NO. COA13-373
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Alamance County
Nos. 11 CRS 57670; 12 CRS 4779

TUNITA SHENETTE COLEMAN

Appeal by defendant from judgment entered 4 December 2012 by Judge R. Allen Baddour Jr. in Alamance County Superior Court. Heard in the Court of Appeals 30 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for the State.

Kevin P. Bradley for defendant-appellant.

HUNTER, Robert C., Judge.

On 4 December 2012, defendant Tunita Shenette Coleman was convicted of felony larceny and having attained the status of an habitual felon. The trial court sentenced defendant to a term of 88 to 115 months imprisonment. Defendant appeals. After careful review, we find no error.

Defendant first argues that she received ineffective assistance of counsel because her attorney did not challenge the

trial court's purported failure to comply with N.C. Gen. Stat. § 9-5 during jury selection.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two prong test.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

N.C. Gen. Stat. § 9-5 provides as follows:

> At least 30 days prior to any session or sessions of superior or district court requiring a jury, the clerk of superior court or assistant or deputy clerk shall prepare or have electronically prepared a *randomized* list of names from the master jury list equal to the number of jurors required for the session or sessions scheduled. The clerk of superior court may decrease the number of randomized names to account for the addition of names of previously selected jurors whose service has been deferred to this session. For each week of a superior court session, the senior resident superior court judge for the

> district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located shall specify the number of jurors to be drawn. For each week of a district court jury session, the chief district judge of the district court district in which the county is located shall specify the number of jurors to be drawn. Pooling of jurors between or among concurrent sessions of various courts is authorized in the discretion of the senior regular resident superior court judge. When pooling is utilized, the senior regular resident superior court judge, after consultation with the chief district judge when a district court jury is required, shall specify the total number of jurors to be drawn for such concurrent sessions.

N.C. Gen. Stat. § 9-5 (2012) (emphasis added).

Here, during jury selection, the following exchange occurred between the trial judge and a potential juror who was leaving the courtroom:

> THE COURT: Hold on. Ma'am?
>
> MS. HUGHES: Yes, sir. I was suppose[d] to be with the other group, not this group.
>
> THE COURT: How do you know that?
>
> MS. HUGHES: My last name is H.
>
> THE COURT: Okay. Okay. All right. Then -- hold on.
>
> MS. HUGHES: Okay.
>
> THE COURT: I'm going to ask you to stay with us for a moment. We may have you serve with us.

MS. HUGHES: Okay.

Defendant notes that all selected jurors' surnames began with the letter "K" or thereafter in the alphabet. Thus, defendant contends that the jurors were not assigned to the courtroom randomly, but rather because their surnames began in the latter part of the alphabet. Defendant asserts that had counsel challenged the trial court's failure to select jurors in accordance with the statutory mandate of N.C. Gen. Stat. § 9-5, then the jury would have been discharged pursuant to N.C. Gen. Stat. § 15A-1211(c) (2011). We are not persuaded.

First, the record does not definitely support a conclusion that the trial court failed to comply with the randomization provisions included within N.C. Gen. Stat. § 9-5. Nevertheless, even assuming *arguendo* that the trial court did not comply with N.C. Gen. Stat. § 9-5, defendant has failed to demonstrate prejudice. If trial counsel had challenged the jury panel, and the challenge had been sustained, the remedy would have been discharge of the jury and another jury would have been chosen prior to trial. *See* N.C. Gen. Stat. § 15A-1211(c). However, defendant has not sustained her burden of demonstrating that the failure of counsel to object to the jury panel and have the jury discharged had any impact on the fairness of the trial or

reliability of the jury's verdict. *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248; *see also State v. Leyva*, 181 N.C. App. 491, 495-96, 640 S.E.2d 394, 396-97 (2007) (holding that while "the trial judge erred by excusing himself from the courtroom during jury selection, defendant failed to show that he was prejudiced in any way by this error").

Defendant next argues that the trial court erred by accepting her guilty plea to attaining habitual felon status where one of the alleged prior convictions was a "nullity." Specifically, defendant contends that the indictment for her prior conviction for larceny from a merchant was facially defective because it failed to allege all of the elements of the offense. We are not persuaded.

"When appealing the use of a prior conviction as a partial basis for an habitual felon indictment, inquiries are permissible only to determine whether the State gave defendant proper notice that [s]he was being prosecuted for some substantive felony as a recidivist, pursuant to the procedure provided in N.C. Gen. Stat. § 14-7.3 (1993)." *State v. Creason*, 123 N.C. App. 495, 500, 473 S.E.2d 771, 773 (1996), *aff'd per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997). "Questioning the

validity of the original conviction is an impermissible collateral attack." *Id.*

Here, defendant's habitual felon indictment correctly stated the type of offense for which defendant was convicted, the county in which she was convicted, and the date of the offense. *See State v. Lewis*, 162 N.C. App. 277, 284–85, 590 S.E.2d 318, 324 (2004) (finding an habitual felon indictment sufficient where it stated the type of offense for which the defendant was convicted and the date of the offense). Defendant's argument that the prior conviction for larceny from a merchant is a nullity is properly brought by a motion for appropriate relief in that cause. *State v. Dammons*, 128 N.C. App. 16, 26, 493 S.E.2d 480, 486-87 (1997). Accordingly, because this is an impermissible collateral attack, we find no error.

NO ERROR.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).