An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-296

Filed: 18 December 2018

Mecklenburg County, Nos. 16 CRS 215435, 17 CRS 8563

STATE OF NORTH CAROLINA,

v.

JERRY JARVIS, Defendant.

Appeal by Defendant from judgment entered 1 November 2017 by Judge Richard L. Doughton in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Goodman, Carr, Laughrun, Levine & Greene, PLLC, by W. Rob Heroy, for the defendant-appellant.

MURPHY, Judge.

Where a party does not object to jury instructions at trial, he fails to preserve an argument regarding those instructions for appeal. Additionally, we have previously held an habitual felon indictment adequately describes a felony conviction for possession of a controlled substance without naming the specific substance. Here,

Defendant, Jerry Jarvis, failed to preserve his argument regarding allegedly improper jury instructions, and his habitual felon indictment met the statutory requirements. Therefore, we find Defendant received a fair trial free from error.

BACKGROUND

This appeal stems from the 2016 arrest and 2017 conviction of Defendant, Jerry Jarvis, for speeding to elude arrest under N.C.G.S. § 20-141.5. Trooper Gary Altman pulled Defendant's car over after he had observed Defendant travelling in the HOV lane at an estimated speed of 70 mph in a 55 mph zone. After Trooper Altman approached Defendant's car and asked him to move over to a safer area, Defendant accelerated back into traffic and Altman gave chase. After a two minute pursuit in which Defendant reached speeds upwards of 100 mph, abruptly changed lanes, and cut off other vehicles, Defendant voluntarily pulled his car over and was apprehended by Altman.

In 2017, a jury convicted Defendant of felony speeding to elude arrest. Defendant stipulated that his license was revoked at the time of the incident, and the jury found that at least two aggravating factors were present such that the charge should be elevated to a felony. Following the guilty verdict, Defendant admitted to his status as a habitual felon and was sentenced to an active term of 85 to 114 months. Defendant now challenges his conviction and sentence.

ANALYSIS

On appeal, Defendant advances two arguments: (1) the trial court erred by failing to require a unanimous verdict as to the factors that elevated his speeding to elude charge to a felony offense and (2) the trial court erred by sentencing Defendant as a habitual felon where the habitual felon indictment failed to describe a felony under state law. Defendant failed to preserve his first argument at trial, so we do not reach it on appeal. As to the second argument, we disagree with Defendant's argument and find he received a fair trial free from error.

A. Unanimous Verdict

Defendant's first argument on appeal is that the trial court "committed reversible error by failing to instruct the jury, over an objection, that the jurors must unanimously agree on the aggravating factors that would elevate [his] charge of Flee[ing] to Elude . . . from a misdemeanor to a felony." Defendant argues the court should have instructed the jury that it must unanimously agree on two specific aggravating factors in order to find Defendant guilty of the felony—rather than a misdemeanor—charge. In response, the State argues Defendant did not properly preserve this issue for appeal, did not seek plain error review of the issue in his opening brief, and that we must invoke Rule 2 of Appellate Procedure if we are to reach the merits of Defendant's argument regarding jury instruction. We agree with the State and hold this issue was not properly preserved for appeal.

Under Rule 10 of our Rules of Appellate Procedure, a party waives his right to appeal a jury instruction "unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection . . . ." N.C. R. App. P. 10(a)(2) (2017). "[W]here a party fails to object to jury instructions, it is conclusively presumed that the instructions conformed to the issues submitted and were without legal error." *Madden v. Carolina Door Controls, Inc.*, 117 N.C. App. 56, 62, 449 S.E.2d 769, 773 (1994) (internal quotations omitted). Here, Defendant did not timely object to the jury instructions and, therefore, failed to preserve this issue for appeal.

At trial, Defendant's only objection regarding jury instructions was to the State's request that the court instruct the jury only as to felony, and not misdemeanor, speeding to elude arrest. The trial court sustained Defendant's objection and submitted instructions on both misdemeanor and felony speeding to elude arrest. After the discussion regarding the misdemeanor charge had concluded, the State asked, "With respect to we [sic] offered the three aggravators, would it be possible to inform the jury that it doesn't have to be unanimous on which two that they choose?" The court replied, "I'm going to give it just right out of the pattern. I am not going to vary the pattern." In response, the State said it would advise the jury that it need not be unanimous during closing argument. Defendant's counsel

objected but was overruled. Defendant argues this second objection effectively preserved the jury instruction issue for appeal. We disagree.

Shortly after the exchange described above, the trial court asked the attorneys to approach for a bench conference, and stated, "I want to put on the record [N.C.G.S. §] 274.54A [sic], and footnote 2 says jury need not unanimously find same aggravating factors to convict. So I will allow the state to argue what the state intends to argue, okay." Defendant's counsel replied, "I'll maintain my prior objection, but I'm not going to make any further objection at this time." Defense counsel's continuing objection was merely to the proposed content of the State's closing argument not, as Defendant now argues, to the court's jury instructions. Therefore, Defendant did not properly preserve this issue for appeal. Defendant also does not seek our plain error review,[1] and we decline to use Rule 2 to reach this argument.

B. Habitual Felon Indictment and Sentencing

Defendant's second argument on appeal is that the trial court erred in sentencing him as a habitual felon because the indictment failed to adequately describe a felony under state law. The indictment lists one of Defendant's prior felonies as "Sell/Deliver [a] Schedule II Controlled Substance," but does not identify which specific controlled substance Defendant was selling. Therefore, Defendant

[1] Defendant seeks plain error review in his reply brief, but "Defendant cannot use a reply brief to introduce new arguments on appeal." *State v. Baskins*, ___ N.C. App. ___, ___, 818 S.E.2d 381, 387 (2018) (citing *State v. Dinan*, 233 N.C. App. 694, 698, 757 S.E.2d 481, 485 (2014)).

argues "[b]ecause the indictment did not state that Defendant sold or delivered a listed controlled substance, it failed list [sic] a felony conviction and thus fails to convey jurisdiction." This argument is unpersuasive.

An habitual felon indictment "must set forth the date that prior felony offenses were committed, the name of the state . . . against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned . . . , and the identity of the court wherein said pleas or convictions took place." N.C.G.S. § 14-7.3 (2017). Here, Defendant does not argue his habitual felon indictment was missing any of the aforementioned requirements, but only that it failed to list the full and proper name of the felony offense.

As the State correctly contends, we denied a similar argument in *State v. McIlwaine*, 169 N.C. App. 397, 399-400, 610 S.E.2d 399, 401 (2005). In *McIlwaine*, as is the case here, "the habitual felon indictment alleged that defendant had been previously convicted of three felonies including 'the felony of possession with intent to manufacture, sell or deliver [S]chedule I controlled substance, in violation of N.C.G.S. [§] 90-95.'" *Id.* However, we disagreed with the defendant's argument that, "because the specific name of the controlled substance was not alleged in the indictment, the indictment was not sufficient to charge habitual felon." *Id.* Indeed, our Supreme Court recently stated the name of a predicate felony offense is "surplusage unnecessary to the existence of a facially valid indictment." *State v.*

Langley, ___ N.C. ___, ___, 817 S.E.2d 191, 195-96 (2018). We disagree with Defendant's argument that his habitual felon indictment was inadequate and find that he received a fair trial, free from error.

CONCLUSION

Defendant failed to preserve an argument regarding allegedly improper jury instructions because he did not raise a proper objection at trial and is not entitled to plain error review because he did not argue plain error in his opening brief. Additionally, his habitual felon indictment met the statutory requirements under N.C.G.S. § 14-7.3.

NO ERROR.

Judges HUNTER, JR. and DAVIS concur.

Report per Rule 30(e).