An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-252
NO. COA11-1082

NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Stanly County
Nos. 08 CRS 2711, 2713-14,
09 CRS 50093-94

MITCHELL TODD BLACK

Appeal by Defendant from judgments entered 20 August 2010 by Judge Thomas W. Seay, Jr. in Superior Court, Stanly County. Heard in the Court of Appeals 1 November 2011. As the issues presented by Defendant's appeals to this Court arise out of the same action and involve common questions of law, we have consolidated the appeals for hearing pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Charlotte Gail Blake for Defendant-Appellant.

McGEE, Judge.

Mitchell Todd Black (Defendant) was indicted on three counts of sexual activity by a custodian and on two counts of

receiving bribes. The charges stemmed from allegations that Defendant, who was a police officer with the Oakboro Police Department, agreed not to pursue or investigate criminal charges against the victims in exchange for the performance of sexual acts by the victims. Defendant was convicted as charged. The trial court consolidated two of the charges of sexual activity by a custodian and sentenced Defendant to a term of twenty-six to forty-one months in prison. On the third count of sexual activity by a custodian, the trial court sentenced Defendant to a concurrent term of thirty to forty-five months in prison. The trial court then consolidated Defendant's convictions for receiving bribes and sentenced him to a suspended term of fifteen to twenty-seven months in prison. Defendant appeals (Defendant's first appeal).

Defendant's Appeal in COA11-252

We first consider Defendant's contention that the trial court abused its discretion by denying his motion to sequester the State's witnesses. Prior to trial, Defendant moved the trial court to sequester the State's witnesses on the basis that sequestration was necessary "to prevent witnesses from tailoring their testimony to that of earlier witnesses" and "to aid in the detection of testimony that [wa]s less than candid." The trial court reserved ruling on Defendant's motion until after jury

selection in order to review the matter further. However, the trial court failed to rule on Defendant's motion. Moreover, at no point thereafter did Defendant seek a ruling on his motion or object to the trial court's failure to sequester. We conclude that, under these circumstances, Defendant has waived review of this issue on appeal. *See State v. Carson*, 46 N.C. App. 99, 102, 264 S.E.2d 404, 406 (1980).

Even assuming *arguendo* that this issue has been preserved for appeal, we conclude that Defendant has failed to demonstrate either an abuse of discretion or prejudice.

> A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.

State v. Call, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998) (citation omitted).

In this case, although Defendant alleged in his motion that witnesses might tailor their testimony to that of other witnesses, he has cited nothing in the record to show that any witnesses actually tailored their testimony to that of other witnesses. *See State v. Anthony*, 354 N.C. 372, 396, 555 S.E.2d 557, 575 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002) (where a defendant failed to point to any instance in the

record where a witness conformed his or her testimony to that of another witness, the defendant failed to show an abuse of discretion in the trial court's denial of a motion to sequester witnesses). Moreover, Defendant had been provided with witnesses' statements through discovery; thus, any attempt by a witness to tailor testimony could have been detected and attacked on cross-examination. *See State v. Cross*, 293 N.C. 296, 299, 237 S.E.2d 734, 737 (1977) (the fact that defendant had prior witness statements with which to impeach any inconsistencies in witness testimony meant the trial court did not abuse its discretion in denying a motion to sequester).

Defendant next argues that the trial court erred in sentencing him to a term of fifteen to twenty-seven months in prison for bribery. We agree.

Receiving bribes is punishable as a Class F felony. N.C. Gen. Stat. § 14-217(a) (2009). Defendant was properly sentenced from the presumptive range for a Class F, Level I felony to a minimum term of fifteen months in prison. N.C. Gen. Stat. § 15A-1340.17(c) (2009). However, the maximum corresponding sentence is eighteen months, not twenty-seven months. N.C. Gen. Stat. § 15A-1340.17(d) (2009). Accordingly, we remand Defendant's judgment for receiving bribes for correction of the judgment to reflect the proper corresponding maximum sentence as

to 08 CRS 2711.

Defendant's Appeal in COA11-1082

Defendant filed a motion for appropriate relief (MAR) on the same day he filed his written notice of appeal from the underlying convictions in this matter. The trial court denied Defendant's MAR in an order dated 9 February 2011. In a separate action, Defendant appealed the denial of his MAR (Defendant's second appeal). As discussed above, Defendant's second appeal has been consolidated for hearing with Defendant's first appeal, and this opinion addresses both appeals.

In Defendant's second appeal, Defendant presents only one argument: that the trial court "erred and abused its discretion in imposing aggravated sentences in [Defendant's] convictions . . . because the trial court considered [Defendant's] position as an on-duty police officer to support more than one aggravating factor. In addition, [Defendant's] position as an on-duty officer was inherent in the offenses charged." In his MAR, however, Defendant made arguments concerning the trial court's rulings regarding a bill of particulars, sequestration of witnesses, the exclusion of evidence, the appropriateness of the sentence based on the weight of the evidence, Defendant's presence at a hearing, and the weight of the aggravating and mitigating factors. Regarding

his MAR, Defendant did not raise with the trial court the argument he now makes on appeal. Thus, Defendant's argument is not relevant to the trial court's ruling on his MAR. Therefore, we affirm the trial court's denial of Defendant's MAR. *See, e.g. State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("[Our Supreme] Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.'").

Defendant argues that "[e]ven though there was no objection to the aggravated sentencing procedure in the lower court, this issue is properly before this Court." In so arguing, Defendant relies on N.C. Gen. Stat. § 15A-1446(d)(18) (2009), which provides that no objection need be made at trial to preserve an error on the grounds that: "The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." However, we note, even assuming that Defendant could properly raise this argument on appeal without objection, the argument would properly be raised in a direct appeal from the underlying convictions below. In his first appeal, COA11-252, Defendant had the opportunity to make this argument.

Our standard of review on appeal from a ruling on an MAR is as follows: "When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.'" *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation omitted). We find no persuasive argument that the trial court erred in ruling on Defendant's MAR and therefore affirm the trial court's order denying Defendant's MAR.

No error in part and remanded in part in COA11-252.

Affirmed in COA11-1082.

Judges ELMORE and McCULLOUGH concur.

Report per Rule 30(e).