

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-230

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

New Hanover County
No. 99 CRS 53350

BOBBY F. IRVING,
Defendant.

Appeal by defendant from judgment entered 17 August 2001 by Judge W. Douglas Albright in Superior Court, New Hanover County. Heard at a special session of the Court of Appeals in Dare County on 31 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Stewart L. Johnson for the State.

William D. Spence for the defendant-appellant.

WYNN, Judge.

On appeal from convictions for robbery with a firearm, defendant makes thirty-two assignments of error. Of these assignments, only two merit a response: (1) Whether defendant was subject to double jeopardy, and (2) whether the trial court erred by failing to grant a jury request to rehear certain testimony. After carefully reviewing the record, we conclude defendant received a fair trial free from prejudicial error.

The underlying facts to this appeal tend to show that on 19

February 1999, Robert Hester and Mike Styes were robbed of their money, wallet, clothing and beer outside their apartment building. After calling the police, the two men went to the police station and looked at several "mug shots" of various individuals fitting the description of their two assailants. They were unable to identify their assailants from the pictures. Several months later, Hester contacted the police after recognizing defendant as one of the robbers and finding out that defendant lived in his apartment complex. From a photo array of six males, Hester identified defendant as the robber. Defendant's initial trial, commencing on 31 July 2001, ended in a mistrial. From his conviction on retrial, and sentence of two consecutive terms of 84-110 months, defendant appeals.¹

On appeal, defendant contends he was twice placed at jeopardy and, therefore, his convictions should be vacated. Defendant contends the first trial court granted a mistrial because of prosecutorial conduct motivated by an intent to provoke a mistrial. Defendant points to the record on appeal which shows that, at the

¹We note defendant's failure to properly preserve several issues for appellate review. Defendant failed to object to, or move to strike, several issues submitted for our review including: (1) the denial of his motion to dismiss for former jeopardy; (2) the trial court's noncompliance with N.C. Gen. Stat. § 15A-1065; (3) the denial of his motion to suppress evidence of flight as fruit of an illegal search; (4) the denial of his motion *in limine* to preclude certain identification evidence; (5) certain prosecutorial comments during closing argument; and (6) the trial court's denial of the jury's request to reread testimony during deliberation. Under N.C. R. App. P. 10(b)(1), these issues are subject to dismissal. In the interests of fairness and justice, however, we exercise our discretion pursuant N.C. R. App. P. 2 and have reviewed defendant's arguments.

initial trial, the State objected to defense counsel's cross-examination of Hester regarding whether he saw a scar on defendant's right hand by stating "I object at this point to Mr. Hicks testifying as to the characteristics of his client who has not testified." From that objection, the trial court granted defense counsel's motion for a mistrial without directing the case be retained for trial. At the beginning of defendant's second trial, defendant moved to dismiss for former jeopardy arguing "the mistrial was caused by the provocative or bad faith conduct by the prosecutor." The trial court denied the motion and found that the record as a whole and the phrasing of the prosecutor's objection did not support a contention of bad faith, overreaching, harassment or intentional misconduct aimed at prejudicing the defendant's chances for acquittal. Defendant assigns error to these findings.

"If a defendant moves for a mistrial, he or she normally should be held to have waived the right not to be tried a second time for the same offense. Where the defendant makes such a motion because of prosecutorial misconduct, and the court grants the motion, retrial is not barred by Article I, Section 19 unless the defendant shows that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice defendant." *State v. White*, 322 N.C. 506, 511, 369 S.E.2d 813, 815 (1988).

As stated, the trial court denied defendant's motion to dismiss for former jeopardy because it found the prosecutor was not motivated by bad faith, harassment, overreaching or intentional

misconduct aimed at prejudicing defendant's chances for acquittal. Our review of the record finds the trial court's conclusions and findings well supported. The improper objection occurred during the cross-examination of the state's first witness, one of the victims in the case. The testimony elicited by the State from this witness related to the events of the evening the robbery occurred, the facts surrounding the identification of the defendant, and the items stolen from the witness. Defendant's cross-examination did not substantially undermine the witness's testimony on direct. Essentially, as the trial court stated in its order, the record does not indicate the State's case was going badly. Nor does the record sustain any allegation of bad faith, intentional misconduct, harassment or overreaching. Therefore, we find no error.

Second, defendant assigns error to the trial court's failure to grant a jury request during deliberation to have the testimony of Robert Hester and Tenique Trotman read aloud. Pursuant to 15A-1233(a), "the Judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence." After reviewing the transcripts and the record, we are convinced that the trial judge plainly exercised his discretion. In a similar case, our Supreme Court held such a decision was without error. See *State v. Fullwood*, 343 N.C. 725, 472 S.E.2d 883 (1996). Accordingly, we find no error.

We have carefully reviewed defendant's remaining assignments

of error and find them to be without any merit.

No Error.

Judges TIMMMONS-GOODSON and HUDSON concur.

Report per Rule 30(e).