NO. COA07-1406

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 06 CRS 20293
06 CRS 55643

RIMA YVETTE YANCEY

Appeal by defendant from judgment entered 26 June 2007 by Judge Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 28 April 2008.

Attorney General Roy Cooper, Jr., Assistant Attorney General Peter A. Regulski, for the State.

James N. Freeman, Jr., for defendant-appellant.

STEELMAN, Judge.

Where defendant attempted to discharge her second appointed counsel at the time the case was called for trial and sought a continuance, the trial court did not abuse its discretion in denying these motions. The State introduced substantial evidence of each element of the offense charged and the trial court did not err in denying defendant's motion to dismiss. Defendant failed to demonstrate that any alleged error in an evidentiary ruling would have resulted in a different result in the trial. Defendant's arguments that her conviction as an habitual felon violates

principles of double jeopardy, constitutes cruel and unusual punishment and violates separation of powers are baseless due to prior appellate decisions in this State.

The State's evidence tended to show that on 28 April 2006, Karla Elaine Moore (Moore) loaned her 1998 Dodge Neon automobile to her roommate Sandra Leftwich (Leftwich) conditioned upon Leftwich picking up Moore from work at 5:00 p.m. Leftwich failed to pick up Moore, and after being driven home by a co-worker, Moore reported the Neon stolen. Moore never saw Leftwich again, but did receive messages from Leftwich reporting the Neon's location. Moore also received a message from defendant who asked for a return call. Moore did not know defendant and did not call her back.

On the night of 7 May 2006, Winston-Salem Police Officer William Cumbo (Cumbo) was driving down West 23rd Street on routine patrol. Officer Cumbo noticed a green Dodge Neon parked in front of 321 West 23rd Street. He observed Rima Yancey (defendant) leaning next to the open driver's side door of the Neon and a man leaning next to the open passenger side door. As soon as Officer Cumbo drove past the Neon, he received a dispatch to 321 West 23rd Street. Officer Cumbo returned to the address within a "few seconds" and the Neon, defendant and the man were gone. The two people sitting on the porch of 321 West 23rd Street denied calling the police. Officer Cumbo then noticed defendant and the man approaching on foot from the east.

The two persons walked up to Officer Cumbo. Defendant told Officer Cumbo she had called police after she paid a man at 321

West 23rd $15.00 for marijuana, and he refused delivery or a refund. Officer Cumbo spoke to the would-be seller, who refunded defendant's money. Officer Cumbo then questioned defendant about the Neon because he thought it unusual that the Neon "was all of a sudden gone, and then she [came] walking back down the street[.]" Defendant told Cumbo the Neon was stolen; that she got scared when she saw police in the area and that she drove the Neon to another location to hide it from police. Defendant told Cumbo she was in the midst of doing her wash, and her laundry was in the Neon. Cumbo placed defendant under arrest.

Officer Cumbo radioed Officer Eric Johnson (Johnson) with the location of the stolen Neon. Officer Johnson found the Neon parked between two residences, obscured from the roadway by a row of trees. In the Neon, Officer Johnson found the plastic housing around the steering column laying on the right rear floorboard, the ignition exposed, a screwdriver head sheared off in the ignition, and a pair of pliers on the driver's side floorboard. Defendant told Officer Johnson that the Neon had been driven by Leftwich; that a man named Reginald Mickens took the Neon from Leftwich over a drug debt; and that Mickens had loaned the Neon to defendant at three o'clock that afternoon. Defendant also told Johnson she had tried to call Moore to return the Neon. Winston-Salem police informed Moore that her Neon had been recovered. When Moore came to retrieve her Neon, Officer Johnson had to start the Neon for Moore with the pair of pliers recovered from its driver's side floorboard.

The jury found defendant guilty of possession of a stolen motor vehicle and of attaining habitual felon status. The trial court imposed an active sentence of 168 to 211 months imprisonment. Defendant appeals.

In her first argument, defendant contends that the trial court erred in denying her motions for new counsel and to continue the trial of this case. We disagree.

In November of 2006, seven months before trial, defendant moved for the court to appoint different counsel because her appointed counsel, Ms. Toomes, did not inform her of a court date which resulted in defendant's failure to appear and her incarceration. The trial court denied her motion. Five months later, Ms. Toomes moved to withdraw because defendant had missed appointments, had been unpleasant to Ms. Toomes' staff, and had been unhelpful with locating witnesses and assisting with her defense. The trial court allowed the motion, informing defendant that it was her responsibility to come to court and to communicate with her attorney. The trial court also advised defendant, "if you fail to get along with your next attorney, then the Judge may find that you're just going to have to go it on your own."

When defendant's case was called for trial on 25 June 2007, Defendant's second appointed attorney, Mr. Beechler, informed the trial court that defendant "wishes for me to be removed from the case, be appointed a new lawyer, and she would move to continue her case today." Upon inquiry from the trial court, defendant stated that her attorney was incompetent and that he would not call

certain witnesses. The trial court noted that defendant's first appointed counsel had already been removed and that defendant was advised that if she "continued to fail to work with [her] attorney, another Court could find that you [] waived your right to counsel due to your misconduct." The trial court found that defendant's disagreement with Mr. Beechler's advice was not good cause to remove him. In its discretion, the trial court denied the motions to remove and to continue.

The right to counsel, which is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, includes the right of an indigent defendant to appointed counsel. *See State v. McFadden,* 292 N.C. 609, 234 S.E.2d 742 (1977); *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799 (1963); *see also* N.C. Gen. Stat. § 7A-450 (2007). Further, we note that "a defendant does not 'have the right to insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services.'" *State v. Anderson*, 350 N.C. 152, 167-68, 513 S.E.2d 296, 306 (1999) (quoting *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981)). Additionally, where a defendant is appointed counsel, he may not demand counsel of his choice. *Anderson* at 167, 513 S.E.2d at 305. More importantly, "an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial." *McFadden* at 616, 234 S.E.2d at 747. As our Supreme Court stated in *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998),

> [a] disagreement between the defendant and his court-appointed counsel over trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. In order to be granted substitute counsel, "the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict."

Id. at 516, 501 S.E.2d at 62 (citations omitted).

In the instant case, the bases for defendant's dissatisfaction with counsel were unsupported allegations that counsel was not acting in defendant's best interests. Defendant does not show why or how her case could have been better prepared had the continuance been granted, nor does defendant show that she was prejudiced by the trial court failing to continue her trial. "Nothing in the record indicates that [counsel] was not qualified to represent defendant in this case. Nor is there any evidence that [counsel] did not serve as a zealous advocate for defendant throughout the entire time in which he represented [her]." *Anderson* at 167, 513 S.E.2d at 306. Further, defendant has failed to show how "[s]he was materially prejudiced by the denial of [her] motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). We fail to perceive that the trial court abused its discretion or deprived defendant of her constitutional right to be represented by competent counsel at her trial. This argument is without merit.

In her second argument, defendant contends the trial court erred in denying her motion to dismiss based on insufficiency of the evidence. We disagree.

The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Patterson,* 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994) (quotation omitted). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King,* 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citation omitted).

In this case, the State was required to present substantial evidence that defendant possessed the stolen vehicle, which she knew or had reason to believe had been stolen or taken. *See* N.C. Gen. Stat. § 20-106 (2007); *State v. Suitt*, 94 N.C. App. 571, 573, 380 S.E.2d 570, 571 (1989). Defendant asserts there was insufficient evidence establishing that she "knew or had reason to believe" the Neon was stolen.

The evidence presented by the State in this case included the following: (1) Officer Cumbo saw defendant leaning next to the open driver's side door; (2) defendant told police that the Neon was

stolen; defendant admitted that she drove the Neon to another location to hide it from police; (3) a screwdriver head had been sheared off in the Neon's ignition and a pair of pliers was on the driver's side floorboard; and (4) Moore testified that she did not know defendant and had not given defendant permission to drive the Neon. Based on the evidence presented at trial, we hold that there was sufficient evidence of the elements of the crime of possession of a stolen motor vehicle to submit the charge to the jury. Accordingly, the trial court properly denied defendant's motion to dismiss the charge of possession of a stolen motor vehicle. This argument is without merit.

In her third argument, defendant contends the trial court erred in allowing Officer Cumbo to testify, over her objection, that defendant told him she had attempted to purchase marijuana. Defendant asserts the testimony was not relevant and highly prejudicial. We disagree.

At trial, the court must determine if the proposed evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). A trial court's rulings on relevancy "'are given great deference on appeal.'" *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 328 (2005) (quoting *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991)). Moreover, a defendant is only prejudiced by the admission of irrelevant evidence "when there is a reasonable

possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is [on] the defendant." N.C. Gen. Stat. § 15A-1443(a) (2007); *see also State v. Mebane*, 106 N.C. App. 516, 529, 418 S.E.2d 245, 253 (1992). Even assuming *arguendo* that the trial court erroneously admitted the testimony, defendant has not shown that there is a reasonable possibility a different result would have been reached at trial had the testimony not been admitted. The State presented overwhelming evidence that defendant possessed the stolen vehicle. Defendant admitted to police she was driving a stolen vehicle. This argument is without merit.

In defendant's next three arguments, she contends the trial court erred in sentencing her as an habitual felon because it subjects her to double jeopardy, constitutes cruel and unusual punishment, and violates the separation of powers clause. We disagree.

"[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (quotations omitted). Further, defendant acknowledges that this Court has previously rejected these identical constitutional challenges. *See State v. Brown*, 146 N.C. App. 299, 302, 552 S.E.2d 234, 236 (2001) (holding the "Habitual Felons Act used in conjunction with structured sentencing [does] not violate . . . double jeopardy protections."); *State v. Dammons*, 159 N.C. App.

284, 298, 583 S.E.2d 606, 615, *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) ("Sentence enhancement based on habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment."); *State v. Williams,* 149 N.C. App. 795, 561 S.E.2d 925 (2002) (upholding Habitual Felon Act against equal protection, and double jeopardy and separation of powers challenges). Defendant, nevertheless, urges this Court to "re-examine its prior holdings[.]" We are bound by the decisions of our State Supreme Court and from other panels of the Court of Appeals. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). In light of controlling precedent, these arguments are all without merit.

Defendant has failed to argue her remaining assignments of error in her brief, and they are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

NO ERROR.

Judges HUNTER and MCCULLOUGH concur.

Report per Rule 30(e).