

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-878

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

Robeson County
No. 02 CRS 19488-89

JOHN LARICE LOCKLEAR

Appeal by defendant from judgments entered 19 August 2003 by Judge E. Lynn Johnson in Superior Court, Robeson County. Heard in the Court of Appeals 24 April 2006.

Attorney General Roy Cooper, by Assistant Attorney General Barry H. Bloch, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

McGEE, Judge.

Defendant was convicted of assault with a deadly weapon inflicting serious injury and common law robbery. He was sentenced in the aggravated range to consecutive active terms of a minimum of 42 months and a maximum of 60 months for the former and a minimum of 20 months and a maximum of 24 months for the latter. As a factor in aggravation of both, the trial court found defendant committed the crimes while on pretrial release on another charge and on the common law robbery conviction, the trial court found that the victim suffered serious injury.

The State presented evidence tending to show that on 30

October 2002, the victim was placing groceries in her vehicle outside of the Food Lion grocery store in Red Springs, North Carolina. A vehicle, operated by a man whom she identified as defendant, pulled in and parked beside her vehicle. Defendant exited his vehicle and spoke to the victim briefly. Defendant then snatched the victim's purse, jumped back into his vehicle, and drove away. Because the victim's arm was still caught in the strap of the purse, defendant's vehicle dragged the victim along, breaking the victim's arm in four places. The victim underwent two surgical procedures on 30 October 2002 and 20 March 2003, to implant metal bars in her arm. The bars were still in her arm at the time of trial and her arm had not healed.

The victim's purse contained, *inter alia*, a ruby and diamond ring, an emerald and diamond ring, a diamond pendant, and a diamond necklace, all inside a ziplock bag. Officer Ben Smith of the Red Springs Police Department located a diamond necklace and a bracelet at two pawn shops. The victim identified them as items that were in her purse. The pawn tickets indicated that they had been pawned by defendant and his wife, Ernestine Locklear.

Defendant also gave a statement to police in which he confessed to taking the victim's purse. He further stated that he pawned the jewelry contained in the purse at two pawn shops and sold a ring at a flea market.

Defendant and his wife testified that they purchased the jewelry from a man named Travis Jones. Defendant denied that he snatched the victim's purse. Defendant asserted that he gave the

statement to the police in order to prevent his wife from being charged with the crimes.

By the first two arguments stated in his brief, defendant contends the trial court erred (1) by not allowing him to testify as to declarations made to him by Travis Jones and (2) by denying his motion to dismiss the charges for insufficiency of the evidence. Defendant does not present any argument in support of these contentions because he claims the contentions are outside the purview of this Court's grant of a writ of certiorari to review the judgments. He "reserve[s]" the right to brief these issues in the event this Court should decide to consider those assignments of error.

Defendant has mistakenly interpreted this Court's order granting certiorari as limiting review to sentencing issues only. The order grants certiorari to review "the judgment entered 19 August 2003 in Robeson County Superior Court." The order does not contain any language limiting review to sentencing issues only.

By not advancing any argument in his brief, defendant abandoned these assignments of error. N.C.R. App. P. 28(b)(6); *See State v. Romero*, 164 N.C. App. 169, 595 S.E.2d 208 (2004). If defendant had any doubt as to whether the issues could be argued, he should have argued them. These assignments of error are dismissed.

By his remaining assignments of error, defendant contends that the trial court erred by sentencing him in the aggravated range based upon findings of aggravating factors that had not been found

by a jury or stipulated to by defendant. In *State v. Allen*, 359 N.C. 425, 438-39, 615 S.E.2d 256, 265 (2005), our Supreme Court held that

those portions of N.C.G.S. § 15A-1340.16(a), (b), and (c) which require trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant and which permit imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence violate the Sixth Amendment to the United States Constitution.

The violation of one's right to a jury trial is a structural error and is reversible *per se*. *Id.* at 440-41, 615 S.E.2d at 266-67. The Court's holding in *Allen* applies to cases "'in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.'" *Id.* at 427, 615 S.E.2d at 258 (quoting *State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001)). As this appeal was pending as of the date of the *Allen* decision, the *Allen* holding applies.

In reviewing the record, we observe that the finding in both judgments that defendant committed the offense while on pretrial release is not based upon a jury finding or stipulation, and thus must be vacated. In the judgment sentencing defendant for common law robbery, the finding that the victim suffered serious injury is actually supported by the jury's verdict finding defendant guilty of assault with a deadly weapon inflicting serious injury. In rendering this verdict, the jury necessarily found that defendant inflicted serious injury upon the victim. We hold that finding can

stand, but because the balance struck by the trial court may have been influenced by the improper finding, defendant must also be resentenced on the common law robbery conviction. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983).

Remanded for resentencing.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).