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NO. COA08-295

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

STATE OF NORTH CAROLINA

v.

Wayne County

Nos. 07 CRS 001979-001980

07 CRS 050779

DARRIUS JAMAR BENTON, a/k/a
DARRIUS JHAMAAR BENTON

Appeal by defendant from judgments entered on or after 19 September 2007 by Judge Charles H. Henry in Wayne County Superior Court. Heard in the Court of Appeals 31 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Yvonne B. Ricci, for the State

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

TYSON, Judge.

Darrius Jamar Benton, a/k/a Darrius Jhamaar Benton, ("defendant") appeals from judgments entered after a jury found him to be guilty of (1) felonious breaking and entering pursuant to N.C. Gen. Stat. § 14-54(a); (2) felonious larceny pursuant to N.C. Gen. Stat. § 14-72(b)(2); and (3) felonious possession of firearm by felon pursuant to N.C. Gen. Stat. § 14-451.1; and after defendant pleaded guilty to having attained habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. We hold there to be no error in the jury's verdict or the judgment entered thereon.

I. Background

On 7 May 2007, defendant was indicted on charges of breaking and entering, larceny after breaking and entering, possession of stolen goods, possession of a firearm by a felon, and habitual felon status. A jury convicted defendant on 19 September 2007 of the four substantive offenses and defendant pleaded guilty to habitual felon status. The trial court arrested judgment of the possession of stolen goods offense. At the sentencing hearing, the following exchange took place:

COURT: Okay. It's your contention that as to the felonious breaking and entering that the Defendant is Record Level IV for punishment?

[PROSECUTOR]: That is correct, Judge.

COURT: And the possession of a firearm by a felon, it's the State's contention that it's Record Level III; is that correct?

[PROSECUTOR]: Yes, your Honor. That is . . . I believe the State has agreed with Defense Counsel, and Defense Counsel is willing to stipulate, I believe, your Honor. The State is certainly stipulating to those records levels.

COURT: Okay. Okay. . . . I'll hear from [defense counsel] with regards to sentencing.

[DEFENSE COUNSEL]: Your Honor, I would ask that the Court seriously consider consolidating all the counts for one - - two is the possession - - sentencing him to a firearm by a convicted felon, consolidate the other counts together; he's a habitual felon; he's admitted that, your Honor. I just - - and he's young - - he's a very young man, your Honor. He has children. One is as little as a year-old. He's going to - - no matter what you give him, your Honor, it's going to be a long time for him. I point out, your Honor, that there were a lot of people that could have been charged in this case that weren't,

and he's taken the full rap for everything and he's got the habitual felon status; there's no question about that, your Honor, but he is an awful young man. And, your Honor, when I first came as a prosecutor years and years and years ago, it was almost unheard of to have anybody as a habitual felon, and people rack up habitual felon status real quick these days. It would be unheard of for someone of his age 30 years ago to be a habitual felon; very few of them we had, your Honor, but it's very easy these days to be sentenced - - he's gotten to that status in a hurry, and I would ask if the Court would seriously consider doing that on the firearm by a convicted felon. He's still - - no matter what the Court does it's going to be a long time for him.

COURT: Okay. [Defendant], do you wish to address the Court? He doesn't have to. But is there anything you want to say . . . at this point in time?

DEFENDANT: I just back up what my lawyer said.

COURT: Okay. Thank you very much.

The trial court consolidated judgment on the larceny and breaking and entering charges and sentenced defendant as a Record Level IV to an active term of a minimum of 133 to a maximum of 169 months imprisonment. The trial court also entered judgment on the possession of a firearm by a felon, and sentenced defendant as a Record Level III and as an habitual felon to a concurrent term of a minimum of 116 to a maximum of 149 months imprisonment. Defendant appeals.

II. Issue

Defendant argues the State failed to meet its burden under N.C. Gen. Stat. § 15A-1340.14(f) to prove defendant's prior convictions.

III. Calculating Prior Record Level

Defendant's sole argument on appeal is that the State failed to meet its burden of proving defendant's prior convictions for purposes of calculating his prior record level. We disagree.

In calculating a defendant's prior record level for sentencing purposes, the General Statutes provide:

A prior conviction shall be proved by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2007). The State bears the burden of proving that prior convictions exist and that the defendant is the same person who is listed in those prior convictions. *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007). As recited in the statute above, a stipulation by the parties is an acceptable method for proving prior convictions.

In the instant case, the State represented to the trial court its stipulation to the prior record levels for each offense, as well as stating its belief that defendant had agreed to stipulate to the same levels. Defense counsel did not object to this statement by the State and instead began arguing mitigating factors to the trial court. This Court has held that "[a] stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an

opportunity to object and failed to do so." *Id.* (citing *State v. Alexander*, 359 N.C. 824, 828-29, 616 S.E.2d 914, 917-18 (2005)). Defendant was provided the opportunity to address the court and "back[ed] up what [his] lawyer said." We also note that defense counsel signed both prior record level worksheets and defendant has not argued, either at the hearing or on appeal, that any of the information contained on those sheets is incorrect. Given these circumstances, we hold that defendant stipulated to the prior convictions, such that the State was not required to produce further evidence. This assignment of error is overruled.

IV. Conclusion

Defendant stipulated to his prior record level. The trial court did not err in calculating defendant's prior record level without additional evidence. Defendant received a fair trial, free from prejudicial error he preserved, assigned and argued. We hold there to be no error in the jury's verdict or the judgments entered thereon.

No error.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).