

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-258

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v.

Guilford County
No. 99 CRS 23457, 23488,
32022, 37733, 37990,
40442, 92116, 92118

CURTIS PRENTISS CHEEK

On a writ of certiorari from judgment entered 19 October 1999 by Judge William Z. Wood, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 26 August 2002.

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

Peter Wood, for defendant-appellant.

WYNN, Judge.

Following defendant's convictions based upon his pleas of guilty to multiple counts of felonious breaking or entering, felonious larceny, possession of stolen goods, and second degree burglary, defendant appeals the trial court's sole finding in aggravation that defendant committed the offenses while on pretrial release from another charge. We find no error and therefore uphold his sentence of 167 to 210 months imprisonment upon the consolidated convictions.

The prosecutor's recitation of the evidence shows that on 23

February 1999, defendant and an accomplice were observed breaking into a residence at 621 Creekridge Road in Greensboro. Defendant was arrested and taken to the police station. At the time of this offense, defendant was on pretrial release on pending charges of first degree trespass and unauthorized use of a motor vehicle. On 6 March 1999, another residence was broken into and defendant's fingerprints were found inside the residence. On 16 March 1999, two other residences were broken into. A neighbor saw a suspicious van parked outside one of the residences. Police officers answering the neighbor's call to the residence saw a van leave the residence. The officers stopped the van and inside the van found items stolen from the two residences. Defendant was driving the van. On 17 June 1999, another residence was broken into and various items were stolen, including an automobile. Defendant was arrested while driving the stolen vehicle.

Defendant contends the trial court erred by finding as an aggravating factor that he committed the offenses while on pretrial release on another charge. He argues the finding is not supported by competent evidence because a prosecutor's statement is insufficient to support a finding of an aggravating factor. He also argues the finding is improper because the charge for which he was on pretrial release was a charge for which he was being sentenced.

In determining whether a factual basis for a plea exists, the trial judge is authorized to consider statements of the facts by the prosecutor and defense counsel, a written statement by the

defendant, a pre-sentence report, and sworn testimony. N.C. Gen. Stat. § 15A-1023(c) (2001). These methods of proof are not exclusive. *Id.* Notwithstanding, our courts have held that a statement of the prosecutor is insufficient, standing alone, to support a finding of a factor in aggravation unless the defendant stipulates to the statement, either expressly or impliedly by failing to object. *State v. Mullican*, 329 N.C. 683, 685, 406 S.E.2d 854, 855 (1991).

The present record shows that defendant's counsel did not object to the prosecutor's statement of the evidence except to say that he did not receive any discovery from the prosecutor regarding any prior arrest for, or conviction of, trespassing. On this basis, counsel objected to a finding as a factor in aggravation that the offenses committed on 23 February 1999 were committed while defendant was on pretrial release on another charge.

For the purpose of deciding this appeal, we conclude counsel's objection is adequate to preserve the issue for review. Nonetheless, we find evidence outside the prosecutor's statement sufficient to support the finding. At the time the trial court accepted the plea, the court record contained arrest warrants showing service of the warrants on defendant on 23 February 1999, 22 March 1999, 11 March 1999, and 9 July 1999. Subsequent to each arrest and during the interim between each arrest, defendant committed other offenses. A reasonable conclusion to be drawn is that defendant committed the later offenses while on pretrial release on the earlier charges.

Since the court consolidated all of the convictions of offenses committed during a period of several months, the applicability of the finding is not limited to the 23 February 1999 offenses. Even if the applicability of the finding was limited to the convictions arising out of the 23 February 1999 offenses, the record shows that pending charges of trespassing and unauthorized use of a motor vehicle were dismissed as part of the plea agreement in the present case.

No error.

Judges MCGEE and CAMPBELL concur.

Report per Rule 30(e).