IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1180

Filed: 6 September 2016

Johnston County, Nos. 14 CRS 55115; 14 CRS 55594

STATE OF NORTH CAROLINA

v.

ISIDORO FLORES MOLINA

Appeal by defendant from judgment entered 7 May 2015 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 12 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Emily H. Davis, for defendant-appellant.

BRYANT, Judge.

Where defendant received a fair trial free from prejudicial error, we find no error in the judgment and sentence imposed by the trial court.

On 26 September 2014, during the annual Mule Days festival in Benson, North Carolina, Sergeant Danny Lucas and Detective William Brown of the Benson Police Department were on patrol. Their attention was drawn to a Chevrolet Avalanche because of the sound of what turned out to be Bud Light beer cans falling from the

vehicle onto the street. The officers approached the vehicle to investigate, and Sergeant Lucas recognized the driver of the vehicle as defendant Isidoro Flores Molina, who had outstanding arrest warrants. Defendant was holding what appeared to be a meth pipe in his hand, which he threw into the back seat floorboards as he exited the vehicle. After arresting defendant on the outstanding arrest warrants, the officers found 0.18 grams of methamphetamine in defendant's pocket.

Defendant was indicted for possession of methamphetamine on 3 November 2014 and for attaining habitual felon status by superseding indictment handed down on 2 December 2014. Defendant was tried by jury during the 4 May 2015 Criminal Session of Johnston County Superior Court, the Honorable Thomas H. Lock, Judge presiding. Defendant's motion to dismiss the possession of methamphetamine charge for insufficiency of the evidence was denied. The jury returned a verdict of guilty on the charge of possession of methamphetamine.

Thereafter, defendant had a separate trial on the habitual felon indictment. The State presented certified copies of judgments for the three prior offenses alleged in the habitual felon indictment and the supporting testimony of Pam Ryals, an Assistant Clerk of Court for Johnston County. During the habitual felon charge conference, defendant requested criminal law pattern jury instruction 104.90 on the State's burden of proving the identity of defendant as the perpetrator of the crime. The trial court denied this request. Defendant made a motion to dismiss the habitual

felon charge, which was also denied. The jury returned a verdict of guilty of attaining the status of habitual felon.

Next, the jury considered aggravating factors. To show a probation violation as an aggravating factor for purposes of sentencing, Ryals was again called to testify. Her testimony allowed for the introduction of a prior judgment showing a suspended sentence, a probation violation report, and a judgment revoking probation. Defendant moved to dismiss the probation violation as an aggravating factor, and his motion was denied. The jury returned a verdict finding the probation violation to be an aggravating factor. A Prior Record Level Worksheet was proffered and stipulated to by defendant.

The trial court found defendant to be a prior record Level IV and sentenced him to a term of 42 to 63 months' imprisonment. Defendant entered notice of appeal in open court.

On appeal, defendant's counsel, after examining the record and relevant case law and being unable to identify any issues of merit to support a meaningful argument for review on appeal, asks this Court to conduct an independent review of the record in accordance with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), to determine whether this appeal discloses any prejudicial error. Defendant also filed a supplemental brief to which we respond together with the *Anders* brief.

Defendant asks this Court to review (1) the sufficiency of the indictments, the sufficiency of the evidence to support his conviction for possession of methamphetamine, his habitual felon status, and the finding of an aggravating factor; (2) whether it was prejudicial error to deny his requested jury instruction; and (3) whether there was any prejudicial error in the calculation of his record level or the sentence imposed. Defendant also asserts an ineffective assistance of counsel claim.

Indictments / Sufficiency of the Evidence

Defendant challenges two indictments: possession of methamphetamine and habitual felon. Defendant contends that the indictment charging possession of methamphetamine contains a fatal variance as it does not "properly charge a felony" where defendant was indicted for possession of a Schedule II controlled substance, a Class 1 misdemeanor.

"If the controlled substance is methamphetamine, . . . the violation shall be punishable as a Class I *felony*." N.C. Gen. Stat. § 90-95(d)(2) (emphasis added). "Felonious possession of a controlled substance has 'two essential elements. The substance must be possessed, and the substance must be "knowingly" possessed.' " *State v. Davis*, 186 N.C. App. 242, 247, 650 S.E.2d 612, 616 (2007) (quoting *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977)).

"A variance occurs where the allegations in the indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citation omitted).

Here, the trial court instructed the jury as follows: "For you to find the defendant guilty of this offense, the State must prove beyond a reasonable doubt that the defendant knowingly possessed any amount of methamphetamine. Methamphetamine is a controlled substance . . . ." Two police officers testified they recognized defendant as an individual for whom they had outstanding arrest warrants, that they placed him under arrest for those warrants, and conducted a search incident to a lawful arrest. During the search, they found a plastic bag containing white powder in defendant's pants pocket. The substance was tested and a forensic scientist testified that the white powder was methamphetamine. This was sufficient evidence to carry the possession of methamphetamine charge to the jury.

As there was sufficient evidence at trial that defendant knowingly possessed methamphetamine, and where possession of methamphetamine is punishable as a felony, the indictment contains no fatal variance and is legally sufficient. Further, the evidence of possession of methamphetamine was sufficient to survive a motion to dismiss. Defendant's arguments as to the sufficiency of the indictment and the evidence are overruled.

Defendant also contends that the indictment charging him as an habitual felon was issued before the occurrence of the underlying felony of possession of methamphetamine. While there had existed an indictment for habitual felon dated 7 April 2014, which predated the November 2014 indictment for possession of methamphetamine, a superseding habitual felon indictment was issued on 2 December 2014. The December indictment was the habitual felon indictment upon which defendant was tried and convicted. In support of that habitual felon indictment, the State introduced certified copies of the court judgments against defendant for felonious restraint in 2001, second-degree kidnapping in 2003, and felony breaking and entering in 2010. Thus, the evidence supporting defendant having attained habitual felon status was overwhelming and undisputed. Accordingly, defendant's arguments as to the legal sufficiency of the indictments and factual sufficiency of the evidence are overruled. Further, because defendant's ineffective assistance of counsel claim was based on his allegation that counsel was ineffective for failing to object to the indictment charging possession of methamphetamine—a claim we have overruled—we determine this argument to be without merit.

Jury Instruction

Defendant also contends the trial court erred in denying his oral request for the pattern jury instruction on the State's burden of proving the identity of defendant

as the perpetrator of the crime. However, defendant's argument on appeal—that because his race was listed as "white" on some of the supporting judgments and as "Hispanic" on others, the trial court erred in denying the requested instruction—was not argued before the trial court, it will not be entertained on appeal.

Here, defendant did not submit the proposed jury instruction in writing, but rather made an oral request and put forth no argument regarding his race. The trial court ruled that "absent a request in writing," it would not give the instruction. Defendant made no further exception to the trial court's ruling either at the charge conference or after the jury charge had been given. *See State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) (overruling defendant's assignment of error on appeal where defendant does not submit proposed instructions in writing and fails to object at charge conference and after charge given). Further, defendant fails to assert plain error from the trial court's denial of the instruction on identity. *See State v. Bell*, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004) (holding failure to specifically assert plain error will not preserve issue for appellate review).

The N.C. Supreme Court has held "that a trial court d[oes] not err where it decline[s] to give requested [jury] instructions that had not been submitted in writing." *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 530 (2005) (citations omitted); *see also id.* ("[R]equested special instructions should be submitted in writing

to the trial judge at or before the jury instruction conference." (citation and quotation marks omitted)).

Assuming *arguendo* defendant's argument was properly before us for plain error review, we would find no plain error exists, as the evidence was overwhelming that defendant was guilty of possession of methamphetamine and of attaining the status of habitual felon. Defendant's argument is overruled.

Sentencing: Aggravating Factor

Defendant next contends the trial court erred in denying his motion to dismiss an aggravating factor at sentencing. To prove the aggravating factor at issue here, the State had to show that during the ten-year period preceding commission of the instant offense, a North Carolina court found defendant willfully violated conditions of probation imposed pursuant to a suspended sentence. N.C. Gen. Stat. § 15A-1340.16(d)(12a) (2015).

Defendant's challenge rests solely on whether or not a box on the sentencing form was properly marked. Following the jury verdict finding defendant guilty of possession of methamphetamine, defense counsel moved to dismiss for insufficient evidence because a box below No. 4 in the "Findings" section of the judgment, which would indicate the violation was willful, was left unchecked. The trial court denied the motion. However, a review of the judgment shows that the box beside No. 1 in the "Findings" section is checked, which incorporates the Violation Report by

reference, and the report contains express language that "defendant has willfully violated" probation. This is sufficient to support the finding that defendant violated his probation. Accordingly, the trial court did not err in denying defendant's motion to dismiss and defendant's argument is overruled.

Defendant also attempts to challenge the timeliness of notice of the State's intent to use an aggravating factor. However, defendant has waived review of that issue by failing to object at trial. *See* N.C. R. App. P. 10(a)(1) (2015). Defendant's challenge based on timeliness of the notice is dismissed.

Defendant also contends that the trial court erred in admitting a 10 October 2011 probation violation report pursuant to N.C. Rules of Evidence 401 and 403 over defendant's objection. We disagree.

A trial court's rulings on relevancy pursuant to Rule 401 are "given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). A trial court's ruling pursuant to Rule 403, including its determination that the probative value of the evidence admitted was not substantially outweighed by unfair prejudice, is subject to an abuse of discretion standard and "will not be disturbed on appeal absent an abuse of discretion." *State v. Lloyd*, 354 N.C. 76, 90–91, 552 S.E.2d 596, 609 (2001) (citation omitted).

Here, the trial court admitted a probation violation report that read, in pertinent part, as follows:

> Of the conditions in that judgment [in which probation was ordered], . . . *defendant has willfully violated*:
>
> 1. Condition of Probation: "Commit no criminal offense in any jurisdiction" in that
>
> . . . DEFENDANT PLEAD GUILTY TO COLICIT [sic] COMMIT PASSENGER TO FLEE ACCIDENT IN GUILFORD COUNTY ON 09-13-2011. THE OFFENSE DATE WAS WHILE . . . DEFENDANT WAS UNDER SUPERVISION, 07-23-2011.

(Emphasis added). While the portion of the report describing the offense to which defendant pled guilty is not a model of clarity, it is clear that defendant's probation had been revoked due to a "willful violation" resulting from his guilty plea to a criminal offense while on supervised probation. The trial court conducted a balancing test and allowed the report to be admitted after determining that the information in the report alleging that defendant willfully violated probation was relevant. Defendant can show no error in the trial court's admission of the probation violation report as an aggravating factor. This argument is overruled.

Sentencing: Prior Record Level

Defendant argues that the trial court erroneously calculated his prior record level. We agree the trial court erroneously calculated defendant's prior record level to the extent that it used the same convictions that were asserted in the habitual felon status phase of the trial in order to increase his prior record level (IV) for sentencing. However, because a correct calculation of defendant's prior record level,

absent the convictions supporting the habitual felon status, would yield the same result, *i.e.*, the same number of points (12) and the same prior record level (IV), the error in calculating defendant's prior record level is harmless error.

"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. Northington*, 230 N.C. App. 575, 580, 749 S.E.2d 925, 928–29 (2013) (quoting *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009)).

"In felony sentencing, an offender's prior record level 'is determined by calculating the sum of the points assigned to each of the offender's prior convictions . . . .' " *State v. Eury*, ___ N.C. App. ___, ___, 781 S.E.2d 869, 870–71 (2016) (quoting N.C. Gen. Stat. § 15A-1340.14(a) (2013)). "In determining the prior record level, convictions used to establish a person's status as habitual felon *shall not be used*." N.C. Gen. Stat. § 14-7.6 (2015) (emphasis added). However, even where a trial court erroneously calculates a defendant's prior record level, if a correct calculation of a defendant's record level would yield the same result, this Court has found such error to be harmless. *See State v. Bethea*, 173 N.C. App. 43, 60–61, 617 S.E.2d 687, 698 (2005) (finding no error and holding that even where the trial court erroneously calculated the defendant's prior record level, because a correct calculation would have still determined the defendant to be a prior record level IV, the defendant was properly sentenced as a level IV offender).

Here, defendant's prior record level worksheet shows two "Prior Felony Class E or F or G Conviction[s]" for a total of eight points, and four "Prior Class A1 or 1 Misdemeanor Conviction[s]" for a total of four points, bringing the total to twelve points. Based on this calculation, defendant's prior record level is IV. *See* N.C.G.S. § 15A-1340.14(c)(4) (2015) (stating an offender with ten to thirteen points is a prior record level IV).

To support defendant's conviction for attaining the status of habitual felon, the following three prior convictions were used: (1) 01 CRS 0056351, Felonious Restraint, a Class F felony, 13 March 2002; (2) 03CRS 053304, Second Degree Kidnapping, a Class E felony, 26 March 2004; and (3) 10 CR 057841, Breaking and or Entering, a Class H felony, 10 March 2011. In Section V of the prior record level worksheet used for sentencing in the instant case, only two prior convictions listed are classified as Class E or F felonies: second-degree kidnapping, 03CRS53304, Class E, and felonious restraint, 01CRS56351, Class F. Accordingly, the trial court erroneously used the same convictions (the Class E and F felonies) to both calculate defendant's prior record level for sentencing and support defendant's conviction for habitual felon.

However, a correct calculation of defendant's prior record level, without relying on the prior convictions used to support the conviction for habitual felon, nevertheless results in a prior record level IV. Defendant's relevant prior convictions for purposes of sentencing in the instant case are as follows:

Offense	**File No.**	**Date of Conviction**	**Class**
Assault on a Female	00CR10868	2 February 2001	A1 misdemeanor
Assault on a Female	01CR53380	14 December 2001	A1 misdemeanor
Habitual Misdemeanor Assault	02CRS684	13 March 2002	H felony
Assault on a Female	02CR53176	26 August 2002	A1 misdemeanor
DWI	02CR52110	9 October 2002	1 misdemeanor
DWI—Level 5	01CR53381	19 March 2003	1 misdemeanor
Habitual Misdemeanor Assault	03CRS53305	26 March 2004	H felony
Possess Drug Paraphernalia	10CR53988	1 July 2010	1 misdemeanor
DWI	10CR55012	17 August 2010	1 misdemeanor
DWI	10CR57718	11 January 2012	1 misdemeanor

Number	**Type**	**Factor**	**Points**	**Subtotal**
2	Prior Felony Class H or I Conviction	X 2	2	4
8	Prior Class A1 or 1 Misdemeanor Conviction	X 1	8	8
			TOTAL =	12

See N.C.G.S. §§ 15A-1340.14, 15A-1340.21. Thus, with eight Prior Class A1 or 1 Misdemeanor convictions and two Prior Felony Class H convictions, defendant has

twelve (12) points for purposes of felony sentencing. An offender with twelve points is a prior record level IV for sentencing purposes. *See* N.C.G.S. § 15A-1340.14(c)(4).

Therefore, even if the trial court erroneously calculated defendant's prior record level, because the correct calculation of defendant's record level would yield the same result (sentencing defendant as a prior record level IV), such error is harmless. *See Bethea*, 173 N.C. App. at 60–61, 617 S.E.2d at 698. Defendant's argument is overruled.

Sentence Imposed

Lastly, defendant argues that the sentence imposed by the trial court was not authorized by statute. We disagree.

Possession of methamphetamine is a Class I felony. N.C.G.S. § 90-95(d)(2). Habitual felon status enhances a Class I felony to a Class E felony for sentencing purposes. N.C. Gen. Stat. § 14-7.6 (2015) ("When an habitual felon . . . commits any felony . . . the felon must, upon conviction or plea of guilty . . . be sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted . . . ."). Aggravated and mitigated sentences are allowed as provided in N.C. Gen. Stat. § 15A-1340.16 (2015). Aggravated terms of imprisonment are allowed for Class E felonies and level IV offenders as provided in N.C. Gen. Stat. § 15A-1340.17(c) (2015).

Here, defendant, a prior record level IV, committed a Class I felony, which was elevated to a Class E for sentencing purposes. *See* N.C.G.S. § 14-7.6. The jury found beyond a reasonable doubt that during the ten-year period preceding the current offense, a North Carolina court determined defendant willfully violated conditions of probation imposed pursuant to a suspended sentence. The trial court found one mitigating factor, but determined the aggravating factor found by the jury outweighed the mitigating factor, and imposed a term of 42 to 63 months' imprisonment, with 221 days of pretrial confinement credit. Thus, the minimum sentence of 42 months was within the range (38–48 months minimum) for Class E offenses committed by level IV offenders. *See* N.C.G.S. § 15A-1340.17(c) (Punishment Chart). Therefore, the sentence imposed by the trial court of 42 to 63 months was in accordance with North Carolina's Structured Sentencing Laws. *See id.* § 15A-1340.17(e) (Table). Defendant's argument is overruled.

NO ERROR.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).