IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-40

Filed: 4 August 2020

Mecklenburg County, Nos. 16CRS024680, 17CRS002507

STATE OF NORTH CAROLINA

v.

RAMON PERRY GIVENS, Defendant.

Appeal by Defendant from judgment entered 8 March 2018 by Judge J. Thomas Davis in Mecklenburg County, Superior Court. Heard in the Court of Appeals 20 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli and Assistant Attorney General William H. Harkins, Jr., for the State.

Lisa Miles for Defendant.

McGEE, Chief Judge.

Ramon Perry Givens ("Defendant") appeals from a judgment, following the denial of his motion to suppress certain evidence, entered upon a jury verdict finding him guilty of possession of a firearm by a felon and a plea of guilty to the charge of habitual felon status. On appeal, Defendant argues that the trial court erred by denying Defendant's motion to suppress and by allowing the admission of "irrelevant and unfairly prejudicial" evidence or, in the alternative, that Defendant received ineffective assistance of counsel. Defendant also asserts that he was improperly charged with habitual felon status. We hold the trial court committed no error.

I. Factual and Procedural Background

Officer Dwain Johnson ("Officer Johnson"), a probation and parole officer/intelligence officer with the North Carolina Department of Public Safety, testified that on 26 July 2016, he was "out conducting searches of high-risk offenders" with fellow probation officers and officers with the Charlotte-Mecklenburg Police Department ("CMPD"). At that time, Officer Johnson had been supervising Defendant on post-release supervision for "more than several months" and had met with Defendant on multiple occasions, both at Officer Johnson's office and at Defendant's residence. At each meeting, Officer Johnson confirmed that Defendant still resided with his mother, Jeannette Givens ("Ms. Givens"), in a two-bedroom apartment located at 1707 Eastcrest Drive in Charlotte.

On the morning of 26 July 2016, Officer Johnson conducted an "investigative search[]" of an apartment located in the same complex as Defendant's apartment. Because Defendant "had not been complying with curfew" and "missed a couple of [Officer Johnson's] office appointments[,]" Officer Johnson decided to "check on [Defendant]." At approximately 8:30 a.m., Officer Johnson and CMPD officers knocked on the door of Defendant's apartment and Ms. Givens answered. Officer

Johnson observed Defendant's cousin, Marcus Miller ("Mr. Miller"), sleeping on the couch in the living room. Ms. Givens confirmed that Defendant was home and was in the "last bedroom on the right" ("Room 2").

Officer Johnson knocked on the door of Room 2 and Defendant answered. Defendant was in the bedroom with a woman, Nicole McGee ("Ms. McGee"), and both were undressed. As a result, Officer Johnson called for the assistance of female probation officer, Taara McClendon ("Officer McClendon"). Officer Johnson and Officer McClendon searched the various articles of clothing on the ground before directing Defendant and Ms. McGee to get dressed. Defendant was placed in handcuffs and "advised that he wasn't under arrest, but it was for [the officers'] safety." Officer McClendon testified that she heard Defendant tell Ms. McGee to "[m]ake sure that you get your Nike shoe box from the side of the bed." Officer McClendon observed a Nike shoe box on the side of the bed and informed Ms. McGee she was not allowed to remove anything from the room. Defendant and Ms. McGee were then escorted to the living room to wait with Ms. Givens and Mr. McCoy while the officers conducted their search.

The officers searched the kitchen, living room, bathroom, and other bedroom ("Room 1") "to make sure that nobody was in there hiding in any closets or anything[.]" While searching Room 2, Officer McClendon opened the Nike shoe box and found a gun and a bag of ammunition. Officer McClendon alerted the other officers of her discovery. Officer Johnson testified that Defendant yelled to Ms. Givens, “[m]other, tell them [Room 2] is your room.” Officer Johnson further testified that he “think[s] there was some drug paraphernalia” found in Room 2, stating, “[i]t may have been a small amount of marijuana. I can’t remember.”

Defendant was arrested and transported to the Eastway Division Team Office, where he was interviewed by Detective Seth Adcox of the CMPD Anticrime Unit (“Detective Adcox”). At trial, the recorded interview was entered into evidence and a ten minute portion of the recording was played for the jury. During the interview, Defendant told Detective Adcox that he was unaware that a gun had been stored in a Nike shoe box in Room 2. Defendant explained to Detective Adcox that he had seen that same gun, which belonged to Mr. Miller, approximately a month before at Mr. Miller’s apartment. Defendant also told Detective Adcox that he had observed Mr. Miller bring a Nike shoe box into the apartment and, despite Defendant’s inquiries, Mr. Miller refused to disclose what was inside the box.

Ms. Givens testified that Room 2 “was basically [her] room[;]” however, on 26 July, she had slept in Room 1 because she was recovering from hip surgery and Room 1 was better suited to her needs. Ms. Givens explained that most of her belongings were in Room 2, along with some of Mr. Miller’s possessions, and most of Defendant’s belongings were in Room 1. Ms. Givens testified that she was unaware there was a gun at her residence and explained that T'Jada Cherry ("Ms. Cherry"), a family friend, frequently visited her apartment to provide her post-surgical care.

Ms. Cherry testified that she provided home health care for Ms. Givens for approximately two or three months. During that time, Ms. Cherry testified that she stored her gun in a Nike shoe box in the closet of Room 2 without Ms. Given's knowledge. Ms. Cherry testified that, following Defendant's arrest, she never disclosed that the gun actually belonged to her.

Defendant testified that Room 2 was not his bedroom. Defendant explained that the reason he had told Detective Adcox in the interview that the gun belonged to Mr. Miller was because he knew his cousin owned a firearm. However, Defendant testified that he never actually saw the gun that was discovered in the shoe box, so his statement was just an assumption. Defendant further testified that he had been convicted of possession of drug paraphernalia on 30 September 2014 in Greene County and possession of cocaine in April 2006 in Pitt County.

Defendant was indicted for possession of a firearm on 29 August 2016 and for attaining habitual felon status on 30 January 2017. Defendant filed a motion to suppress on 3 July 2017, requesting that the trial court "suppress any an[d] all evidence obtained as a result of the search of the apartment at 1707 Eastcrest Drive, Apt. M, on July 26, 2016 as being a search in violation of th[e] Fourth Amendment and his rights under the North Carolina Constitution."

The case was heard in Superior Court, Mecklenburg County on 5 March 2018. That morning, the trial court conducted a hearing on Defendant's motion to suppress and the trial court entered an order denying Defendant's motion to suppress on 6 March 2018. Defendant and the State stipulated that Defendant was previously convicted of a felony in Pitt County Superior Court.

Following the trial, the jury found Defendant guilty of possession of a firearm by a felon; Defendant thereafter pleaded guilty to habitual felon status. The trial court entered a judgment and commitment on 8 March 2018, sentencing Defendant to a term of 88 months minimum and 118 months maximum imprisonment. Defendant appeals.

II. Analysis

A. *Motion to Suppress*

Defendant argues that the trial court erred in denying his motion to suppress evidence obtained during the search of his apartment because the search was unlawful. Specifically, Defendant contends that the warrantless search of his apartment "was neither a valid condition of his post-release supervision nor supported by reasonable suspicion." As an initial matter, we must determine whether this issue has been preserved for appellate review.

"As a general rule, a party may not make one argument on an issue at the trial level and then make a new and different argument as to that same issue on appeal."

Rolan v. N.C. Dep't of Agric. & Consumer Servs., 233 N.C. App. 371, 381, 756 S.E.2d 788, 794 (2014) (citing *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E.2d 836, 838 (1934)); *see also Weil*, 207 N.C. at 10, 175 S.E.2d at 838 ("[T]he law does not permit parties to swap horses between courts in order to get a better mount [on appeal]."). Accordingly, "where a theory argued on a[n] appeal was not raised before the trial court[,] the argument is deemed waived on appeal." *State v. Davis*, 207 N.C. App. 359, 363, 700 S.E.2d 85, 88 (2010) (citing *State v. Augustine*, 359 N.C. 709, 721, 616 S.E.2d 515, 525 (2005)); *see also* N.C. R. App. P. 10(a)(1) (2019) (providing that "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling . . . [and] obtain a ruling"). "Thus, a criminal defendant is not entitled to advance a particular theory in the course of challenging the denial of a suppression motion on appeal when the same theory was not advanced in the court below." *State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013).

Defendant's motion to suppress the evidence obtained during the search of his apartment included the following relevant assertions:

> 3. The defendant contends that he was not, at the time of the search, a resident of the apartment or the bedroom that the weapon was found in. Defednant [sic]contends that the admission of such evidence is a violation of his rights, as exceedin [sic] exceeding the scope of a proper search.
>
> 4. The defendant is ordered under 15A-1368.4 to submit to warrantless searches of his person. The search of the box and the room in general exceeds the scope of the allowable search.

At the suppression hearing, Defendant argued that the room where the gun was discovered was not his bedroom. The trial court explicitly asked Defendant's counsel if the search of the bedroom was authorized under the terms of Defendant's post-release supervision:

> THE COURT: Well, do you dispute that they had authority to search his room pursuant to his post-release supervision?
>
> [DEFENSE ATTORNEY]: *No. They had, they had authority to search his room.*
>
> THE COURT: They did?
>
> [DEFENSE ATTORNEY]: The ques -- they did. He -- *the question is, what is his room?* And we would contend that the, the room that -- where his items and his possessions are, that he says is his room and his mother says is his room, that is, in fact, his room. That this was a temporary situation with her staying there. She's in control of the apartment. She would have a perfect right to stay there if she wants to.
>
> THE COURT: Well, it certainly was his room at the time he was in there, wasn't it?
>
> [DEFENSE ATTORNEY]: Well, in that regards, your Honor, we would contend that, yes, when they go in to remove him from the room, yes, they have a right to remove him from the room. They have a right to search him for, for article -- dangerous articles. Just like you would anybody.
>
> THE COURT: Right.

> [DEFENSE ATTORNEY]: You would have that right. But not necessarily to extend that search to other items in the room, such as the shoe box.
>
> THE COURT: Why do you say that?
>
> [DEFENSE ATTORNEY]: Because that was -- at the time he was removed from the room he could not reach the shoe box. It would not have been a danger to them.

(Emphasis added). Thus, Defendant's counsel argued that because Room 2 was not Defendant's bedroom, the officers were *only* authorized to search Defendant's person for dangerous articles. Later in the hearing, the trial court again directed Defendant's counsel back to the conditions of Defendant's post-release supervision:

> THE COURT: Well, what defines the scope -- in your mind, what defines the scope of a search for purposes of a post-release supervision?
>
> [DEFENSE ATTORNEY]: Well, the statute talks about the person -- the person's person.
>
> THE COURT: Okay.
>
> [DEFENSE ATTORNEY]: The vehicle, and the premises.
>
> THE COURT: It does say vehicle and premises?
>
> [DEFENSE ATTORNEY]: Well, I think it does say vehicle. Well, let me, let me, before I -- because I may have probation officer and -- may have probation and post-release. Actually, it says: "Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision." He does not -- the supervisee does not have to submit to any searches that would otherwise be unlawful. And then if it's drugs, you know,

> the statute says he'll have to pay for a test. *But I would contend that whether, you know. I mean, if there's a gun in plain view it doesn't matter whether he's necessarily a -- on post-release or not.* They're gonna get him. They're gonna get him out of the room. They're gonna seize it. But none of that is the facts here. There's nothing that's indicating that there was any situation that required any immediate removal of him of the room from this box, where the box was, anything along those lines. So we would ask that your Honor suppress the evidence of the search, which is the box with its contents.

(Emphasis added). Even when directly asked by the trial court about the scope of the search condition of post-release supervision, Defendant's counsel made no argument to that effect, contending only that "it doesn't matter whether he's . . . on post-release or not."

The State intervened, explaining that although the *statutory search condition* provided in N.C. Gen. Stat. § 15A-1368.4(e)(10) (2015) is limited to a supervisee's person, the warrantless search of Defendant's premises was authorized as a *discretionary condition* of post-release supervision by N.C. Gen. Stat. § 15A-1368.4(c):

> [THE STATE]: And your Honor, if I could just clarify. 15A-1368.4([e])(10) is the statute that governs people who are on post-release supervision, which is the case with the defendant here.
>
> THE COURT: But it's -- it says search the person.
>
> [THE STATE]: Right. But your Honor, it -- the Post-Release Supervision and Parole Commission, Commission is allowed, under the statute, to add the discretionary condition, which is from 1368.4(c), which requires supervisees to submit, at reasonable times, to searches of

> my person, premises, or any vehicle. Which is applicable in this case. Your Honor, defense counsel contends that the question here is, whose room is it? But your Honor, that is actually not the question. The question here is whether or not the area that Officer Johnson was searching was premises that the defendant had access to. . . .

Subsequently, Officer Johnson testified regarding the terms of Defendant's post-release supervision and the State entered into evidence Defendant's post-release supervision certificate, specifically noting the controlling and discretionary conditions of Defendant's post-release supervision. The trial court gave Defendant's counsel another opportunity to address the State's argument regarding the conditions of Defendant's post-release supervision:

> THE COURT: Any further evidence from the defense in rebuttal?
>
> [DEFENSE COUNSEL]: No, your Honor.
>
> THE COURT: All right. Back to your argument. And I'll come back to you in just a minute. All right, go ahead and finish your argument.
>
> [THE STATE]: So your Honor, that document shows that the defendant was subject to the discretionary conditions, which expanded the search, essentially, to his person or premises. So your Honor, in this particular instance you heard two -- testimony from three witnesses, and they're all consistent. All of the witnesses testified that the defendant had access to that residence. All of the witnesses testified that the defendant came and went from that residence, whether he stayed there two, three, four, or five nights a week. And all of the witnesses testified that the defendant was in the back bedroom when Officer Johnson arrived on the scene. Now, they disagree as to which room

> actually belonged to the defendant. But your Honor, that is not relevant in this case. The defendant, as a post-release supervisee, does not have the same reasonable expectation of privacy as other citizens. He knows, and he even testified that he knows, he's subject to Officer Johnson showing up at his house and conducting a search.

After hearing the State's argument regarding the discretionary conditions of Defendant's post-release supervision, the trial court gave Defendant's counsel one final opportunity to respond before announcing its ruling:

> THE COURT: All right. Anything else for the defense?
>
> [DEFENSE COUNSEL]: No, your Honor.
>
> THE COURT: All right. The Court is going to deny the motion to suppress. . . .

A review of the transcript of the suppression hearing shows that Defendant's counsel made no argument before the trial court regarding the lawfulness of the discretionary condition of Defendant's post-release supervision allowing for the warrantless search of Defendant's person, vehicle, and premises. Indeed, by rejecting the trial court's invitation to rebut the State's argument, Defendant's counsel appeared to concede this issue. Moreover, Defendant's counsel made no argument before the trial court regarding the constitutionality of the search under Fourth Amendment considerations. On appeal, however, Defendant argues that "[a] warrantless search of a supervisee's premises not based on reasonable suspicion is not lawful under [N.C. Gen. Stat. § 15A-1368.4] or the Fourth Amendment."

"[G]iven that Defendant[] ha[s] advanced an argument before this Court to which [he] did not allude in the court below, we conclude that [his] challenge to the trial court's suppression order has not been properly preserved for appellate review and cannot provide a basis for an award of appellate relief." *Hernandez*, 227 N.C. App. at 609, 742 S.E.2d at 830 (footnote omitted). As a result, we dismiss this argument.

B. *Admissibility of Evidence*

Defendant argues that the trial court erred by admitting certain "irrelevant and unfairly prejudicial" portions of Officer Johnson's testimony "tending to show [Defendant] was a generally dangerous man with some, unnamed, prior convictions." In the alternative, Defendant contends that he received ineffective assistance of counsel. We disagree.

Defendant asserts that the admission of certain portions of Officer Johnson's testimony violated his state and federal constitutional rights to due process and argues that "[b]ecause the state cannot show its admission as harmless beyond a reasonable doubt, a new trial is required."[1] However, Defendant did not make this

[1] Defendant's assertion incorrectly places the burden of demonstrating *unpreserved* error on the State, not the defendant. *See State v. Samuel*, 203 N.C. App. 610, 618, 693 S.E.2d 662, 668 (2010) ("Where a defendant has failed to make a timely objection at trial, the admission of evidence which is technically inadmissible *will be treated as harmless unless plain error is shown*." (emphasis added)); *see also State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000) ("In meeting the heavy burden of plain error analysis, *a defendant must convince this Court*, with support from the record, that the claimed error is so fundamental, so basic, so prejudicial, or so lacking in its elements that absent the error the jury probably would have reached a different verdict." (emphasis added) (citation omitted)).

constitutional argument before the trial court and, as a result, this issue is not preserved for appellate review. *State v. Gobal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error[.]" (citations omitted)).

In addition to his constitutional argument, Defendant also contends that portions of Officer Johnson's testimony were inadmissible under the North Carolina Rules of Evidence. Recognizing that Defendant's trial counsel did not object to the admission of Officer Johnson's testimony at trial, Defendant asks this Court to conduct plain error review. "We may review unpreserved evidentiary errors in criminal cases for plain error." *State v. Dawkins*, ___ N.C. App. ___, ___, 827 S.E.2d 551, 555 (2019) (citation omitted). "The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done. . . .'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citation omitted).

Rule 401 of the North Carolina Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C–1, Rule 401 (2017). Rule 403 states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403. Additionally, Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C–1, Rule 404(b).

We note that Defendant quotes Rules of Evidence 401, 403, and 404(b) in his brief as "applicable legal principles" and broadly asserts that Officer Johnson's testimony was "irrelevant and unfairly prejudicial." However, Defendant only substantively advances one argument in his brief – that Officer Johnson's testimony "far exceeded what was relevant to any issue before the jury[.]" Because Defendant does not argue that the testimony was inadmissible under either Rule 403 (probative value was substantially outweighed by the danger of unfair prejudice) or Rule 404(b) (improper "bad acts" evidence), our review is limited to whether the challenged testimony is relevant under Rule 401. *See* N.C. R. App. P. 28 ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Defendant identifies the following statements as "far exceed[ing] what was relevant to any issue before the jury[:]" Officer Johnson testified about his role as an intelligence officer, stating that "I supervise high-risk individuals, based on security risk groups" and explaining that the risk is "based on [a supervisee's] record level, and the way that [the supervisee] answer[ed] the particular questions on the risk needs assessment that we provide." Officer Johnson also testified about the context of his search, stating that on the morning of 26 July 2016, "[w]e were out conducting searches of high-risk offenders" and explaining that he checked on Defendant because Defendant "had not been complying with curfew, and missed a couple of [Officer Johnson's] office appointments." Officer Johnson explained that "[b]ased on [Defendant's] previous convictions and his high risk, [the search] was focusing on weapons and drugs." Finally, Officer Johnson testified about the evidence obtained during the search, stating that he "th[ought] there was some drug paraphernalia [found in the room]" and explaining that "[i]t may have been a small amount of marijuana. I can't remember."

Defendant contends that "[h]is status as a 'high risk offender', references to his record level and how he answered a 'risk needs assessment' were not relevant to the question of whether he was [a] convicted felon or possessed a firearm." Additionally.

because "[h]e was not charged with – much less on trial for – possession of marijuana or drug paraphernalia[,]" Defendant argues the trial court erred in admitting the testimony.

The North Carolina Supreme Court has held "[e]vidence tending to establish the context or chain of circumstances of a crime, which incidentally establishes the commission of a prior bad act," to be relevant. *State v. Agee*, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990). "Such 'chain of circumstances' evidence is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts." *State v. Sexton*, 153 N.C. App. 641, 648, 571 S.E.2d 41, 46 (2002) (citation omitted). In *Agee*, the Supreme Court explained that

> "[e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

326 N.C. at 548, 391 S.E.2d at 174–75 (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

In the present case, the portions of Officer Johnson's testimony challenged on appeal serve as relevant "chain of circumstances" evidence. *Sexton*, 153 N.C. App. at 648, 571 S.E.2d at 46. Officer Johnson's testimony regarding his role as an intelligence officer, including a description of the class of individuals he supervises, provides context as to why Officer Johnson was assigned to supervise Defendant and, in that capacity, conduct a search of Defendant's apartment. Officer Johnson's references to Defendant's prior conviction, high risk status, and noncompliance with the terms of his post-release supervision provides context regarding the purpose of the search that led to the discovery of the gun, which served as the basis of the charged crime. Moreover, the evidence "forms part of the history of the event," *Sexton*, 153 N.C. App. at 648, 571 S.E.2d at 46, and provides context for the reason the search was focused on weapons and drugs.

Likewise, Officer Johnson's testimony regarding the evidence obtained during the search, including the possible presence of a small amount of marijuana and drug paraphernalia, "serves to enhance the natural development of the facts." *Id.* Indeed, although the evidence regarding drug paraphernalia and marijuana was not part of the crime charged, the evidence was discovered during the same search that revealed the gun and was therefore "linked in time and circumstances with the charged crime[.]" *Agee*, 326 N.C. at 548, 391 S.E.2d at 174–75 (quotation marks omitted). Thus, although some portions of Officer Johnson's testimony may have been objectionable under other North Carolina Rules of Evidence, under Rule 401—the only rule properly argued to this Court—Officer Johnson's testimony was relevant because it established the sequence of events surrounding the commission of the crime of possession of firearm by felon.

Even assuming, *arguendo*, that Officer Johnson's testimony that his search "was focus[ed] on weapons or drugs" and his reference to the discovery of drugs was inadmissible, Defendant has not demonstrated prejudice. The trial court advised the jury that Defendant had stipulated to a prior felony; however, the trial court did not provide any additional details regarding the nature of the conviction. Defendant, however, testified that he had been convicted of possession of drug paraphernalia on 30 September 2014 in Greene County and possession of cocaine in April 2006 in Pitt County. Thus, considering Defendant's testimony, we cannot say that Officer Johnson's passive references to drugs prejudiced Defendant such that absent the testimony, "the jury probably would have reached a different result." *Perkins*, 154 N.C. App. at 152, 571 S.E.2d at 648. Moreover, the jury was instructed as to the permissible considerations regarding Defendant's prior convictions:

> Evidence has been received concerning prior criminal convictions of the defendant. You may consider this evidence for one purpose only: If, considering the nature of the crimes, you believe that this bears on the defendant's truthfulness, then you may consider it, and all other facts and circumstances bearing upon the defendant's truthfulness, in deciding whether you will believe the defendant's testimony at this trial. A prior conviction is not evidence of the defendant's guilt in this case. You may not convict the defendant on the present charge because of something the defendant may have done in the past.

Thus, in light of Defendant's testimony and the jury instructions, we reject Defendant's argument that "[t]here is a reasonable probability that, absent the testimony of [Officer] Johnson casting [Defendant] as a dangerous druggie with unspecified prior convictions and 'high risk' factors, the jury would have acquitted."

C. *Ineffective Assistance of Counsel*

As an alternative to his claim of plain error, Defendant asserts that he received ineffective assistance of counsel because "[t]here can be no reasonable strategy behind counsel's failures to object to such clearly irrelevant and highly prejudicial testimony." We disagree.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citation omitted). However, "[i]t is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits [only] when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Burton*, 251 N.C. App. 600, 604, 796 S.E.2d 65, 68 (2017) (quoting *State v. Turner*, 237 N.C. App. 388, 395, 765 S.E. 2d 77, 83 (2014)). In the present case, because the record on appeal and transcript of the proceedings suffice to show that Defendant's ineffective assistance of counsel claim lacks merit, we decide the claim on the merits on direct review.

To succeed on an ineffective assistance of counsel claim, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 80 L. Ed. 2d 674, 693, 698 (1984); *State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) (adopting the *Strickland* standard for ineffective assistance of counsel claims under N.C. Const. art. 1, §§ 19, 23). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

In the present case, Defendant limits his ineffective assistance of counsel argument to his counsel's "failures to object to such clearly irrelevant and highly prejudicial testimony." For the reasons discussed above, we hold "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different[.]" *Id.* As a result, we reject Defendant's ineffective assistance of counsel argument.

D. *Habitual Felon Status*

Defendant contends that his underlying felony indictments do not comply with N.C. Gen. Stat. § 14-7.3. Specifically, Defendant argues the indictments do not "charge that said person is an habitual felon" as required by the statute. Defendant concedes, however, that "our Supreme Court has ruled on this issue against the defendant in *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985)" and, therefore, Defendant only "raises the issue as a matter of preservation."

In *Todd*, the Supreme Court expressly rejected the argument that N.C. Gen. Stat. § 14-7.3 requires an underlying felony indictment to refer to a defendant's status as an habitual offender. *Id.* at 120, 326 S.E.2d at 255. Therefore, we reject Defendant's argument.

III. Conclusion

As discussed above, we hold Defendant failed to preserve the argument he advances on appeal regarding the denial of his motion to suppress. Additionally, we hold the trial court did not err in admitting certain portions of Officer Johnson's testimony and Defendant did not receive ineffective assistance of counsel. Finally, we reject Defendant's argument that his underlying felony indictments did not comply with the statutory mandate.

NO ERROR.

Judge STROUD concurs.

Judge MURPHY concurs in part and concurs in result only in part.

Report per Rule 30(e).

No. COA19-40 – State v. Givens

MURPHY, Judge, concurring in part and concurring in result only in part.

I concur fully with the Majority as to Parts II-A and II-C. However, I cannot join the Majority in its Rule 401 relevancy analysis. Although I would hold all of the challenged evidence to be irrelevant, I agree with the Majority that Defendant has not demonstrated the requisite prejudice for a new trial under our plain error standard of review. Therefore, I concur in the result only as to Part II-B.