

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-50

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v.

Wayne County
Nos. 96 CRS 5405, 11737

CHRISTOPHER DONNELL BRINSON

On writ of certiorari to review the judgments entered 5 September 1996 by Judge Quentin T. Sumner in Superior Court, Wayne County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Deborah L. Newton, for the State.

Benjamin M. Turnage for defendant-appellant.

WYNN, Judge.

Following his convictions for possession of a firearm by a convicted felon and being an habitual felon, defendant appeals on the ground that the trial court committed plain error by failing to declare a mistrial based on improper testimony. We uphold the trial court's decision not to declare a mistrial. Nonetheless, we must vacate the judgment and remand the matter for entry of a new judgment because the trial court erred in entering a separate judgment for being an habitual felon rather than entering a judgment for possession of a firearm by a convicted felon enhanced

by defendant's habitual felon status.

At trial, the State elicited testimony from Ronnie Johnson that he gave defendant a gun. He testified that defendant "wanted to have a gun on him . . . for his own protection." He also testified that defendant possessed the gun previously while engaged in an armed robbery. The trial court sustained defendant's objection to the testimony and instructed the jury to disregard Johnson's statements about the armed robbery.

Defendant argues on appeal that the trial court should have declared a mistrial *ex mero motu* based on Johnson's testimony that defendant possessed a firearm during an uncharged armed robbery. He asserts that Johnson had already testified that he had given defendant a handgun because defendant wanted to have a gun on him when he went out to a club. Thus, since there was already evidence that defendant had the gun, the testimony regarding defendant's use of a firearm during a robbery was unnecessary. Furthermore, defendant argues that the evidence was inflammatory and its only usefulness was to indicate that he had a propensity to engage in criminal behavior.

After careful review of the record, briefs and contentions of the parties, we find no error at trial. Whether to declare a mistrial is a decision:

within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion. It is appropriate for a trial court to declare a mistrial only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the

law.

State v. Bowman, 349 N.C. 459, 472, 509 S.E.2d 428, 436 (1998) (citations omitted). Here, defendant argues that the trial court should have declared a mistrial *ex mero motu* because the testimony regarding defendant's involvement in a prior armed robbery was inadmissible, unnecessary and inflammatory. We disagree and find that defendant received a fair trial. First, the trial court sustained defendant's objection and instructed the jury to disregard the statement. Thus, any prejudice to defendant was cured. *State v. Knight*, 340 N.C. 531, 564, 459 S.E.2d 481, 501 (1995). Second, Johnson's testimony did not result in "substantial and irreparable prejudice to the defendant's case," *State v. Harris*, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001), *appeal dismissed and review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002), especially in light of the overwhelming evidence of defendant's guilt. Specifically, we note that defendant admitted at trial that he possessed the gun.

Nonetheless, we have further reviewed defendant's record on appeal and determined that the record shows an error in the entry of judgment on the habitual felon conviction. The record shows that after his conviction for possession of a firearm by a convicted felon, defendant admitted his status as an habitual felon. However, no judgment and commitment was entered on the possession of the firearm charge, the court noting in an order that "action abates, defendant sentenced as [an] habitual felon." Instead, judgment was entered solely on the habitual felon charge

and defendant was sentenced to a term of 116 to 149 months imprisonment.

We hold that the trial court erred in entering a separate judgment for being an habitual felon rather than entering a judgment for possession of a firearm by a convicted felon enhanced by defendant's habitual felon status. "'Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence.'" *State v. Gentry*, 135 N.C. App. 107, 110, 519 S.E.2d 68, 70 (1999) (quoting *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977)); See also N.C. Gen. Stat. § 14-7.1 (2001). *State v. Mason*, 126 N.C. App. 318, 324, 484 S.E.2d 818, 821 (1997) ("defendant's status as a violent habitual felon serves only to enhance his punishment for the predicate substantive felony"). Accordingly, we vacate and remand the case to the trial court for entry of a new judgment and commitment in accordance with G.S. 14-7.1 *et seq.*

No error in part, vacated and remanded in part.

Judges MCGEE and CAMPBELL concur.

Report per Rule 30(e).