An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1505

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

STATE OF NORTH CAROLINA

v. Wake County
Nos. 06 CRS 87291, 87229

JAMES F. HOLLOWAY

Appeal by defendant from judgment entered 9 May 2007 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 30 June 2008.

Court of Appeals

Attorney General Roy Cooper, by Assistant Attorney General Barbara A. Shaw, for the State.

Winifred H. Dillon for defendant.

Slip Opinion

MARTIN, Chief Judge.

Defendant was indicted for felonious larceny and having attained habitual felon status. A jury convicted him of felonious larceny, and he thereafter entered a guilty plea to having attained habitual felon status. He appeals from the judgment entered as a result of the jury's verdict.

At trial, the State's evidence tended to show that on 19 October 2006, James Fitzgerald Holloway ("defendant") entered the Belk's department store at Crabtree Valley Mall in Raleigh, North Carolina. Terry Eacret, a loss prevention officer employed by Belk's, observed defendant placing several shirts, sweaters, and

jackets into a Hecht's shopping bag. Defendant left the store carrying the bag and without paying for any of the merchandise. Mr. Eacret detained defendant and took an inventory of the clothing found in the Hecht's shopping bag. Each of the items found in the bag had a Belk's price tag on it, and defendant did not have a receipt for any of the items. None of the items were on sale, and the value of the merchandise, based on the affixed price tags, was $1,113.00.

On appeal, defendant first argues the trial court erred in not dismissing the charge of felonious larceny because the State presented insufficient evidence that the value of the property stolen was in excess of $1,000.00. However, at trial, defendant did not make a motion to dismiss for insufficiency of the evidence at either the close of the State's evidence or the close of all evidence. Therefore, he may not attack on appeal the sufficiency of the evidence at trial. N.C.R. App. P. 10(b)(3) (2008) ("A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial."); *see also State v. Boyd*, 162 N.C. App. 159, 162, 595 S.E.2d 697, 699 (2004). This assignment of error is dismissed.

Defendant next contends he received ineffective assistance of counsel because his trial counsel failed to move to dismiss the charge of felony larceny at the close of the evidence. "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then

that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)), *cert. denied*, ___ U.S. ___, 166 L. Ed. 2d 116 (2006). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Id.* (internal quotation marks omitted); *see also State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (holding a defendant must demonstrate a deficiency in his counsel's performance by showing "'errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment'") (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (internal quotation marks omitted). "[I]neffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (internal quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). The record before this Court is sufficient to enable

review at defendant's ineffective assistance of counsel claim without the development of additional evidence.

Defendant argues his trial counsel should have made a motion to dismiss the charge of felony larceny because his counsel's trial strategy involved an argument to the jury that the bag with which defendant was apprehended was not empty when he entered the store, and thus, he did not steal all of the merchandise found in the bag. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). In considering a motion to dismiss, "the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Given the standard of review on a motion to dismiss, any such motion by defendant's trial counsel in this case would have been denied.

Here, the State presented evidence from a loss prevention officer who observed defendant placing shirts, sweaters, and jackets into a Hecht's shopping bag and leave the store without paying for them. The officer testified that a Belk's price tag was affixed to each of the items recovered from the bag and defendant

had no receipt for any of the merchandise. The officer further testified to the price of each item recovered from the bag on the day of the incident. The total value of the merchandise was $1,113.00. Defendant presented no evidence.

The State clearly presented substantial evidence of each essential element of the charged offense and that the defendant was the perpetrator. *See* N.C. Gen. Stat. § 14-72(a) (2007) ("Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony."); *State v. Skinner*, 162 N.C. App. 434, 443, 590 S.E.2d 876, 884 (2004) ("The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the consent of the owner; and (4) with the intent to deprive the owner of it permanently.") (quoting *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982)). As any motion to dismiss made by defendant's trial counsel would have been denied, defendant cannot show the failure of his counsel to make such a motion constitutes deficient performance. This assignment of error is overruled.

Defendant received a sentence of 101 to 131 months imprisonment, which is the lowest possible sentence in the mitigated range for one with defendant's prior record level and the offense for which defendant was convicted. He contends the sentence is grossly disproportionate in consideration of the severity of the crime for which he was convicted and violates the Eighth Amendment prohibition against cruel and unusual punishment. However, defendant did not object or otherwise raise this issue at

trial and this Court will not consider constitutional arguments for the first time on appeal. *State v. Chapman*, 359 N.C. 328, 360, 611 S.E.2d 794, 819 (2005); *accord State v. Freeman*, ___ N.C. App. ___, ___, 648 S.E.2d 876, 881 (2007) (refusing to consider the defendant's Eighth Amendment argument concerning his habitual felon status-enhanced sentence where the defendant did not raise the issue at his trial), *appeal dismissed*, 362 N.C. 178, 657 S.E.2d 663 (2008). This assignment of error is dismissed.

No error.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).