

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-75

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

BENJAMIN HILLIARD

Wake County
Nos. 04 CRS 110490
05 CRS 009816

Appeal by defendant from judgment entered 21 July 2005 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 29 September 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas R. Miller, for the State.

John T. Hall, for defendant-appellant.

TYSON, Judge.

Benjamin Hilliard ("defendant") appeals from judgment entered after a jury found him to be guilty of felonious possession of a stolen motor vehicle and being an habitual felon. We find no error.

I. Background

The State's evidence tended to show on 4 December 2004 Jonathan Lloyd ("Lloyd"), a driver for Quality Towing, was towing vehicles to the company's storage lot located at 415 Tryon Road in Wake County, North Carolina. At approximately 11:30 p.m., Lloyd was in the truck with his girlfriend, Alicia Littmath ("Littmath"),

when they observed a large black male run outside of the storage lot's fence and hide behind a dumpster. They called 911. Lloyd shined a spotlight on the dumpster, and the man "took off walking nonchalantly [sic]." Lloyd testified that the man had been leaning down near an area where approximately fifty catalytic converters were stored.

After police officers arrived, Lloyd and Littmath provided a description of the man they had observed. A short time later, officers brought back an individual for them to identify. Lloyd and Littmath identified the individual located in the patrol car as the man they had seen. That person was identified as defendant.

At some point, Lloyd found an old pickup truck parked near the storage lot's fence. Upon further inspection of the truck, Lloyd and a Wake County Sheriff's Deputy observed twenty to thirty catalytic converters, mufflers, and tail pipes laying in the bed of the truck. Upon further investigation, it was learned the pickup had been brought to Honeycutt Transmission for repair and had been removed from their lot without permission.

On 22 February 2005, defendant was indicted for felonious larceny and being an habitual felon. Defendant was tried at the 18 July 2005 Criminal Session of Wake County Superior Court. A jury found defendant guilty of possession of a stolen motor vehicle and being an habitual felon. Defendant was sentenced to a term of ninety to 117 months imprisonment. Defendant appeals.

II. Issues

Defendant argues: (1) the trial court erred by denying his

motion to dismiss the charge of possession of a stolen motor vehicle; (2) there was a fatal variance between the indictment and the State's proof at trial; and (3) the trial court erred by denying his motion to dismiss the habitual felon charge and by sentencing him as a Class C, Level V felon.

III. Motion to Dismiss

Defendant asserts insufficient evidence was presented that he either actually or constructively possessed the pickup or defendant had reason to believe that it was stolen. Defendant also asserts no testimony was offered regarding the legal identity of the owner of the truck that was stolen. After careful review of the record, briefs, and contentions of the parties, we find no error.

First, we decline to address defendant's arguments concerning whether the State proved he possessed the stolen vehicle or that he knew it was stolen. Defendant's assignments of error challenge whether the State's evidence was sufficient to prove "value and ownership." Defendant did not assign error to the issues of possession or knowledge. Defendant failed to properly preserve these issues for appellate review. His assignments of error set forth different grounds for review than that argued on appeal. See N.C.R. App. P. 10(a) (2006); N.C.R. App. P. 10(c)(1) (2006); N.C.R. App. P. 28(b)(6) (2006). Defendant has waived these arguments and they are dismissed.

Defendant's sole argument that is properly before this Court regards the sufficiency of the evidence to show the legal owner of the truck. Defendant contends the State failed to prove ownership

or that a fatal variance exists between the allegations in the indictment and the proof adduced at trial. The name of the owner of the stolen vehicle is neither an essential element of the offense, nor does a fatal variance exist between the indictment's allegation of ownership of the vehicle and the proof of ownership. *State v. Jones*, 151 N.C. App. 317, 327, 566 S.E.2d 112, 119 (2002), *disc. rev. denied*, 356 N.C. 687, 578 S.E.2d 320 (2003); *State v. Medlin*, 86 N.C. App. 114, 124, 357 S.E.2d 174, 180 (1987). These assignments of error are overruled.

IV. Habitual Felon

Defendant argues that the trial court erred by denying his motion to dismiss the habitual felon charge and by sentencing him as a Class C, Level V felon. Defendant contends the trial court miscalculated his prior record level when it assigned a point for defendant being on probation when the offense was committed. Defendant argues that this fact was neither alleged in the indictment nor was it found by a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 301, 159 L. Ed. 2d 403, 412 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000).

At trial, the State handed the prior level worksheet to the judge and stated that defendant had seventeen points, and that "15 of the points are for prior convictions." The State noted two additional points that would raise the total to seventeen, including a point for defendant having committed the offense while on probation, "should not count under *Blakely* without a jury

finding that." Defendant then stipulated to having a prior record Level V, and the trial court specifically found that defendant had "15 points, not 17." Despite defendant's argument to the contrary, it is clear that he did not receive a point for having committed the offense while on probation. Defendant's prior record level was calculated using only his prior convictions. This assignment of error is overruled.

V. Conclusion

Defendant waived his arguments on possession or knowledge element of the crime to challenge the denial of his motion to dismiss. No fatal variance exists between the indictment and the State's proof at trial. The trial court did not include defendant's being on probation at the time of the offense in determining his prior record points. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).