

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1654

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

Guilford County
No. 03 CRS 086858

TONY BERNARD MILLER

Appeal by defendant from judgment entered 10 March 2005 by Judge Judson D. DeRamus, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 11 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for the State.

Brannon Strickland, PLLC, by Robin E. Strickland and Anthony M. Brannon, for defendant-appellant.

CALABRIA, Judge.

Tony Bernard Miller ("defendant") appeals from a judgment entered upon a jury verdict of guilty of felonious possession of cocaine. We find no error.

The State presented evidence tending to show that on 5 June 2003, members of the United States Marshal's Fugitive Task Force received information that a certain named fugitive might be found in a residence located at 509A Richardson Avenue in High Point. Members of the task force knocked on the door of this residence, and defendant opened the door. At that time, the residence was occupied by defendant and a second person, William Dockery

("Dockery"). Dockery, who resided at the residence, allowed officers to search for the fugitive in the residence. One of the officers found a small plastic bag in the bathroom containing what appeared to be crack cocaine. The officers then handcuffed defendant and Dockery and placed them under investigative detention, and Dockery told the officers that there was a gun under the living room couch. The officers lifted the couch and found a handgun. At that time, defendant admitted the gun belonged to him. As two officers observed, a third officer conducted a patdown search of defendant and retrieved from defendant's pocket a plastic bag containing a white powdery substance, subsequently identified as 4.7 grams of cocaine.

Based on this and related evidence, the State charged defendant with felonious possession of cocaine and possession of cocaine with intent to sell and deliver. A grand jury subsequently returned the necessary indictment, and on 9 March 2005, this matter was heard in Guilford County Superior Court. At the close of the State's evidence the trial court granted defendant's motion to dismiss the charge of possession of cocaine with intent to sell and deliver. Defendant presented no evidence, and the trial court then submitted the charge of felonious possession of cocaine to the jury. The jury found defendant guilty of the charged offense. During sentencing, the trial court sentenced defendant to a minimum of six months to a maximum of eight months in the North Carolina Department of Correction. The trial court then suspended the sentence and placed defendant on supervised probation for thirty

months. Defendant appeals.

Defendant first contends the court "committed prejudicial error in allowing the State to present irrelevant and inflammatory evidence regarding a firearm which had the unavoidable effect of predisposing the jury toward conviction." We hold this argument has not been properly preserved for our review.

In this case, two police officers testified, without objection from defense counsel, about the location and method of retrieval of the gun. Additionally, one of these officers testified, without objection, that defendant admitted ownership of the gun. Defendant later objected for the first time to submission of evidence regarding the gun when a third officer testified about it. Pursuant to N.C. R. App. P. 10(b)(1) (2006), "[i[n] order to preserve a question for appellate review, a party must have presented to the trial court a *timely* request, objection or motion[.]" (Emphasis added). Moreover, our Supreme Court has held, "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Accordingly, because defendant did not object when the challenged evidence was first introduced, this argument has not been preserved for our review.

Defendant's remaining contention is that the court committed plain error by giving the "dynamite charge" provided in N.C. Gen. Stat. § 15A-1235 (2005). The record shows that less than one hour

after retiring to deliberate, the jury returned to the courtroom at 11:25 a.m. and informed the trial court that it was deadlocked. After determining that the jurors were unanimous as to their inability to agree, the trial court instructed the jurors to

consult with one another with a view to reaching an agreement if it can be done without violence to individual judgment. . . . In the course of deliberations, each of you should not hesitate to reexamine your own views and change your opinion, if it is erroneous. However, none of you should surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict at this time.

The trial court then asked the jury to "give at least some additional deliberation time to this matter," and it repeated the foregoing instructions and dismissed the jurors at 11:30 a.m. to deliberate further. The jury returned to the courtroom at 12:17 p.m. to be excused for lunch. After resuming deliberations at 2:06 p.m., the jury returned to the courtroom with a verdict at 2:28 p.m.

Defendant notes that he did not object to this instruction at the time it was given, and thus, he asks this Court to review the matter under a plain error standard. See *State v. Williams*, 315 N.C. 310, 328, 338 S.E.2d 75, 86 (1986). Under this standard, we review the entire record and determine whether the instruction had a probable impact on the jury's finding of guilt. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). "In deciding whether the court's instructions forced a verdict or merely served as a catalyst for further deliberation, an appellate court must

consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364-65 (1978).

In this case, the jury had been deliberating for less than one hour when it returned to the courtroom, and the additional instructions given by the trial court carefully directed the jurors to attempt to reach a consensus without the abandonment of any deeply held belief. The jury then deliberated for over an hour before reaching its verdict. Under these circumstances, it may be fairly stated that the instructions served as a catalyst for further deliberations without any element of coercion. See *id.* For the foregoing reasons, we conclude the trial court did not commit plain error.

No error.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).