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NO. COA 12-1558
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v.

Onslow County
No. 11 CRS 55123

LARRY FELENTISE RAMBERT

Appeal by Defendant from judgment entered 23 August 2012 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 9 May 2013.

Attorney General Roy A. Cooper, by Assistant Attorney General Brian R. Berman, for the State.

Geeta N. Kapur for Defendant.

DILLON, Judge.

Where the trial court did not act improperly by holding a prosecution witness in contempt of court for providing false and evasive testimony, the trial court did not deprive Defendant of his right to a fair trial. Where the trial court improperly allowed the jury to convict Defendant of the sale of a controlled substance and delivery of a controlled substance

arising out of a single transaction, we reverse and remand to the trial court for a new sentencing hearing. Where Defendant pled guilty to the charge of attaining the status of an habitual felon, raised no objection to the indictment during trial, and does not raise a facial validity challenge on appeal, Defendant waived his right to bring such argument as the basis of his appeal.

I: Facts and Procedural History

Larry Rambert (Defendant) was indicted on 10 July 2012 on the following charges for conduct that occurred on 26 April 2011: selling cocaine; delivering cocaine; manufacturing Schedule II controlled substances; maintaining a place to keep controlled substances; manufacturing, selling or delivering, or possessing a controlled substance within 1000 feet of a school; and possession with the intent to manufacture, sell or deliver cocaine. The same day, Defendant was also indicted in an ancillary indictment as an habitual felon for three prior felony convictions.¹ Though the indictment and the ancillary indictment were issued as separate documents, both indictments contained the same file number: 11 CRS 55123.

¹ Defendant was originally indicted on 10 January 2012. The 10 July 2012 indictments superseded these original indictments.

At trial, Detective Dale Silance of the Jacksonville Police Department testified that, on the evening of 26 April 2011, he contacted Shawn Jones to act as a confidential informant in a drug transaction. Det. Silance directed Mr. Jones to call someone to make a drug deal. Det. Silance and Detective Kevin Doyle recorded the telephone conversation.

In preparation for the drug transaction, Det. Silance gave Mr. Jones \$160 for the cocaine purchase and fitted him with an audio/video recording device. Mr. Jones was also under surveillance by a number of other officers and additional video surveillance. Mr. Jones left the police car, walked to the purchase site, entered a gold GMC Yukon, and returned twelve minutes later with a rock of crack cocaine.

At trial, the State conducted a voir dire of Mr. Jones during which he answered alternately that he either had no memory of his actions as a confidential informant or that he was not present for the transaction, even after being presented with the video and audio surveillance. The State then called Det. Silance to authenticate the video and audio recording exhibits and identify Mr. Jones in the exhibits. The trial court had Mr. Jones return to the stand for voir dire:

THE COURT: Thank you very much. Anything that Mr. Silance testified to that refreshes your memory, sir, as to the transactions of April 26, 2011?

JONES: I don't recall.

THE COURT: You don't recall any of it?

JONES: I don't remember.

THE COURT: Do you understand that the court could hold you in contempt for refusal to testify?

JONES: Yes, sir.

THE COURT: And that you could be subject to 30 days of jail and a fine, do you understand that?

JONES: Yes, sir.

The trial court ultimately found Mr. Jones in contempt of court, and he did not testify for the State. Defendant neither objected to Mr. Jones being held in contempt nor did Defendant attempt to call Mr. Jones as a witness.

Following the trial, a jury found Defendant guilty of selling cocaine, delivering cocaine, and possession of cocaine with the intent to sell or deliver. Defendant then pled guilty to attaining the status of an habitual felon and entered a plea agreement. Pursuant to the plea agreement, the trial court consolidated all three charges into one judgment. The trial court determined that Defendant had 15 prior record points,

indicating that he was a Level V offender. The trial court sentenced Defendant to 101 to 131 months of imprisonment.

II: Argument

A. Constitutional Right to Fair Trial

Defendant argues that the trial court deprived him of his constitutional right to a fair trial when it invaded the province of the jury and found a material witness not credible and in contempt. Defendant contends that the remarks made by the trial court and the findings that ultimately led to Mr. Jones being held in contempt violated the trial court's duty of impartiality, thereby depriving him of his right to a fair trial.

Our appellate rules provide as follows:

In order to preserve an issue 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(a)(1) (2013). "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003) (citation omitted).

In the instant case, Defendant made no objection to Mr. Jones being held in contempt or any commentary concerning the trial court's findings with regard to the witness. Additionally, Defendant never attempted to call Mr. Jones as a witness at any time during the trial or voir dire. Moreover, Defendant made no objection based on a deprivation of his right to a fair trial. In the absence of any objection during trial, Defendant did not effectively preserve the issue and, therefore, waived his right to assert the issue on appeal.

Assuming *arguendo* that the trial court's actions and remarks regarding Mr. Jones's testimony on voir dire and the court's finding of contempt somehow affected Defendant's constitutional right to a fair trial, and assuming *arguendo* Defendant's argument were properly preserved, we would review under a harmless error analysis. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2011).

In the instant case, during extensive questioning on voir dire, Mr. Jones responded either that he had no memory of the

drug transaction or that he was not present for the transaction. The trial court determined "Jones's testimony [was] obviously false and evasive and is the legal equivalent of refusing to testify" and that Mr. Jones "willfully behaved in a contemptuous manner," "interrupted the proceedings of the court," and "impaired the respect of its authority, as a judge."

We believe the trial court was well within its power to make a determination concerning the conflicting evidence obtained during voir dire and concerning the credibility of Mr. Jones as a witness; we further believe the trial court did not err by holding Mr. Jones in contempt of court, upon making appropriate findings of fact. See *State v. Jenkins*, 300 N.C. 578, 584, 268 S.E.2d 458, 463 (1980); *Galyon v. Stutts*, 241 N.C. 120, 124, 84 S.E.2d 822, 825 (1954). Moreover, as all of the foregoing questioning of Mr. Jones occurred on voir dire, out of the presence of the jury, we cannot see how any alleged violation of Defendant's constitutional right to a fair trial was affected. Any alleged error pertaining to Defendant's constitutional right to a fair trial was harmless.

III: Conviction on Sale and Delivery

Next, Defendant contends that the trial court erred by allowing him to be improperly convicted and sentenced for both

the sale and delivery of a controlled substance arising from a single transfer. We agree, and the State concedes the error.

N.C. Gen. Stat. § 90-95(a)(1) (2011) makes it unlawful for any person “[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance.”

Id. Our Supreme Court has interpreted the statute subsection as follows:

Having examined the statute, we now conclude that the language of N.C.G.S § 90-95(a)(1) creates three offenses: (1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance. . . . By phrasing N.C.G.S § 90-95(a)(1) to make it unlawful to manufacture, *sell or deliver*, or possess with intent to manufacture, sell or deliver, a controlled substance[], . . . the legislature, *solely for the purpose of this statutory subsection*, has made each single transaction involving transfer of a controlled substance one criminal offense, which is committed by either or both of two acts – sale or delivery.

State v. Moore, 327 N.C. 378, 381-82, 395 S.E.2d 124, 126-27 (1990) (emphasis in original). Consequently, our Supreme Court has found that while “[a] defendant may be indicted and tried under N.C.G.S. § 90-95(a)(1) . . . for the transfer of a controlled substance, whether it be by selling the substance, or by delivering the substance, or both[,]” “a defendant may not,

however, be convicted under N.C. Gen. Stat. § 90-95(a)(1) of both the sale *and* the delivery of a controlled substance arising from a single transfer." *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990) (emphasis in original).

In the instant case, Defendant was indicted, tried, and convicted of *both* selling and delivering cocaine under N.C. Gen. Stat. § 90-95(a)(1) for the single transaction arising from the events of 26 April 2011, as well as possession of cocaine with the intent to sell or deliver. Therefore, since the trial court improperly convicted and sentenced Defendant for both the sale *and* the delivery arising from a single transfer of cocaine, we remand for resentencing upon a *single* conviction for transfer by sale or delivery.

IV: Habitual Felon Indictment

Finally, Defendant contends that the trial court did not have jurisdiction to sentence Defendant as an habitual felon because the ancillary indictment was not "separate from the indictment charging him with the principal felony" as both indictments were identified by the same file number, 11 CRS 55123, and, therefore, failed to comply with N.C. Gen. Stat. § 14-7.3 (2011). Defendant did not object to the indictments at trial but argues that failure to follow the mandates of the

statute is a question of law that is automatically preserved for appellate review regardless of whether it was objected to at trial. We find Defendant's argument without merit.

N.C. Gen. Stat. § 14-7.3 provides the following:

An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony.

Id. Our Supreme Court also noted that the "habitual felon indictment is necessarily ancillary to the indictment for the substantive felony." *State v. Cheek*, 339 N.C. 725, 727, 453 S.E.2d 862, 863 (1995) (citation omitted).

As to the validity of an indictment, our Supreme Court has found that "[a]n attack on an indictment is waived when its validity is not challenged in the trial court[,] but "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000) (citations omitted).

An indictment is not facially invalid as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy. Notification is sufficient if the illegal act or omission alleged in the indictment is "clearly set forth so that a person of common understanding may know what is intended."

State v. Haddock, 191 N.C. App. 474, 476-77, 664 S.E.2d 339, 342 (2008) (citations omitted).

Here, Defendant made no objection to the ancillary indictment alleging habitual felon status at any time during trial or the sentencing hearing. Therefore, Defendant waived his ability to challenge the validity of the indictment on appeal unless Defendant alleges that the indictment is facially invalid. This, Defendant has not done. As Defendant has not alleged that either indictment was facially invalid and no objection was made at trial, Defendant has waived such an argument on appeal.

In any event, we believe the indictments were sufficiently separate. The principle indictment alleged six drug-related offenses. Similarly, the ancillary indictment alleging habitual felon status identified three prior felony offenses, as well as the occurrence date, conviction date, convicting court, and convicting state. The indictments are physically separate and

the ancillary indictment alleging habitual felon status is explicitly titled "ancillary" and refers to the indictment alleging the drug-related offenses as the "principal indictment." Defendant's argument is, accordingly, overruled.

AFFIRMED, in part, REVERSED and REMANDED, in part.

Judges ELMORE and GEER concur.

Report per Rule 30(e).