NO. COA14-502
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Brunswick County
Nos. 12 CRS 4292
12 CRS 4293

FREDERICK CORBITT PENCE,
Defendant.

Appeal by defendant from judgment entered 31 October 2013 by Judge Ebern T. Watson, III in Brunswick County Superior Court. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

Brock & Meece, P.A., by C. Scott Holmes, for defendant-appellant.

GEER, Judge.

Defendant Frederick Corbitt Pence appeals from a judgment entered upon his convictions for habitual impaired driving and attaining habitual felon status. While defendant challenges on appeal the trial court's instruction to the jury regarding the results of the Intoximeter's chemical analysis, we hold that defendant has failed to demonstrate that he was prejudiced by

any error. However, we agree, and the State concedes, that the trial court erred by sentencing defendant as a habitual felon. The trial court did not submit the issue whether defendant was a habitual felon to the jury, and defendant did not plead guilty to attaining habitual felon status. We, therefore, reverse the habitual felon conviction and remand for further proceedings.

Facts

The State's evidence tended to show the following facts. On 14 September 2012, at about 10:30 p.m., Officer Charles Murray of the Sunset Beach Police Department was sitting in his patrol car at the Minute Man convenience store and gas station when defendant pulled into the parking lot on his moped. Defendant was covered in sand and dirt, was not wearing a shirt, and was wearing only one boot. He parked the moped and started walking towards Officer Murray, staggering to the left and right about three to five feet in both directions. Officer Murray asked defendant if he was okay, and defendant responded that he needed a light for his cigarette. Officer Murray could smell a strong odor of alcohol coming from defendant and asked if he had been drinking. Defendant said "no," but then, when asked again, stated: "I only drank some beer."

Officer Murray asked defendant to lean against the wall because he had been swaying. Defendant's speech was very

slurred, slow, and hard to understand, and his eyes were red and glassy. Officer Murray asked defendant where he was coming from, and defendant replied, "I was getting a light for my smoke." The officer then asked defendant where he was headed, and defendant replied again, "I was going to get a light for my smoke." When Officer Murray asked defendant how much he had had to drink, defendant replied "Just a couple of smokes." At one point while defendant was leaning against the wall, he stumbled out of his boot.

Based on Officer Murray's observations of defendant and defendant's inability to answer simple questions completely and correctly, Officer Murray formed the opinion that defendant had consumed a sufficient amount of alcohol to appreciably impair his mental and physical faculties. He placed defendant under arrest for driving while impaired. After defendant was handcuffed, defendant exclaimed multiple times: "I am going to kick your fucking ass."

Officer Murray transported defendant to the jail and turned him over to Deputy John Rogers of the Brunswick County Sheriff's Office for processing. Deputy Rogers conducted field sobriety tests, a portable breath test, and an Intoximeter test on defendant. With respect to the field sobriety tests, defendant exhibited 18 out of 18 possible signs of impairment.

Defendant's speech continued to be very thick and slurred, and he had trouble identifying the day of the week and the date. Based on his observations of defendant, Deputy Rogers was of the opinion that defendant was appreciably impaired. The Intoximeter test, a chemical analysis of defendant's breath, resulted in a blood alcohol concentration of 0.15 grams per 200 liters of breath.

On 10 December 2012, defendant was indicted for habitual impaired driving and being a habitual felon. Outside the presence of the jury, defendant stipulated to having three prior convictions for driving while impaired ("DWI"), which constituted an element of habitual impaired driving. The jury then found defendant guilty of the 14 September 2012 DWI. Thereafter, defendant "stipulated" to his status as a habitual felon. The trial court then sentenced defendant to a term of 77 to 105 months imprisonment. Defendant timely appealed the judgment to this Court.

I

Defendant challenges the trial court's instruction to the jury regarding the results of the Intoximeter's chemical analysis. The trial court instructed the jury that "[t]he results of a chemical analysis are deemed sufficient evidence to *presume* a person's alcohol concentration." (Emphasis added.)

The pattern instruction, however, states that "[t]he results of a chemical analysis are deemed sufficient evidence to *prove* a person's alcohol concentration." N.C.P.I.-Crim. 270.20A (emphasis added). Defendant argues that by using the word "presume" instead of "prove," the trial court shifted the burden of proof and created an unconstitutional conclusive presumption.

Based on our review of the transcript and record, it appears that the trial court's use of the word "presume" instead of "prove" was not intentional, but was rather an inadvertent misstatement. Defendant, however, failed to object to the trial court's misstatement after the charge to the jury and therefore failed to preserve this issue on appeal. Defendant argues that he preserved this issue by objecting to the trial court's proposed instruction at the charge conference, and that it is not necessary for defense counsel to renew an objection after instructions are delivered to the jury. We disagree, given the circumstances of this case.

Based on the parties' discussion at the charge conference, as well as the trial court's proposed instructions, it is apparent that the trial court intended to use the pattern instruction. Therefore, when defendant lodged his objection, he was objecting to use of the pattern instruction and not the trial court's use of the word "presume" instead of "prove." On

appeal, however, defendant's argument is based entirely on the trial court's misstatement to the jury. In this instance, defendant should have objected after the charge to the jury. Accordingly, defendant's objection at the charge conference was not sufficient to preserve this error on appeal.

Because defendant failed to preserve his challenge to the trial court's instruction as given to the jury, it is reviewable only for plain error. *See* N.C.R. App. P. 10(a)(4). Defendant, however, has failed to argue plain error, and, as a consequence, he is not entitled to plain error review of this issue. *See State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005) (per curiam) ("[B]ecause defendant did not 'specifically and distinctly' allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4) [now Rule 10(a)(4)], defendant is not entitled to plain error review of this issue.").

Even if this issue were properly before the Court, a review of the record indicates that defendant has failed to show that he was prejudiced by any error. Given Officer Murray's and Deputy Rogers' observations of defendant, defendant's behavior and speech, and the results of the field sobriety tests, we conclude that there is no reasonable probability or even

possibility that the jury would have found defendant not guilty had the trial court used the word "prove" rather than "presume."

II

Defendant additionally argues, and the State concedes, that the trial court erred in sentencing him for attaining the status of a habitual felon when the habitual felon charge was not submitted to the jury, and defendant did not enter a guilty plea to the charge. We agree.

When a defendant is charged with being a habitual felon, the issue must either be submitted to the jury, or defendant may plead guilty. N.C. Gen. Stat. § 14-7.5 (2013); *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 699 (2001). When a defendant pleads guilty to being a habitual felon, the trial court must meet the requirements of N.C. Gen. Stat. § 15A-1022 (2013) before accepting the guilty plea. *State v. Bailey*, 157 N.C. App. 80, 88, 577 S.E.2d 683, 689 (2003). Pursuant to N.C. Gen. Stat. § 15A-1022, the trial court must address the defendant personally and make certain inquiries required by statute.

Here, after the jury rendered its verdict, defendant "stipulated" to his prior felony convictions and the trial court "received" his stipulation. The trial court then conducted a sentencing hearing and imposed a sentence of 77 to 105 months

imprisonment. At no time during this hearing did the trial court conduct the colloquy required by N.C. Gen. Stat. § 15A-1022.

In *Gilmore*, the defendant stipulated to his three prior felony convictions, but did not plead guilty to attaining the status of a habitual felon, and the issue whether he was a habitual felon was never submitted to the jury. 142 N.C. App. at 471, 542 S.E.2d at 699. This Court held that "such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, [was] not tantamount to a guilty plea." *Id.* Therefore, this Court reversed and remanded the defendant's habitual felon conviction. *Id.* at 472, 542 S.E.2d at 699.

We find this case indistinguishable from *Gilmore*. Here, as in *Gilmore*, the trial court failed to conduct a colloquy pursuant to N.C. Gen. Stat. § 15A-1022. And, in the absence of such a colloquy, defendant's stipulation was not tantamount to a guilty plea. Accordingly, we must reverse defendant's habitual felon conviction and remand the case for further proceedings.

No error in part; reversed and remanded in part.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).