

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1178

NORTH CAROLINA COURT OF APPEALS

Filed: 17 June 2008

STATE OF NORTH CAROLINA

v.

TOMMIE PARKS

Mecklenburg County
Nos. 06 CRS 216778-79
07 CRS 31415

Appeal by defendant from judgment entered 14 June 2007 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 June 2008.

Attorney General Roy Cooper, by Assistant Attorney General Diane Martin Cooper, for the State.
Daniel F. Reed for defendant-appellant.

McCULLOUGH, Judge.

Defendant appeals from judgment entered upon his conviction of first-degree burglary and common law robbery and his plea of guilty to habitual felon status. Defendant raises the following issues on appeal: (1) he was deprived of his statutory right to a twenty-day period between issuance of the habitual felon indictment and the start of trial, (2) the trial court erred in denying his motion to dismiss, and (3) his long sentence constitutes cruel and unusual punishment. We find no error.

The State's evidence at trial tends to show that on the night of 9 April 2006, Odessa Parks was sleeping at home alone when she

heard a noise in her bedroom. She first thought the noise was caused by her cat. She then realized a person was standing at her dresser, and she could see that the person was wearing dark clothing by a light coming in through the window from a street lamp outside. The intruder turned around, grabbed her arm, and put a pillow over her face. He put his hands around Ms. Parks' neck, and she asked him to take the pillow off, telling him that he was smothering her. He took the pillow off and demanded several times to know where she kept her money.

Ms. Parks stated she recognized that the intruder was defendant, and she recognized his voice. Defendant is related to Ms. Parks, and she has known him for his whole life. She allowed defendant to live with her on occasion, and she fed him somewhat regularly whenever he needed a meal, including breakfast on the morning before this incident occurred. Ms. Parks eventually told defendant that her money was in a dresser drawer, and he took \$40.00 from the drawer. He took her arm and led her to the front door, where he knocked the door down and ran away. Defendant was not living with Ms. Parks at the time and did not have permission to be in her home that night.

Ms. Parks' grandson Gary Parks was living with her at the time of the incident, but he was away from the house working at his job from 11:00 p.m. to 7:00 a.m. when the robbery occurred. He stated that his grandmother had already gone to bed when he left for his shift and that the front and back doors to the house were locked when he left. In the middle of his shift, he received a call that

someone had broken into Ms. Parks' house, and he went home at approximately 3:15 a.m. to check on his grandmother. After confirming that she was not injured, Gary Parks returned to work to finish his shift, and when he got home in the morning, he called the police around 8:00 a.m.

When interviewed by a police officer, Ms. Parks identified defendant as the intruder and never wavered in her conviction that defendant was the person who broke in and stole her money. Gary Parks showed the police officer the back door, which had been pried open. Although several tools were in the backyard which might have been used to pry the door open, because it had been several hours since the robbery, the police considered the scene to be contaminated and did not take fingerprints.

Nina Grigley, an acquaintance of defendant, testified that she had been at a friend's house the night of the incident with two friends and defendant. The friend's house was in the same neighborhood as Ms. Parks' house. Ms. Grigley and the others were doing drugs. Defendant stated he was going to get money from someone's house, and he left. He returned sometime later, breathing hard as though he had been running. He told the group he had been to his grandma's house, and Ms. Grigley took that to mean Odessa Parks, since she was the only person with the name Parks in that neighborhood. Although the group spent some time riding around in a car after defendant returned, when morning came, Ms. Grigley called Ms. Parks to see if she was all right and went to her house. From there, Ms. Grigley called the police to tell them

about defendant's statements. Defendant declined to offer any evidence on his behalf.

The jury returned guilty verdicts on the charges of first-degree burglary and common law robbery. Defendant pled guilty to habitual felon status, and the trial court determined defendant had a prior record Level VI before sentencing him to one active sentence of a minimum of 168 months' and a maximum of 211 months' imprisonment. From the judgment entered, defendant appeals.

Defendant first argues the trial court erred by allowing the matters to proceed to trial less than twenty days after defendant's habitual felon indictment was issued in contravention of N.C. Gen. Stat. § 14-7.3 (2007). Defendant contends his due process rights were violated and his counsel was ineffective for failing to advise defendant of his right to wait twenty days before proceeding to trial. We disagree.

N.C. Gen. Stat. § 14-7.3 provides, "No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within twenty days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period." *Id.* Defendant was indicted for first-degree burglary and common law robbery on 1 May 2006, and for being an habitual felon on 29 May 2007; the trial began on 11 June 2007. Defendant did not seek a continuance or otherwise object to the time line of the trial. Therefore, he waived the twenty-day period.

Defendant now alleges the trial court failed to ensure defendant was afforded due process of law. Constitutional arguments not raised in the trial court will not be reviewed on appeal. *State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Defendant also contends his counsel provided ineffective assistance for failing to inform defendant of his right to continue the trial.

An ineffective assistance of counsel claim involves two steps: (1) a determination that counsel's performance was deficient, and (2) that the defendant was prejudiced thereby. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006), *cert. denied*, ___ U.S. ___, 166 L. Ed. 2d 116 (2006). Prejudice is shown where a reasonable probability exists that absent counsel's deficient performance, the proceedings would have resulted in a different outcome. *Id.* Even assuming defense counsel was deficient for failing to inform defendant of his right not to proceed to trial within twenty days of the issuance of the habitual felon status indictment, defendant has not advanced any argument regarding how such failure caused him prejudice. Defendant pled guilty to habitual felon status and has failed to demonstrate how lack of additional time hindered trial preparation or any other needs. This argument has no merit, and defendant's assignments of error on this issue are therefore overruled.

Defendant next argues the trial court erred in denying his motion to dismiss at the close of the State's evidence. Defendant contends the evidence of his identity as the perpetrator of the

crime is inherently incredible, in that several discrepancies are apparent in the evidence: (1) Ms. Parks testified she was 78 years old, but her grandson Gary testified she was 87; (2) Ms. Parks testified she needed glasses but she was not wearing any at the time the intruder was in her room; (3) when defense counsel asked if Ms. Parks could see her, Ms. Parks answered, "Sort of"; and (4) when asked to identify defendant in the courtroom, Ms. Parks stated, "I can't see right good but I believe that's him." Defendant also notes that Ms. Parks initially told the police that defendant had stolen her revolver, but later discovered the revolver in her house and realized it was not stolen. Defendant states that these inconsistencies undermine Ms. Parks' credibility as a witness, particularly her eyewitness identification of defendant as the perpetrator of the robbery, and that the trial court should have granted his motion to dismiss. We disagree.

In reviewing a trial court's denial of a motion to dismiss, we review the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences to be drawn from the evidence. *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994), *cert. denied*, 533 S.E.2d 475 (1999). Any discrepancies or contradictions in the evidence must be resolved in the State's favor. *Id.* Substantial evidence must be presented as to each element of the offense charged, and as to the identity of defendant being the perpetrator of the crime. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence means such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion.'" *State v. Jarrett*, 137 N.C. App. 256, 262, 527 S.E.2d 693, 697 (2000) (citation omitted). The reviewing court must consider both competent and incompetent evidence in making its determination. *Scott*, 356 N.C. at 596, 573 S.E.2d at 869.

Here, the State presented evidence that Ms. Parks had known defendant for his entire life, that he stayed at her house off and on, that she took care of him when he needed assistance, and that he often ate meals at her house, including on the morning before the robbery. Ms. Parks testified that she saw defendant in her room and recognized his voice. Taken in the light most favorable to the State, we find this evidence is sufficient to allow the jury to determine that defendant was the person who committed the robbery. It is within the jury's province to resolve any discrepancies or inconsistencies in the evidence, and to weigh the credibility of the witnesses. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). We find there was sufficient evidence of defendant's identity as the perpetrator of the crimes charged to send the case to the jury, and the trial court did not err in denying defendant's motion to dismiss. Accordingly, this assignment of error is overruled.

Finally, defendant contends his enhanced sentence for a crime involving \$40.00 constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution. Defendant concedes this issue has been resolved contrary to his position, but

argues that the use of two convictions seventeen and twenty years old is unfair and results in harsh punishments for those who have attempted to undergo rehabilitation in the intervening years. This Court has previously stated, "Sentence enhancement based on habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment." *State v. Dammons*, 159 N.C. App. 284, 298, 583 S.E.2d 606, 615 (2003), *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382 (2004). "Where a panel of the Court of Appeals has decided an issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384 379 S.E.2d 30, 37 (1989). This assignment of error is overruled.

No error.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).