

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-1585

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2002

STATE OF NORTH CAROLINA

v.

Catawba County
No. 01 CRS 6128

ALLEN DWAYNE HUFFMAN

Appeal by defendant from judgment entered 18 September 2001 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 9 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Ted R. Williams, for the State.

Samuel L. Bridges for defendant-appellant.

WALKER, Judge.

Defendant was convicted of providing a controlled substance to an inmate and was sentenced to 8 to 10 months in prison. The State's evidence tended to show that defendant came to the Catawba County Jail and gave a bar of soap and a stick of deodorant to the jailer, Officer Duckworth. Defendant asked Officer Duckworth to give the items to William Haggerman, an inmate. Officer Duckworth checked the items and found a bag of marijuana inside the stick of deodorant. Defendant was subsequently arrested.

First, defendant contends the trial court erred in failing to grant defendant's motion to dismiss because the State's evidence only showed that defendant attempted to give a controlled substance to an inmate. Defendant argues that his failed attempt is an insufficient basis for conviction because the controlled substance never reached the inmate.

In ruling on a defendant's motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, affording it the benefit of every reasonable inference which may be drawn therefrom. *State v. Pigott*, 331 N.C. 199, 207, 415 S.E.2d 555, 559 (1992); *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). If any evidence submitted tends to prove the fact in issue, then it is proper to submit the case to the jury. *Pigott*, 331 N.C. at 207, 415 S.E.2d at 559-60.

The statute under which defendant was charged, N.C. Gen. Stat. § 14-258.1, states in pertinent part:

If any person shall... confederate, conspire, aid, abet, solicit, urge, investigate, counsel, advise, encourage, attempt to procure, or procure another or others to give or sell to any inmate of any charitable, mental or penal institution... any controlled substances... he shall be punished as a Class H felon....

N.C. Gen. Stat. § 14-258.1(a) (2001).

Here, the State's evidence tended to show that defendant gave the deodorant to Officer Duckworth with instructions to give it to an inmate. The fact that the marijuana never reached the inmate is immaterial, as the statute prohibits an "attempt to procure... another" to give a controlled substance to an inmate. Therefore,

the trial court did not err in denying defendant's motion to dismiss.

Next, defendant contends the marijuana was improperly admitted into evidence. Specifically, defendant argues it was never identified or tested by an expert. Although the record does not contain any finding that Officer Duckworth was testifying as an expert, the trial court's overruling of defendant's objection was an implicit determination that he was so qualified. *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142 (1990). The qualification of expert witnesses is within the trial court's discretion. *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985). We review this assignment of error for an abuse of that discretion. *Id.*

Experts may testify to assist the trier-of-fact in determining a fact in issue, provided they are qualified as an expert by knowledge, skill, experience, training or education. N.C. Gen. Stat. § 8C-1, Rule 702 (2001); see *State v. Davis*, 106 N.C. App. 596, 418 S.E.2d 263 (1992). Specifically, our courts have upheld a law enforcement police officer's expert opinion as to the identity of controlled substances. *State v. Fletcher*, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

When the State introduced the marijuana, it was identified by Officer Duckworth, over the objection of defendant. Officer Duckworth testified that he had been employed with the sheriff's department for approximately one and one-half years, had been in the Army for six and one-half years where he had served as a drug and alcohol NCO, and that he had experience in identifying

controlled substances and was familiar with marijuana. This was sufficient knowledge, experience and training to support the trial court's determination that Officer Duckworth's testimony would be helpful to the jury in determining whether the substance seized was marijuana. We find no abuse of discretion.

Lastly, defendant contends the trial court erred in not granting a mistrial after Officer Duckworth testified he "recognized Allen Dwayne Huffman as as [sic] being incarcerated before in the jail." Defendant's objection was sustained and the trial court allowed his motion to strike this testimony. However, on cross-examination by the State, defendant testified that he had been convicted of assault with a deadly weapon, assault inflicting serious injury and concealed weapons charges.

The trial court is required to grant a mistrial if there occurs "error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2001). Whether such an error or defect has occurred is within the discretion of the trial court. *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997); *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982).

The trial court sustained defendant's objection and allowed defendant's motion to strike. Similar information to which defendant objected was later elicited from him on cross-examination. Defendant has failed to show that he sustained substantial and irreparable harm which would require a mistrial.

Therefore, we find the trial court did not abuse its discretion in not granting a mistrial.

No error.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).