NO. COA10-1560
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

State of North Carolina

v. Wake County
No. 09 CRS 17080, 31412

Freddie Robinson

Appeal by defendant from judgment entered 26 July 2010 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General Phyllis A. Turner, for the State.

Haral E. Carlin, for Defendant.

ERVIN, Judge.

Defendant Freddie Robinson appeals from a judgment entered by the trial court sentencing him to a minimum term of 121 months and a maximum term of 155 months imprisonment in the custody of the North Carolina Department of Correction based upon his convictions for felonious larceny and having attained the status of an habitual felon. On appeal, Defendant contends that the trial court erred by (1) refusing to dismiss the felonious larceny charge that had been lodged against him for

insufficiency of the evidence; (2) denying his motion to suppress photographs of a Wachovia bank bag, tip folder and United States currency; (3) refusing to intervene in the absence of an objection to preclude the presentation of testimony tending to show that Defendant refused to make a statement after being taken into custody; (4) failing to deliver a curative instruction to the effect that the jury should not consider the testimony concerning Defendant's refusal to make a statement to investigating officers in deciding the issue of his guilt; and (5) refusing to dismiss the habitual felon indictment as violative of the provisions of the federal and state constitutions prohibiting cruel and unusual punishment. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant received a fair trial that was free from prejudicial error and that his convictions should not be disturbed on appeal.

I. Factual Background

A. Substantive Facts

At approximately 11:00 a.m. on 26 February 2009, Katrina Jenkins, manager of the Raleigh Times Bar LLC, arrived at the restaurant, which opened for business about thirty minutes later. After the end of the lunch shift, Ms. Jenkins ordinarily deposited the proceeds from the prior night's business at the

bank. Until the daily deposit is made, a white Wachovia deposit bag containing the monies to be deposited and the employees' tips from the preceding evening were stored in a blue accordion folder placed in an unlocked file cabinet in the upstairs office.

At approximately 1:00 p.m., Jonathan Peedin, the husband of a Raleigh Times employee, noticed someone rummaging around in the office. After Mr. Peedin told Ms. Jenkins about his observations, they both saw Defendant "open the door and peek [his] head out, and close it again." At that point, Ms. Jenkins and Mr. Peedin watched Defendant move directly across the hall from the office to the restroom.

As Defendant emerged from the restroom, Ms. Jenkins asked him if he needed help with something and patted his back to ascertain if the deposit bag was there. Ms. Jenkins noted that the Defendant was nervous and that the front of his clothes looked "bulky." After indicating that he had gotten lost while looking for the bathroom, Defendant left the restaurant.

While Mr. Peedin kept track of Defendant's location, Ms. Jenkins went to the office to check on the status of the deposit bag and discovered that it was missing. After making this discovery, Ms. Jenkins yelled to Mr. Peedin that Defendant had taken the money. At that point, both Ms. Jenkins and Mr. Peedin began pursuing Defendant. Upon looking over his shoulder and

realizing that he was being chased, Defendant began to run down the street.

Initially, Defendant pretended that he was going to board a bus. Next, Defendant attempted to enter a parked car on Blount Street. After realizing that Ms. Jenkins and Mr. Peedin were still chasing him, Defendant shut the car door and continued his flight. At that point, Defendant was "fumbling around with his pants," making "it look[] pretty obvious [that] he [wa]s trying to keep something from falling down."

Mr. Peedin and Ms. Jenkins enlisted the aid of several construction workers during their pursuit of Defendant. After this assistance had been obtained, Ms. Jenkins stopped to call 911. As the chase continued, Defendant turned a corner and then "motion[ed] . . . as if he ha[d] a pistol;" however, Defendant did not have a weapon in his possession. Shortly thereafter, Defendant went into the First Baptist Church.

After Defendant entered the church, George Flemming, a Bible study teacher at the church, saw him walk through the chapel and go upstairs. According to Mr. Fleming, Defendant remained on the second floor for approximately twenty minutes before returning to the first floor. According to Mr. Fleming, there were no events taking place on the second floor of the church that day.

Officer Steven Wilner of the Raleigh Police Department arrested Defendant at the rear of the church. Although he told Officer Wilner that he had entered the church for the sole purpose of locating a bathroom, Defendant refused to answer any questions when he was taken to the station.

Officers M. Walton and J.D. Ellington, also of the Raleigh Police Department, searched the First Baptist Church for the stolen money. During that process, Officer Walton noticed "some dirt which appeared to be like sheet rock dust" on the back of a toilet in the upstairs men's restroom. Upon examining the ceiling, Officer Walton noted that one of the ceiling tiles was slightly out of place, so he stood on a toilet, reached up into the ceiling, and discovered the Wachovia deposit bag. After reaching further into the ceiling, Officer Ellington discovered the accordion file containing the missing tips.

At that point, Officers Ellington and Walton returned the Wachovia deposit bag and the accordion file to Ms. Jenkins, who counted the money in the deposit bag and verified, using a computer printout, a signed bartender's receipt, and the deposit slip that was still in the deposit bag, that it contained the same $1,898.00 amount that had been received at the restaurant on the preceding evening. Although the blue accordion file contained $453.00, that amount could not be verified because there was no written record of the amount of tips that had been

received by Raleigh Times employees and placed in the file folder. Officers Ellington and Walton gave the deposit bag and accordion file back to Ms. Jenkins, who signed a receipt stating that she received the property in question. Photographs of the Wachovia bag and the stolen currency were introduced into evidence at Defendant's trial for illustrative purposes.

B. Procedural History

On 26 February 2009, a warrant for arrest was issued charging Defendant with felonious larceny. On 4 May 2009, the Wake County grand jury returned a bill of indictment charging Defendant with felonious larceny. On 28 July 2009, the Wake county grand jury returned a bill of indictment charging Defendant with having attained the status of an habitual felon.

The charges against Defendant came on for trial before the trial court and a jury at the 22 July 2010 criminal session of the Wake County Superior Court. Prior to trial, Defendant filed a motion seeking to either have the photographs of the allegedly stolen bank bag and currency suppressed pursuant to N.C. Gen. Stat. § 15A-825(3) or the charges against Defendant dismissed on the grounds that investigating officers unlawfully failed to preserve the cash and deposit bag that were recovered from the bathroom ceiling. The trial court denied Defendant's motion. On 26 July 2010, the jury returned a verdict finding Defendant guilty of felonious larceny.

After the jury convicted Defendant of felonious larceny, Defendant unsuccessfully sought to have the habitual felon charge dismissed on the grounds that sentencing him as an habitual felon would result in the imposition of cruel and unusual punishment. Following the presentation of evidence and the arguments of the parties at the habitual felon proceeding, the jury returned a verdict finding that Defendant had attained habitual felon status.

At the ensuing sentencing hearing, the trial court found that Defendant had accumulated seventeen prior record points and should be sentenced as a Level V offender. Based upon these determinations, the trial court sentenced Defendant to a minimum term of 121 months and a maximum term of 155 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Sufficiency of the Evidence

On appeal, Defendant initially argues that the trial court erred by denying his motion to dismiss the felonious larceny charge that had been lodged against him because the evidence was insufficient to support his conviction for that offense. We disagree.

> The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In determining the sufficiency of the evidence, "the trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom."

State v. Harris, 145 N.C. App. 570, 578, 551 S.E.2d 499, 504 (2001) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990), *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982), and *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994)), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002). "If the evidence presented is circumstantial, 'the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts . . . satisfy them beyond a reasonable doubt that the defendant is actually guilty.'" *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

Defendant was convicted of a felonious larceny made punishable by N.C. Gen. Stat § 14-72(a), which provides, in pertinent part, that "[l]arceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony." A

determination that a defendant is guilty of felonious larceny requires proof of "(1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Barbour*, 153 N.C. App. 500, 502, 570 S.E.2d 126, 127 (2002) (citing *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled in part on other grounds in State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010)). In challenging his conviction, Defendant argues that the record evidence raises nothing more than a surmise or conjecture of guilt and should, for that reason, be deemed insufficient to withstand a motion to dismiss. More specifically, Defendant contends that the record evidence does not suffice to show that he was the perpetrator of the theft from the Raleigh Times or that he had actual or constructive possession of the stolen goods. We disagree.

As a careful review of the record clearly shows, Mr. Peedin spotted Defendant rummaging around in the upstairs office of the Raleigh Times despite the fact that Defendant was not authorized to be in that location. At that time, Defendant was acting in a suspicious manner, "peek[ing] [his] head out" from behind the door and then crossing the hall to enter the men's bathroom, where he remained for several minutes. According to Ms. Jenkins, Defendant appeared to be nervous at the time that he

left the bathroom. In addition, Ms. Jenkins noticed that Defendant's clothes looked "bulky," and, upon Defendant's departure, discovered that the deposit bag was missing. After Defendant realized that Ms. Jenkins and Mr. Peedin were following him, he began to run, taking a circuitous route that took him through parking lots, a bus terminal, and various streets before reaching First Baptist Church. As he ran, Mr. Peedin testified that Defendant was "fumbling around with his pants, as if . . . he's trying to keep something from falling down."

At the First Baptist Church, Mr. Fleming observed Defendant going up to the second floor, where he remained for approximately twenty minutes despite the fact that there were no events taking place on that floor on that particular day. Upon being taken into custody, Defendant said that he had been looking for a bathroom on the second floor. Subsequently, Officers Wilner and Ellington discovered the stolen items in the ceiling of the second floor bathroom.

"It is well settled that all of the essential elements of larceny . . . can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture." *State v. Boomer*, 33 N.C. App. 324, 327-28, 235 S.E.2d 284, 286 (citing *State v. Delk*, 212 N.C. 631, 194 S.E. 94 (1937)), *cert. denied*, 293 N.C.

254, 237 S.E.2d 536 (1977). In this case, a reasonable juror could logically infer that Defendant took the stolen items and then hid them in the First Baptist Church. Contrary to Defendant's argument, the record contains ample evidence tending to show Defendant's identity as the perpetrator of the theft and his actual possession of the stolen property. As we understand the record, the evidence tending to show Defendant's guilt was exceedingly strong. As a result, the trial court did not err by declining to dismiss the felonious larceny charge that had been lodged against Defendant.

B. Photographic Evidence

Secondly, Defendant argues that the trial court erred by denying his motion to suppress the photographs of the Wachovia deposit bag, the tip folder, and the allegedly stolen currency on the grounds that the State did not retain the actual property for introduction into evidence at trial. Once again, we conclude that Defendant's contention lacks merit.

In its order denying Defendant's motion, the trial court made findings of fact that are generally consistent with the factual statement set forth at the beginning of this opinion. Based upon those findings of fact, the trial court concluded as a matter of law that:

> [1]. N.C. Gen. Stat. [§] 15-11.1 allows photographs to identify seized property as substitute evidence as "long as the

substitute evidence 'is not likely to substantially prejudice the rights of the defendant.'" *State v. Alston*, 91 N.C. App. [707,] 712, 373 S.E.2d [306,] 311 (1988).

[2]. The *Alston* Court further stated, "we are unaware of any authority which has applied the constitutional right of confrontation to physical evidence." *Id.*

[3]. N.C. Gen. Stat. [§] 15A-258 states, "Property seized shall be held in the custody of the person who applied for the warrant . . . upon condition that upon order of the court the items may be retained by the court . . . ". However, to the extent that this statute requires retention of property which may be evidence of a crime, where currency is not available at the time of trial due to its return to its rightful owner, the "evidence of the currency would not be excludable on that ground because the evidence would not have been 'obtained as a result of' a violation of the statute." *State v. Jones*, 97 N.C. App. [189,] 199, 388 S.E.2d [213,] 218 (1990).

[4]. Based upon the foregoing findings of fact and the totality of the circumstances, the Court concludes that the Defendant has not shown any substantial prejudice arising from the return of the currency, deposit bag and folder to the Bar or the admission of a photograph as illustrative evidence of the same. As such, the Court finds that the Defendant's constitutional rights to confront witnesses and adequately prepare for trial have not been frustrated and that there are no other grounds for the exclusion or suppression of this evidence.

Based upon the findings of fact and conclusions of law, the trial court denied Defendant's motion.[1]

On appeal, Defendant contends that his due process rights were violated by virtue of the fact that the deposit bag, file folder, and currency were not properly preserved for introduction into evidence at trial. "In considering the effect, if any, of the release of this evidence, such inquiry must focus on the question of whether defendant was thereby deprived of his rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution." *State v. Mlo*, 335 N.C. 353, 372, 440 S.E.2d 98, 107 (1994), *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841, 114 S. Ct. 2716 (1994). According to well-established federal and state law,

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[1] In his brief, Defendant advances a lengthy argument based upon N.C. Gen. Stat. § 15A-825(3), which provides, in pertinent part, that "the judicial system should make a reasonable effort to assure that each victim or witness" "[h]as any stolen or other personal property expeditiously returned by law-enforcement agencies when it is no longer needed as evidence" and when "its return would not impede an investigation or prosecution of the case," with "all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property whose ownership is disputed" to be "photographed and returned to the owner within a reasonable period of time of being recovered by law-enforcement officials." Unfortunately for Defendant, however, the clear purpose of N.C. Gen. Stat. § 15A-825(3) is to protect the rights of victims and witnesses rather than the rights of individuals charged with having committed one or more criminal offenses. As a result, Defendant lacks standing to assert any claim based on N.C. Gen. Stat. § 15A-825(3).

however, "[t]he constitutional duty imposed on the State to preserve evidence is 'limited to evidence that might be expected to play a significant role in the suspect's defense.'" *State v. Banks*, 125 N.C. App. 681, 683, 482 S.E.2d 41, 43 (quoting *California v. Trombetta*, 467 U.S. 479, 488, 81 L. Ed. 2d 413, 422, 104 S. Ct. 2528, 2534 (1984)), *aff'd*, 347 N.C. 390, 493 S.E.2d 58 (1997), *cert. denied*, 523 U.S. 1128, 140 L. Ed. 2d 955, 118 S. Ct. 1817 (1998). In such instances, "[e]vidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (citing *Kyles v. Whitley*, 514 U.S. 419, 434, 131 L. Ed. 2d 490, 506, 115 S. Ct. 1555, 1566 (1995)). Moreover, in *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 289, 109 S. Ct. 333, 337 (1988), the United States Supreme Court held that

> [t]he Due Process Clause of the Fourteenth Amendment . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. . . . We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

As a result, in order to obtain relief on appeal on the basis of his challenge to the State's decision to return the Wachovia bag, file folder, and currency to employees of the Raleigh Times, we conclude that Defendant must establish either that the evidence in question would have played a significant role in Defendant's defense or that the State acted in bad faith at the time that it decided to return this evidence to employees of the Raleigh Times instead of preserving it for use at trial.

After carefully reviewing the record, we do not believe that the evidence in question would have played a significant role in Defendant's defense. Although Defendant argues that he had no opportunity to obtain an independent examination of the evidence, that this evidence might have been subjected to fingerprint analysis had it been retained for use at trial, and that such analysis, if it failed to reveal Defendant's fingerprints on the bag, the accordion file, or the currency might have allowed Defendant to argue to the jury that he never possessed the bag. We conclude, however, that, given the overwhelming evidence against Defendant, the absence of fingerprints on the stolen items would not have changed the result in this trial. As a result, notwithstanding Defendant's contention that fingerprint testing might have yielded potentially exculpatory evidence, we conclude that the evidence was not material. As a result, particularly given the extensive

evidence tending to identify Defendant as the perpetrator of the theft from the Raleigh Times, the record simply does not support Defendant's contention that the investigating officers' decision to return the bag bank, file folder, and currency to employees of the Raleigh Times resulted in the loss of material exculpatory evidence.[2]

Moreover, the record contains no indication that the investigating officers acted in bad faith when they decided to return the deposit bag, file folder, and currency to employees of the Raleigh Times instead of retaining it for use at trial. Officer Walton indicated that established department procedure required him to return stolen property to the rightful owner after that property had been properly documented and photographed. According to Ms. Jenkins, the amount of money retrieved from the bathroom ceiling at the First Baptist Church was the same amount that had been received at the restaurant on the preceding evening. The officers' conduct in returning the stolen property to its rightful owner certainly does not rise to

[2] In addition, Defendant argues that the failure to retain the currency precluded any independent calculation of the amount of money that was taken from the Raleigh Times. However, given that Ms. Jenkins had an independent basis for determining that more than $1,000.00 was taken in the theft and that Defendant's defense at trial was focused on the issue of identity rather than the amount of money taken in the course of the theft, we are unable to say that the currency that was returned to employees of the Raleigh Times constituted material exculpatory evidence for this reason either.

the level of bad faith, and the record is devoid of any other showing of bad faith in the officers' actions. Thus, for all of these reasons, this argument lacks merit.

C. Comment Concerning Defendant's Silence

Thirdly, Defendant contends that the trial court committed plain error by allowing Officers Wilner and Ellington to testify that Defendant refused to give a statement while in custody and that the trial court committed plain error by failing to instruct the jury to refrain from considering the testimony concerning Defendant's refusal to give a statement after his arrest in deciding the issue of his guilt. We do not find either of Defendant's arguments persuasive.

As a result of the fact that Defendant did not object at trial to the officers' statements or request the trial court to deliver a curative instruction, his challenges to the trial court's failures to act are subject to review using a plain error standard. A plain error is an error that is "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912, 108 S. Ct. 1598 (1988). Under plain error analysis, the burden is on the defendant to show that, "absent the error[,] the jury probably would have reached a

different verdict." *State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 399 (1988) (citations omitted).

According to Defendant, investigating officers commented on his refusal to answer questions or make a statement following his arrest on several occasions during his trial. More specifically, Officer Wilner testified that:

> Q. Once you took him downtown, was he formally charged and processed?
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> A. He was interviewed or we attempted to interview him at the main station, and then he refused to answer any questions. And then I took him down to the Wake County Jail for processing.
>
> . . . .
>
> Q. Did he make any statements when he was downtown related to the offense for which he'd been arrested?
>
> A. No.

Similarly, Officer Ellington testified that:

> Q. Okay. And at some point, did you go back to the church?
>
> A. Yes, I had - - in speaking to Officer Wilner and Detective Arnold, the suspect did not want to make a statement. After being very frustrated, feeling defeated, I made a comment to my sergeant that that money is in that church somewhere. . . . .
>
> . . . .
>
> Q. Did you have any other duties in this matter?

> A. Other than maintaining communication with Officer Wilner who was with the suspect, letting him know we had recovered the money and at that point, Mr. Robinson was not willing to give a statement. Therefore, I told Officer Wilner you can tell Mr. Robinson that we found the money in the ceiling over the toilet in the men's bathroom, mainly because we were concerned he was going to go back into the church again.
>
> Q. Thank you. Did you ever at any time have specific contact or conversation with the Defendant in this case?
>
> A. No, I did not.

Defendant did not object to any of this testimony or request that the jury be instructed to disregard it.

"It is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution." *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (citing *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389, 122 S. Ct. 475, (2001)). "A defendant's exercise of this right may not be used against him, and any reference by the State to a defendant's failure to testify violates that defendant's constitutional rights." *Mitchell*, 353 N.C. at 326, 543 S.E.2d at 840. The Supreme Court has "consistently . . . held that when the trial court fails to give a curative

instruction to the jury concerning the prosecution's improper comment on a defendant's failure to testify, the prejudicial effect of such an uncured, improper reference mandates the granting of a new trial." *State v. Reid*, 334 N.C. 551, 556, 434 S.E.2d 193, 197 (1993) (citations omitted).

In *Mitchell*, the Supreme Court determined that a prosecutor's improper reference to the defendant's post-arrest silence did not mandate an award of appellate relief. Instead, the Supreme Court stated that, "[a]ssuming *arguendo* that the prosecutor's comment in the present case was error, we conclude, in light of the overwhelming evidence of defendant's guilt, that the prosecutorial error and the trial court's failure to intervene *ex mero motu* were harmless beyond a reasonable doubt." *Mitchell*, 353 N.C. at 326, 543 S.E.2d at 841. "Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless." *State v. Castor*, 285 N.C. 286, 292, 204 S.E.2d 848, 853 (1974) (citation omitted). The logic adopted in *Mitchell* and *Castor* indicates that the same result is appropriate here. As we have already noted, the evidence against Defendant was exceedingly strong, if not overwhelming. The testimony upon which Defendant's claims are based was factual in nature and did not overtly suggest that an inference of Defendant's guilt should be drawn from his refusal to give a statement to investigating

officers following his arrest. Simply put, Defendant has failed to show that, absent the comments about his silence or the delivery of an appropriate curative instruction, the jury would have reached a different verdict. As a result, the trial court did not commit plain error by failing to either intervene *ex mero motu* at the time that Officers Wilner and Ellington testified that Defendant had refused to make a statement in the aftermath of his arrest or to deliver a curative instruction despite the absence of a request that such an instruction be given.

D. Cruel and Unusual Punishment

Finally, Defendant argues that the trial court erred by denying his motion to dismiss the habitual felon indictment and sentencing him as an habitual felon on the theory that sentencing him as an habitual felon would violate his right to be free from cruel and unusual punishment as guaranteed by U.S. Const. amend. VIII and N.C. Const. art. I, §§ 19 and 27. The trial court rejected Defendant's challenge to the habitual felon allegation based on the decision in *Rummel v. Estelle*, 445 U.S. 263, 272, 63 L. Ed. 2d 382, 390, 100 S. Ct. 1133, 1138 (1980), in which the United States Supreme Court noted that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* "[O]ur Supreme Court [has] 'reject[ed] outright the

suggestion that our legislature is constitutionally prohibited from enhancing punishment for habitual offenders as violations of constitutional strictures dealing with . . . cruel and unusual punishment.'" *State v. Hensley*, 156 N.C. App. 634, 639, 577 S.E.2d 417, 421 (quoting *State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985)), *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003).

The sentence imposed upon Defendant in this case stemmed from the fact that he had accumulated seventeen prior record points, was subject to being sentenced as a Level V offender, and had attained habitual felon status. Defendant had achieved habitual felon status based upon convictions for felonious breaking and entering, breaking and entering a motor vehicle, and felonious larceny. Defendant was sentenced within the presumptive range set out in N.C. Gen. Stat. § 15A-1340.17(c). In view of the fact that the jury convicted Defendant of the substantive offense with which he had been charged, the fact that the jury determined that Defendant had attained habitual felon status, the fact that Defendant had a lengthy criminal record, and the fact that the sentence imposed upon Defendant was consistent with all applicable statutory provisions, we find no basis for overturning Defendant's sentence on appeal or for finding that the habitual felon statute, either facially or as applied to Defendant's situation, contravened the provisions of

the United States and North Carolina Constitutions that prohibit the imposition of cruel and unusual punishment. As a result, we conclude that Defendant's constitutional challenge to his sentence lacks merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant received a fair trial that was free from prejudicial error and that Defendant's challenges to the trial court's judgment lack merit. As a result, we further conclude that Defendant is not entitled to any relief on appeal and that the trial court's judgment should remain undisturbed.

NO ERROR.

Judges MCGEE and MCCULLOUGH concur.

Report per Rule 30(e).