

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-336

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v.

Rowan County
Nos. 99 CRS 3325 and 7649

ERICK THOMAS EATON

Appeal by defendant from judgment dated 21 October 1999 by Judge F. Fetzer Mills in Rowan County Superior Court. Heard in the Court of Appeals 19 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General John J. Aldridge, III, for the State.

R. Marshall Bickett, Jr. for defendant-appellant.

GREENE, Judge.

Erick Thomas Eaton (Defendant) appeals a judgment dated 21 October 1999 entered consistent with a jury verdict finding him guilty of possession of a handgun by a convicted felon, N.C.G.S. § 14-415.1 (1999), and of being an habitual felon, N.C.G.S. § 14-7.1 (1999).

On 21 June 1999, Defendant was indicted for possession of a firearm by a convicted felon and for being an habitual felon. The charge for possession of a firearm by a convicted felon was based on Defendant's previous conviction for possession of stolen goods. The habitual felon charge listed as underlying felonies Defendant's

convictions for: (1) larceny, (2) possession of stolen goods, and (3) possession with intent to sell or deliver cocaine.

At trial, Deborah Miller (Miller) testified she had known Defendant for years and had seen him on the sidewalk in front of her house the night of 6 March 1999. Miller and her husband went outside that evening and approached Defendant who was standing with a group of people including Stag Lee (Lee). At that point, Miller observed Defendant pull out a "silver" gun and heard him threaten Lee that he would beat him with the gun. Upon being asked by Miller and her husband to leave, the group went across the street where Defendant subsequently beat Lee with the gun. Miller went back inside to telephone 911. When she returned outside she saw Lee running away. Defendant, who was wearing a black sweatshirt, blue jeans, and a red hat, pursued Lee and shot at him twice. When asked by the State if she recognized a photograph of her residence at the time of the incident, Miller replied: "That's the house I used to stay in, and they [Defendant and others] had a habit of sitting up there." The State also asked Miller if she had encountered problems in the area in which she had lived at that time. Miller answered that drug dealers would sit in front of her house "[e]very day." Defendant objected to these questions, and the trial court sustained the objections. Defendant, however, did not move to strike Miller's answers from the record.

Salisbury Police Officer Michael Colvin (Colvin) testified he was dispatched on 6 March 1999 in response to a call about a man with a gun who had fired shots. Colvin was told the man was

wearing a black sweatshirt, blue jeans, and a red hat. When he arrived at the scene, Colvin spotted a man fitting this description. Colvin and another police officer, Officer Todd Marcum (Marcum), stopped Defendant and frisked him. Because they did not find a gun on Defendant or in the immediate area, they released him. After continuing to search the area, Marcum found a revolver lying on top of the garbage inside a green trash can the officers had previously overlooked, which was near the area where Colvin had first observed Defendant. The revolver "had four live rounds and two spent cartridges." Defendant claimed he neither possessed nor fired a gun that night.

The jury found Defendant guilty as charged. In determining Defendant's prior record level for his sentence for possession of a firearm by a felon, the trial court did not consider the underlying felonies for the habitual felon charge of possession of stolen goods, larceny, and possession with intent to sell or deliver cocaine.

The issues are whether: (I) Defendant has preserved for review his assignment of error claiming he was prejudiced by Miller's statements regarding drug dealers sitting in front of her house; and (II) the trial court erred in using the same underlying felony, i.e., possession of stolen goods, to prove the charge of possession of a firearm by a felon as was used to enhance the punishment of this crime by finding Defendant to be an habitual felon.

Defendant argues he was prejudiced by Miller's testimony that drug dealers sat in front of her house "every day" and that "they [Defendant and others] had a habit of sitting up there." The trial court sustained Defendant's objections to both of these statements. Defendant, however, did not request the trial court to strike Miller's responses. By failing to do so, Defendant has waived his objections, leaving room for plain error analysis only. See *State v. Burgin*, 313 N.C. 404, 409, 329 S.E.2d 653, 657 (1985). Defendant has also failed to specifically and distinctly argue plain error, thus waiving appellate review of this issue. See N.C.R. App. P. 10(c)(4); *State v. Call*, 349 N.C. 382, 407, 508 S.E.2d 496, 512 (1998).

II

Defendant further argues the trial court erred in using the same underlying felony, possession of stolen goods, to prove the charge of possession of a firearm by a felon as was used to enhance the punishment of this crime by finding Defendant to be an habitual felon. We disagree.

In *State v. Misenheimer*, this Court upheld a defendant's convictions for felony habitual impaired driving and being an habitual felon, both of which were based in part on the same underlying previous felony convictions. *State v. Misenheimer*, 123 N.C. App. 156, 472 S.E.2d 191, *disc. review denied*, 344 N.C. 441, 476 S.E.2d 128 (1996). This Court stated the only prohibition against using the same underlying felony for both the habitual impaired driving and habitual felon charge related to the

sentencing phase. *Id.* at 158, 472 S.E.2d at 193. N.C. Gen. Stat. § 14-7.6 provides that “[i]n determining the prior record level [of a defendant], convictions used to establish a person’s status as an habitual felon shall not be used.” N.C.G.S. § 14-7.6 (1999).

In this case, the trial court did not consider the underlying felonies of possession of stolen goods, larceny, and possession with intent to sell or deliver cocaine in determining Defendant’s prior record level for the purpose of aggravating his sentence. Accordingly, the trial court committed no error.

No error.

Judges McGEE and THOMAS concur.

Report per Rule 30(e).