NO. COA01-1348

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 00 CRS 54026; 5462

ADULA WALI ALLAH

Appeal by defendant from judgments entered 18 April 2001 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 14 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien for the State.

W. Gregory Duke for defendant appellant.

McCULLOUGH, Judge.

Defendant Adula Wali Allah (a/k/a Linwood Earl Duffie) was tried before a jury at the 16 April 2001 Criminal Session of Pitt County Superior Court after being charged with one count of felony breaking or entering a motor vehicle, one count of misdemeanor larceny, one count of misdemeanor possession of stolen goods, and being an habitual felon. At trial, the State presented videotape evidence from a surveillance camera mounted atop the Target store in Greenville, North Carolina. The videotape showed that a white Chevrolet Corsica with two occupants arrived at the Target parking lot around 4:30 p.m. on 3 April 2000. The passenger went into the

store, while the driver remained outside near a shopping cart area. The driver was wearing a purple football jersey with a large white double zero on the front and back, dark shorts reaching his knees, white socks, white sneakers, and a black leather cap. The driver got a shopping cart, then walked between the parked cars and stopped to look inside a blue car parked next to the shopping cart area. He held a white rag in his hand, pulled the door handle up, and got into the car. When he got out a few moments later, he was carrying items from the car. The man got back into his white Corsica and drove away. Upon exiting the store, the owner of the blue car returned to her vehicle and noticed some of her belongings -- a pocketbook and a daily planner -- were missing. She reported a theft to the Target store employees and called the police at 4:40 p.m.

Officer Frank DeSantis of the Greenville Police Department responded to the victim's call. After speaking with the victim, he learned the Target store had a surveillance camera overlooking its parking lot. Officer DeSantis immediately watched the videotape and was able to read the license plate number of the white Corsica. Officer DeSantis took the videotape into his custody and ran a license number check on the Corsica. Officer DeSantis proceeded to the owner's address and learned that the owner lived at a different location. Around 5:30 p.m., approximately one hour after the theft, Officer DeSantis located the Corsica from the videotape. He noted a number of individuals standing near the car, including a man, later identified as defendant, who was wearing the same items

as the man depicted in the videotape. After learning that defendant's mother owned the Corsica, Officer DeSantis spoke to her and obtained her consent to search the car. Officer DeSantis recovered a white rag from the passenger area, but did not locate the victim's pocketbook or daily planner. He then placed defendant under arrest.

During trial, the State called a total of five witnesses, and introduced several exhibits, including the videotape from Target and a mug shot of defendant, which was taken around 6:30 p.m. on 3 April 2000. In the photograph, defendant was wearing a purple shirt.

Defendant presented testimony from his mother, his brother and his sister. Defendant's mother, Willie Mae Hammond, testified defendant was at her home on 3 April 2000 and left only once around 3:45 p.m. to purchase some aspirin for her at a supermarket. Ms. Hammond testified defendant always wore a black Muslim hat, and that he was wearing a pair of black tennis shoes that day. Upon viewing the videotape, she stated the man was not defendant.

Defendant's brother, James Earl Hammond, testified he, not defendant, drove the white Corsica on the afternoon of 3 April 2000. He further testified that the man in the videotape was not defendant. Finally, defendant's sister Darlene Phillips testified and corroborated her mother's testimony regarding defendant's whereabouts on 3 April. She stated defendant drove their mother's yellow car when he went to the store to get aspirin for their mother and was gone for only ten to fifteen minutes. Ms. Phillips

further testified her two brothers looked very much alike; however, upon viewing the videotape, she stated the man depicted was her brother James Earl Hammond, not defendant.

The jury found defendant guilty on all counts. The trial court sentenced defendant to 120 days' imprisonment for the misdemeanor larceny conviction. Judgment was arrested for the misdemeanor possession of stolen goods conviction. Defendant's conviction for felony breaking or entering a motor vehicle was enhanced to a Class C felony based on his habitual felon status, and the trial court sentenced him to a consecutive term of imprisonment of 107-138 months. Defendant appealed.

On appeal, defendant argues the trial court erred by (I) refusing to dismiss the habitual felon indictment returned against him, based on constitutional grounds; (II) failing to dismiss the habitual felon indictment as fatally defective; (III) overruling his objection to testimony of a witness regarding how he was processed at the local detention center; (IV) failing to exclude his photograph from evidence; and (V) denying his motion to dismiss the breaking or entering charge at the close of all the evidence. For the reasons set forth herein, we disagree with defendant's arguments and find he received a trial free from error.

Habitual Felon Indictment

By his first three assignments of error, defendant contends the trial court should have dismissed the habitual felon indictment returned against him due to numerous alleged defects. We will examine each contention in turn.

Defendant was found guilty of being an habitual felon pursuant to N.C. Gen. Stat. § 14-7.1 (2001). Defendant first argues the habitual felon statute, as applied in his case, violates the Separation of Powers clause in the North Carolina Constitution because the prosecutors, not the legislature, decide which felonies are enhanced by the statute. We deem defendant's arguments meritless, as this Court has previously rejected that argument. *See State v. Wilson*, 139 N.C. App. 544, 549-50, 533 S.E.2d 865, 869-70, *appeal dismissed, disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000). We also note defendant did not object on these grounds before the trial court and therefore failed to preserve the issue for our review. *See* N.C.R. App. P. 10(b)(1) (2002). Additionally, defendant is not entitled to plain error review, as his argument does not involve an alleged error in jury instructions or a ruling on an evidentiary matter. *State v. Fleming,* 350 N.C. 109, 132, 512 S.E.2d 720, 736, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). Defendant's assignment of error is overruled.

Defendant next argues N.C. Gen. Stat. § 14-7.1 violates the Equal Protection Clause of the United States Constitution because all similarly situated criminal defendants in Pitt County are not prosecuted as habitual felons. *See* U.S. Const. amends. V and XIV. Once again, our Court has squarely rejected this argument. *See State v. Parks*, 146 N.C. App. 568, 570-71, 553 S.E.2d 695, 697 (2001), *appeal dismissed, disc. review denied*, 355 N.C. 220, 560 S.E.2d 355 (2002); and *Wilson*, 139 N.C. App. at 550-51, 533 S.E.2d at 870. As defendant failed to show that the prosecutor charged

and prosecuted him based upon "an unjustifiable standard such as race, religion or other arbitrary classification[,]" *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996), this assignment of error is overruled.

Defendant further contends that N.C. Gen. Stat. § 14-7.1, when used in conjunction with the Structured Sentencing Act, N.C. Gen. Stat. §§ 15A-1340.10 to -1340.23, violates the Fifth and Fourteenth Amendments of the United States Constitution and subjects him to double jeopardy. Once again, our Court has squarely rejected this argument. *See State v. Brown*, 146 N.C. App. 299, 301-02, 552 S.E.2d 234, 235-36, *appeal dismissed, disc. review denied*, 354 N.C. 576, 559 S.E.2d 186 (2001), *cert. denied*, ___ U.S. ___, 152 L. Ed. 2d 1061 (2002). At any rate, defendant failed to object and obtain a ruling at the trial court level and is precluded from asserting plain error. *See* N.C.R. App. P. 10(b)(1); and *Fleming,* 350 N.C. at 132, 512 S.E.2d at 736. This assignment of error is likewise overruled.

Defendant also contends the trial court should have dismissed the habitual felon indictment as fatally defective because it was dated before the indictment for the principal felony. The Pitt County grand jury returned bills of indictment for breaking or entering a motor vehicle, larceny, and possession of stolen goods on 22 May 2000. Defendant's habitual felon indictment was dated 21 May 2000. Defendant believes this was error.

"Being an habitual felon is not a crime but is a status the

attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). To attain habitual felon status, a criminal must be indicted for his fourth felony. *See* N.C. Gen. Stat. § 14-7.1. Defendant did not move to dismiss the habitual felon indictment on this ground and consequently failed to obtain a ruling from the trial court. The issue has not been preserved for appellate review and plain error review does not apply. *See* N.C.R. App. P. 10(b)(1); and *Fleming*, 350 N.C. at 132, 512 S.E.2d at 736.

Our review of the record indicates that the date on the habitual felon indictment was simply a clerical error on the jury foreman's part. "The law requires the courts to take judicial notice of the days, weeks, and months of the calendar." *State v. Brunson*, 285 N.C. 295, 302, 204 S.E.2d 661, 665 (1974), *aff'd*, 287 N.C. 436, 215 S.E.2d 94 (1975). The grand jury did not meet on 21 May 2000, as that date fell on a Sunday. It appears the foreman dated both the principal indictment and the habitual felon indictment "5/21/2000." He later corrected the date on the principal indictment, but inadvertently failed to do so on the habitual felon indictment. Our conclusion is bolstered by the verbatim transcript. While arguing a motion on another issue, the prosecutor stated, *without objection*, that "[defendant] was indicted for felony breaking and entering on the same day he was indicted as habitual felon."

Both the principal indictment and the habitual felon

indictment were returned by the same grand jury, were signed by the same grand jury foreman, and were considered during the same grand jury session. The habitual felon indictment referenced the date of the principal felony, 3 April 2000, thereby indicating that the grand jury did not intend for the habitual felon indictment to stand alone as an independent proceeding. After carefully considering defendant's arguments, his assignment of error is overruled.

Witness Testimony

By his next assignment of error, defendant contends the trial court erred in allowing witness Brent Johnson to testify regarding how he was processed at the local detention center because the State impermissibly presented evidence of defendant's prior criminal history.

During trial, Mr. Johnson testified that he worked at the Pitt County Detention Center and was familiar with the manner in which individuals were processed at the center. He answered the State's questions as follows:

> Q. When someone was arrested, would they be brought to the detention center?
>
> A. If they were put under a secured bond, they would.
>
> * * * *
>
> Q. And when they are -- was part of your duty to process people in?
>
> A. Yes, it was.
>
> Q. If you would, please, explain to the jury what that entailed?

> A. We would ask them questions about [] themselves; we would inventory all the property that they had on them. We would inventory their clothes and ask them any medical questions -- like I said, any personal questions, and there is usually a photograph taken. Sometimes we would not take a photograph, if it had been someone who had been incarcerated several times, just not to have ten pictures of the same person in the computer, the only way we would retake the photograph --

Defendant objected, arguing the jury could infer from Mr. Johnson's testimony that defendant had a criminal record. After sending the jury out of the courtroom and hearing from both defendant and the State, the trial court overruled defendant's objection, but did instruct Mr. Johnson not to "make any reference to whether or not you took a picture of a particular individual unless you're talking about, specifically, this defendant, sir." The testimony then continued as follows:

> Q. Now, on April 3, 2000, was there a photograph taken of the defendant?
>
> A. I'm not sure. The computer system -- we were having trouble at the jail at that time with the computer system.
>
> Mr. Brown [Defendant's Attorney]: Your Honor, I'm going to object on our discussion earlier.
>
> The Court: Overruled. You may explain your answer, sir. You may continue.
>
> A. We were experiencing difficulties with the current computer system we had at that time. We were in the process of changing over to computers -- so that that information during that time is no longer available because we do not have rights to that information. I went back and looked at the hard file and there wasn't -- there was none.

> Q. There was not a picture on the hard file of the defendant, on April 4th?
>
> A. Not -- not in April.
>
> Q. Excuse me. April the 3rd?
>
> A. No, it was not.

Upon review, we believe defendant has failed to carry his burden of showing that exclusion of the testimony would have led to a different result. *See* N.C. Gen. Stat. § 15A-1443(a) (2001); and *State v. Loren*, 302 N.C. 607, 613, 276 S.E.2d 365, 369 (1981). Mr. Johnson testified he could not locate a photograph of defendant in the hard file and he was "not sure" if he took defendant's photograph on 3 April 2000. We agree with the State that, if any inference could be drawn from Mr. Johnson's testimony, it would be that defendant had no prior criminal record.

We also note defendant himself introduced testimony that his photograph was taken on 3 April 2000. Officer DeSantis testified on cross-examination that "I took his picture, just standard procedure." Later, during his presentation of evidence, defendant elicited testimony from his mother which alluded to defendant's prior involvement with the police. Lastly, given the strong evidence against defendant, it is unlikely that Mr. Johnson's testimony was the deciding factor which caused the jury to find defendant guilty. *See State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985). Based on these facts, we conclude the trial court correctly overruled defendant's objection to Mr. Johnson's testimony. Defendant's assignment of error is overruled.

Photograph

Defendant next contends the trial court abused its discretion by allowing his photograph into evidence. Specifically, defendant argues the State committed a discovery violation (of N.C. Gen. Stat. § 15A-903(e) (2001)) by not providing him with a copy of the photograph prior to trial and that his constitutional rights were violated.

We first note that defendant did not raise any constitutional concerns below and is precluded from asserting those arguments for the first time on appeal. *See* N.C.R. App. P. 10(b)(1). "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996).

Defendant also asserts the State violated N.C. Gen. Stat. § 15A-903(e), which states:

> Upon motion of the defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.

Photographs, however, properly fall under N.C. Gen. Stat. § 15A-903(d) (documents and tangible objects). Despite the error on his part, defendant contends the State should have provided a copy of the photograph to him prior to trial. After considering this

assignment of error, we agree with the State that it need only provide discovery after defendant makes a motion requesting it. *State v. Cummings*, 346 N.C. 291, 322, 488 S.E.2d 550, 568 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

Defendant's discovery motion asked "[t]hat defendant's attorney be allowed to view any photographs the State intends to use as evidence at the trial." Defendant later asked for "[a]ny information and evidence which 'would tend to exculpate [defendant] or reduce the penalty,' and [] '[a]ll information and evidence in the possession of the State or prosecution or its agents that may be materially favorable to the Defendant either of a direct or impeaching nature[.]" We agree with the State that the photograph did not fall within the parameters of either of defendant's two discovery requests. Moreover, we believe the State did not intend to use the photograph prior to trial, and did so only after defendant cross-examined Officer DeSantis and implied he was not thorough with his investigation.

Defendant's request for imposition of discovery sanctions likewise fails. "Which sanction, if any, is the appropriate response to a party's failure to comply with a discovery order is entirely within the sound discretion of the trial court." *State v. Alston*, 307 N.C. 321, 330, 298 S.E.2d 631, 639 (1983); *see also* N.C. Gen. Stat. § 15A-910 (2001). "The decision of the trial court will not be reversed absent a showing of abuse of that discretion." *Alston*, 307 N.C. at 330, 298 S.E.2d at 639.

Defendant argues the admission of his photograph constituted

unfair surprise and that the trial court should have excluded the photograph because it established defendant was wearing a purple jersey at the time of his arrest. Defendant also contends the State's actions made defendant's attorney lose credibility with the jury because it produced the photograph for the jury's consideration shortly after defendant's attorney conducted a vigorous cross-examination of Officer DeSantis, and implied no photograph was taken. After noting that the imposition of sanctions for discovery violations is solely within the discretion of the trial court, we adopt the reasoning of *State v. Pigott*, 320 N.C. 96, 357 S.E.2d 631 (1987) and conclude defendant has failed to show irreparable prejudice to his case by inclusion of the photograph at trial. We conclude the trial court did not abuse its discretion in allowing defendant's photograph into evidence, and this assignment of error is overruled.

Motion to Dismiss

By his final assignment of error, defendant contends the trial court erred by denying his motion to dismiss the felony breaking or entering a motor vehicle charge against him at the close of all the evidence because the State failed to present substantial evidence of the essential elements of the crime. Specifically, defendant contends the State failed to prove, beyond a reasonable doubt, that he was the perpetrator of the offense. We disagree.

Felonious breaking or entering a motor vehicle is codified by N.C. Gen. Stat. § 14-56 (2001), which states:

> If any person, with intent to commit any

> felony or larceny therein, breaks or enters any . . . motor vehicle . . . containing any goods, wares, freight, or other thing of value, or after having committed any felony or larceny therein, breaks out of any . . . motor vehicle . . . containing any goods, wares, freight, or other thing of value, that person is guilty of a Class I felony. It is prima facie evidence that a person entered in violation of this section if he is found unlawfully in such a . . . motor vehicle[.]

In the present case, defendant moved to dismiss the charge of felony breaking or entering a motor vehicle. When considering a motion to dismiss,

> all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). Moreover,

> [o]nce the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then "'it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.'"

State v. Barnes, 334 N.C. 67, 75-76, 430 S.E.2d 914, 919 (1993), (quoting *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965))). In making this

determination,

> the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. . . . When ruling on a motion to dismiss, the trial court should only be concerned about whether the evidence is sufficient to go to the jury and consider, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

The State presented evidence of the Target store's surveillance videotape, which depicted a man getting out of a white Chevrolet Corsica and using a white rag to lift the door handle of a blue car. The man stayed in the car for a few moments and emerged with items he had not held previously. The man in the videotape was wearing a purple football jersey with a white double zero on the front and back, dark knee-length shorts, white socks, white sneakers and a black leather cap. Officer DeSantis traced the Corsica's license plate and learned it belonged to defendant's mother. Approximately one hour after the theft, Officer DeSantis found both the Corsica and defendant at Ms. Hammond's residence. Defendant was wearing the same clothing as the man depicted in the surveillance videotape. A search of the Corsica revealed the presence of a white rag like the one used by the man in the videotape. Based on this evidence, a reasonable inference could be drawn that the man in the videotape was defendant. The trial court was therefore required to deny defendant's motion to dismiss, and did not err in doing so. *See State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994). Defendant's final assignment of

error is overruled.

After careful examination of the record and the arguments of the parties, we conclude defendant received a fair trial, free from error.

No error.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).