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NO. COA09-1095

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v.

Mecklenburg County

No. 08 CRS 40873

JEFFREY ANTONIO WILLIAMS

08 CRS 10234

Appeal by Defendant from judgment and commitment entered 8 April 2009 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals 11 February 2010.

Attorney General Roy Cooper, by Assistant Attorney General Ward Zimmerman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for Defendant.

STEPHENS, Judge.

On 8 April 2009, a jury found Defendant guilty of possession of a firearm by a felon and attaining the status of an habitual felon. The trial court found that Defendant had a prior record level of IV and sentenced Defendant as an habitual felon to a term of 120 to 153 months imprisonment. From judgment and commitment entered, Defendant appeals.

I. Procedural History

Defendant was indicted for possession of a firearm by a convicted felon on 12 May 2008. The original indictment predicated

the possession charge on Defendant's previous attainment of habitual felon status. A superseding indictment was returned on 6 April 2009, in which the State predicated the possession charge on Defendant's prior conviction for felony breaking and entering. Defendant was also charged with attaining habitual felon status on 23 June 2008.

This matter was tried before a jury during the 7 and 8 April 2009 Criminal Session of Mecklenburg County Superior Court, the Honorable J. Gentry Caudill presiding. The evidence presented at trial tended to show the following:

On 6 January 2008, Charlotte Mecklenburg police officers Michael Blee ("Officer Blee") and Christopher Busic ("Officer Busic") responded to a domestic dispute between Defendant and his girlfriend at the time, Melissa Cox ("Cox"). Cox informed Officer Blee that Defendant had a shotgun in the back of his truck. Defendant initially denied having the gun and consented to a search of his truck. When Officer Busic began moving boxes around in the back of the truck, however, Defendant remembered the gun and told Officer Busic he had found it by some dumpsters and wanted to get rid of it.

The police collected the shotgun, filed the gun in police property, and had the gun tested. The shotgun was rusty and made of wood stock with black tape around it. At trial, a firearms examiner with the Charlotte Mecklenburg Police Department crime laboratory testified the gun was in good operating condition, and the court entered the gun into evidence as State's Exhibit 2.

Instead of arresting Defendant the day the officers recovered the shotgun, the officers gave Defendant the opportunity "to provide cooperation or undercover type work." Defendant's undercover work failed to prove helpful, however, and Defendant was arrested on or about 29 February 2008.¹

The State offered into evidence State's Exhibit 3, a certified copy of the judgment and commitment entered 7 December 2000 where Defendant pled guilty to the felonies of larceny after breaking and entering, breaking and/or entering, and attaining the status of an habitual felon. Defendant did not object to the admission of this evidence.

The jury found Defendant guilty of possession of a firearm by a felon. The trial court then proceeded to the habitual felon phase of the trial to determine whether Defendant had attained habitual felon status. Before the State presented evidence on Defendant's habitual felon status, defense counsel informed the trial court that he believed the State intended to introduce copies of a prior plea agreement, and he was "objecting to that because I haven't seen the underlying judgments." When asked for clarification, defense counsel stated, "I've never encountered that problem before with a client who had a prior habitual felon from -- and I mean just because he pled guilty[.]" After further discussion, defense counsel objected to the "State presenting evidence in this particular form. It's not in the statute." The

¹A warrant for Defendant's arrest was issued on 29 February 2008. However, the record on appeal does not establish on which date Defendant was arrested.

trial court overruled Defendant's objection, pointing out that *State v. Brewington*, 170 N.C. App. 264, 281, 612 S.E.2d 648, 658-59, *disc. review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005), "states that [the terms of N.C. Gen. Stat. § 14-7.4] regarding how to prove these convictions are permissive and do not exclude other methods of proving prior conviction for determination of habitual felon status." *See id.* ("[T]he terms of N.C. Gen. Stat. § 14-7.4 [are] permissive and do not exclude other methods of proving prior convictions for determining habitual felon status.").

The State again submitted State's Exhibit 3 as well as State's Exhibit 4, a "certified true copy" of the indictment which listed the three underlying felonies used to determine Defendant's status as an habitual felon in State's Exhibit 3. The State's exhibits showed that Defendant previously pled guilty to habitual felon status on 7 December 2000 after being indicted for habitual felon status on 15 May 2000. Defendant did not present any evidence during the habitual felon phase.

The jury found Defendant guilty of attaining habitual felon status. At sentencing, Defendant stipulated he had 12 prior record points. Judge Caudill found Defendant's prior record level to be a level IV and sentenced him as an habitual felon to a presumptive term of 120 to 153 months imprisonment. The trial judge found Defendant was entitled to credit for pretrial confinement and ordered as a condition of any income-producing privileges that he may receive while in the Department of Correction, Defendant make restitution to the State for the services of his court-appointed

attorney. Defendant gave notice of appeal from the judgment and commitment in open court.

II. Discussion

A. Use of Prior Indictment and Judgment to Prove

Habitual Felon Status

Defendant argues that the trial court committed "plain and reversible error" by overruling Defendant's objection to the State's use of an indictment and judgment from a prior habitual felon case to prove Defendant's habitual felon status in this case. Specifically, Defendant asserts that the indictment and judgment from the prior case were inadmissible as irrelevant and hearsay not allowed within any exception. We disagree.

At trial, before the State presented any evidence in the habitual felon phase of the trial, defense counsel objected to the State's use of a prior indictment and judgment "because I haven't seen the underlying judgments." After further discussion, defense counsel restated his objection to "the State presenting evidence in this particular form. It's not in the statute." Defense counsel did not object to this evidence on the grounds of hearsay or relevancy, which he now argues on appeal. "To the extent defendant failed to object to introduction of much of the evidence he now contends was inadmissible, or objected on grounds other than those now argued on appeal, he has waived his right to appellate review other than for plain error." *State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 303 (2009).

"[P]lain error review is limited to errors in a trial court's

jury instructions or a trial court's rulings on admissibility of evidence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000). "The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to plain error, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal citation and quotation marks omitted).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). "Hearsay is not admissible except as provided by statute or by [the Rules of Evidence]." N.C. Gen. Stat. § 8C-1, Rule 802 (2009). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009).

It is well established that prior judgments are admissible for the purposes of demonstrating that a defendant has attained habitual felon status. In *State v. Tyson*, 189 N.C. App. 408, 658 S.E.2d 285 (2008), the State established that the defendant had attained habitual felon status by introducing into evidence the judgments from three prior felonies for which the defendant had been convicted. *Id.* at 421, 658 S.E.2d at 294. On appeal, the admissibility of these judgments was not at issue; nevertheless,

our Court noted that these prior judgments were sufficient to show that the defendant had attained habitual felon status. *Id.*; see *State v. Petty*, 100 N.C. App. 465, 470, 397 S.E.2d 337, 341 (1990) (State introduced three prior judgments to prove an habitual felon charge). Thus, it is common practice in our courts to prove habitual felon status by the introduction of prior judgments. It necessarily follows that a prior judgment for a conviction of being an habitual felon would also be admissible to demonstrate a defendant's habitual felon status in a current matter.

"Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). Pursuant to N.C. Gen. Stat. § 14-7.1, one attains habitual felon status by being "convicted of or [pleading] guilty to three felony offenses in any federal court or state court in the United States or combination thereof[.]" N.C. Gen. Stat. § 14-7.1 (2009).

"One basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony as a recidivist." *Allen*, 292 N.C. at 436, 233 S.E.2d at 588. Once a defendant reaches the trial phase, the notification purpose has been fulfilled, and the State's burden is to prove that the defendant has attained habitual felon status. To meet this burden, the State may present "the record or records of prior convictions of felony offenses . . . , but only for the purpose of proving that said person has been convicted of former

felony offenses.” N.C. Gen. Stat. § 14-7.4 (2009). In *State v. Wall*, 141 N.C. App. 529, 539 S.E.2d 692 (2000), this Court held that the terms of N.C. Gen. Stat. § 14-7.4 were permissive and do not exclude other methods of proving prior convictions for determining habitual felon status. *Id.* at 533, 539 S.E.2d at 695; see *Brewington*, 170 N.C. App. at 281, 612 S.E.2d at 658-59. This Court held in *Wall* that a faxed, certified copy of a court record was a reliable source of a defendant’s prior conviction for habitual felon purposes. *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695.

Thus, in the present case, the judgment in the prior case was admissible to show that Defendant had previously been convicted of attaining habitual felon status. Once this status is attained, it is never lost. *State v. Creason*, 123 N.C. App. 495, 498, 473 S.E.2d 771, 772 (1996), *aff’d per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997). It is clear from our case law that prior judgments are admissible and relevant for determining whether a defendant has attained habitual felon status. Here, the prior judgment demonstrating Defendant had previously attained the status of an habitual felon may have been sufficient on its own to prove that Defendant qualified as an habitual felon in the present case. Nevertheless, the indictment from that prior case was helpful to establish which three felonies Defendant had previously been convicted of and which qualified him for habitual felon status in the prior case, since this information was not ascertainable from the prior judgment. Thus, the prior indictment was also relevant

and admissible.

Accordingly, the trial court did not err in admitting into evidence the indictment and judgment in the prior case to prove that Defendant had previously attained habitual felon status. Defendant's argument is overruled.

B. Sufficiency of the Evidence

Defendant also argues that the trial court erred by failing to *sua sponte* dismiss the habitual felon case where the State's evidence was insufficient to prove that Defendant was convicted of the felonies alleged in the habitual felon indictment. Defendant has not preserved this issue for appellate review, however, because Defendant failed to move to dismiss at the close of the evidence during the habitual felon phase of the trial.

"Rule 10(b) (3) provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial." *State v. Richardson*, 341 N.C. 658, 677, 462 S.E.2d 492, 504 (1995).

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, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

N.C. R. App. P. 10(b) (3) (2009).

Here, Defendant failed to move to dismiss at the close of the

evidence in the habitual felon phase of the trial, and thus, Defendant has not preserved his argument that the State's evidence was insufficient to prove that Defendant had attained habitual felon status. Additionally, plain error review is not available for determinations of the sufficiency of the evidence. See *Golphin*, 352 N.C. at 460, 533 S.E.2d at 230. Defendant's argument is dismissed.

C. Ineffective Assistance of Counsel

Lastly, Defendant contends that defense counsel's failure to move to dismiss the charge of habitual felon at the close of the evidence constituted ineffective assistance of counsel. We disagree.

It is well established that

[t]he components necessary to show ineffective assistance of counsel are (1) "counsel's performance was deficient," meaning it "fell below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense," meaning "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

State v. Garcell, 363 N.C. 10, 51, 678 S.E.2d 618, 644 (2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674 (1984)). Thus, to establish ineffective assistance of counsel, Defendant must show that there is a reasonable probability that the trial court would have granted Defendant's motion to dismiss.

"A motion to dismiss must be denied if, viewing the evidence and all reasonable inferences to be drawn therefrom in the light

most favorable to the State, there is substantial evidence of each element of the offenses charged." *State v. Jarrett*, 137 N.C. App. 256, 262, 527 S.E.2d 693, 697 (2000). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "It is well established that when considering a motion to dismiss, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Denny*, 361 N.C. 662, 664, 652 S.E.2d 212, 213 (2007) (internal citation and quotation marks omitted).

Pursuant to N.C. Gen. Stat. § 14-7.1, "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon." In the present case, the State's evidence showed that Defendant had been convicted of the felonies of obtaining property by false pretenses on 30 June 1992, breaking and entering on 12 September 1994, and breaking and entering on 31 May 1995. State's Exhibit 3, the judgment and commitment entered 7 December 2000 in case 00 CRS 121633, showed that Defendant had previously pled guilty to attaining the status of an habitual felon. State's Exhibit 4, the 15 May 2000 indictment in case 00 CRS 121633, delineated Defendant's prior convictions that qualified him for habitual felon status.

Accordingly, the State presented sufficient evidence of Defendant's attaining habitual felon status such that had defense

counsel made a motion to dismiss, that motion would have been denied. Defendant has, therefore, failed to show that his case was prejudiced by defense counsel's failure to move to dismiss the habitual felon charge. Defendant's argument is overruled.

DISMISSED in part; NO ERROR in part.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).