NO. COA12-1055
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v. Durham County
Nos. 11 CRS 1848
11 CRS 1849

TERRY CORNELIUS CATES,
Defendant.

Appeal by defendant from judgment entered 6 February 2012 by Judge Elaine Bushfan in Durham County Superior Court. Heard in the Court of Appeals 27 February 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas M. Woodward, for the State.

Anne Bleyman for defendant-appellant.

GEER, Judge.

Defendant Terry Cornelius Cates appeals from his conviction of obtaining property by false pretenses and being a habitual felon. On appeal, defendant primarily contends that the trial court erred in classifying a prior out-of-state conviction as a Class I felony for sentencing purposes when the State did not show the offense was substantially similar to a North Carolina offense. N.C. Gen. Stat. § 15A-1340.14(e) (2011) specifies that

an out-of-state felony conviction shall be classified as a Class I felony unless the State proves that the offense is substantially similar to a higher-level felony in North Carolina. Because the State offered into evidence a certified copy of the prior out-of-state conviction that identified the offense as a felony and because the trial court classified the conviction as a Class I felony, the default classification specified by N.C. Gen. Stat. § 15A-1340.14(e), we hold that the trial court did not err in sentencing defendant.

Facts

The State's evidence tended to show the following facts. On 10 August 2010, Gene Parker, a resident of Buffalo Junction, Virginia, called the Mecklenburg County, Virginia, Sheriff's Office ("Mecklenburg County Sheriff's Office") to report the theft of two "four-wheelers." Mr. Parker described one of the four-wheelers as a green "Recon 4x4" and the second as a blue "FourTrax." Mr. Parker had last seen the four-wheelers parked beside his house the previous evening; he noticed that they were missing at about 9:00 a.m. that morning.

Also on 10 August 2010, defendant took two four-wheelers to Cash Converters, a chain store that buys and resells used merchandise with a location in Durham, North Carolina. He negotiated a sale of the vehicles with the owner, Charles

Renfrow, Jr. Mr. Renfrow knew defendant from previous occasions when defendant was in the store. Defendant signed a "buy ticket" stating that defendant owned the four-wheelers and had a right to sell them. Cash Converters paid defendant $1,000.00 in cash for the four-wheelers. At some point later, defendant returned to the store and attempted to sell two more four-wheelers. Mr. Renfrow refused to buy them when he saw that the Vehicle Identification Numbers on the four-wheelers had been altered.

In late August 2010, Investigator Sergeant Jason Wilborn with the Person County Sheriff's Department contacted Investigator Robert E. Wilson, then working with the Durham Police Department. Sergeant Wilborn asked Investigator Wilson to obtain from Cash Converters a list of everything defendant had sold to Cash Converters since the beginning of the year. Investigator Wilson obtained the list from Mr. Renfrow and then sent the list to Sergeant Wilborn.

After being informed by Sergeant Wilborn that the two four-wheelers on the list of items defendant sold to Cash Convertors had been reported stolen, Investigator Wilson met officials from the Mecklenburg County Sheriff's Office at Cash Converters so that the officers could recover the vehicles. Investigator

Wilson also obtained the original buy ticket for the four-wheelers.

The four-wheelers were returned to Mr. Parker. Mr. Parker identified the four-wheelers as belonging to him based on "scratches and various things that had happened to them" in addition to finding an item in the storage compartment of one of the four-wheelers that he recognized as belonging to him.

In May 2011, defendant was indicted in Mecklenburg County, Virginia, for grand larceny of property having a value of $200.00 or more belonging to Mr. Parker. The offense date listed on the indictment was 9 August 2010. Following a 7 September 2011 hearing in which defendant pled guilty to grand larceny, the Mecklenburg County, Virginia trial court entered judgment on 9 September 2011.

On 21 March 2011, defendant was indicted in Durham County, North Carolina for obtaining property by false pretenses based on his selling the four-wheelers to Cash Converters. In a separate indictment, defendant was charged with being a habitual felon. Defendant testified at trial and claimed that on 9 August 2010, he bought two four-wheelers for $800.00 from a seller on Craigslist after meeting the seller in Wilson, North Carolina. Defendant bought them because he believed he could make a profit by reselling them, and admitted selling the four-

wheelers to Cash Converters for $1,000.00. Defendant claimed he had never been to Mecklenburg County, Virginia and did not know the four-wheelers were reported stolen until he was arrested. Defendant testified that he only pled guilty to the Virginia grand larceny charge because the plea was part of a plea agreement that allowed him to get out of jail in Virginia and provided that if defendant testified for the Commonwealth of Virginia in an unrelated matter, all charges against him would be dismissed.

The jury found defendant guilty of obtaining property by false pretenses. Defendant then pled guilty to being a habitual felon. In accordance with a plea arrangement, the trial court sentenced defendant to a mitigated-range term of 78 to 103 months imprisonment. Defendant timely appealed to this Court.

Discussion

We must initially address this Court's jurisdiction over defendant's appeal. Defendant did not give oral notice of appeal at trial, but timely filed two pro se handwritten notices of appeal. Written notice of appeal in criminal cases "shall designate the judgment or order from which appeal is taken and the court to which appeal is taken," and must be served upon all adverse parties. N.C.R. App. P. 4(b).

Defendant concedes that neither of his notices of appeal were served upon the State and that neither notice designates the court to which appeal is taken. Defendant further concedes that although his second notice provided the file numbers for both of the charges at issue, his first notice referred only to the obtaining property by false pretenses charge. Given these issues, defendant filed a petition for writ of certiorari seeking review of the judgment in the event this Court determines it does not have jurisdiction over his appeal. The State asserts that the issues conceded by defendant render the notices defective and divest this Court of jurisdiction.

"[A] party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal . . . ." *Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993). Here, the State raised the issue of service in its response to defendant's petition and did not, therefore, waive the issue.

Where, as here, a notice of appeal is timely filed, but not served upon all parties, the Rule 4 violation is a nonjurisdictional defect. *See Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 102, 693 S.E.2d 684, 689 (2010). Since the State filed a brief addressing defendant's arguments on the merits, and this

violation has not impeded our task of review, we decline to impose any sanction for this nonjurisdictional rule violation. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).

This Court has held that "'[an appellant's] failure to designate this Court in its notice of appeal is not fatal to the appeal where the [appellant's] intent to appeal can be fairly inferred and the [appellees] are not mislead [sic] by the [appellant's] mistake.'" *State v. Ragland*, ___ N.C. App. ___, ___, 739 S.E.2d 616, 620 (2013) (quoting *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, ___ N.C. App. ___, ___, 720 S.E.2d 785, 791 (2011)). Since, here, defendant's notices clearly show his intent to appeal, and this Court is the only court with jurisdiction over his appeal, it can be fairly inferred defendant intended to appeal to this Court. The State does not suggest it was misled by the notices.

Finally, the fact that one of defendant's notices of appeal did not specify appeal from both file numbers in this case does not constitute a violation of the Rules of Appellate Procedure since that notice was superfluous given the second notice of appeal, which appropriately specified both file numbers. Accordingly, the issues with defendant's notices of appeal do

not warrant dismissal of this appeal, and we dismiss the petition for writ of certiorari as moot.

I

Defendant first challenges the limiting instruction given by the trial court in connection with the admission of evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Defendant does not challenge the admission of the Rule 404(b) evidence.

The State offered at trial, pursuant to Rule 404(b), a certified copy of defendant's Virginia conviction for grand larceny of the two four-wheelers. The State contended that the conviction, accompanied by the underlying Virginia indictment, showed that defendant was convicted of larceny of the same two four-wheelers that were sold to Mr. Renfrow at Cash Converters -- the basis for the charge of obtaining property by false pretenses. The State asserted that the Virginia conviction was relevant to show defendant's intent, knowledge, and the absence of mistake, and to present the "complete story" to the jury.

The trial court admitted the conviction into evidence, but gave the following limiting instruction over defendant's objection: "This evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary

element of the crime charged in this case; that the defendant had the knowledge, which is a necessary element of the crime charged in this case; that there is the absence of mistake; that there is the absence of accident. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received." The court also gave, without objection, a substantially similar instruction during its final charge to the jury.

Defendant points out that the trial court's instructions followed the pattern instruction, N.C.P.I.--Crim. 104.15 (2011), entitled "EVIDENCE OF SIMILAR ACTS OR CRIMES. G.S. § 8C-1, Rule 404(b)." That pattern instruction contains a footnote that states in relevant part:

> The Committee recommends that this instruction not be given in three instances in which proof of similar acts or crimes is generally admitted for substantive purposes: (1) where two crimes are so closely connected that neither can be adequately proved without the other . . . . The Committee believes that in these instances the evidence of similar acts or crimes is introduced for such a broad purpose that any attempt to define and limit that purpose by an instruction such as this would be futile.

Id. n.1.

Defendant correctly asserts that the State offered the Virginia conviction, in part, for the purpose of showing the "complete story" of this case. Defendant reasons that the

State's "complete story" rationale below demonstrated that the crimes at issue -- the Virginia grand larceny and the North Carolina obtaining property by false pretenses -- were so closely connected that one could not be proven without the other. Accordingly, given the pattern instruction footnote, defendant contends the trial court's limiting instructions to the jury were "futile" and, as such, erroneous. Defendant concedes that he failed to properly object to the instructions and we, therefore, may only review this issue for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

Defendant's argument fails to recognize, first, that regardless of the State's argument to the trial court, the court actually received the evidence "solely" for the purposes of showing defendant's "intent," defendant's "knowledge," "the absence of mistake," and "the absence of accident." Those four purposes are all expressly recognized in the pattern instruction as Rule 404(b) purposes for which a limiting instruction is proper. N.C.P.I.--Crim. 104.15.

Second, even if the court had admitted the evidence based on the closely connected crimes purpose, the Committee's footnote merely comments that when Rule 404(b) evidence is admitted for that purpose, any instruction is likely to be so

broad or confusing that the jury will simply disregard it and use the evidence without limitation. Accordingly, the Committee's observation that an instruction would be "futile" points to the fact that there would be no purpose in giving an instruction since the practical effect would be the same whether an instruction was given or not: the jury would use the evidence without limitation. *See Webster's Third New Int'l Dictionary* 925 (1968) (defining "futile" as "serving no useful purpose"). It follows that, even if the court had not given the instruction, as defendant now contends would have been proper, defendant would be in the exact same position as if a futile instruction were given. Defendant cannot, therefore, show prejudice with this argument.

II

Defendant next argues that the trial court erred in assigning defendant prior record level points for a Virginia conviction. We review alleged sentencing errors to determine "'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.'" *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006) (quoting *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997)).

We initially address the State's contention that defendant has not preserved this issue for appeal by failing to object at

trial to the classification of his prior Virginia conviction for sentencing purposes. This Court has previously held that "[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). Defendant's argument is, therefore, preserved for appeal.

N.C. Gen. Stat. § 15A-1340.14(a) provides: "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." The number of prior record points for each class of felony and misdemeanor offense is specified in N.C. Gen. Stat. § 15A-1340.14(b).

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). A prior conviction may be proved by (1) "[s]tipulation of the parties"; (2) "[a]n 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"; or (4) "[a]ny other method found by the court to be reliable." *Id.*

Defendant does not dispute that the State presented sufficient evidence of the fact of his prior felony Virginia conviction. He argues, however, that the State failed to demonstrate that his prior Virginia conviction was substantially similar to a North Carolina offense.

In relevant part, N.C. Gen. Stat. § 15A-1340.14(e) provides for the classification of prior convictions from other jurisdictions as follows: "Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony . . . ." Further, "[i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points." *Id.*

Here, the trial court admitted into evidence at trial a certified copy of defendant's Virginia conviction for grand

larceny. Defendant concedes in his brief that the "conviction order indicated that grand larceny was a felony." Since there is no dispute that defendant's Virginia conviction was classified as a felony conviction in Virginia, the conviction, at a minimum, "is classified as a Class I felony." *Id.* Consistent with the statute, the trial court classified defendant's Virginia conviction as a Class I felony for sentencing purposes.

Defendant nonetheless argues that the court erred in classifying the Virginia conviction as a Class I felony, rather than a Class 3 misdemeanor, since the State did not present evidence that the Virginia conviction was substantially similar to a North Carolina felony. However, as this Court has previously explained:

> "[T]he default classification for out-of-state felony convictions is 'Class I.' Where the State seeks to assign an out-of-state conviction a more serious classification than the default Class I status, it is required to prove 'by the preponderance of the evidence' that the conviction at issue is 'substantially similar' to a corresponding North Carolina felony. [N.C. Gen. Stat. § 15A-1340.14(e).] However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required."

Bohler, 198 N.C. App. at 637, 681 S.E.2d at 806 (quoting *State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009)).

Since the trial court classified the Virginia conviction as a Class I felony, no showing of substantial similarity to a North Carolina offense was required under the statute.

In support of his contention that this Court should order a new sentencing hearing whenever the State fails to present evidence that an out-of-state conviction is substantially similar to a North Carolina offense, defendant cites *State v. Ayscue*, 169 N.C. App. 548, 610 S.E.2d 389 (2005), and *State v. Moore*, 188 N.C. App. 416, 656 S.E.2d 287 (2008).

In *Ayscue*, the Court held that the trial court improperly classified the defendant's prior out-of-state conviction as a Class 1 misdemeanor because the State did not present sufficient evidence to show that the out-of-state conviction was substantially similar to a North Carolina crime to be treated as a Class 1 misdemeanor. 169 N.C. App. at 556, 610 S.E.2d at 395. Defendant fails to recognize that in *Ayscue*, the designation of the prior out-of-state conviction as a Class 1 misdemeanor, rather than the lower, default class of Class 3 misdemeanor, expressly required, under N.C. Gen. Stat. § 15A-1340.14(e), that the State prove by a preponderance of the evidence that the conviction was substantially similar to a North Carolina Class 1 misdemeanor. There is no equivalent requirement that the State show a conviction is substantially similar to a North Carolina

offense when the State has met its burden of showing the conviction is treated as a felony in the foreign jurisdiction, and the offense is classified in the default class as a Class I felony.

In *Moore*, this Court remanded for resentencing where the trial court classified the defendant's out-of-state convictions as Class I felonies based on stipulations by the defendant, but without any additional evidence that the out-of-state convictions were in fact classified as felonies in the foreign jurisdiction. 188 N.C. App. at 425-26, 656 S.E.2d at 293-94. Nothing in *Moore* suggests that it is improper for a trial court to classify a defendant's prior out-of-state conviction as a Class I felony based on evidence, such as the State presented here, of a certified copy of the prior out-of-state conviction designating that offense as a felony in the foreign jurisdiction.

Defendant's arguments are, therefore, unpersuasive. We hold that the trial court did not err in classifying defendant's prior Virginia conviction as a Class I felony for sentencing purposes.

III

Finally, defendant argues that his sentence, imposed in accordance with the Habitual Felon Act, violates his right to be

free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution. Defendant did not raise this issue at trial. "'It is well settled that this Court will not review constitutional questions that were not raised or passed upon in the trial court.'" *State v. McGee*, 175 N.C. App. 586, 590, 623 S.E.2d 782, 785 (2006) (quoting *State v. Carpenter*, 155 N.C. App. 35, 41, 573 S.E.2d 668, 673 (2002)).

Defendant nonetheless cites *State v. Evans*, 162 N.C. App. 540, 591 S.E.2d 564 (2004), to support his contention that this issue can be reviewed for plain error. In *Evans*, the Court applied plain error review to the issue whether the defendant's sentence constituted cruel and unusual punishment. *Id.* at 541, 543, 544, 591 S.E.2d at 565, 566, 567. However, *Evans* predates our Supreme Court's decision in *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333, which emphasized that "plain error review in North Carolina is normally limited to instructional and evidentiary error." Because defendant's argument does not allege an instructional or evidentiary error, we do not review it for plain error. We conclude that defendant received a trial free from prejudicial error.

No error.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).