

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-260
NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2012

STATE OF NORTH CAROLINA

v.

Sampson County
Nos. 10 CRS 50622-23

MICHAEL GILLIS

Appeal by defendant from judgments entered 12 October 2011 by Judge Paul L. Jones in Sampson County Superior Court. Heard in the Court of Appeals 29 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kenneth A. Sack, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.

CALABRIA, Judge.

Michael Gillis ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of possession with intent to sell and deliver ("PWISD") cocaine, possession of marijuana, intentionally keeping and maintaining a dwelling house used for keeping and selling cocaine and marijuana ("maintaining a

dwelling”), and attaining the status of an habitual felon. We find no error.

I. Background

On 30 March 2010, Special Agent Ronald R. Lessard (“Lessard”) of the Sampson County Sheriff’s Office (“the Sheriff’s Office”) procured a search warrant for defendant’s residence. Officers from the Sheriff’s Office executed the search warrant that same day. During the search, law enforcement seized, *inter alia*, marijuana and cocaine.

Defendant was arrested and indicted for PWISD cocaine, PWISD marijuana, maintaining a dwelling, and attaining the status of an habitual felon. Lessard was the State’s witness before the grand jury. However, after he testified, Lessard was convicted of multiple crimes and lost his position with the Sheriff’s Office. The State then obtained superseding indictments against defendant based upon the testimony of a different witness.

Defendant subpoenaed Lessard to testify at defendant’s trial. In response, the State filed a motion *in limine* seeking to prohibit defendant and his counsel “from inquiring about, informing the jury during jury selection, offering evidence of, or questioning the State’s witnesses about any evidence relating

to the prior conviction of Ronald Lessard." After a hearing, the trial court granted the State's motion.

Beginning 11 October 2011, defendant was tried by a jury in Sampson County Superior Court. Defendant testified on his own behalf. Prior to his testimony, the trial court specifically reminded defendant that it had granted the State's motion *in limine*, and that, as a result, defendant could not mention Lessard's name in any way. Nevertheless, at the conclusion of his testimony, without prompting from an attorney, defendant began to inform the jury about Lessard's convictions. The trial court repeatedly ordered defendant to stop, and when defendant failed to do so, the court had defendant removed from the courtroom.

The trial court briefly excused the jury so that he could discuss defendant's outburst with the State and defense counsel. The trial court determined that defendant would not be permitted to return to the courtroom for closing arguments. When the jury returned to the courtroom, the trial court instructed the jury that defendant had been removed for violating a court order and that the jury should not consider defendant's removal in determining his guilt or innocence.

The jury returned verdicts finding defendant guilty of PWISD cocaine, possession of marijuana, and maintaining a dwelling. The case then proceeded to the habitual felon stage. After a brief trial, for which defendant was present, the jury returned a verdict finding defendant guilty of attaining the status of an habitual felon. For the conviction of PWISD cocaine, the trial court sentenced defendant to a minimum of 100 months to a maximum of 129 months. For the conviction for maintaining a dwelling, the trial court sentenced defendant to a minimum of 100 months to a maximum of 129 months. These sentences were to be served consecutively in the North Carolina Department of Correction ("DOC"). Finally, for the conviction for possession of marijuana, the trial court sentenced defendant to ten days, to be served concurrently with his other sentences. Defendant appeals.

II. Motion In Limine

Defendant argues that the trial court erred by granting the State's motion *in limine*. Specifically, defendant contends that defendant should have been able to call Lessard as a defense witness. We disagree.

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial[.]"

State v. Maney, 151 N.C. App. 486, 491, 565 S.E.2d 743, 746 (2002) (internal quotations and citation omitted). "The trial court has wide discretion in ruling on motions *in limine* and will not be reversed absent an abuse of discretion." *State v. Rainey*, 198 N.C. App. 427, 431, 680 S.E.2d 760, 765 (2009) (internal quotations and citation omitted).

"[A] party objecting to the grant of a motion in limine must attempt to offer the evidence at trial to properly preserve the objection for appellate review." *State v. Reaves*, 196 N.C. App. 683, 687, 676 S.E.2d 74, 77 (2009). In the instant case, defendant did not attempt to call Lessard as a witness at trial or make an offer of proof of the testimony he sought to have admitted into evidence. Accordingly, he has waived appellate review of this issue. *Compare State v. Hernandez*, 184 N.C. App. 344, 347 n.3, 646 S.E.2d 579, 582 n.3 (2007) (finding that the defendant properly preserved his objection to the trial court's grant of the State's motion *in limine* when he "requested *voir dire* examination of the challenged witnesses and made offers of proof of the testimony he sought to have admitted into evidence.").

Defendant argues, in the alternative, that if his trial counsel failed to make an offer of proof regarding Lessard's

testimony, he has a claim for ineffective assistance of counsel. In support of his argument, defendant only cites one case which establishes the test for ineffective assistance. However, defendant fails to argue that he was prejudiced by the performance of his trial counsel, and thus, he cannot show ineffective assistance of counsel. See *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (a defendant claiming ineffective assistance of counsel must show that (1) his attorney's performance was constitutionally deficient and (2) the deficiency deprived the defendant of a fair trial). This argument is overruled.

III. Trial Court's Instructions After Defendant's Removal

Defendant argues that the trial court erred by instructing the jury that defendant was removed from the courtroom for willfully violating a court order. Defendant contends that the trial court's instruction improperly discredited defendant in the eyes of the jury. We disagree.

Removal of a disruptive defendant is governed by N.C. Gen. Stat. § 15A-1032(a), which states: "A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly

manner." N.C. Gen. Stat. § 15A-1032(a) (2011). "[T]he trial court is required to set forth an explanation on the record for the reasons to remove defendant and instruct the jury that removal is not to be a factor in weighing the evidence or determining his guilt." *State v. Ash*, 169 N.C. App. 715, 725, 611 S.E.2d 855, 862 (2005) (citing N.C. Gen. Stat. § 15A-1032(b) (1)-(2)).

In the instant case, the trial court specifically warned defendant prior to his testimony that he was not to mention Lessard in any way. Despite the trial court's warning, defendant began speaking to the jury about Lessard after the conclusion of his redirect examination. Defendant continued to talk about Lessard as the trial court repeatedly ordered him to stop. Since defendant refused to comply with the trial court's orders, he was removed. The trial court then excused the jury so he could discuss defendant's outbursts with trial counsel outside their presence.

When the jury returned, the trial court instructed them as follows:

Ladies and gentlemen, the Court made a decision to remove the defendant from the courtroom because he was disruptive after being told not to violate a previous Court order, and that he did so willfully, and in violation of the Court order. The Court

wants to remind you, as jurors, that the removal of the defendant from the Court is not to be considered by you in weighing the evidence or determining the guilt or the innocence of the defendant. Thank you.

The trial court's explanation to the jury fully complied with the requirements of N.C. Gen. Stat. § 15A-1032. Contrary to defendant's argument, the trial court's explanation was not an impermissible comment on defendant's credibility. The jury had just witnessed defendant directly ignoring the trial court's orders and disrupting the trial before being removed from the courtroom. The trial court accurately explained for its reasons for removing defendant, which were consistent with what the jury had witnessed. Moreover, the trial court specifically instructed the jury to not consider defendant's removal when determining his guilt or innocence. Thus, the trial court's explanation was proper in all respects. This argument is overruled.

IV. Conclusion

Defendant failed to preserve his objection to the trial court's grant of the State's motion *in limine*. The trial court properly instructed the jury regarding defendant's absence from the courtroom after defendant willfully violated the trial court's order. Defendant received a fair trial, free from error.

No error.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).