An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-303

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

STATE OF NORTH CAROLINA

v. Haywood County
Nos. 05 CRS 52464, 3658

JOSEPH RAY HOWES, JR.

Appeal by defendant from judgment entered 8 December 2005 by Judge Dennis J. Winner in Haywood County Superior Court. Heard in the Court of Appeals 21 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

William B. Gibson for defendant-appellant.

CALABRIA, Judge.

Joseph Ray Howes, Jr. ("defendant") appeals from a judgment entered upon jury verdicts finding defendant guilty of failure to register as a sex offender and of attaining the status of an habitual felon. We find no error.

The State and the defendant stipulated that on 23 March 1998 defendant was convicted of second degree rape in Buncombe County Superior Court. At trial, the State presented evidence tending to show that on 29 April 2005, Donna Henson ("Henson"), who works in the Haywood County Sheriff's Office and is primarily responsible

for sex offender registration, received notification defendant was moving to Haywood County. Defendant came to Henson's office on 2 May 2005 and completed a registration card verifying that he would be residing at 266 Birchwood Circle in Clyde, North Carolina. Henson advised defendant that if he changed his address, he had to "provide written notification of this address change to the sheriff in the county where he ... [is] most currently registered." This written notification of an address change occurred either by letter or by personally visiting the sheriff's office and completing a change of address form. Defendant responded that he understood this requirement.

Subsequently, Henson received an anonymous telephone call reporting defendant no longer resided at 266 Birchwood Circle ("Birchwood"). Henson asked Lieutenant Patrick Steven Mann ("Lieutenant Mann") of the Haywood County Sheriff's Department to visit this address to determine whether defendant still resided there. Lieutenant Mann traveled to Birchwood on 2 July 2005 and spoke to Carolyn Sue Price ("Price"). Price stated defendant lived with her at Birchwood until either late May or late June 2005, when he left the residence and moved to Asheville. On 12 July 2005, Lieutenant Mann obtained a warrant charging defendant with failure to register as a sex offender. Henson received neither written notification from defendant regarding any change of address nor saw him personally in the Sheriff's Office to complete the change of address form. Defendant did not testify or present any evidence.

On 7 December 2005, defendant was found guilty of failure to

register as a sex offender. On 8 December 2005, defendant was found guilty of attaining the status of an habitual felon. Defendant was sentenced to a minimum of 138 months to a maximum of 175 months imprisonment in the North Carolina Department of Correction. Defendant appeals.

Defendant argues the trial court erred in denying his motion to dismiss. Defendant contends the State presented insufficient evidence. We disagree.

To withstand a motion to dismiss, the State must present substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). In deciding the motion, the court must examine the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975). "If there is substantial evidence – whether direct, circumstantial, or both– to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). The two essential elements the State must prove regarding the offense of failing to register as a sex offender are "1) the defendant is a sex offender who is required to register; and 2) that defendant failed to notify the last registering sheriff of a change of address." *State v. Holmes*, 149 N.C. App. 572, 577, 562 S.E.2d 26, 30 (2002).

In the case *sub judice*, defendant asserts in his brief that he could not be convicted of the instant offense because he had "not yet acquired a new address" and therefore, could not notify the sheriff of any change in address. At trial, however, defendant moved to dismiss and argued that the State failed to prove "exactly when [defendant] was supposed to have left Price's residence. There's some discrepancy about that, and I would argue that that's not been proven." Thus, defendant is attempting to argue on appeal what he failed to raise and contend at the trial court. Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount'" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). Consequently, this assignment of error is overruled.

Defendant failed to present any argument regarding his remaining two assignments of error and thus, they are abandoned. *See* N.C. R. App. P. 28(b)(6) (2005).

No error.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).