

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-346

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

STEVEN LAMAR LEAK

Union County
Nos. 00 CRS 11363, 11365,
52988

Appeal by defendant from judgments entered 17 October 2001 by Judge Sanford L. Steelman, Jr. in Union County Superior Court. Heard in the Court of Appeals 7 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert O. Crawford, III, for the State.

Haakon Thorsen for defendant-appellant.

EAGLES, Chief Judge.

A jury found defendant guilty of assault with a deadly weapon, robbery with a dangerous weapon, and possession of a firearm as a convicted felon. In a separate proceeding, the jury found defendant to be an habitual felon. The trial court sentenced defendant as an habitual felon to consecutive prison terms of 133 to 169 months for possession of a firearm and robbery with a dangerous weapon. It imposed a concurrent 120-day sentence for the misdemeanor assault. Defendant gave notice of appeal in open court.

The State's evidence tended to show that defendant and two other men approached Prime Leon Jones on Green Street in Monroe on the early morning of 18 July 2000. Defendant asked to borrow Jones' cigarette lighter. After using the lighter, he asked Jones if he was carrying any money. Defendant then drew a dark-colored pistol from beneath his shirt, pointed it at Jones and told him "to give it up." When Jones asked why he was doing this, defendant fired the gun past Jones' head and stole his wallet, jewelry and house keys. Defendant and his two associates then began removing Jones' clothing but ran away when Monroe Police Officer Norman Smith arrived in his patrol car. Jones told Smith he had been robbed at gunpoint by three men, whom he identified by name, and claimed that defendant had fired the gun by his head. Smith made radio contact with Officer David McCallister, who apprehended defendant outside of a nearby apartment building on Maurice Street. McCallister searched defendant and recovered Jones' jewelry, wallet, money, and keys. No gun was found. However, police discovered "one impression that is consistent with what a small caliber firearm would leave" on a cement curb in the area of the robbery.

Defendant contends that the trial court erred in denying his motion to dismiss, absent substantial evidence that he possessed or used a handgun during the robbery. We disagree. A motion to dismiss is properly denied if the evidence, viewed in the light most favorable to the State, is sufficient to permit a reasonable jury to find defendant guilty beyond a reasonable doubt. See *State*

v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982). Here, Jones' testimony, as corroborated by his statement to Officer Smith immediately after the robbery, was sufficient to support a finding that defendant brandished and fired a handgun. See *State v. Roddey*, 110 N.C. App. 810, 813, 431 S.E.2d 245, 248 (1993). "The fact that no [gun] was found does not automatically preclude the existence of substantial evidence, it only means that the credibility of Mr. [Jones] was at a premium in establishing the existence of substantial evidence." *Id.* Jones' credibility as a witness was a question of fact for the jury. *Id.* at 814, 431 S.E.2d at 248.

Defendant also claims that the trial court erred in convicting and sentencing him as an habitual felon, because his instant offenses were committed before he attained habitual felon status. He shows that his indictment for habitual felon status alleges three prior felony convictions on 26 May 1993, 30 January 1996, and 7 August 2000. Defendant notes his instant offenses were committed in July 2000, prior to the third predicate felony conviction listed in the indictment. The State concedes error on this issue.

Our statutes define an "habitual felon" as "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof[.]" N.C. Gen. Stat. § 14-7.1 (2001). "A defendant becomes an habitual felon when he is convicted of the third qualifying felony." *State v. Brown*, 146 N.C. App. 590, 593, 553 S.E.2d 428, 430 (2001). Only "a defendant who commits a felony

after he has qualified as an habitual felon" is subject to the sentencing enhancement provision of the Habitual Felon Act. *Id.* at 592, 553 S.E.2d at 430; see also N.C. Gen. Stat. § 14-7.6 (2001) (authorizing enhanced sentence "[w]hen an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina[.]"); *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) (noting the effect of the Act is to "enhance the punishment which would otherwise be appropriate for the substantive felony which [the defendant] has allegedly committed while in such a status").

Under the facts alleged in the habitual felon indictment, defendant became an habitual felon on 7 August 2000, the date of his conviction for felony possession of cocaine. Defendant committed his instant felonies of robbery with a dangerous weapon and possession of a handgun as a convicted felon on 18 July 2000, before he attained habitual felon status. On its face, the habitual felon indictment filed will not support a finding that defendant committed the offenses of robbery with a dangerous weapon and possession of a firearm while having habitual felon status. We must therefore arrest judgment as to defendant's habitual felon status and remand to the trial court for re-sentencing on defendant's substantive offenses. *Cf. See State v. McNair*, 146 N.C. App. 674, 684, 554 S.E.2d 665, 672 (2001) (citing *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998)).

The record on appeal contains an additional assignment of error not addressed by defendant in his brief to this Court. By rule, we deem it abandoned. See N.C.R. App. P. 28(b)(6).

No error as to defendant's convictions in possession of a firearm by a felon and robbery with a dangerous weapon; judgment arrested as to habitual felon status; remanded for re-sentencing.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).