An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-486

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. — Mecklenburg County, Nos. 07 CRS 203651-52

WILLIAM JARMAL GOSIER

On writ of certiorari to review judgment entered 29 April 2008 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 October 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Richard Moore, for the State.

Michael E. Casterline for defendant.

ELMORE, Judge.

William Jarmal Gosier (defendant) appeals from judgment entered pursuant to a jury verdict finding him guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The trial court consolidated defendant's convictions for sentencing and sentenced defendant in the presumptive range to a term of sixty to eighty-one months' imprisonment. Defendant did not give timely notice of appeal, but on 9 June 2009, this Court granted his petition for writ of certiorari to review the judgment entered against him.

At trial, the State’s evidence tended to show that on the evening of 22 January 2007, Ramon de Santos, a painter for a construction company, was sent to patch holes in the wall of a house at 4952 Rockwood Road in Charlotte. The house was occupied at the time by three children, one young boy and two teenage girls. While Mr. Santos worked on patching the walls, defendant and one or more other individuals came into the house and spoke with Mr. Santos. These individuals left after talking with Mr. Santos, but shortly thereafter, one of the girls let two teenage boys into the house. Mr. Santos identified the older of the two boys as defendant and stated that both had chrome semi-automatic handguns. The boys pointed the guns at Mr. Santos, threatened to kill him, and demanded his wallet. The younger boy hit Mr. Santos, and Mr. Santos gave the boys his wallet, which contained $300.00. The boys fled and one of the girls in the house ran after them. She returned with Mr. Santos’ wallet, but without the money. Mr. Santos phoned the police and gave a statement detailing the robbery. The officers learned the street names of the boys involved and drove to the home of the younger boy, known as “Junior.” When officers arrived at the home, a group of boys were walking away, and one was standing in front of the residence. Mr. Santos had accompanied one of the investigating officers and identified defendant, who was among the boys walking away, and Junior, who was standing in front of his home, as the two boys who had robbed him. Officers subsequently arrested defendant and Junior. Defendant gave a statement to investigating officers in

which he admitted being in the area of the robbery, but he denied any direct involvement in the crime.

Defendant testified on his own behalf at trial. Defendant stated he had run away from home and was staying at the house where Mr. Santos was sent to repair the walls. He was playing video games when Mr. Santos arrived, but then he left and went to Junior's house, where he continued to play video games. Defendant testified that he returned to the house after one of the girls phoned and stated that she was afraid of Mr. Santos and that Mr. Santos had spoken with her about having sex for money. Defendant said Junior and another boy, "M," accompanied him back to the house, where the girl told them that Mr. Santos had a lot of money and they should rob him. Defendant stated that "M." had a spray-painted BB gun, and that he didn't want to rob Mr. Santos because he was afraid Mr. Santos might have a real gun. Defendant testified he saw Junior and "M." rob Mr. Santos and that Junior was pointing a gun at Mr. Santos while "M." stood behind Mr. Santos. After Junior and "M." took the wallet, they ran off, and defendant stated that he ran behind the house and back to Junior's home, arriving a few minutes after Junior and "M."

Defendant now argues that the trial court erred by giving an ambiguous jury instruction on the charge of robbery with a dangerous weapon. We hold that defendant has not properly preserved this issue for review on appeal.

Defendant contends that the challenged jury instruction violates his constitutional right to a unanimous verdict, which is

reviewable on appeal without having been preserved by objection at trial. *See State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("Where, however, the error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal.") However, this Court has held that an argument involving whether or not a jury instruction is ambiguous does not implicate a defendant's constitutional right to a unanimous verdict and must be preserved by objection at trial or argued as plain error on appeal. *State v. Walker*, 167 N.C. App. 110, 125-26, 605 S.E.2d 647, 658 (2004), *vacated in part on other grounds*, 361 N.C. 160, 695 S.E.2d 750 (2006). Defendant did not object to the jury instruction challenged on appeal, nor did he object to the submission to the jury of the printed jury instruction given in the case after the jury asked the court to clarify the difference between robbery with a firearm and common law robbery with respect to when the weapon "is not a true firearm, but the victim has every reason to believe . . . that it is." Accordingly, defendant's issue presented on appeal is only reviewable for plain error. *State v. Maready*, 362 N.C. 614, 621, 669 S.E.2d 564, 568 (2008). Defendant does not, however, argue plain error in his brief to this Court and, thus, he has waived appellate review of this issue. *State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 756 (2005); *see also* N.C.R. App. P. 10(a)(4)(2010) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may

be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). We note that, even had this issue been properly preserved for appeal, the trial court's instruction does not amount to error.

Defendant next argues that the trial court erred or abused its discretion when it failed to find defendant's young age as a mitigating factor at sentencing. Defendant contends that his culpability for his crime is lessened because he was only sixteen years old at the time of the crime. Defendant urges this Court to consider *Roper v. Simmons*, 543 U.S. 551, 161 L. Ed. 2d 1 (2005) (holding that the characteristics of juvenile offenders rendered the death penalty unconstitutional as applied to offenders who committed their offenses before the age of eighteen years old), in deciding this issue. Defendant's reliance on *Roper* is misplaced. In *Roper*, the Court considered only the imposition of the death penalty for juvenile offenders. Accordingly, the Court's holding in *Roper* is not applicable to defendant's argument that the young age of a juvenile offender requires the juvenile be given a mitigated sentence.

We review a trial court's findings and application of mitigating factors for an abuse of discretion. *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 785 (2006); *see also* N.C. Gen. Stat. § 15A-1340.16(a) (2009) ("The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate,

but the decision to depart from the presumptive range is in the discretion of the court.") However, it is well established that a "trial court is required to take 'into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing.'" *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (quoting *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997)); *see also Hagans*, 177 N.C. at 31, 628 S.E.2d at 786 ("Defendant's notion that the court is obligated to formally find or act on proposed mitigating factors when a presumptive sentence is entered has been repeatedly rejected.").

Here, the trial court sentenced defendant to a term of imprisonment in the presumptive range. *See* N.C. Gen. Stat. § 15A-1340.17(c) (2009). Thus, even had defendant presented a preponderance of evidence to support a finding that his age or immaturity at the time of the commission of the offense significantly reduced his culpability for the offense, the trial court was not obligated to find or act on the proposed mitigating factor. Consequently, we hold that the trial court did not abuse its discretion by failing to make the requested finding and sentence defendant in the mitigated range.

No error.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).