

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

NO. COA04-437

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 02 CRS 62914

VIRGIL TYRONE MYERS

Appeal by defendant from judgment entered 23 July 2003 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 29 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State

Charns & Charns, by D. Tucker Charns, for defendant-appellant.

STEELMAN, Judge.

On 27 January 2003, defendant was indicted on charges of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon. On 23 July 2003, defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and misdemeanor larceny and was sentenced to a term of 92 to 120 months imprisonment. Defendant appeals.

In his first assignment of error, defendant asserts that he received ineffective assistance of counsel because his attorney failed to request recordation of the jury *voir dire*, opening

statements and closing arguments. We disagree.

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Here, defendant cites no error that occurred in the unrecorded portions of the trial. Thus, even assuming *arguendo* that counsel's performance was deficient for failure to request that the proceedings be recorded, defendant shows no prejudice. *Id*; See also *State v. Crawford*, _ N.C. App. _, 592 S.E.2d 719, 724 (2004) (trial attorney's failure to request a recording of jury *voir dire* did not constitute ineffective assistance of counsel). This assignment of error is without merit.

In his second assignment of error, defendant argues that the trial court erred by failing to *sua sponte* order recordation of closing arguments, depriving him of meaningful appellate review and the effective assistance of appellate counsel.

We find no error. N.C. Gen. Stat. § 15A-1241(b) provides that upon motion of any party or the court, the trial court may order recordation of closing arguments. However, defendant cites no

authority for his argument that the trial court was required to order the closing argument be recorded, and in fact we know of none. Furthermore, based on the record and defendant's failure to specifically allege how he was prejudiced by the lack of recordation, we hold that defendant has failed to show any error. This assignment of error is without merit.

In his third assignment of error, defendant contends that the trial court erred in sentencing defendant as a prior record level II. We disagree.

Defendant argues that his counsel's stipulation was insufficient to prove his prior record level because the trial court made no inquiry of the defendant as to whether he understood what it meant to stipulate. Defendant contends the trial court should have made inquiry to determine whether he understood the effect of his attorney's stipulation.

We find no error. N.C. Gen. Stat. § 15A-1340.14 provides that the State bears the burden of proving by the preponderance of the evidence that "a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f). A defendant's prior convictions may be proven by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information ["DCI"], the Division of Motor Vehicles, or of the

Administrative Office of the Courts.

(4) Any other method found by the court to be reliable.

Id. See also *State v. Riley*, 159 N.C. App. 546, 556, 583 S.E.2d 379, 386 (2003).

In the instant case, counsel stipulated that defendant was a Level II felon. Thus, defendant's prior record level was proven by stipulation pursuant to N.C. Gen. Stat. § 15A-1340(f)(1). Defendant cites no authority for the proposition that he must be examined before the court can accept the stipulation, and we find none. Accordingly, this assignment of error is without merit.

NO ERROR.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).