NO. COA01-502

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Davidson County
Nos. 99 CRS 8512
99 CRS 21564

COREY RICO HORNE,
Defendant.

Appeal by defendant from judgment entered 6 December 2000 by Judge William Z. Wood, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 11 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General William McBlief, for the State.

Jon W. Myers, for defendant-appellant.

BRYANT, Judge.

Defendant appeals from a judgment sentencing him as a habitual felon to a minimum term of 75 months and a maximum term of 99 months following his conviction by a jury of possession of a firearm by a felon.

The State presented evidence tending to show that while conducting a driver's license checkpoint on 14 May 1999, officers of the Lexington Police Department saw defendant, the sole passenger in the backseat of a vehicle, cram something into the crevice of the seat. A search of the seat produced the seizure of a .38 caliber handgun from the crevice. Defendant had a number of

prior felony convictions.

Defendant testified that he placed crack cocaine, not a gun, in the crevice of the seat.

Defendant contends that the court erred as a matter of law by failing to investigate jury misconduct. During the charge conference, the bailiff handed the court a note from the jury. The note contained two questions: (1) "Who is the gun registered to?" and (2) "Was any Crack Cocaine found in the back seat of the vehicle?" The court asked the parties for input as to what to tell the jurors. The court indicated that in response to the note it would instruct the jury to consider only the evidence they had heard. After the prosecutor indicated agreement with the court's proposal, the court asked for defendant's position. Defendant's counsel nodded his head in agreement with the court's proposed instruction. The court then instructed the jury as it proposed. Defendant did not object to the court's instruction.

By not objecting, and in fact assenting, to the court's action, defendant waived his right to appellate review of alleged juror misconduct. *State v. Jaynes*, 342 N.C. 249, 262-63, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). Further, the issue of juror misconduct is addressed to the discretion of the trial court. *State v. Murillo*, 349 N.C. 573, 600, 509 S.E.2d 752, 767-68 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). A trial court's discretionary decision is not subject to plain error review. *State v. Steen*, 352 N.C. 227, 254-55, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S.

1167, 148 L. Ed. 2d 997 (2001). This assignment of error is without merit.

Defendant also contends that he was denied his right to effective assistance of counsel. He contends counsel rendered ineffective assistance when he failed to call witnesses from a prior trial, failed to cross examine the witnesses, failed to file appropriate motions, failed to formulate a coherent theory of the case, and failed to request in a timely fashion the transcript of the prior trial which resulted in a mistrial due to a non-unanimous verdict.

To prove that counsel rendered ineffective assistance, the defendant must show that counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 561-562, 324 S.E.2d 241, 248 (1985). More specifically, the defendant must show (1) counsel's performance was deficient; and (2) his defense was prejudiced thereby. *Id.* at 562, 324 S.E.2d at 248. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248.

The decisions as to what witnesses to call, whether to conduct cross examination, and other matters of strategy and tactics are within the exclusive province of the lawyer, who is necessarily given wide latitude. *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979), *overruled on other grounds by State v.*

Grier, 307 N.C. 628, 300 S.E.2d 351 (1983). Here, counsel interposed several timely and successful objections to examination by the prosecutor. Counsel succeeded in excluding evidence that defendant had been convicted of possession of a concealed weapon arising out of this same incident. Defendant also has not shown that he was prejudiced by counsel's failure to obtain the transcript of the first trial. The speculative possibility that the transcript contained material for impeachment and could conceivably have had an effect on the jury's verdict is insufficient to support a claim of ineffective assistance of counsel.

No error.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).