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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-835

Filed: 7 April 2020

Mecklenburg County, No. 16 CRS 236634

STATE OF NORTH CAROLINA

v.

ANTONIO CABRAL, Defendant.

Appeal by defendant from judgment entered 3 April 2019 by Judge Casey M. Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

YOUNG, Judge.

Where defendant was sentenced to a term of imprisonment for 15-27 months, any error in sentencing defendant to an additional, lesser concurrent term of imprisonment was not prejudicial. We therefore find no prejudicial error.

I. Factual and Procedural Background

On 17 July 2017, the Mecklenburg County Grand Jury indicted Antonio Cabral (defendant) for felonious secret peeping upon a room occupied by another person, and for taking indecent liberties with children, namely the minor occupying the room. Subsequently, the Grand Jury entered a superseding indictment for secretly using a photographic imaging device and taking indecent liberties with children. The case proceeded to trial, and the jury returned verdicts finding defendant guilty of both charges. The trial court found defendant to have a prior felony record level of II, and sentenced defendant to a minimum of 15 months and a maximum of 27 months for taking indecent liberties, and a minimum of 4 months and a maximum of 14 months for peeping, to be served concurrently in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Standard of Review

Sentencing errors are automatically preserved for appellate review. *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010). This Court reviews arguments as to whether a trial court complied with the sentencing statutes *de novo*. See *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003).

III. Sentencing

In his sole argument on appeal, defendant contends that the trial court erred in sentencing him to an Active punishment for secretly using a photographic imaging device. We disagree.

Pursuant to our General Statutes, a person found guilty of secretly peeping by installing a device to photograph another without consent “shall be guilty of a Class I felony.” N.C. Gen. Stat. § 14-202(f) (2019). Defendant was indicted for this offense, and the trial court properly found it to be a Class I felony. Defendant contends, however, that for a person with a prior felony record level II, a Class I felony should not have resulted in a term of imprisonment.

Per North Carolina Structured Sentencing guidelines, a person with a prior record level II convicted of a Class I felony is subject to Community or Intermediate punishment, not Active punishment. N.C. Gen. Stat. § 15A-1340.17(c) (2019). Active punishment is defined as imprisonment which is not suspended; Intermediate punishment includes supervised probation, drug treatment, and special probation; and Community punishment is a sentence not involving imprisonment, a drug treatment program, or special probation. N.C. Gen. Stat. § 15A-1340.11 (2019). In the instant case, defendant was sentenced to a term of imprisonment – an Active punishment – as opposed to the Intermediate or Community punishments authorized by statute. As such, defendant is correct, and the trial court erred in imposing a punishment not authorized by defendant’s conviction and prior record level.

The State contends, however, that defendant has not shown that this sentence prejudiced him. The State notes that defendant was sentenced to 4-14 months for secret peeping, but 15-27 months for indecent liberties, to run concurrently. Thus, argues the State, even if the former sentence were to be reversed, defendant would still be serving the longer, second sentence. Moreover, notes the State, if the trial court were to have imposed a probationary sentence instead of imprisonment, as is appropriate under Intermediate punishment, that sentence would run at the completion of defendant's imprisonment for indecent liberties, rather than concurrently with it. This would result in defendant's sentence actually being extended, due to the increase in probation.

The State is correct that defendant bears the burden of showing not only error, but prejudice resulting from that error. Our General Statutes provide that

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2019). Indeed, our Courts have long held that sentencing errors are not *per se* prejudicial, and a defendant bears the burden on appeal of showing prejudice. *See e.g. State v. Stutts*, 225 N.C. 647, 648, 35 S.E.2d 881, 881 (1945) (holding that, where a defendant was subject to a prior sentence to

run concurrently with another, any error in vacating the suspension of the prior sentence was not prejudicial); *State v. McCotter*, 18 N.C. App. 411, 414, 197 S.E.2d 50, 52 (1973) (where a 30-day sentence was authorized but a 90-day sentence was imposed, to run consecutively with other sentences, the imposition of a longer sentence was prejudicial); *State v. Mumford*, 364 N.C. 394, 404, 699 S.E.2d 911, 917 (2010) (where defendant could not be forced to pay more than what was owed, error in restitution sentence was not prejudicial); *State v. Harding*, ___ N.C. App. ___, ___, 813 S.E.2d 254, 263, *writ denied, disc. review denied*, ___ N.C. ___, 817 S.E.2d 205 (2018) (where two offenses were consolidated for sentencing with a higher class offense, and the sentences imposed were based on the higher class offense, defendant could not establish prejudice based on a sentencing error in the two offenses themselves).

Notwithstanding the conjectural nature of the State's argument, it is clear that defendant does indeed bear the burden of establishing that the trial court's error in sentencing him to an Active punishment instead of an Intermediate or Community punishment was prejudicial. Defendant makes no such argument, instead merely offering that the trial court erred, and that therefore a new sentencing hearing is mandated. This Court declines to construct defendant's argument on prejudice for him. Accordingly, we hold that, where defendant would serve the same 15-27 month term of imprisonment for indecent liberties regardless of whether the sentence for

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secret peeping was entered in error, he has failed to show prejudice. We therefore find no prejudicial error in the trial court's judgment.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).