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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-925

Filed: 15 May 2018

Gaston County, Nos. 15 CRS 55427, 55430, 16 CRS 006

STATE OF NORTH CAROLINA

v.

EDWARD SMITH, JR.

Appeal by defendant from judgments entered 1 March 2017 by Judge Yvonne M. Evans in Gaston County Superior Court. Heard in the Court of Appeals 5 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga Vysotskaya de Brito, for the State.

Joseph P. Lattimore for defendant-appellant.

DAVIS, Judge.

Edward Smith, Jr. ("Defendant") appeals from his convictions for two counts of possession with intent to sell or deliver cocaine and attaining the status of a habitual felon. On appeal, Defendant argues that (1) the trial court erred by admitting into evidence a witness's pre-trial statement; and (2) his habitual felon indictment was not supported with sufficient evidence at trial regarding the offense

date of one of his prior convictions. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: In 2014, Detective Joseph Burch and other officers working for the special investigations unit of the Gaston County Police Department were investigating a controlled substance violation in Gaston County. Defendant was suspected of dealing drugs — including both cocaine and Percocet pills — to Sandra Braly and Sidney Hayes, a married couple living in the area. In the fall of 2014, Braly and Hayes were both interviewed and given the opportunity to assist in the investigation, and they agreed to serve as confidential informants. They were instructed to conduct controlled purchases of cocaine from Defendant.

At approximately 3:17 p.m. on 10 October 2014, Detective Burch arranged the first of two cocaine purchases using the informants. Hayes and Braly met Detective Burch at the police department, and Detective Burch instructed Hayes that he should ask Defendant to sell him "[a]n eighth of an ounce of powder cocaine." Hayes then texted Defendant that he "needed 3.5 grams, which [in] street slang [is an] 8-ball of cocaine." Defendant responded, "I got you." Hayes knew that Defendant would meet

him "on Alexis High Shoals Road, at the chicken houses" because they "always met right there" for drug transactions.

Hayes and Braly then drove to a nearby church where Detective Burch, Detective Pease of the Gaston County Police Department, and Special Agent William Galloway of the State Bureau of Investigation conducted pat-downs of Hayes and Braly and searched the car they were driving. The officers also placed voice recorders on them and put a recording device in the backseat of their car. Immediately before leaving the church, Detective Burch gave Hayes $250 to purchase the cocaine from Defendant.

The officers then drove behind Hayes and Braly to Alexis High Shoals Road. Detective Burch dropped Special Agent Galloway off in a wooded area "in the vicinity of the undercover drug buy location" where he could set up a video recording of the transaction. Detective Pease rode in a separate car to monitor the drug purchase.

When Hayes and Braly arrived at a parking lot near the "chicken houses" on Alexis High Shoals Road, Defendant was waiting in a pickup truck. Hayes exited his car and walked up to Defendant's driver's side window. He handed Defendant the money, and in return Defendant gave him 3.18 grams of cocaine. After the transaction, Hayes met with Detective Burch and provided him with the cocaine he had purchased from Defendant.

On 15 October 2014, Detective Burch organized a second controlled drug sale. He instructed Hayes to send Defendant a text asking for a quarter ounce of cocaine. Hayes, in turn, informed Defendant that Braly would be picking up the cocaine. They agreed that Braly would meet Defendant at 3:00 p.m. the following day at the parking lot of the Westfield Mall in Gastonia.

Shortly before 2:45 p.m. on 16 October 2014, Braly met with Detectives Burch and Pease at which time the officers patted her down and placed recording devices on her person and in her vehicle. The officers then followed Braly to the parking lot of the Westfield Mall where Defendant's pickup truck was waiting. Three unmarked vehicles manned by five law enforcement officers — Detective Burch, Detective Pease, and Special Agent Galloway as well as Sergeant Jon Leatherwood and Detective Yancy of the Gaston County Police Department — were watching the drug transaction near the parking lot. Additionally, Sergeant Leatherwood was conducting video surveillance of Braly's entire encounter with Defendant.

Braly exited her vehicle and walked up to the driver's side of Defendant's truck. As he opened the door, she handed him $500, and he handed her 6.65 grams of cocaine. After this interaction, Braly met with Detective Burch and gave him the package of cocaine that she had purchased from Defendant. The officers conducted a second pat-down search of Braly after the drug transaction.

On 15 June 2015, Defendant was indicted for two counts of possession with intent to sell or deliver cocaine, and on 4 January 2016 he was indicted for attaining the status of a habitual felon. A jury trial was held beginning on 23 February 2017 in Gaston County Superior Court. The State presented testimony from Hayes, Braly, Detective Burch, Special Agent Galloway, Sergeant Leatherwood, Ashley Stallworth (a forensic drug chemist), and Melissa Miller (a deputy clerk at the Gaston County Clerk's Office). Defendant testified on his own behalf.

On 1 March 2017, the jury found Defendant guilty of two counts of possession with intent to sell or deliver cocaine and attaining the status of a habitual felon. The trial court consolidated the convictions and sentenced Defendant to a term of 89 to 119 months imprisonment. Defendant filed a handwritten notice of appeal.

Analysis

I. Appellate Jurisdiction

As an initial matter, we must determine whether we possess jurisdiction over this appeal. The State has moved to dismiss Defendant's appeal on the basis that his notice of appeal failed to comply with certain requirements of Rule 4 of the North Carolina Rules of Appellate Procedure. Defendant filed a handwritten letter indicating his intent to appeal but failed to serve a copy of the letter on the State as required by Rule 4(c). N.C. R. App. P. 4(c). The notice of appeal also failed to designate this Court as the court to which he was appealing as required by Rule 4(b).

N.C. R. App. P. 4(b). Because Defendant's handwritten notice failed to conform to the requirements of Rule 4, his appeal is subject to dismissal.

However, Defendant has filed a petition for writ of *certiorari* requesting appellate review of his convictions in the event that his notice of appeal is deemed to be insufficient to confer jurisdiction upon this Court. Pursuant to Rule 21(a)(1) of the Appellate Rules, this Court possesses the authority to grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1).

The State does not contend that it has been misled by Defendant's failure to serve the notice of appeal. It is within this Court's discretion to issue a writ of *certiorari* under these circumstances where the appellee has not been misled by the appellant's mistake. *See State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) ("[A] defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." (citation, quotation marks, and ellipsis omitted)).

Thus, in our discretion, we grant Defendant's petition for writ of *certiorari* and proceed to address the merits of his arguments. *See State v. Rowe*, 231 N.C. App. 462, 466, 752 S.E.2d 223, 226 (2013) (granting defendant's petition for writ of

certiorari where he failed to designate the court to which appeal was taken and did not serve notice of appeal on the State).

II. Introduction of Prior Statement

Defendant first argues that the trial court erred by admitting into evidence an out-of-court statement made by Braly. Specifically, he argues that the State improperly introduced a pre-trial statement by Braly that Defendant had sold her *cocaine* on 16 October 2014 given that her trial testimony tended to establish that Defendant had, in fact, sold her Percocet pills on this date.

During the State's direct examination of Braly, the following exchange occurred:

> [PROSECUTOR:] And what were you purchasing from [Defendant]?
>
> [BRALY:] I think probably Percocets. I think.
>
> . . . .
>
> [PROSECUTOR:] Ms. Braly, I'm going to show you what's been marked as State's Exhibit 28 at this point. I just ask you to take a look at that and read it, if you don't mind, just to yourself until you get done.
>
> (The witness reviewed the document)
>
> [PROSECUTOR:] Does that refresh your recollection a little bit about what happened that day?
>
> [BRALY:] Yes.
>
> . . . .

> [PROSECUTOR:] Ms. Braly, I'm going to ask you, if you will, to read that statement out loud, starting with where it says, synopsis of interview.
>
> [BRALY:] All right. (Reading) [Hayes] text [sic] [Defendant] yesterday. [Hayes] asked what time [Defendant] had to be at work because he wanted to get *an 8-ball of cocaine*. [Defendant] said he didn't have to work and asked what exactly they needed. [Hayes] told him an 8-ball. We told him it would be in the afternoon. [Hayes] confirmed with [Defendant] if it was the same fire as last time. He said it was. We told him it would be around 3 or 4:00. [Defendant] called [Hayes] to confirm the time and then sent a text telling us to not be holding back (photographed text [sic]. [Hayes] confirmed it was good. At 1:30 p.m. today [Defendant] text me asking what time we were meeting. I told him 3:00, and asked to meet at the chicken houses. [Defendant] text twenty minutes later telling me to meet at the mall. Detective Burch wrote down the other texts when I met him. As I was getting to the mall I text [Defendant] I was pulling in, and he replied two minutes. [Defendant] arrived in his red truck and parked next to my driver's door. I got out and he opened his door. We performed the deal in the open door area of his truck. [Defendant] didn't count the money he just kept it in his hand. I returned to my car and left.

(Emphasis added.)

Defendant did not object at trial to the admission of this statement. Thus, our review of this issue is limited to plain error review. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be

made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Defendant argues that the admission of Braly's pre-trial statement constituted error because Braly had not previously testified that Defendant had sold her cocaine on 16 October 2014. Thus, he argues, this prior statement added new information and did not, in fact, merely corroborate Braly's testimony. *See, e.g.*, *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997) (holding that trial court erred in admitting prior statement containing information that was "manifestly contradictory to [witnesss's] testimony at trial and did not corroborate the testimony"); *State v. Reynolds*, 91 N.C. App. 103, 107, 370 S.E.2d 600, 602 (1988) (holding that witness's prior statement that "defendant was very active in persuading him to commit the Mayflower robbery add[ed] neither weight nor credibility to his trial testimony that

he was unable to remember if defendant even participated in the discussions concerning the robbing of the Mayflower Restaurant").

However, even assuming — without deciding — that the admission of Braly's prior statement constituted error, the State's evidence of Defendant's guilt was overwhelming, and he therefore has failed to show that the introduction of this evidence prejudiced him. The evidence tended to show that (1) Defendant participated in two drug transactions with Braly and Hayes; (2) Braly, Hayes, and their vehicle were all searched by law enforcement officers before and after the drug purchases; (3) no cocaine was found on either informant or in the vehicle before either of the purchases; (4) the informants were watched by three officers and videotaped during the first drug transaction with Defendant; (5) Braly was surveilled by five officers and videotaped during the second drug transaction with Defendant; and (6) the drugs that Hayes and Braly gave to Detective Burch after each transaction were tested by a forensic drug chemist and determined to be cocaine in amounts generally corresponding to the quantities requested by Hayes for each purchase.

Defendant's theory of the case was that he never sold cocaine to Braly or Hayes. Rather, he testified that during the 10 October 2014 interaction he handed Hayes a small amount of high quality marijuana contained in a "joint" and $30. He testified that, in return, Hayes provided him with a "quarter bag of regular [marijuana]." He

further stated that during the 16 October 2014 interaction he gave Braly $30 in exchange for her giving him a "quarter bag of [marijuana]."

But Defendant has failed to explain how Braly and Hayes could have (1) possessed marijuana without it being detected by the officers who had searched them prior to each of these transactions; (2) not possessed cocaine prior to the purchases but obtained cocaine immediately after the transactions prior to being searched by officers; or (3) avoided detection while swapping marijuana received by Defendant for the cocaine they ultimately gave to Detective Burch while three to five officers watched and videotaped them during each of the drug transactions.

Therefore, Defendant has failed to show plain error. Accordingly, we overrule his argument on this issue.

III. Habitual Felon Charge

Defendant's final argument is that his conviction for attaining the status of a habitual felon should be vacated because the State did not introduce evidence at trial regarding the date of the offense for one of his prior felony convictions. Defendant failed to make a motion to dismiss the habitual felon charge in the trial court. Thus, he has not preserved this issue for appellate review.

However, Defendant requests that we review this issue pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to prevent manifest injustice. *See State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) ("Rule 2 relates to

the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." (citations and quotation marks omitted)). Because Defendant also argues in the alternative that he received ineffective assistance of counsel by virtue of his trial attorney's failure to move for dismissal of the habitual felon charge, we elect to review Defendant's argument on this issue.

In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that

> ineffective assistance of counsel claims brought on direct review will be decided on the merits 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. Turner, 237 N.C. App. 388, 395, 765 S.E.2d 77, 83 (2014) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 563 (2015).

"The Habitual Felons Act, contained in Article 2A of Chapter 14, North Carolina General Statutes, specifies that when a defendant has previously been convicted of or pled guilty to three non-overlapping felonies, defendant may be indicted by the State in a separate bill of indictment for having attained the status of being an habitual felon." *State v. Wells*, 196 N.C. App. 498, 502, 675 S.E.2d 85, 88 (2009). N.C. Gen. Stat. § 14-7.3 governs the contents of habitual felon indictments.

> 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 or other sovereign 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 (2017) (emphasis added). Our Supreme Court has made clear that

> a defendant charged as a habitual felon is not defending himself against the predicate substantive felony, but

> against a charge that he has at least three prior felony convictions. The trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury. . . . [N.C. Gen. Stat.] § 14-7.3 requires the State to allege all the elements of the offense of being a habitual felon thereby providing a defendant with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge.

State v. Cheek, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995) (internal citation omitted).

Here, Defendant's habitual felon indictment stated as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously . . .
>
> is a habitual felon in
>
> 1) That on or about April 7, 1982 in Stanly County Court, defendant was convicted of the felony offense of Common Law Robbery against the State of North Carolina *with the commission date on or about November 28, 1981;*
>
> 2) That thereafter on or about February 24, 1983 in the Superior Court of Montgomery County, defendant was convicted of the felony offense of Armed Robbery against the State of North Carolina *with the commission date on or about October 28, 1982* (82 CRS 5678); and,
>
> 3) That thereafter on or about March 12, 1991 in the Superior Court of Stanly County, defendant was convicted of the felony offense of PWISD Cocaine against the State of North Carolina *with the commission date of September 9, 1990* (90 CRS 4596).

> All of the aforementioned felony convictions were committed against the peace and dignity of the State of North Carolina and at least two of the aforementioned felony convictions were committed after defendant attained the age of 18 years.

(Emphasis added.)

Thus, Defendant's habitual felon indictment meets the requirements of the statute. All of the information required by N.C. Gen. Stat. § 14-7.3 was present — including the dates of offense for Defendant's three prior convictions. Thus, the indictment is facially valid. *See State v. McGee*, 175 N.C. App. 586, 588, 623 S.E.2d 782, 784 (holding that habitual felon indictment was facially valid where it included each element specified in N.C. Gen. Stat. § 14-7.3), *disc. review denied*, 360 N.C. 489, 632 S.E.2d 891 (2006).

Defendant argues, however, that the State never presented evidence *at trial* regarding the date of the offense for his 7 April 1982 conviction of common law robbery. He contends that because the judgment for this conviction did not contain a date for the commission of the offense and no witness testified as to that date, there was not sufficient evidence presented of each essential element of the habitual felon charge.

The State introduced at trial certified copies of the judgments for each of Defendant's three prior convictions. Exhibit A contained a judgment for the 7 April 1982 offense; Exhibit B contained a judgment for the 28 October 1982 offense; and

Exhibit C contained a judgment for the 9 September 1990 offense. Exhibits B and C also listed the dates that the offenses referenced therein were committed. Exhibit A did not contain this information regarding the 7 April 1982 conviction.

The State also elicited testimony from Melissa Miller, who served as a deputy clerk in the Gaston County Clerk's Office. She testified as to the dates that Defendant's second and third prior felonies had been committed and the conviction dates of those two offenses as stated in Exhibits B and C. Although Miller did not testify as to the date Defendant's first prior felony was committed, she did testify that 7 April 1982 was the date of conviction for that offense based on Exhibit A.

Defendant argues that in addition to proving the date of his conviction for his first prior felony, the State was also required to affirmatively offer evidence of the date he committed the offense. However, Defendant has failed to direct us to any legal authority in support of this proposition. Instead, he cites case law from our courts standing for the entirely separate proposition that a habitual felon indictment must contain all of the elements stated in N.C. Gen. Stat. § 14-7.3. *See, e.g.*, *State v. Langley*, __ N.C. App. __, __, 803 S.E.2d 166, 172 (2017) (vacating conviction because habitual felon indictment did not provide date of offense for prior felony), *disc. review allowed*, __ N.C. __, 805 S.E.2d 483 (2017). However, as noted above, Defendant's habitual felon indictment *did* contain all of the requisite elements set out in N.C. Gen. Stat. § 14-7.3.

N.C. Gen. Stat. § 14-7.1 provides that "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . 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(a) (2017). It further states, in relevant part, as follows:

> For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony.

N.C. Gen. Stat. § 14-7.1(c).

This Court has stated that "the date alleged in the indictment is neither an essential nor a substantial fact as to the charge of habitual felon . . . ." *State v. Taylor*, 203 N.C. App. 448, 454, 691 S.E.2d 755, 761 (2010) (citation and quotation marks omitted), *cert. denied*, 366 N.C. 408, 736 S.E.2d 180 (2012). The testimony elicited from Miller regarding the conviction date for Defendant's 7 April 1982 offense was substantial evidence that Defendant had committed a third felony despite the absence of evidence as to the date that the felony was committed. Therefore, any motion to dismiss Defendant's habitual felon charge in the trial court would have lacked merit. Accordingly, the failure to make such a motion did not constitute ineffective assistance of counsel. *See State v. Fraley*, 202 N.C. App. 457, 467, 688 S.E.2d 778, 786 ("[I]f the evidence is sufficient to support a conviction, the defendant

is not prejudiced by his counsel's failure to make a motion to dismiss at the close of all the evidence."), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010).

It is important to note that this case does not involve a potential violation of either of the two requirements contained in N.C. Gen. Stat. § 14-7.1. First, the State's evidence sufficiently showed that the defendant must have committed three prior non-overlapping felonies. *See* N.C. Gen. Stat. § 14-7.1(c); *see also State v. Parks*, 146 N.C. App. 568, 572, 553 S.E.2d 695, 698 (2001) ("Habitual felon status only attaches to a defendant who has committed three prior non-overlapping felonies and is then convicted of a fourth felony."), *appeal dismissed and disc. review denied*, 355 N.C. 220, 560 S.E.2d 355, *cert. denied*, 537 U.S. 832, 154 L. Ed. 2d 49 (2002). Miller testified as to the dates that Defendant committed the second and third prior felonies listed in the habitual felon indictment. The State also introduced Exhibits B and C, which contained the offense dates for these two felonies. Because the conviction date for the first felony occurred before the offense date listed for the second felony, Defendant's argument does not implicate the non-overlapping felony rule.

Second, Defendant had attained the age of 18 prior to the commission of the second and third prior felonies. *See* N.C. Gen. Stat. § 14-7.1(c) ("For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony."). The State's evidence demonstrated that

Defendant was at least 18 years old at the time he committed the second and third felonies.

Conclusion

For the reasons stated above, we conclude Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges INMAN and MURPHY concur.

Report per Rule 30(e).