NO. COA14-473
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 12CRS206596, -030953

RANDY JUNIOR MEEKS,
Defendant.

Appeal by Defendant from judgment entered 31 October 2013 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2014.

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

Gilda C. Rodriguez, for Defendant-appellant.

DILLON, Judge.

Randy Junior Meeks ("Defendant") appeals from convictions for robbery with a dangerous weapon and attaining the status of habitual felon. For the following reasons, we find no error in part in Defendant's trial and reverse and remand in part for correction of a sentencing error.

I. Background

On 5 March 2012, Defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. On 2 July 2012, Defendant was also indicted for attaining the status of habitual felon.

On 3 December 2012, a superseding indictment was entered for the robbery and conspiracy charges.

Defendant was subsequently tried on these charges before a jury. The State's evidence tended to show that a masked man, who the State contended was Defendant, entered a retail bank branch location, approached a bank teller and demanded money. The teller complied and also put into his bag two "bait packs[,]" which looked like stacks of $20.00 bills but contained a GPS tracker.

The teller stated that she never saw a weapon. However, three other bank employees who were present during the robbery testified that they heard threats about being shot, indicating that the masked man had a gun. Specifically, one employee heard someone say, "Do not move. I have a gun, and I'll shoot you." Another employee testified that the masked man said, "Don't look or I'll shoot." A third employee testified that he heard the masked man say "something about being shot."

When the masked man left the bank, the bank employees locked the bank doors and triggered the silent alarm to contact the police. Shortly thereafter, police determined from the GPS tracker that the stolen money was in a moving red Ford Taurus. Police stopped the vehicle and found Defendant inside the car with a plastic grocery bag full of U.S. currency on the passenger's side floor board, along with the GPS tracking devices, and three stocking masks. However, no weapons were found in the vehicle.

At the close of the State's evidence, the trial court granted Defendant's motion to dismiss the conspiracy charge but denied his motion regarding the charge of robbery with a dangerous weapon. Defendant did not present any evidence at trial and renewed his motion to dismiss the robbery charge, which was denied.

The jury found Defendant guilty of robbery with a dangerous weapon. Defendant pleaded guilty to attaining the status of habitual felon. After determining that Defendant had a prior record level of five, the trial court sentenced Defendant as a habitual felon to a term of 102 to 135 months of imprisonment. Defendant gave oral notice of appeal at trial.

II. Analysis

Defendant argues on appeal that (1) he was denied his constitutional right to due process because he was not notified of a superseding indictment until half-way through his trial and that the trial court erred in denying his motion for mistrial and dismissal after learning of the superseding indictment; and (2) the trial court erred in calculating his prior record level.

A. Superseding Indictment

Defendant contends that his constitutional right to due process was violated when the trial court failed to serve the superseding indictment. Both the superseding indictment and the original indictment charge Defendant with robbery with a dangerous weapon. The difference between the superseding indictment and the original indictment was that the original indictment listed only the teller as a victim; however, the superseding indictment also listed the three other bank employees as victims. Defendant argues that the teller's statements to police, that she did not see a weapon and was not threatened with a weapon, only support a conviction for common law robbery, whereas the testimony of the other bank employees--that the masked man had made threats about shooting and kept his hand in his pocket--would support a conviction for robbery with a dangerous weapon. Defendant concludes that because of this

lack of notice regarding this change in the indictment, he examined the other bank employees "as stand by victims and not as alleged victims," and their inclusion on the superseding indictment amounted to an unfair surprise and deprived him of the opportunity to properly prepare for his defense. Defendant further contends that the trial court erred in denying his motions for mistrial and dismissal because his case was prejudiced by the failure to serve the superseding indictment on defense counsel.

We apply *de novo* review to alleged violations of constitution rights. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). Our right to due process of law includes the "opportunity for preparation for trial and for the presentation of a proper defense at the trial." *State v. Farrell*, 223 N.C. 321, 328, 26 S.E.2d 322, 326 (1943). "The purpose of an indictment is: (1) to give defendant notice of the charges against him so that he may prepare his defense; and (2) to enable the court to know what judgment to pronounce in case of conviction." *State v. Wilson*, 108 N.C. App. 575, 584, 424 S.E.2d 454, 459 (1993) (citation omitted).

We apply an abuse of discretion standard to the trial court's decision on Defendant's motion for a mistrial. Our Supreme Court has held that "the decision to grant a motion for mistrial is within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. Steen*, 352 N.C. 227, 279, 536 S.E.2d 1, 31 (2000) (citation and quotation marks omitted), *cert. denied*, 531 U.S. 1167, 148 L.Ed. 2d 997 (2001). Further, "[a] trial court should declare a mistrial only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *Id.* (citation and quotation marks omitted).

Our Supreme Court has held that "it is neither necessary [for an indictment] to state particulars of the crime in the meticulous manner prescribed by common law, nor to allege matters in the nature of evidence[,]" *State v. Greer*, 238 N.C. 325, 329, 77 S.E.2d 917, 920 (1953), but that "[t]he purpose of setting forth the name of the person who is the subject on which an offense is committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of one acquittal or conviction if

accused a second time." *State v. Scott*, 237 N.C. 432, 433-34, 75 S.E.2d 154, 155 (1953) (citation and quotation marks omitted).

From the record before us, it appears that the inclusion of the other bank employees in addition to the teller on the superseding indictment amounted to little, if any, surprise to Defendant. During the trial, it was evident that defense counsel knew all of these bank employees; knew that they had all given statements to police; had access to follow-up interviews by the State; and had observed these witnesses on a video surveillance tape of the crime. Defense counsel raised specific questions regarding their statements to police and their observations of the crime, and thoroughly cross-examined each of these witnesses regarding their testimony before the jury. Defendant raises no argument that he did not have access to the pre-trial discovery. By his questioning and comments regarding these witnesses, we can only conclude that defense counsel was aware of these witnesses prior to his discovery of the superseding indictment at trial and the addition of these three other bank employees amount to little, if any, surprise or detriment to Defendant's defense on these charges.

As to Defendant's motion for mistrial, N.C. Gen. Stat. § 15A-630 (2011) states, in pertinent part, that "[u]pon the return of a bill of indictment as a true bill the presiding judge must immediately cause notice of the indictment to be mailed or otherwise given to the defendant *unless he is then represented by counsel of record*." This Court determined in *State v. Miller*, 42 N.C. App. 342, 256 S.E.2d 512 (1979) that because of the phrase "unless he is then represented by counsel of record" a defendant is not entitled to the notice requirements of this section if the defendant is represented by counsel. *Id.* at 346, 256 S.E.2d at 515. Our Supreme Court came to the same conclusion in *State v. Carson*, where it concluded that "[t]here was no requirement that these defendants [in *Carson*] be served with copies of the superseding indictments" because the record clearly showed they were represented by counsel at the time the superseding indictments were returned. 320 N.C. 328, 334, 357 S.E.2d 662, 666 (1987).

Here, the record shows that Defendant had appointed counsel on 16 February 2012, and defense counsel admitted in court that he was appointed counsel at the time the superseding indictment was handed down on 3 December 2012. Accordingly, based on *Carson* and *Miller*, we are compelled to hold that the trial court

was not required to give notice regarding the superseding indictment. Accordingly, the trial court did not violate Defendant's constitutional rights in not giving him notice of the superseding indictment or abuse its discretion in denying his motions for mistrial. Defendant's arguments are overruled.

B. Prior record level calculation

Defendant contends and the State concedes that the trial court erred in calculating his prior record level.

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010).

"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." N.C. Gen. Stat. § 15A-1340.14(a)(2011). The points assigned for each class of felony and qualifying misdemeanor are listed in G.S. 15A-1340.14.[1] Where "an offender is convicted of more than one

[1] G.S. 15A-1340.14(b) states that "Points are assigned as follows:

offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used." G.S. 15A-1340.14(d). G.S. 15A-1340.14(b)(5) further states that a defendant is to only get one prior record level point for each prior misdemeanor conviction including "any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes." G.S. 15A-1340.14(b)(6) states that an additional point can be added to the record level points "[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level[.]" Also, "[i]n determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." N.C. Gen. Stat. § 14-7.6 (2011).

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(1) For each prior felony Class A conviction, 10 points.
(1a) For each prior felony Class B1 conviction, 9 points.
(2) For each prior felony Class B2, C, or D conviction, 6 points.
(3) For each prior felony Class E, F, or G conviction, 4 points.
(4) For each prior felony Class H or I conviction, 2 points."

On Defendant's prior record level worksheet, it lists five misdemeanors and ten felonies. Based on these prior convictions, the trial court determined that Defendant had 14 prior record level points. Based on these points, the trial court determined that Defendant was a prior record level "V" five.

Turning first to his misdemeanor convictions, Defendant had four qualifying misdemeanors including misdemeanor breaking and entering, DWI, assault on a female, and violation of a domestic violence protective order. However, the assault on a female and violation of a domestic violence protective order convictions occurred on the same court calendar date 14 December 2000 and only one can be counted pursuant to G.S 15A-1340.14(d). Therefore, Defendant received three prior record level points, one for each of the three remaining qualifying misdemeanor convictions.

As to Defendant's ten prior felonies, seven of his convictions are from 27 October 1987. Pursuant to G.S 15A-1340.14(d), the trial court could only consider in its calculation the most serious felony of those seven, armed

robbery, a class "D" felony, giving Defendant six prior record level points.[2]

As to the other felonies, two convictions for felony breaking and entering and a conviction for robbery with a dangerous weapon were used to establish Defendant's habitual felony status, and pursuant to G.S. 14-7.6 could not be considered for prior record level points. The remaining felony included is a federal conviction for bank robbery, classified as a Class I felony, giving Defendant two more prior record level points.

Therefore, for his prior felony convictions, Defendant should have received eight prior record level points. Accordingly, the total number of record level points should have been calculated as 12, and not 14, based on the three points from his qualifying misdemeanor convictions, the eight points from his felony convictions and one point because Defendant's prior record level worksheet also included a conviction for

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[2] The trial court considered another one of the seven felonies from 27 October 1987 to establish Defendant as a habitual felon, which was permissible under our holding in *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996) (stating that the statutes do not prevent "the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another separate conviction obtained the same week to determine prior record level").

robbery with a dangerous weapon that was not included in determining prior record level, see G.S. 15A-1340.14(b)(6).

An error in calculating prior record points is harmless if it does not affect the defendant's prior record level. *See State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000). A total of 12 prior record level points would be a class "IV" four not a class "V" five prior record level, as the trial court concluded. *See* N.C. Gen. Stat. § 15A-1340.14(c). Because this error in calculating his prior record level resulted in Defendant being sentenced as a record level "V" five offender rather than a record level "IV" four offender, Defendant was prejudiced by this error. Accordingly, we reverse the trial court's order and remand for sentencing to include the correct prior record level.

NO ERROR IN PART; REVERSE AND REMAND IN PART.

Judge HUNTER, Robert C. and Judge DAVIS concur.

Report Per Rule 30(e).