

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1130

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

Anson County
No. 04 CRS 51381

KENNETH DARRYL PARRISH

Appeal by defendant from judgment entered 12 May 2005 by Judge Christopher J. Collier in Anson County Superior Court. Heard in the Court of Appeals 8 March 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Grady M. Balentine, Jr., for the State.

John T. Hall, for defendant-appellant.

JACKSON, Judge.

On the evening of 27 July 2004, Pernell Harris ("Harris") and his brother were cleaning fish in a barn outside a friend's home. Darryl Parrish ("defendant"), an acquaintance and neighbor of Harris, came into the barn and showed Harris and his brother a knife, stating that it was the type of knife they needed to clean fish. Shortly thereafter, an argument ensued between Harris and defendant, in which defendant accused Harris of stealing defendant's gun. After a brief argument, defendant went outside, and Harris went back to cleaning the fish. Harris then felt something touch his left shoulder, and when he turned around he saw

defendant swinging a knife at him. Harris put his arm up and was cut on his wrist by defendant's knife. When the police arrived, Harris' brother gave the responding officer a butcher knife with Harris' blood on the tip that had been taken from defendant.

On 21 March 2005, defendant was indicted on the misdemeanor offense of assault with a deadly weapon, in violation of North Carolina General Statutes, section 14-33(c)(1). Defendant's case came for trial on 9 May 2005, at which time he also was tried for the offenses of unlawfully removing a serial number on a firearm and possession of a firearm by a felon. At the close of the State's evidence, the trial court granted defendant's motion to dismiss the charge of unlawfully removing a serial number on a firearm, but denied the motion to dismiss as to defendant's two additional charges.

Following deliberations, the jury returned verdict sheets showing "not guilty" for each of the offenses charged. When attempting to confirm that these verdicts were the jury's unanimous verdicts, there was some confusion as all of the jurors failed to respond to the trial court's questions. The trial court, which did not state that it had accepted the jury's verdict, thanked the jury for their service and excused them. As the jury was leaving the courtroom, one of the jurors immediately approached the bench and spoke to the trial judge, at which point the trial judge called the jury back into the court room, and stated that the juror had "indicated there may be some problems with the verdict sheets." The trial judge then asked the jury to return to the jury room, and

review the verdict sheets to make sure that they were their unanimous verdicts. The trial court instructed the jury that if the verdict sheets were correct, to do nothing, and if they need to be changed, to do so as needed. After the jury was excused, defendant made a motion for a mistrial. The trial court delayed its ruling on the motion until after the jury returned. Within minutes, the jury returned to the courtroom and returned a verdict finding defendant guilty of misdemeanor assault with a deadly weapon.

The trial court confirmed with the jury that the guilty verdict was their unanimous verdict. The trial court *sua sponte* asked the clerk to poll the jury. When the jury was polled, each juror responded that the corrected verdict was his or her unanimous verdict. Defendant renewed his motion for a mistrial, and asked that the trial court enter the original verdict that was returned by the jury prior to the jury's being called back. The trial court denied defendant's motion, and found that after the jury had left, they were called back before any of them had an opportunity to discuss the verdict with each other or anyone else. The trial court found that the foreperson simply made a mistake in marking the verdict sheet. Defendant was sentenced on the charge of misdemeanor assault with a deadly weapon to a term of 150 days imprisonment with the North Carolina Department of Correction. Defendant now appeals from his conviction and sentence.

On appeal, defendant contends the trial court erred in allowing the jury to impeach their verdict, and in sentencing

defendant for the offense of misdemeanor assault with a deadly weapon after the jury initially returned a verdict of "not guilty" for the offense.

"Generally, once a verdict is rendered, jurors may not impeach it." *State v. Heatwole*, 344 N.C. 1, 12, 473 S.E.2d 310, 314 (1996) (citing *State v. Cherry*, 298 N.C. 86, 100, 257 S.E.2d 551, 560 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980)), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997). North Carolina General Statutes, section 15A-1240 and Rule 606(b) of the Rules of Evidence provide limited exceptions to the rule against impeachment of a verdict. Section 15A-1240 provides that once a jury has been "dispersed," the verdict may be impeached by the testimony of a juror only when it concerns:

- (1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or
- (2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

N.C. Gen. Stat. § 15A-1240(c) (2005). Rule 606(b) of our Rules of Evidence provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside

influence was improperly brought to bear upon any juror.

N.C. Gen. Stat. § 8C-1, Rule 606(b) (2005).

"A jury pronouncement is not a verdict until accepted by the court." *State v. Ware*, 31 N.C. App. 292, 296, 229 S.E.2d 249, 252 (1976) (citing *State v. Rhinehart*, 267 N.C. 470, 481, 148 S.E.2d 651, 659 (1966)). In the instant case, the trial court did not state that it had accepted the jury's verdict, and there was no statement by the court ordering the verdict to be entered and recorded. Although there is no indication that the jury's initial verdict was based on bribery, intimidation, or extraneous matters, there is evidence that the verdict sheet did not accurately reflect the jury's verdict. The record and transcripts presented to this Court indicate that when the trial court inquired as to whether the jury's initial verdict was their actual and agreed upon verdict, no juror responded. The transcript states that some of the jurors said "yes," but that the trial court did nothing to acknowledge the verdict as the final, accepted verdict of the jury. When the trial court called the jurors back to review their verdict sheet, the trial court specifically instructed the jury that if the verdict sheet accurately reflected their unanimous verdict, then they were to do nothing to it, but that if it was incorrect, they were instructed to correct it. The jury in the instant case was not attempting to impeach their initial verdict, but was instead attempting to correct a clerical error by informing the court of the inaccurately reflected verdict.

Following the trial court's acceptance of the jury's corrected verdict, the trial court made the following findings of fact.

The Court noted upon the Clerk taking the verdict, the Clerk asked the jury if that was their [original] verdict and was that still their verdict, or words to that effect.

And the Court observed a number of jurors, perhaps two or three, nodding affirmatively. There was no verbal response from any juror. At which time the Court thanked the jury and released the jury from any further obligation on this case.

The Court noted as the jury stood up that juror number three summonsed the bailiff and was speaking to the bailiff as the jurors began filing out of the jury box.

The bailiff immediately got the Court's attention and indicated that juror number three wanted to approach the bench, which he did immediately as the rest of the jurors were filing out of the jury box.

Juror number three said that the reported not guilty verdict for the assault with a deadly weapon charge was an error; that they found him guilty. The Court immediately summonsed all the jurors back to the jury box.

The majority of the jurors were in the aisle on the way out of the courtroom. That two, maybe three jurors had made it to the vestibule just outside the courtroom.

That it was the Court's observation, based on the time that had elapsed, that there was no time for the jurors to collaborate or further deliberate on their verdict.

That within approximately 60 seconds the jurors were re-assembled in the jury box. And the foreperson, I believe, and the record will indicate, said she had made a mistake. And the Court sent the jurors back into the jury room for them to decide among themselves whether or not a mistake had been made.

They returned to the courtroom approximately one to two minutes later, and returned in open court a verdict of guilty to assault with a deadly weapon, contrary to their initial verdict.

The Court finds that it was obvious that the foreperson simply made an error and checked the wrong blank. And that it would be contrary to the interests of justice for the defendant to benefit from what was an obvious clerical error by the foreperson.

Defendant's case is somewhat similar to *State v. Farmer*, 158 N.C. App. 699, 582 S.E.2d 352 (2003), in which the trial court presented the jury with a second verdict sheet after their initial verdict of "not guilty" was read aloud in open court. In *Farmer*, this Court upheld the trial court's actions, holding that the jury's initial verdict had not been accepted by the trial court prior to the trial judge's decision to submit a second verdict sheet to the jury. *Id.* at 705, 582 S.E.2d at 356. In *Farmer*, when the trial court questioned the jury, they, in unison, informed the trial court that the "not guilty" verdict which was read aloud was not their unanimous and correct verdict. *Id.* at 704, 582 S.E.2d at 355. In defendant's case, the jury did not, in unison, reply that the initial verdict was their unanimous and correct verdict. Instead, the jury failed to respond to the Clerk when asked "Is this your verdict so say you all?" None of the jurors responded to the Clerk's question, and only some of them replied "yes" when ordered by the trial court to answer the Clerk's question out loud. This interaction with the trial court, coupled with the juror's immediate report to the trial court regarding an error in the verdict sheet clearly evidences that the verdict initially

announced was a mere clerical error, and was not in fact the jury's unanimous and correct verdict. The trial court in the instant case expressed no opinion on the verdict in its instructions to the jury that they "go back in the jury room, review the verdict sheets, and make sure that these were your unanimous verdicts." In fact, the trial court instructed the jury that if the verdict sheets were correct, to "leave [them] alone. If they need to be changed, do what you need to do." The trial court simply instructed the jury to correct the clerical error, if there was one, as had been reported to the court by the juror.

Our statutes provide the defendant, and the trial court, with avenues to ensure that a verdict returned by a jury is indeed the jury's unanimous verdict. North Carolina General Statutes, section 15A-1238 allows for the individual polling of the jury following the announcement of the jury's verdict.

Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

N.C. Gen. Stat. § 15A-1238 (2005). "The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered." *State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 402 (1991). In the instant case, the trial court *sua sponte* requested the jury be

polled following the announcement of their corrected verdict. Each juror replied in the affirmative that the "guilty" verdict was in fact their true and unanimous verdict. The jury in defendant's case was unanimous in their corrected verdict and conveyed this to the trial court.

Based on the transcript, it is apparent that the initial verdict consisted of a clerical error made by the jury foreman, and was not the jury's unanimous and agreed upon verdict. We hold the trial court's actions of calling the jury back to the court room to review their initial verdict did not constitute an impermissible impeachment of the jury of their verdict, as a clerical error had been made, and the trial court had not yet accepted and entered the jury's initial verdict. Defendant's assignment of error is therefore overruled.

Defendant next contends the trial court erred in denying defendant's motions for a directed verdict and to set aside the second verdict returned by the jury.

Following the return of the jury's corrected verdict, defendant made motions for a mistrial and to set aside the second verdict. Defendant also made a motion for a directed verdict, asking the trial court to accept and enter the verdict initially returned by the jury. The trial court denied all of defendant's motions. On appeal, defendant presents argument only as to the denial of his motion for a directed verdict, thus this is the sole issue we will address with respect to this portion of defendant's appeal. See N.C. R. App. P. 28(b)(6) (2005) ("Assignments of error

not set out in the appellant's brief, or in support of which no reason or argument is stated . . . , will be taken as abandoned.").

The standard of review for a motion for a directed verdict is the same as that for a motion to dismiss. See *State v. Burrus*, 344 N.C. 79, 93, 472 S.E.2d 867, 876 (1996); *State v. Ingle*, 336 N.C. 617, 630, 445 S.E.2d 880, 886 (1994) ("it is well settled that a motion to dismiss and a motion for a directed verdict have the same effect"), *cert. denied*, 514 U.S. 1020, 131 L. Ed. 2d 222 (1995). "In reviewing a motion to dismiss, 'the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense.'" *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001) (quoting *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982)), *aff'd as modified*, 355 N.C. 266, 559 S.E.2d 788 (2002). In reviewing a challenge to the sufficiency of the evidence presented at trial, all evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of all reasonable inferences which may be drawn from that evidence. *State v. Compton*, 90 N.C. App. 101, 103-04, 367 S.E.2d 353, 355 (1988).

To sustain a conviction for the misdemeanor offense of assault with a deadly weapon, a defendant must be found to have committed an assault, an assault and a battery, or an affray, and in doing so, "[i]nfl[ic]t[ed] serious injury upon another person or use[d] a deadly weapon." N.C. Gen. § 14-33(c)(1) (2005). In the instant

case, the evidence presented at defendant's trial tended to show that defendant got into an argument with Harris, and that at some point defendant approached Harris with a knife, and touched the knife to Harris' shoulder. Harris turned towards defendant, whom Harris testified was swinging the knife at him, and Harris was cut on his wrist. Evidence was presented that a butcher knife with Harris' blood on the tip was taken from defendant and given to the responding police officer. The trial court instructed the jury that a deadly weapon is one "which is likely to cause death or serious bodily injury," thus leaving the issue of whether the knife was in fact a deadly weapon for the jury to decide. Based on the evidence presented at defendant's trial, we hold there was sufficient evidence of each element of the misdemeanor offense and that defendant was indeed the perpetrator. Thus, the trial court acted properly in denying defendant's motion for a directed verdict.

Finally, defendant contends the trial court erred in denying his motion to dismiss the charge of misdemeanor assault with a deadly weapon. At the close of the State's evidence, defendant made a motion to dismiss all charges, and the trial court denied the motion to dismiss the charge of assault with a deadly weapon, but granted the motion to dismiss the charge of unlawfully removing a serial number on a firearm.

As stated previously, the standard of review for a motion to dismiss is the same as that for a motion for directed verdict. Thus, as there was sufficient evidence as to each element of the

charged offense of misdemeanor assault with a deadly weapon, such that a motion for directed verdict should be denied, we therefore hold there also was sufficient evidence which supports the trial court's denial of defendant's motion to dismiss. As there was sufficient evidence of each element of the offense charged, the trial court acted properly in denying defendant's motion to dismiss, and in submitting the case to the jury.

No error.

Judges ELMORE and STEELMAN concur.

Report per Rule 30 (e).