

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-1434

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v.

Cherokee County
No. 01 CRS 000064-65

TERRY DEWAYNE OWNBEY,
Defendant.

Appeal by defendant from judgment entered 16 May 2001 by Judge James L. Baker, Jr. in Cherokee County Superior Court. Heard in the Court of Appeals 14 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Dorothy Powers, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

EAGLES, Chief Judge.

Terry Dewayne Ownbey ("defendant") appeals from judgment entered on his convictions of assault on a female, habitual misdemeanor assault and being an habitual felon. After careful consideration of the briefs and record, we discern no error.

The State's evidence tended to show that Shylon Cable ("Cable") lived with Sally McTaggart ("McTaggart") in McTaggart's home. On 4 January 2001, Cable and Wendell Ownbey arrived at McTaggart's house with some carpet as McTaggart and her boyfriend were leaving. Cable saw defendant, Doug Underwood and Chris Hardin

walking across the street towards the house as Cable was shutting the front door. Defendant entered the house without knocking and began yelling at Cable. Defendant then struck Cable in the mouth knocking her to the floor. Defendant picked Cable up and threw her to the ground twice. Defendant took out a pocketknife and continued to yell at Cable. Cable attempted to leave through the back door but was stopped by defendant. During the struggle, Wendell attempted to talk to the defendant while Underwood and Hardin sat on the couch. Defendant cornered Cable in the bathroom and threatened her with a "big, big knife." As Wendell moved towards a door and defendant went after him, Cable left the bathroom and went into the living room. Defendant pushed Wendell to the ground and then smashed the telephone as Cable was attempting to reach it. Defendant then pushed Cable over the couch and "suffocated [her] until there was no more air left in [her]." McTaggart came home and as she entered the house, defendant let Cable go. Cable ran out of the house and drove to see her daughter. Cable's daughter then took Cable to the hospital. Cable was "black and blue from the top of [her] head to the bottom of [her] feet," had broken ribs, and suffered injuries to her nose and mouth.

Defendant was charged with assault on a female, habitual misdemeanor assault and being an habitual felon. The matter was tried at the 14 May 2001 Criminal Session of Cherokee County Superior Court before Judge James L. Baker, Jr. Defendant stipulated to the five prior misdemeanors listed in the habitual

misdemeanor assault indictment. The jury returned a verdict of guilty of assault on a female. Based on the stipulation and the jury verdict, the trial court found defendant guilty of habitual misdemeanor assault. The jury then returned a verdict of guilty of being an habitual felon. The trial court entered judgment and sentenced defendant to a minimum term of imprisonment of 133 months to a maximum term of 169 months. Defendant appeals.

Defendant raises three issues on appeal. Defendant contends that his habitual misdemeanor assault conviction must be vacated because G.S. § 14-33.2 violates constitutional prohibitions against double jeopardy and *ex post facto* laws. Defendant further contends that his habitual felon conviction must be vacated because "habitual misdemeanor assault is not a substantive felony for purposes of the habitual felon statute." Defendant also contends that his habitual misdemeanor assault conviction must be vacated because G.S. § 14-33(c)(2) violates defendant's rights to equal protection of the laws. After careful consideration, we discern no error.

Defendant presents arguments relating to 5 of the 19 assignments of error in the record on appeal. Any assignments of error not argued in defendant's brief are deemed abandoned. N.C.R. App. P. 28(b)(6).

First, defendant contends that his habitual felon conviction must be vacated because "habitual misdemeanor assault is not a substantive felony for purposes of the habitual felon statute." We do not agree.

Defendant concedes that *State v. Smith*, 139 N.C. App. 209, 214, 533 S.E.2d 518, 520, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000) held that the habitual misdemeanor assault statute defines a substantive offense. Defendant seeks for this Court to review the issue and overrule *Smith*. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We are bound by *Smith* and dismiss this assignment of error.

Next, defendant contends that his habitual misdemeanor assault conviction must be vacated because G.S. § 14-33(c)(2) violates defendant's rights to equal protection of the laws. We are not persuaded.

G.S. § 14-33(c)(2) (2001) states that:

Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

. . . .

(2) Assaults a female, he being a male person at least 18 years of age.

Defendant concedes that he did not raise the constitutionality of the statute at trial but requests that this Court review his claim pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. It is well settled that this Court will not review

constitutional questions that "[were] not raised or passed upon in the trial court." *State v. Elam*, 302 N.C. 157, 160-61, 273 S.E.2d 661, 664 (1981). We decline to review this issue pursuant to Rule 2. This assignment of error is dismissed.

Defendant next contends that his habitual misdemeanor assault conviction violates the provisions of the double jeopardy and *ex post facto* clauses of the United States and North Carolina Constitutions. Specifically, defendant argues that G.S. § 14-33.2 is unconstitutional on its face and is unconstitutional as applied to the defendant.

As to defendant's argument that G.S. § 14-33.2 is unconstitutional on its face, defendant argues that his conviction for habitual misdemeanor assault violates double jeopardy because his prior misdemeanor convictions are elements of the habitual misdemeanor assault offense. Defendant further argues that his habitual misdemeanor assault conviction violates double jeopardy because it is a substantive offense, rather than a penalty enhancing offense.

Defendant did not object at trial to his conviction on double jeopardy grounds. Defendant seeks for this Court to review this assignment of error pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. This Court will not review constitutional questions on appeal that were not argued or raised in the trial court. *Elam*, 302 N.C. at 160-61, 273 S.E.2d at 664. We decline to review this issue pursuant to Rule 2. This assignment of error is dismissed.

Defendant argues that the habitual misdemeanor assault statute is unconstitutional as applied to defendant because it retroactively increases the punishment for defendant's five misdemeanor charges used to support the habitual misdemeanor assault charge. Defendant argues that some of the prior misdemeanors preceded the enactment of the habitual misdemeanor assault statute. Defendant argues that this violates the *ex post facto* clauses of the United States and North Carolina Constitutions.

Defendant's argument that the habitual misdemeanor assault conviction violates the *ex post facto* prohibitions has already been rejected by this Court. See *Smith*, 139 N.C. App. at 214-15, 533 S.E.2d at 520-21. Because the habitual misdemeanor assault statute "does not impose punishment for previous crimes, but imposes an enhanced punishment for behavior occurring after the enactment of the statute, because of the repetitive nature of such behavior, we hold the habitual misdemeanor assault statute does not violate the prohibition on *ex post facto* laws." *Id.* at 214-15, 533 S.E.2d at 521.

No error.

Judges TYSON and THOMAS concurs.

Report per Rule 30(e).