preserve his assignments of error asserting his constitutional rights were violated when he was: (1) not present during a stage of his trial and (2) forced to wear leg restraints throughout his trial. These alleged errors are not subject to plain error review. *Greene*, 351 N.C. at 566, 528 S.E.2d at 578.

Defense counsel's failure to request recordation of non-mandatory proceedings under the recording statute does not constitute ineffective assistance of counsel. *Hardison*, 326 N.C. at 661-62, 392 S.E.2d at 373. Defendant received a fair trial, free from the prejudicial errors he preserved, assigned, and argued. We hold there is no error in the jury's verdict or the judgment entered thereon.

No error.

Judges MCCULLOUGH and STROUD concur.

Report per Rule 30(e).