

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-814

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v.

CLAYTON WADE McCALLUM,  
Defendant.

Durham County  
Nos. 00 CRS 22512,  
00 CRS 57623,  
00 CRS 57624

Appeal by defendant from judgment entered 6 February 2001 by Judge Stafford G. Bullock in Durham County Superior Court. Heard in the Court of Appeals 22 April 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for the State.*

*Miles and Montgomery, by Lisa Miles, for defendant-appellant.*

HUDSON, Judge.

On 16 October 2000, defendant was indicted for obtaining property by false pretenses, felonious breaking and entering, felonious larceny, felonious possession of stolen goods, and being an habitual felon. Defendant allegedly broke and entered into a garage in Durham, North Carolina, stole a tiller, and then went to a pawn shop where he obtained \$150 for the tiller. The case was tried before a jury at the 5 February 2001 Criminal Session of Durham County Superior Court.

After the jury handed up the verdict sheets, the court clerk

read aloud the verdicts. When the clerk read a verdict of not guilty for the count of possession of stolen goods, the transcript reflects that there was a "stir" among the jurors. The foreman of the jury then interrupted, and the judge asked to see the verdict sheet. When the clerk finished reading the verdicts, the court questioned the jury about each of the counts. When questioned about the verdict of not guilty of possession of stolen goods, the jury foreman informed the trial court that the verdict was incorrect, that it was a "clerical error," and that the verdict "was suppose[d] to be guilty, unanimously." Based on the statements of the foreman, the jury was instructed to return to the jury room and "correct the clerical error." When the jury returned, it returned a verdict of guilty on the charge of possession of stolen goods.

Defendant was convicted of possession of stolen goods and obtaining property by false pretenses, as well as being an habitual felon, and was sentenced to a term of 135 to 171 months imprisonment. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by returning the verdict form to the jury and instructing it to correct the clerical error. Defendant contends that the verdict was unambiguous and proper in form, and that the trial court could not decline to accept it. See *State v. Abraham*, 338 N.C. 315, 359, 451 S.E.2d 131, 155 (1994) (stating that court may refuse to accept verdict only when it "is not responsive to the indictment or the verdict is incomplete, insensible or repugnant" (internal quotation

marks omitted)); *State v. Currence*, 14 N.C. App. 263, 265, 188 S.E.2d 10, 11 (stating that "if the jury returns a verdict that is permissible under the charge and complete in itself, the court must accept it"), *cert. denied*, 281 N.C. 315, 188 S.E.2d 898 (1972). Defendant further contends that the proper course for the court was to first poll the jury. See N.C. Gen. Stat. § 15A-1238 (1999). Defendant argues that had there then been dissent as to the verdict returned, the court could have required the jury to return to the jury room for further deliberations. Defendant further argues that the error in the trial court's failure to poll the jury was compounded by its instruction to the jury to "return to the jury room to make that correction." Defendant contends that the "guilty" verdict could have been the result only of the foreman's vote, and the jury could have misunderstood the court's instruction to mean that the court thought the jury got the "wrong" verdict, thus constituting an impermissible expression of judicial opinion. See N.C. Gen. Stat. § 15A-1222 (1999).

After careful review of the record, briefs and contentions of the parties, we find no error. Our Supreme Court has stated:

The verdict is not complete until accepted by the court. It is the practice in North Carolina that before the court accepts and records the verdict of the jury, the clerk repeats to the jury its verdict as understood by the court. When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say: "So say you all?" At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual.

*State v. Best*, 280 N.C. 413, 419, 186 S.E.2d 1, 5 (1972) (citations and internal quotation marks omitted). In the case *sub judice*, when the verdict for possession of stolen property was announced, there was a stir among the jurors and the foreman attempted to interrupt. In response to the jury's apparent concern, the trial court repeated the verdicts and asked the jurors to confirm that these were their verdicts. When the court repeated the not guilty verdict for possession of stolen property, the jury foreman announced that this verdict was in error, that it was a mistake. Accordingly, the trial court sent the jurors back to the jury room to correct the error. The court expressed no opinion on the verdict in its instructions, simply instructing the jury to correct the error that the foreman stated had occurred. Defendant did not ask for the jury to be polled, and thus waived this right. *State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 403 (1991). Upon its return, the jury found defendant guilty. "There was no possibility that there was any mistake in this verdict." *Best*, 280 N.C. at 420, 186 S.E.2d at 5.

No error.

Judges GREENE and TYSON concur.

Report per Rule 30(e).