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NO. COA02-62

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 00 CRS 40391, 57553 and
57958; 01 CRS 4207

MICHAEL JUNIOR COOPER,
Defendant

Appeal by defendant from judgment entered 22 August 2001 by Judge Clarence W. Carter in Forsyth County Superior Court. Heard in the Court of Appeals 18 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Leslie C. Rawls for defendant.

BRYANT, Judge.

Defendant Michael Junior Cooper was indicted for one count each of larceny of a motor vehicle, possession of a stolen vehicle, delivering a schedule II controlled substance, and conspiracy to violate the Controlled Substances Act. By separate indictments, defendant was indicted for habitual misdemeanor assault and for habitual felon. These matters came for jury trial at the 20 August 2001 session of Forsyth County Superior Court with the Honorable Clarence W. Carter presiding. Defendant was found guilty of possession of a stolen vehicle, but the jury was deadlocked as to

the remaining charges.

Subsequently, defendant entered into a plea agreement whereby he agreed to plead guilty to all of the remaining charges including habitual misdemeanor assault (a felony) and habitual felon status. Based on the trial court's calculating of defendant's prior record level at a level V, defendant was sentenced to 151-191 months. Defendant gave notice of appeal in open court.

Facts

The State's evidence at trial tended to show the following. On 15 October 2000, Winston-Salem Police Officer Raymond Nowack was working day patrol. He saw a 1988 Honda Accord on Peters Creek Parkway, emitting a lot of smoke from the exhaust. The vehicle was occupied by the driver and one passenger. He stopped the vehicle and cited the driver, defendant, for driving while license revoked and emitting visible contaminants for more than five consecutive seconds. After giving defendant a court date, Officer Nowack told both the driver and the passenger not to drive the vehicle. He allowed them to leave the scene. The vehicle was left in the McDonald's parking lot at Trade Mart Boulevard and Peters Creek Parkway.

On 17 October 2000, Officer Nowack received a "hit" on his computer, indicating the Honda Accord he had stopped on Peters Creek Parkway was stolen. He got a copy of the report confirming that the vehicle was stolen (sometime between 14-16 October 2000), and then began to circulate in the area where defendant had said he lived. He found the vehicle in the 500 block of West Brookline

Avenue, a couple of blocks from defendant's address. There was no one in the vehicle. Officer Nowack called for additional units to respond to the area and process the vehicle.

As Officer Nowack stood with the vehicle, defendant approached him and asked what was going on with the vehicle. Officer Nowack told him it was stolen. Defendant then told Officer Nowack that he had traded crack for the vehicle just before Officer Nowack stopped him the prior Sunday. Defendant was again permitted to leave the scene, but six days later, Officer Nowack obtained a warrant charging defendant with possession of a stolen vehicle.

Jimmy Dwane Killian, owner of Jimmy's Garage, testified that he owned the 1988 Honda Accord. When he closed his business for the night on Saturday, 14 October 2000, the vehicle was outside on the lot. The business next opened on Monday, 16 October 2000. That evening when he was outside with a customer, he realized the vehicle was gone. Mr. Killian did not know defendant and did not give him permission to use the vehicle. He had no personal knowledge of who took the vehicle from the lot.

Stokes County Sheriff's Deputy Randy Joyce testified that he first met defendant in February 1991. Over defendant's objection, Deputy Joyce was permitted to testify as follows. On 7 February 1991, while on uniform patrol, he received a call regarding a "suspicious person" at Guardian Care Nursing Home. When Deputy Joyce responded to the call, the suspect left in a dark blue Audi. Deputy Joyce pursued the vehicle for a mile to a mile-and-a-half before the Audi went into a ditch. A black male jumped out of the

vehicle and ran, but was caught about a quarter mile from the crash site. The man was identified as the same defendant in the instant case. Defendant was taken into custody, where he told Deputy Joyce that he had taken the Audi from Cannon Motors in Statesville so that he could visit his children. He had gone to Guardian Care Nursing Home to see his girlfriend. Deputy Joyce could smell alcohol on defendant, though he said defendant was not impaired.

At the close of the State's evidence, defendant made a motion to dismiss the charges. The trial court reserved its ruling on defendant's motion until all the evidence was presented. The trial court then recessed until the following morning.

Defendant presented no evidence in his defense, but renewed the motion to dismiss. The trial court denied the motion.

I.

Defendant presents three arguments on appeal. First, defendant argues that the trial court erred in denying his motion to dismiss. We disagree.

"In reviewing a motion to dismiss, 'the trial court is to determine whether there is substantial evidence (a) of each essential element of the offenses charged, or of a lesser offense included therein, and (b) of defendant[] being the perpetrator of the offense.'" *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *aff'd as modified*, 355 N.C. 266, 559 S.E.2d 788 (2002). When reviewing challenges to the sufficiency of the evidence, the evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of all

reasonable inferences to be drawn from the evidence. *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 355 (1988).

The elements for the charge of possession of a stolen vehicle under N.C.G.S. § 20-106 (2001), are (1) that the defendant possessed the vehicle and (2) that he knew or had reason to believe the vehicle was stolen. There is seldom direct evidence as to whether defendant knew or should have known the vehicle was stolen. Therefore, "[w]hether the defendant knew or should have known that the vehicle was stolen 'must [often] be proved through inferences to be drawn from the evidence.'" *State v. Baker*, 65 N.C. App. 430, 436, 310 S.E.2d 101, 107 (1983).

Defendant contends that the State presented no evidence that defendant knew or should have known the vehicle was stolen. In *State v. Abrams*, 29 N.C. App. 144, 223 S.E.2d 516 (1976), this Court held that the fact that the defendant was in possession of the vehicle the day after it was stolen, and his "apparent disregard for the value of the automobile" were evidence from which the jury could infer that the defendant knew or should have known the vehicle was stolen. *Abrams*, 29 N.C. App. at 146, 223 S.E.2d at 517.

In the instant case, the evidence shows that defendant had been in possession of the vehicle just after the time of the theft, volunteered to the officer that he had traded crack cocaine for the vehicle, parked the vehicle a couple blocks from his home, and left the keys in it. The defendant's action of parking the vehicle away from his home and leaving the keys in the vehicle, can be

interpreted as an "apparent disregard for the value of the automobile." Furthermore, the State introduced Rule 404(b) evidence of defendant's previous conviction of larceny of a motor vehicle "to show motive, knowledge, intent, and lack of accident on the part of this defendant."

The State presented sufficient evidence that defendant knew or should have known that the vehicle was stolen. The trial court did not err in denying defendant's motion to dismiss the possession of a stolen vehicle charge. Therefore, this assignment of error is overruled.

II.

Defendant next argues that the trial court erred by accepting defendant's guilty plea without a factual basis. We disagree.

Defendant may not raise issues on appeal that were not presented to the trial court in the form of a timely objection or motion. N.C. R. App. P. 10 (b) (1). This Court has held that where the defendant did not object, during the plea hearing, to the sufficiency of the factual basis for entry of judgment, defendant is precluded from raising that issue on appeal. *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), *rev. denied*, ___ N.C. ___, 548 S.E.2d 150 (2001). Defendant in this case did not raise an objection to the sufficiency of the factual basis for the plea at the time of the entry of the plea and subsequent judgment; therefore, defendant may not raise this issue on appeal. This assignment of error is overruled.

In addition, defendant argues that the trial court erred in

allowing the State to use the same convictions as the underlying offenses in both habitual felon indictments. We disagree. At least twice before this Court has visited the issue, and decided that defendants' rights were not violated by using the same underlying convictions to support current and subsequent habitual felon indictments. See *State v. Creason*, 123 N.C. App. 495, 497-98, 473 S.E.2d 771, 771-72 (1996) (stating that defendant's second habitual felon indictment, allegedly based on the same underlying offenses used in a previous habitual felon indictment, did not violate defendant's right against double jeopardy); *State v. Smith*, 112 N.C. App. 512, 517, 436 S.E.2d 160, 162 (1993) ("[D]efendant argues that once certain underlying convictions are used to convict an individual as an habitual felon, those same convictions may not be used again to enhance another conviction. We do not agree."). This assignment of error is overruled.

III.

Last, defendant argues that the trial court erred by sentencing defendant to 151-191 months, claiming that this sentence is an incorrect application of the statutory sentencing guidelines. Specifically, defendant argues that because the previous assault convictions used to establish habitual misdemeanor assault are substantive elements of the offense, it is double jeopardy to include those offenses in determining his prior record level. For the following reasons, we agree with defendant and remand for resentencing.

In case number 00 CRS 057958, defendant was indicted for

habitual misdemeanor assault. The indictment alleged that on 2 November 2000, defendant did

unlawfully, willfully, and feloniously [] assault and strike Madeline Ann Schumacher, a female person, by grabbing her on her arm and hitting her in her face and head. The defendant is a male person and was at least 18 years of age when the assault and striking occurred. The defendant has been previously convicted of five or more prior misdemeanor convictions, at least two of which were assaults.

N.C.G.S. § 14-33.2 (2001), defines habitual misdemeanor assault as:

A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. A person convicted of violating this section is guilty of a Class H felony.

In *State v. Smith*, 139 N.C. App. 209, 213, 533 S.E.2d 518, 520, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000), this Court noted that the language of the habitual misdemeanor assault statute reads very similar to language contained in N.C.G.S. § 20-138.5, the habitual impaired driving statute.

N.C.G.S. § 20-138.5 (2001), defines habitual impaired driving in pertinent part:

(a) A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense.

(b) A person convicted of violating this section shall be punished as a Class F felon and shall be sentenced to a minimum active

term of not less than 12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.

In *Smith*, the Court concluded that habitual misdemeanor assault, like habitual impaired driving, is a substantive offense, rather than merely a status for purposes of sentence enhancement. *Smith*, 139 N.C. App. at 214, 533 S.E.2d at 520.

In *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999), this Court held that a trial court erred in assigning points to defendant's three prior DWI convictions, as those prior DWI convictions were the same convictions underlying defendant's habitual DWI charge. Although, the holding in *Gentry* is not binding authority for the facts in the instant case, the holding does provide persuasive authority for analyzing the issue currently before us.

The cardinal rule of statutory construction is to achieve the intention of our legislators in drafting the law. *Gentry*, 135 N.C. App. at 110, 519 S.E.2d at 70. This Court previously has noted the very similar language legislators used in drafting the habitual misdemeanor assault statute and in the habitual impaired driving statute. *Smith*, 139 N.C. App. at 213, 533 S.E.2d at 520. In construing the habitual impaired driving statute, this Court has held that the underlying DWI convictions used to support that charge, cannot be counted towards defendant's prior conviction points. *Gentry*, 135 N.C. App. at 111, 519 S.E.2d at 70-71. We

find no justifiable reason to depart from the rationale utilized in *Gentry* in construing the habitual misdemeanor assault statute.

In the instant case, the State listed in its habitual misdemeanor assault indictment the underlying charges as follows: disorderly conduct on 8 July 1993, communicating threats on 11 December 1995, misdemeanor larceny on 17 August 1990, simple assault on 11 January 1995, and assault on a female on 11 January 1995. The trial court included the charges of communicating threats on 11 December 1995, misdemeanor larceny on 17 August 1990, and assault on a female on 11 January 1995 in calculating defendant's prior record level. It does not appear that the trial court used the charges of disorderly conduct on 8 July 1993 or simple assault on 11 January 1995 in calculating defendant's prior record level.

We hold that the trial court committed error in assigning points to the underlying convictions, as those same convictions were used to establish the charge of habitual misdemeanor assault. This matter is remanded for resentencing consistent with the language stated herein.

No error in trial; remanded for resentencing.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).