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NO. COA05-729

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v.

LARRY TYRONE WILSON,
Defendant.

Forsyth County
Nos. 03 CRS 57336
03 CRS 57337
03 CRS 57338
03 CRS 10718

Appeal by defendant from judgments entered 30 October 2003 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 26 January 2006.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for defendant-appellant.

GEER, Judge.

Defendant Larry Tyrone Wilson appeals from his convictions for assault on a female, malicious conduct by a prisoner, and habitual misdemeanor assault ("HMA") and his sentencing as a habitual felon. On appeal, defendant argues that the trial court erred by admitting into evidence the victim's statements to police and a videotape showing defendant's behavior after his arrest, by denying his motion to dismiss the charges, by sentencing him for HMA, and by committing a variety of other sentencing errors. Because we are unable to adequately review defendant's arguments pertaining to his

HMA conviction based on the current record, we remand to the trial court for further proceedings on that issue. With respect to the rest of defendant's trial, however, we find no prejudicial error.

Facts

The State's evidence at trial tended to show the following facts. In the early morning hours of 3 July 2003, Lieutenant Wilson Weaver of the Winston-Salem Police Department responded to a call regarding an assault in progress at a rooming house. Lieutenant Weaver observed a woman, Stacy Marie Coles, walking rapidly away from defendant, who was trying to catch up with her. Ms. Coles appeared to be frightened.

Lieutenant Weaver concluded he had located the people involved in the assault and called for assistance. While waiting for additional officers, Lieutenant Weaver asked defendant what was going on, and defendant responded that he and Ms. Coles had been having "a little argument." Ms. Coles stayed about 30 feet away during this exchange, and Lieutenant Weaver did not speak to her.

Corporal Carl McClaney was the first officer to arrive in response to Lieutenant Weaver's call for assistance. After parking his patrol vehicle, Corporal McClaney approached Ms. Coles, who still appeared frightened. Ms. Coles said in a loud voice that everything was fine and that defendant had done nothing wrong. Immediately afterward, however, Ms. Coles whispered to Corporal McClaney that "she was terrified of [defendant] and needed to get away." Ms. Coles then quietly explained that defendant had

assaulted her and showed Corporal McClaney several scratches on her neck.

Corporal Lesa Butner and Officer Brian Raber then arrived at the scene and arrested defendant. After defendant was placed in the rear of Officer Raber's patrol vehicle, Corporal Butner went to speak with Ms. Coles. At that point, defendant turned sideways in the rear of the patrol car, elevated both his feet, and kicked out the right-side rear window.

The officers opened the rear doors of the patrol car, and Officer Ralph Mason pulled defendant — kicking and screaming — out by his shoulders and laid him on the sidewalk. After defendant spit in Officer Mason's face, the officers applied a "spit sock," which was described at trial as a "netting material that goes over the head to attempt to stop saliva from being spit out." The spit sock was not completely effective, as defendant soon succeeded in spitting into the faces of both Officer Mason and Officer David Walsh.

Defendant continued to be, according to the officers, "extremely combative." As the officers moved defendant into the rear of Officer Walsh's car, defendant stated: "You can't hold me down. I'll kick another window out," and "You don't have [(expletive omitted)] on me because she'll deny everything. She'll say nothing happened." Officer Walsh took defendant to the detention facility where a videotape of defendant's arrival showed him in the midst of a raging monologue.

After Officer Walsh left the scene with defendant, Officer Raber spoke with Ms. Coles, whose jaw was swollen and neck reddened. Ms. Coles explained that she had returned home that day, and defendant had choked her unconscious while they were outside. She woke up inside, where defendant appeared to be calming down, but, after she refused his invitation to take a walk, he again became enraged and began choking her. Before Ms. Coles lost consciousness for a second time, defendant dragged her down the front steps of the house and back outside. After Ms. Coles finished describing what had happened, Corporal Butner accompanied her into an ambulance where photographs were taken of her injuries.

On 4 August 2003, defendant was indicted for first degree kidnapping, assault on a female, HMA, and two counts of malicious conduct by a prisoner. Defendant was separately indicted as having achieved the status of a habitual felon. The State ultimately dismissed the charge of first degree kidnapping. On 30 October 2003, a jury found defendant guilty of assault on a female and both counts of malicious conduct by a prisoner. Defendant pled guilty to being a habitual felon. The record on appeal does not contain any specific resolution of the HMA charge, whether by stipulation or conviction.

The trial court sentenced defendant within the presumptive range to 107 to 138 months imprisonment for assault on a female and HMA. The trial court then sentenced defendant as a habitual felon to a consecutive sentence within the presumptive range of 151 to

191 months imprisonment for both malicious conduct by a prisoner convictions. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court erred by admitting the testimony of Officer Raber, Corporal McClaney, and Corporal Butner regarding Ms. Coles' statements at the scene. Specifically, defendant contends: (1) that Ms. Coles' statements were hearsay, and, therefore, inadmissible as substantive evidence; (2) to the extent the statements were admitted as only non-substantive corroborative testimony, the trial court erred by allowing Officer Raber and Corporal McClaney to testify prior to Ms. Coles; and (3) that the trial court erred in failing to adequately instruct the jury, with respect to this testimony, as to the distinctions between substantive, corroborative, and impeachment evidence.

Regarding Corporal McClaney's testimony that Ms. Coles whispered she was terrified of defendant and needed to get away, a statement that is otherwise hearsay is nevertheless admissible if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . ." N.C.R. Evid. 803(3). Our Supreme Court has previously held that statements of fear and terror by a victim regarding her assailant fall within the scope of this hearsay exception, and, consequently, Ms. Coles' statements regarding her then existing state of mind were properly admitted. *See State v. Locklear*, 320 N.C. 754, 759-

60, 360 S.E.2d 682, 685 (1987) (statements by rape victim to medical personal that she was "afraid" and "scared" of rapist admissible under N.C.R. Evid. 803(3)).

With respect to (1) Officer Raber's testimony that Ms. Coles said she had been choked into unconsciousness and dragged outside, (2) Corporal McClaney's testimony that Ms. Coles said she had been assaulted, and (3) Corporal Butner's testimony regarding Ms. Coles' descriptions of her injuries, even if these statements would otherwise be hearsay, a "prior consistent statement of a witness is admissible to corroborate the testimony of the witness . . . ." *State v. Jones*, 329 N.C. 254, 257, 404 S.E.2d 835, 836 (1991). "'In order to be admissible as corroborative evidence, a witness' prior consistent statements merely must tend to add weight or credibility to the witness' testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates.'" *State v. Walters*, 357 N.C. 68, 89, 588 S.E.2d 344, 356 (quoting *State v. Farmer*, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993)), *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320, 124 S. Ct. 442 (2003).

Here, Ms. Coles testified at trial that the photographs taken at the scene accurately showed bruises on her chest, neck, and back. Ms. Coles also testified that defendant gave her the bruise on her chest, that the bruise on her back was from their "little tussle," and that the bruise on her neck was from defendant "grabbing [her] neck." The officers' testimony, therefore,

corroborated Ms. Coles' account of her physical altercation with defendant and was admissible as offering evidence of prior consistent statements. The fact that Officer Raber and Corporal McClaney testified prior to Ms. Coles' testimony at trial is of no consequence. *See State v. Joyce*, 97 N.C. App. 464, 470, 389 S.E.2d 136, 140 (holding that whether corroborative statements are admitted before or after testimony they corroborate is "immaterial" because trial court has discretion regarding order of evidence), *disc. review denied*, 326 N.C. 803, 393 S.E.2d 902 (1990).

Finally, regarding defendant's argument that the trial court erred by failing to adequately instruct the jury as to the distinctions between substantive, corroborative, and impeachment evidence, "[t]he admission of evidence which is relevant and competent for a limited purpose will not be held error in the absence of a request by the defendant for a limiting instruction. Such an instruction is not required unless *specifically* requested by counsel." *State v. Stager*, 329 N.C. 278, 309, 406 S.E.2d 876, 894 (1991) (internal quotation marks and citation omitted). Defendant did not request such an instruction at trial and, therefore, it was not error for the trial court to fail to provide one. These assignments of error are overruled.

II

Defendant next challenges the trial court's decision to admit the statements he made while being placed into the rear of Officer Walsh's patrol car and the tape of defendant's conduct at the detention center. Specifically, defendant contends these

statements were inadmissible hearsay, violated his *Miranda* rights, and should have been excluded under N.C.R. Evid. 403.

With respect to defendant's hearsay arguments, it is well-established that "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and . . . is . . . his own statement . . . ." N.C.R. Evid. 801(d). The admission of defendant's own statements to the officers did not, therefore, violate the prohibition on hearsay found in N.C.R. Evid. 802. *See State v. Felton*, 330 N.C. 619, 637, 412 S.E.2d 344, 355 (1992) (holding defendant's statement to detectives was admissible against him "because it fell within the exception to the hearsay rule for admissions of a party opponent").

As for defendant's contention that these statements should have been excluded under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), it is well-settled that *Miranda* warnings are only required during custodial interrogation. *State v. Thomas*, 284 N.C. 212, 216, 200 S.E.2d 3, 7 (1973). Even assuming that defendant was in custody when these statements were made, defendant points to no evidence — and makes no argument — indicating that the statements were elicited pursuant to interrogation. *See State v. Brewington*, 352 N.C. 489, 503, 532 S.E.2d 496, 504 (2000) (Interrogation includes "'[a]ny words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64

L. Ed. 2d 297, 308, 100 S. Ct. 1682, 1689-90 (1980))), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992, 121 S. Ct. 1126 (2001). Indeed, all the evidence suggests defendant's statements were spontaneous and volunteered, and, accordingly, *Miranda* does not require their exclusion. 384 U.S. at 478, 16 L. Ed. 2d at 726, 86 S. Ct. at 1630 ("Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.").

Finally, regarding defendant's argument that any probative value was substantially outweighed by the danger of unfair prejudice, a trial court's decision to admit or exclude evidence under N.C.R. Evid. 403 will not be overturned on appeal absent an abuse of discretion. *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005), *cert. denied*, __ U.S. __, 164 L. Ed. 2d 523, 126 S. Ct. 1773 (2006). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Defendant was on trial for an assault and two charges of malicious conduct by a prisoner. The trial court admitted defendant's statements while entering Officer Walsh's patrol car that he would "kick another window out" and that the police did not have anything "on [him] because [Ms. Coles would] deny everything" because they showed defendant was conscious of his own guilt. The trial court admitted the videotape because it illustrated

defendant's knowing and willful combativeness. Significantly, defendant argues on appeal with respect to the malicious conduct charges that he did not act knowingly or willfully — a contention strongly rebutted by the videotape. The evidence was, therefore, highly probative and any prejudice derives primarily from the very relevance of the evidence. Consequently, we cannot conclude that the admission of these statements was "manifestly unsupported by reason."

III

Defendant next argues that the trial court erred by denying his motion to dismiss the assault on a female charge and both malicious conduct by a prisoner charges for insufficient evidence. In ruling on a defendant's motion to dismiss, the trial court must determine whether the State presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). When considering the issue of substantial evidence in assessing a motion to dismiss, the trial court must view all of the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v.*

Rose, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

The elements of assault on a female are "(1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988). Defendant contests only the first element, arguing that, although the evidence indicates that he "grabbed" Ms. Coles, "[p]hysical contact under these circumstances was insufficient to support an assault charge."

"Assault on a female may be proven by finding either an assault on or a battery of the victim. Assault is defined as an intentional attempt, by violence, to do injury to the person of another. Battery is an assault whereby any force is applied, directly or indirectly, to the person of another." *State v. West*, 146 N.C. App. 741, 743, 554 S.E.2d 837, 839-40 (2001) (internal citations and quotation marks omitted). Here, Ms. Coles testified that the photographs taken at the scene accurately showed the bruises on her chest and back that defendant's conduct caused and that the bruise on her neck originated when defendant grabbed her. Construed in the light most favorable to the State, a rational juror could have concluded this was sufficient evidence that defendant battered Ms. Coles. Defendant cites no authority — and we know of none — supporting his position that "tussl[ing]" and grabbing a female hard enough to cause bruising is insufficient to constitute an assault on a female.

With respect to the malicious conduct by a prisoner charges:

> There are five essential elements required to prove a defendant's guilt of the offense of malicious conduct by a prisoner:
>
> (1) the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim;
>
> (2) the victim was a State or local government employee;
>
> (3) the victim was in the performance of his or her State or local government duties at the time the fluid or excrement was released;
>
> (4) the defendant acted knowingly and willfully; and
>
> (5) the defendant was in the custody of . . . [a] law enforcement officer . . . .

State v. Robertson, 161 N.C. App. 288, 292-93, 587 S.E.2d 902, 905 (2003); *see also* N.C. Gen. Stat. § 14-258.4(a) (2005) (defining malicious conduct by a prisoner). Defendant contests only the fourth element, arguing that "[t]he State failed to meet its burden to prove that Defendant's expectorating was a proximate result of knowing and willful behavior rather than an involuntary reaction to the force and restraint executed against him . . . ."

"'Knowledge is a mental state that may be proved by offering circumstantial evidence to prove a contemporaneous state of mind.'" *State v. Crouse*, 169 N.C. App. 382, 389, 610 S.E.2d 454, 459 (quoting *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989)), *disc. review denied*, 359 N.C. 637, 616 S.E.2d 923 (2005). "Likewise, the willfulness of a defendant's conduct may be inferred from the circumstances surrounding the crime." *Id.*

Here, the State presented evidence that, during his arrest, defendant was "very combative," "spit directly into [Officer

Mason's] left eye," that "[s]o much saliva covered [Officer Mason's] face, it was coming off the side of [his] face," that defendant "rock[ed] back and forth" as he spit at Officer Mason, that defendant was "spitting at the officers," and that defendant "spit directly in the face of Officer Mason and Officer Walsh." This is sufficient evidence from which a rational juror could conclude that defendant knowingly and willfully spit on the officers. *Compare id.* at 389, 610 S.E.2d at 459 (finding sufficient evidence of knowing and willful element of malicious conduct by a prisoner where defendant "expressed dissatisfaction with the officers grabbing her hands, and that she drew her breath, puckered her mouth, collected saliva, and then spit"). This assignment of error is overruled.

IV

Defendant next argues that the State needed to provide a separate habitual felon indictment, ancillary to each felony charge, before defendant could be sentenced on each felony as a habitual felon. As noted by defendant, however, this position was rejected by our Supreme Court in *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 709 (1996), where the Court concluded that "a separate habitual felon indictment is not required for each substantive felony indictment."

Defendant nevertheless attempts to argue that the transcript demonstrates that the plea colloquy in which defendant pled guilty to attaining habitual felon status "failed to accurately apprise Defendant that the informed consequences of his plea would expose

him to these consecutive habitual felon sentences . . . ." Defendant's assignment of error did not, however, raise this issue, but rather states that the trial court erred only by "imposing consecutive habitual felon sentences based upon one habitual felon indictment." "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a). Consequently, we decline to consider the issue beyond defendant's assignment of error, which, pursuant to our Supreme Court's holding in *Patton*, is overruled.

V

Defendant next contends that his HMA indictment was invalid because one of the listed predicate offenses is a 1998 conviction for assault on a female that, according to defendant, occurred before he was 18 years of age and was, therefore, "invalid." Unquestionably, to be guilty of an assault on a female, a defendant must be at least 18. *Herring*, 322 N.C. at 743, 370 S.E.2d at 370. Defendant is, however, making an impermissible collateral attack upon a conviction that occurred nearly a decade ago and has not been overturned. *See State v. Stafford*, 114 N.C. App. 101, 103, 440 S.E.2d 846, 847 (holding defendant could not collaterally attack prior convictions for driving while impaired while appealing new conviction for habitual impaired driving), *appeal dismissed and disc. review denied*, 336 N.C. 614, 447 S.E.2d 410 (1994); *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) ("Questioning the validity of the original judgment where sentence

was suspended on appeal from an order activating the sentence is, we believe, an impermissible collateral attack."). Accordingly, this assignment of error is overruled.

VI

Defendant next argues that his sentence for HMA must be vacated because he did not stipulate to the required predicate offenses, and the State offered no evidence of them at trial. In *State v. Burch*, 160 N.C. App. 394, 397, 585 S.E.2d 461, 463 (2003), this Court held that a defendant charged with HMA must, in accordance with N.C. Gen. Stat. § 15A-928(c) (2005), be arraigned as to the HMA charge after commencement of the trial and before the close of the State's case, in order to give the defendant an "opportunity to admit the prior convictions which are an element of the offense and prevent the State from presenting evidence of these convictions before the jury." If, however, "the defendant fails to admit the prior convictions, then the State may present evidence of them to the jury as an element of the habitual crime." *Burch*, 160 N.C. App. at 397, 585 S.E.2d at 463.

In *Burch*, this Court vacated the defendant's HMA conviction when the defendant had not been arraigned under N.C. Gen. Stat. § 15A-928(c) — and, therefore, had not stipulated to the prior convictions — and the State had presented no evidence regarding the prior convictions during the trial. *Burch*, 160 N.C. App. at 399, 585 S.E.2d at 464. The Court concluded that in the absence of either an arraignment and a stipulation prior to the close of the State's case, the defendant's motion to dismiss the HMA charge

should have been granted as "[t]he State failed to present evidence of an essential element of the offense of [HMA]," namely, the defendant's prior convictions. *Id.*

In this case, the record as submitted to this Court contains neither a stipulation by defendant nor evidence presented by the State regarding the required predicate convictions. This omission may, however, be the result of a problem with the transcription of the proceedings, since it is apparent from the opening pages of the transcript that some of the pretrial proceedings went either unrecorded or untranscribed. Indeed, the court's first question for the State's attorney on the first page of the transcript is simply, "Is there anything else?"[1]

At sentencing, both the court and the parties appeared to believe that HMA was a foregone conclusion even though the transcript contains nothing addressing HMA prior to sentencing:

> THE COURT: So on the assault on a female, *which is elevated to habitual misdemeanor assault* which then goes up to habitual felon, for that count he would be a Level IV?
>
> MS. TOOMES [Defense Counsel]: That's correct, Your Honor.
>
> MR. HALL [State's Attorney]: That's correct, Your Honor.

(Emphasis added.) This colloquy does not, however, explain what occurred during the trial regarding the HMA charge.

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[1]According to the transcript for the second day of the trial, the court reporter who transcribed the first day's proceedings was "terminated from employment, [and] failed to prepare the transcript in a timely manner." The transcript was not finally completed until 18 months after the two-day trial.

We are unable to conclusively determine from the record on appeal whether defendant validly stipulated, prior to the close of the State's evidence, to the existence of his prior convictions. Consequently, we must remand to the trial court for a determination whether defendant entered a stipulation in accordance with *Burch*. *See also State v. Jernigan*, 118 N.C. App. 240, 243-44, 455 S.E.2d 163, 166 (1995) (trial court's failure to arraign under N.C. Gen. Stat. § 15A-928(c) and State's failure to present evidence of defendant's prior convictions did not constitute reversible error when defendant had stipulated to the existence of the prior convictions before trial).

VII

Defendant next argues that, during sentencing, the trial court erroneously determined his prior record level because the State failed to meet its burden of establishing defendant's prior convictions. Under N.C. Gen. Stat. § 15A-1340.14(f)(1) (2005), however, prior convictions may be proven by "[s]tipulation of the parties." The State presented to the trial court a sentencing worksheet that defense counsel inspected. Defense counsel then asserted various objections to that worksheet. The court adopted all but one of defense counsel's suggested corrections. The court then summarized: "So we're dealing with one Class C, Level IV, and two Class C, Level V's?" The prosecutor stated, "That's correct," and defense counsel made no objection.

This colloquy is sufficient to establish that defendant stipulated to the accuracy of the worksheet, as modified by the

trial judge pursuant to defense counsel's objections. *See State v. Eubanks*, 151 N.C. App. 499, 506, 565 S.E.2d 738, 743 (2002) (concluding defense counsel's statement that he had no objections to State's worksheet could "reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet"). Because of this stipulation, we further find defendant's remaining arguments as to his prior record level unpersuasive. Defendant's assignments of error relating to the calculation of his prior record level are, therefore, overruled.

VIII

Defendant next contends that the trial court erred under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), when, pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6), it added one point to defendant's prior record level because of his prior conviction for assault on a female. Defendant contends this improperly increased his sentence based upon facts not submitted to a jury. This Court has previously held, however, that the determination of a defendant's prior record level is not a question for the jury:

> Determining a defendant's prior record involves a complicated calculation of rules and statutory applications[.] This calculation is a mixed question of law and fact. The 'fact' is the fact of the conviction, which under *Blakely* is not a question for a jury. The law is the proper application of the law to the fact of [a] defendant's criminal record . . . .

State v. Hanton, ___ N.C. App. ___, ___, 623 S.E.2d 600, 604 (2006) (alterations in original) (internal citations and quotation marks

omitted). The impact of defendant's prior conviction for an assault on a female does not require the resolution of disputed facts but, rather, "involves statutory interpretation, which is a question of law." *Id.* at ___, 623 S.E.2d at 604. This assignment of error is, therefore, overruled.

Finally, defendant asserts that his sentence as a habitual felon, based upon his conviction of HMA, constitutes cruel and unusual punishment and has subjected him to double jeopardy. "Because defendant did not raise these constitutional issues at trial, he has failed to preserve them for appellate review and they are waived." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005). We, therefore, decline to consider this issue.

No error in part; remanded in part.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).