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NO. COA11-429  
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Cleveland County  
No. 08 CRS 002088  
ASHLEY PIERRE LEE 09 CRS 1323

Appeal by Defendant from judgment entered 12 October 2010  
by Judge F. Lane Williamson in Superior Court, Cleveland County.  
Heard in the Court of Appeals 1 November 2011.

*Attorney General Roy Cooper, by Assistant Attorney General  
Susannah P. Holloway, for the State.*

*Michael E. Casterline for Defendant-Appellant.*

McGEE, Judge.

Ashley Pierre Lee (Defendant) appeals from judgment entered  
after a jury found him guilty of possession with intent to sell  
or deliver cocaine, sale of cocaine, and of having attained  
habitual felon status. In his sole argument on appeal,  
Defendant contends that the trial court erred when it failed to  
instruct the jury that it was required to reach a unanimous

verdict at the habitual felon phase of Defendant's trial. We find no prejudicial error.

Defendant was indicted for possession with intent to sell or deliver cocaine and sale of cocaine on 19 May 2008, and was indicted for having attained habitual felon status on 13 April 2009. A jury found Defendant guilty of the substantive offenses on 12 October 2010.

The case then proceeded to the habitual felon stage. Detective Randy Conner testified that Defendant had three prior felony convictions, and the trial court admitted the judgments for those convictions into evidence. At the charge conference, the trial court proposed to give the pattern habitual felon instruction, and the parties did not object to the proposed charge. The trial court instructed the jury as proposed, but omitted an instruction that the jury was required to reach a unanimous verdict. Defendant did not object to the jury charge given.

The jury received the verdict sheet from the trial court at 4:42 p.m. and returned with a verdict at 4:44 p.m. The trial court asked the jury foreman to stand and had the following brief exchange with the foreman:

COURT: Has the jury reached a unanimous verdict on this phase of the trial?

JUROR: Yes, sir.

The foreman then returned the verdict sheet to the clerk. The verdict sheet read: "We the jury, as our unanimous verdict, find . . . [D]efendant named above: Guilty of Habitual Felon Status[.]" The trial court then asked the jury whether the verdict sheet was correct, and the transcript indicates that all jurors "appeared to respond affirmatively." The jurors also raised their hands when the trial court inquired as to whether that was still their verdict. The trial court imposed a judgment consolidating the two substantive convictions and imposed a term of 96 to 125 months in prison based on Defendant's habitual felon status. Defendant appeals.

Defendant argues that the trial court committed prejudicial error by failing to instruct the jury that it was required to reach a unanimous verdict at the habitual felon phase of the trial. We disagree.

The North Carolina Constitution provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. Art. I, § 24. However,

in the absence of a request, a trial judge is not required to charge the jury that its verdict must be unanimous. Since the defendant has the right to have the jury polled, there is no apparent reason why the

trial judge should be required in every case to so instruct.

*State v. Inland*, 278 N.C. 42, 47, 178 S.E.2d 577, 580 (1971).

"An omission [of a unanimity instruction] complained of must not only be erroneous but also material and prejudicial to merit retrial of the case." *Id.*

In this case, the trial court's failure to give a unanimity instruction is harmless. First, Defendant did not request that the trial court give such an instruction, nor did he object to the jury charge as given. Further, the verdict sheet explicitly states that the jury reached a unanimous verdict, and the transcript indicates that when the trial court asked the jury in open court, the jurors indicated their verdict was unanimous. Finally, the State offered convincing evidence of Defendant's habitual felon status. Thus, we hold Defendant has failed to demonstrate that the trial court committed prejudicial error in omitting a unanimity instruction in this case. Accordingly, we find no prejudicial error.

No prejudicial error.

Judges ELMORE and McCULLOUGH concur.

Report per Rule 30(e).