

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-487

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 04 CRS 63141,
04 CRS 63144

DAVID MARTINEZ JUAREZ,
Defendant.

Appeal by defendant from judgment entered 9 May 2006 by Judge Andy D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 14 October 2010.

Roy Cooper, Attorney General, by Lisa Bradley Dawson, Assistant Attorney General, for the State.

J. Clark Fischer, for defendant-appellant.

THIGPEN, Judge.

Defendant was charged with two counts of trafficking in cocaine and one count of conspiring to traffic in cocaine. He was convicted of all counts on 9 May 2006. He was sentenced to 175 to 219 months for the trafficking convictions to begin at the expiration of the federal sentence defendant was currently serving. Defendant was sentenced to an additional term of 175 to 219 months for conspiracy to traffic in cocaine to begin at the expiration of his trafficking sentence. Defendant gave oral notice of appeal in open court, however, he did not perfect his appeal. This Court granted defendant's petition for certiorari on 30 November 2009.

The State's evidence tended to show that defendant was arrested on 27 October 2004 as a result of an undercover operation conducted by the Winston-Salem Police Department. In a pre-trial proceeding, defendant's counsel sought to bar admission of evidence concerning a prior search of defendant's home and the seizure of a handgun during that search. The trial judge allowed the search and its fruits into evidence because it "[had] some relevance to a plan [or] motive." He also found the evidence "to be probative and not outweighed by prejudice." The trial court noted defendant's objection for the record, however the objection was not renewed when testimony about the handgun was presented at trial. Defendant appears to concede that the issue was not preserved under N.C.R. App. 10(a)(1) and can only be reviewed for plain error under N.C.R. App. 10(a)(4).

Defendant contends that the trial court's admission of testimony about the handgun amounted to plain error. "[P]lain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). "Under the plain error standard of review, defendant has the burden of showing: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135

(internal quotation marks omitted), *cert. denied*, 543 U.S. 1023, L. Ed. 2d 500 (2004).

Defendant alleges that testimony about the handgun was "irrelevant" and "inflammatory." While we agree that evidence of the gun may have been irrelevant and was possibly prejudicial, we find that any error in admitting this evidence did not amount to plain error in light of the overwhelming evidence of defendant's guilt.

At defendant's trial, Brigido Sanchez, a co-conspirator, testified for the State in order to receive a reduced sentence. Sanchez was approached by a confidential informant and asked if he knew anyone who sold drugs. Sanchez replied he did not. A few months later, Sanchez met defendant and asked him if he knew anyone who sold drugs. Sanchez testified defendant agreed to deliver 400 grams of cocaine to the confidential informant for \$11,500.00 on 27 October 2004. On 27 October 2004, Sanchez met the confidential informant in a parking lot and waited for defendant.

Detective J. E. Gomez with the Winston-Salem Police Department was informed of the planned drug sale by the confidential informant and set up surveillance of the parking lot. Detective Gomez testified he saw a red Suburban park next to the vehicles driven by Sanchez and the confidential informant. The confidential informant and Sanchez got into the Suburban for a short time, exited the vehicle, and then the Suburban left the parking lot. Sanchez testified that inside the Suburban, defendant told the confidential informant that he did not have the drugs and was not going to bring

them. However, after defendant was promised more money he agreed to come back with the cocaine.

Detective Gomez stated he and another detective recognized the driver of the red Suburban as defendant from a previous encounter. Detective Gomez learned that after the Suburban left the parking lot, it was located at defendant's residence. Detective Gomez asked Detective Tollie to conduct surveillance on defendant and his vehicles. Detective Tollie knew what defendant looked like, what his vehicle looked like, and his home address. Detective Tollie testified that when he arrived to do surveillance, the red Suburban was at defendant's residence. A woman got into the driver's seat of the Suburban and Detective Tollie thought someone entered the passenger side. The woman drove to another apartment where defendant and another man got into a black Ford Taurus. Defendant was a passenger in the vehicle and the other man was the driver. Detective Gomez testified that in a later statement the driver indicated defendant had a brown bag in his hands when the driver picked him up. Detective Tollie followed the men for about six miles, but then had to discontinue surveillance to avoid being detected. Detective Tollie contacted Detective Gomez and described what defendant was wearing, the vehicle he was in, and its last location.

Meanwhile, Detective Gomez had maintained surveillance at the parking lot. Sanchez spoke to defendant on the phone and defendant told him to meet him at a gas station instead. Detective Gomez continued to watch Sanchez and the confidential informant as they

parked at the gas station. Sanchez stated that when defendant arrived at the gas station, defendant told the confidential informant to leave the money in the car and went into the gas station. Sanchez testified that he would not go into the car to verify the presence of the cocaine. The confidential informant entered the vehicle. Sanchez testified that the confidential informant stated he was going to get the money and would come back. At this point, detectives moved in to detain the suspects. A search of the Taurus revealed a brown paper bag containing a white powder substance, later determined to be cocaine, wrapped in Saran Wrap.

In light of the testimony of the detectives about their surveillance and the testimony from the co-conspirator about what happened during the sale, we cannot conclude that the introduction of the evidence of the gun was a miscarriage of justice, or that excluding this evidence would have changed the jury's verdict.

NO ERROR.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).