IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-779

Filed 19 December 2023

Edgecombe County, Nos. 19CRS50399, 21CRS606

STATE OF NORTH CAROLINA

v.

ERIC TREMAINE PITTMAN, Defendant.

Appeal by defendant from judgment entered 14 January 2022 by Judge William D. Wolfe in Superior Court, Edgecombe County. Heard in the Court of Appeals 11 April 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sondra C. Panico, for the State.

Caryn Strickland for defendant-appellant.

STROUD, Chief Judge.

Defendant appeals his convictions for assault inflicting physical injury by strangulation and having attained habitual felon status, asserting the trial court erred by: (1) denying his motion to dismiss the habitual felon charge for a fatal variance between the indictment and proof offered at trial; (2) improperly considering an aggravating factor during sentencing; and (3) failing to accurately record the

judgment. We: (1) conclude the trial court committed no error in denying the motion to dismiss the habitual felon charge; (2) conclude the trial court did not abuse its discretion in its consideration of aggravating Defendant's sentence; and (3) remand for correction of the clerical error.

I. Background

The State's evidence tended to show that on 23 February 2019, law enforcement was called after Defendant had a physical altercation with his cousin. Defendant was arrested and later indicted for first-degree forcible rape, first-degree kidnapping, assault with a deadly weapon inflicting serious injury, assault by strangulation, assault on a female, and attaining habitual felon status. On 13 January 2022, a jury ultimately found Defendant guilty of one count of assault by strangulation.

After the jury returned its verdict as to the substantive offenses, the trial court proceeded to the State's presentation of aggravating factors. The State called an Edgecombe County deputy clerk of court to testify and introduced a judgment from 18 April 2014 showing that "during the 10-year period prior" to the offense in February 2019, Defendant had been convicted of a different offense, had his sentence suspended, willfully violated the conditions of his probation, had his probation revoked, and his sentence had been activated.

Defendant admitted he had violated his probation in April 2014, his probation was revoked, and he had served an active sentence. Defendant testified in his own

defense as to mitigating factors. Ultimately, the jury concluded aggravating factor 12a under North Carolina General Statute Section 15A-1340.16(d)(12a)[1], "willful violation of the conditions of probation imposed pursuant to a suspended sentence[,]" existed beyond a reasonable doubt. *See* N.C. Gen. Stat. § 1340.16(d)(12a) (2021). The trial court then considered all the factors and determined "the aggravating factors substantially outweigh any findings of mitigation."

The trial court then went on to the adjudication stage of Defendant's habitual felon status. Defendant was charged with habitual felon status based on testimony from the Edgecombe County deputy clerk that Defendant had been convicted of three previous felonies. The State presented evidence that: (1) on 9 November 2004, Defendant pled guilty to felony breaking and/or entering committed on 10 May 2004; (2) on 18 August 2010, Defendant pled guilty to felony assault with a deadly weapon inflicting serious injury committed on 2 May 2010; and (3) on 26 March 2013, Defendant pled guilty to possession with intent to sell and/or deliver cocaine committed on 17 April 2012.

Evidence tended to show that all three prior judgments had the wrong birth year for Defendant, and his name was misspelled. In response to Defendant's questions, the county deputy clerk clarified that the name and date of birth would have originally been provided by Defendant each time he was arrested and charged.

[1] North Carolina General Statute Section 15A-1340.16 was amended in 2023, but the amendment is not relevant to this case. *See* N.C. Gen. Stat. § 15A-1340.16 (2023).

Defendant also testified about other inaccuracies in the prior judgments, but ultimately admitted, "I know I said I got a couple of convictions. But I am a three-time felon." At the close of the evidence, the trial court denied Defendant's motion to dismiss the habitual felon charge.

During the habitual felon charge conference, counsel for the State noticed a typographical error on the habitual felon indictment. On the habitual felon indictment, the date Defendant allegedly committed assault with a deadly weapon inflicting serious injury was listed as "on or about May 10, 2010," but the judgment stated Defendant committed this offense on 2 May 2010, and evidence at trial supported the 2 May 2010 date. The State made a motion to amend the indictment:

> [The State]: I'd ask to be able to amend that indictment to - - I believe that would have been a typo since it's May 10th, 2004. The certified judgment says May 2nd. And the defendant admitted that it was May 2nd on the stand, May 2nd, 2010.
>
> The Court: [Defense Counsel]?
>
> [Defense Counsel]: For the record, that - - it would be our position that's a material allegation and it can't be amended at this point.
>
> The Court: I think it is too. I am going to deny the motion to amend. But you can certainly argue that the defendant did in fact admit the particular date. So that motion is denied.

The jury was instructed if it found "from the evidence" and "beyond a reasonable doubt" that Defendant was convicted on (1) 9 November 2004 for felony

breaking and/or entering committed on 10 May 2004; (2) 18 August 2010 for felony assault with a deadly weapon inflicting serious injury committed on 10 May 2010;[2] and (3) 26 March 2013 for felony possession with intent to sell and/or deliver cocaine committed on 17 April 2012, that the jury must return a verdict finding Defendant guilty of being a habitual felon. The jury returned a verdict that Defendant was guilty of being a habitual felon.

Judgment was entered accordingly. Defendant was sentenced to 105 to 138 months incarceration based on his prior record level, an aggravating factor, and Defendant's habitual felon status. Defendant appealed.

II. Defendant's Arguments

Defendant argues that the trial court erred by: (1) denying his motion to dismiss the habitual felon charge for a material variance between the indictment and proof offered at trial; (2) improperly considering an aggravating factor during sentencing; and (3) failing to accurately record the judgment. We address each of these issues, in turn.

A. Habitual Felon Status

Defendant argues the trial court erred in denying his motion to dismiss because there was a fatal variance between the habitual felon indictment and the

[2] For clarity, the felony assault with a deadly weapon inflicting serious injury charge was committed on 2 May 2010, but the jury was instructed the charge was committed on 10 May 2010, as stated in the habitual felon indictment. This is at issue on appeal and is discussed in detail below.

evidence presented during the adjudication of his habitual felon status. Specifically, Defendant argues the 2010 felony was committed on 2 May 2010 and not 10 May 2010, as shown on the indictment. Further, Defendant contends that the date was material to the indictment because the trial court agreed with defense counsel that the date was material.

1. Standard of Review

"We review *de novo* the issue of a fatal variance." *State v. Clagon*, 279 N.C. App. 425, 431, 865 S.E.2d 343, 347 (2021) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). In reviewing a motion to dismiss, "we must determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and quotation marks omitted). "When considering defendant's motion to dismiss, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* (citation and quotation marks omitted).

2. Variance between the Indictment and the Evidence

North Carolina General Statute Section 14-7.1 provides "[a]ny person who has been convicted of or pled guilty to three felony offenses in any . . . state court . . . is declared to be an habitual felon and may be charged as a status offender pursuant to this Article." N.C. Gen. Stat. § 14-7.1 (2021). North Carolina General Statute Section 14-7.3 sets the requirements for a habitual felon indictment:

> An indictment which charges a person with being an habitual felon 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 in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3 (2021).

In *State v. Glidewell*, 255 N.C. App. 110, 804 S.E.2d 228 (2017), our Court clarified when a variance in an indictment is fatal and requires reversal:

> When allegations asserted in an indictment fail to conform to the equivalent material aspects of the jury charge, our Supreme Court has held that a fatal variance is created, and the indictment is insufficient to support that resulting conviction. Furthermore, for a variance to warrant reversal, the variance must be material, meaning it must involve an essential element of the crime charged. The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) insuring that the defendant is able to prepare his defense against the crime with which he is charged and (2) protecting the defendant from another prosecution for the same incident. However, a variance does not require reversal unless the defendant is prejudiced as a result.

Glidewell, 255 N.C. App. at 113, 804 S.E.2d at 232 (citations, quotation marks, ellipsis, and brackets omitted).

In considering which elements are the "essential elements" to the crime charged, our Court has also said "[t]he date on which a defendant committed a prior felony is not an essential element of . . . having attained habitual felon status." *State v. Taylor*, 203 N.C. App. 448, 456, 691 S.E.2d 755, 762 (2010) (citation omitted). "It is the fact that another felony was committed, not its specific date, which is the essential question in the habitual felon indictment." *Id.* at 457-58, 691 S.E.2d at 763 (citation, quotation marks, and alterations omitted). Accordingly, the precise date in May 2010 on which Defendant committed assault with a deadly weapon inflicting serious injury is not an essential element of having attained habitual felon status. *See id.* Because the date is neither essential nor material, the variance is not fatal. *See id.* at 456, 691 S.E.2d at 762. The trial court properly denied Defendant's motion to dismiss.

B. Aggravating Factor

During the sentencing phase, the trial judge stated he was sentencing in the aggravated range based on the jury's finding that Defendant had violated his probation in April 2014, under North Carolina General Statute Section 15A-1340.16(d)(12a) and "not only because of that but because the [c]ourt knows from [Defendant's] record that he has no fewer than eight previous convictions of assaultive conduct on his record." Defendant makes no argument regarding his

probation violation but contends the trial court erred in relying on Defendant's criminal history as an aggravating factor. Indeed, the trial court did state,

> The court considers both the aggravating factor that the State presented, and that the jury found beyond a reasonable doubt, and the mitigating factors offered by [Defendant], and finds that the aggravating factors substantially outweigh any findings of mitigation. And therefore, the Court will impose an aggravated punishment. The Court will do so not only because of that but because the Court knows from the defendant's record that he has no fewer than eight previous convictions of assaultive conduct on his record.

However, on the "FELONY JUDGMENT FINDINGS OF AGGRAVATING AND MITIGATING FACTORS[,]" the trial court noted only the probation violation as an aggravating factor.

In a similar case, *State v. Shaw,* the trial court stated regarding sentencing,

> I understand the appellate court has said it is best to find as few aggravating factors as possible to be argued about. So we have found one aggravating that the defendant has prior convictions for criminal offenses punishable by more than 60 days confinement and we have found one mitigating that the defendant has been honorably discharged from the United States Armed Services, and that appears to be the extent of it. The Court also finds without any argument that the lady, like any other citizen, is entitled to peace of mind and body in her home.

State v. Shaw, 106 N.C. App. 433, 441-42, 417 S.E.2d 262, 268 (1992) (brackets omitted). The defendant appealed, contending

> that he is entitled to a new sentencing hearing because the trial court erroneously found as a nonstatutory aggravating sentencing factor that "the lady, like any other

> citizen, is entitled to peace of mind and body in her home." The State argues that, contrary to defendant's assertion, the trial court only considered one aggravating factor-defendant's prior convictions-and did not consider [the lady's] entitlement to peace of mind and body in her home as an aggravating factor in sentencing [the] defendant.

Id. at 442, 417 S.E.2d at 268. This Court agreed with the defendant and remanded for resentencing. *Id.* at 443-44, 417 S.E.2d at 268-69.

We, however, conclude that *Shaw* is distinguishable. In *Shaw*, the trial court specifically stated it had "found one aggravating [factor] . . . and we have found one mitigating [factor] . . . . The Court also finds without any argument that the lady, like any other citizen, is entitled to peace of mind and body in her home." *Id.* at 441-42, 417 S.E.2d at 268. Thus, the trial court stated it found an aggravating factor, a mitigating factor, and "also finds" what the *Shaw* Court interpreted as another aggravating factor. *See id.*

Here, however, the trial court had rendered its entire ruling before it added the sentence Defendant contends is problematic:

> The Court considers both the aggravating factor that the State presented, and that the jury found beyond a reasonable doubt, and the mitigating factors offered by the defendant, and finds that the aggravating factors substantially outweigh any findings of mitigation. And, **therefore, the Court will impose an aggravated punishment**. The Court will do so not only because of that but because the Court knows from [Defendant's] record that he has no fewer than eight previous convictions of assaultive conduct on his record.

(Emphasis added.)

Furthermore, it is important to place this statement in context by considering the entirety of the trial court's statement,

> All right. Thank you. All right. Madam Clerk, this is a Class H offense, but by virtue of the jury having found [Defendant] has the status of habitual felon, it is therefore a Class D offense. The Court finds as a matter of law and by stipulation of the parties that the [Defendant] is a prior record Level 3 for sentencing on Class D.
>
> The Court considers both the aggravating factor that the State presented, and that the jury found beyond a reasonable doubt, and the mitigating factors offered by [Defendant] and finds that the aggravating factors substantially outweigh any findings of mitigation. And therefore, the Court will impose an aggravated punishment. The Court will do so not only because of that but because the Court knows from [Defendant's] record that he has no fewer than eight previous convictions of assaultive conduct on his record.
>
> It is the judgment of the Court [Defendant] will be in prison, custody of NCDAC for not less than 105 nor more than 138 months. He's to receive credit for any and all time spent in pretrial confinement awaiting this disposition. The Court directs that as a condition of post-release supervision, he's not to have any contact, direct or indirect, with . . . the victim in this case. While incarcerated he's not to have any contact with . . . [victim] either by mail, telephone, or any other means available to him while incarcerated.
>
> The Court recommends psychological counseling while he's incarcerated. The Court directs that both the cost and the fee allowed to his court-appointed attorney, which is $5,610, be docketed as a civil judgment against him. That's the judgment. He's in your custody, Sheriff.

It is clear the trial court was providing its final summary of sentencing.

Read in context, the trial court referring back to "eight previous convictions" harkens back to his statement regarding the "stipulation of the parties that the

defendant is a prior record Level 3 for sentencing on Class D[,]" which is quite different from the trial court's opinion statement in *Shaw* "that the lady, like any other citizen, is entitled to peace of mind and body in her home." *Id.* Accordingly, we do not conclude that the trial court was using Defendant's prior record to aggravate his sentence, and this conforms with the judgment as only Defendant's probation violation was noted as an aggravating factor. Therefore, this single portion of a sentence referring back to Defendant's prior record is not an abuse of discretion. *See State v. Vaughters*, 219 N.C. App. 356, 358, 725 S.E.2d 17, 20 (2012) ("We review the trial court's weighing of aggravating factors and mitigating factors for abuse of discretion. In reviewing sentencing, a judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." (citations, quotation marks, and brackets omitted)).

C. Inconsistency between Rendered Judgment and Written Judgment

Finally, Defendant contends he is entitled to be resentenced because of an inconsistency between the trial judge's oral findings on 14 January 2022 and written findings in the final judgment, also entered on 14 January 2022. In the alternative, Defendant asserts the judgment should be remanded for correction of a clerical error. The State asserts "[t]he trial court properly considered both the aggravating and mitigating factors," but concedes the trial court "did not reflect this consideration by

checking a box on the Felony Judgment Findings of Aggravating and Mitigating Factors form[.]"

The type of error Defendant points out is indeed a clerical error. *See State v. Sellers*, 155 N.C. App. 51, 59-60, 574 S.E.2d 101, 106-07 (2002) (concluding the trial court's failure to make a finding that aggravating factors outweighed mitigating factors on the written judgment, after rendering a judgment in open court where he stated he had considered both, was clerical error). The proper remedy to correct a clerical error in the trial court's judgment is to remand with instructions to correct the error. *See id*. We, therefore, remand to the trial court with instructions to correct the judgment by checking the appropriate boxes.

III. Conclusion

We conclude the trial court committed no error by denying Defendant's motion to dismiss the habitual felon charge; the trial court did not improperly consider an aggravating factor during sentencing; and the trial court committed a clerical error on the written judgment. Thus, we conclude there was no error in part and remand for correction of the clerical error.

NO ERROR IN PART; REMANDED IN PART.

Judges COLLINS and FLOOD concur.

Report per Rule 30(e).