

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-54

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Durham County
Nos. 07 CRS 56213
08 CRS 1086

MARK HOWARD ROOK,
Defendant.

Appeal by defendant from judgment entered 18 February 2009 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 30 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Christopher H. Wilson, for the State.

Jon W. Myers for defendant-appellant.

HUNTER, Robert C., Judge.

Mark Howard Rook appeals from the trial court's judgment entered pursuant to his conviction of felony operation of a motor vehicle to elude arrest and his guilty plea to being a habitual felon. Although defendant argues on appeal that the trial court erred in denying his motion to dismiss the eluding arrest charge for insufficient evidence, review of the record shows that defendant never made such a motion at trial. As defendant failed to preserve his sole argument for appellate review, we dismiss defendant's appeal.

Facts

On 13 December 2007, Officer Robert Cornatzer of the Durham Police Department was working an off-duty job at Northgate Mall in Durham, North Carolina. Officer Cornatzer was in uniform, and his job duties required him to patrol the mall in an effort to deter crime. At approximately 8:45 p.m., Officer Cornatzer received a call about a possible shoplifter. In response to the call, Officer Cornatzer went to the Sears department store. As he approached the store from the parking lot, he observed a man, later identified as defendant, leaving the store carrying a large item toward a car parked in the package pick-up area. Officer Cornatzer believed that defendant was stealing the item.

Officer Cornatzer announced himself to defendant as "Durham Police" and told him to stop. In response, defendant looked in Officer Cornatzer's direction, but continued walking toward his car. Defendant, ignoring Officer Cornatzer's repeated orders to stop, got into the car and put it in reverse. As Officer Cornatzer continued to approach defendant's vehicle from the front, another law enforcement officer, Sergeant Barry Cayton, with the Durham County's Sheriff's Department, approached the car from behind. Both Officers heard defendant's tires "squealing," and Officer Cayton saw the car "shimmy" as though it had gained "traction" and the car began to move backwards toward Officer Cayton, who was at the back passenger side corner of the car. Fearing that Officer Cayton would "get run over" by defendant, Officer Cornatzer shot at defendant's front driver's side tire. Defendant's car veered to the left, brushing Officer Cayton's pants as he jumped back out of

the way. After a brief chase on Interstate 85, defendant stopped his car and ran from the vehicle. Defendant was eventually apprehended and charged with assault with a deadly weapon on a government officer, felonious operation of a motor vehicle to elude arrest, and being an habitual felon.

Prior to trial, defendant filed a motion to dismiss the charges "pursuant to N.C.G.S. § 15A-954, the Fourth and Fourteenth amendments to the United States Constitution, applicable sections of the North Carolina Constitution, and other applicable laws of the State of North Carolina." Just prior to trial, the trial court held a hearing on defendant's motion, where he argued that his constitutional rights were violated because Officer Cornatzer shot at defendant while attempting to apprehend him for a misdemeanor. Defendant claimed that his "constitutional rights were violated to such a degree that the only remedy would be to dismiss the proceedings." At the conclusion of the proceeding, the trial court deferred ruling on defendant's motion. At trial, defendant renewed his motion at the close of the State's evidence and at the close of all the evidence, arguing that "there needs to be a gauge on the type of force . . . that can be used [when] trying to arrest someone" and that when arresting someone for a misdemeanor, the "use of a pistol . . . is not allowed." Thus, defendant argued, the only appropriate remedy under N.C. Gen. Stat. § 15A-954(a)(4) (2009) was dismissal. The trial court denied both motions. Defendant was found not guilty of assaulting a government officer with a deadly weapon, but was convicted of felonious operation of

a motor vehicle to elude arrest. Defendant subsequently pled guilty to having attained habitual felon status. The trial court consolidated the charges into one judgment and sentenced defendant to 101 to 131 months imprisonment as a habitual felon. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court erred by refusing to dismiss for insufficient evidence the charge of felonious operation of a motor vehicle to elude arrest. As a general rule, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Our appellate rules further specify that, "[i]n a criminal case, defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial." N.C. R. App. P. 10(a)(3).

Here, although defendant moved to dismiss the charge at the close of the State's evidence and, again, at the close of all the evidence, the record on appeal indicates that the basis for the motions was defendant's contention that Officer Cornatzer's shooting at him while attempting to arrest him for a misdemeanor "flagrantly violated" his constitutional rights and warranted dismissal of all charges. See N.C. Gen. Stat. § 15A-954(a)(4)

(providing that "[t]he [trial] court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines" that "[t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution"). At no time, however, did defendant assert insufficiency of the evidence as a ground for dismissal. Consequently, defendant waived appellate review of the issue. See *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 604-05 ("Defendant never made a motion to dismiss based on the sufficiency of the evidence. . . . As such, defendant has failed to preserve th[is] assignment[] of error for appellate review."), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). We decline to address defendant's contention on appeal. See *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal."). Defendant's appeal is dismissed.

Dismissed.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).