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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-956

Filed: 20 June 2017

Mecklenburg County, Nos. 15 CRS 204994–95; 15 CRS 16968; 15 CRS 206987

STATE OF NORTH CAROLINA

v.

MICHAEL DESHAWN GILCHRIST

Appeal by defendant from judgments entered 11 May 2016 by Judge Christopher W. Bragg in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Alesia Balshakova, for the State.

Joseph P. Lattimore for defendant-appellant.

ELMORE, Judge.

Defendant appeals from judgments entered upon jury verdicts finding him guilty of felony larceny from a merchant by removing, destroying, or deactivating a component of an anti-theft device; misdemeanor larceny; and felony assault; and upon his plea of guilty to attaining habitual felon status. The sole issue presented is whether the court committed plain error by allowing a store loss prevention officer

STATE V. GILCHRIST

Opinion of the Court

(“LPO”) to describe what he saw in a security camera videotape as it was played for the jury. We conclude the court did not commit plain error.

On 16 February 2015, defendant was indicted for misdemeanor larceny and larceny from a merchant. Subsequently, defendant was indicted for felony assault and habitual misdemeanor assault, as well as attaining habitual felon status.

At trial, the State presented evidence tending to show that on 6 February 2015, John McDonnell, the loss prevention manager walking the floor, and an LPO, seated in the security camera room of a Target store in Charlotte, working in tandem by walkie-talkie, observed defendant remove the “spider wrap” from a JBL Bluetooth speaker on a shelf in the electronics department. Spider wrap is a security wire wrapped around a piece of merchandise that sounds an alarm if the wire is cut. Defendant placed the speaker into a shopping basket. The officers continued to monitor defendant and saw him walk into the bedsheets aisle and conceal the speaker under his coat. McDonnell and his associate decided to detain defendant if he passed all of the registers, and McDonnell went to the store exit for that purpose. McDonnell’s associate notified him that defendant was headed toward the exit. As defendant approached the exit, McDonnell identified himself as a store security officer and grabbed defendant’s arms. Defendant attempted to flee but the other officer, who had come to assist, wrapped his arms around defendant. As McDonnell attempted to handcuff defendant’s wrists, defendant bit him on the shoulder.

STATE V. GILCHRIST

Opinion of the Court

Defendant dropped the speaker and a pack of Pampers diapers. Two police officers arrived at the store, handcuffed defendant, and escorted him to the police car.

In viewing the surveillance video, McDonnell saw defendant remove the wrap, place the item in the basket, place the speaker under his coat, pick up a pack of Pampers disposable diapers from a shelf, walk past the registers, stand at the service desk for about thirty seconds, and then walk toward the exit without stopping at any cash registers. McDonnell made a copy of the surveillance video, which was played at trial. As the video was played to the jury, McDonnell described what he saw.

Two officers with the Charlotte-Mecklenburg Police Department testified that they responded to a service call at the Target store on South Boulevard on this date. They encountered defendant struggling with store security officers, handcuffed him, and then escorted defendant to a patrol car. As defendant was being placed into the patrol car, he spit in the face of one of the officers.

Defendant did not present any evidence.

The jury found defendant guilty of misdemeanor larceny, misdemeanor larceny from a merchant by removing an antitheft device, and assault. Defendant entered a plea admitting that he was convicted of two prior assaults as required for the habitual misdemeanor assault charge and a plea of guilty to attaining habitual felon status. The trial court consolidated the larceny convictions and entered a judgment sentencing defendant to 78 to 106 months of imprisonment. The trial court also

STATE V. GILCHRIST

Opinion of the Court

entered a judgment on the habitual misdemeanor assault charge and sentenced defendant to another 78 to 106 months of imprisonment to run concurrently with the first sentence.

On appeal, defendant contends the court committed plain error by allowing McDonnell to describe his observations as the surveillance videotape was played for the jury because his statements amounted to improper lay opinion testimony.

Because defendant did not object to McDonnell's description of the events and scenes portrayed on the videotape, our review is limited to determining whether plain error was committed. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error “had a probable impact on the jury’s finding that the defendant was guilty.”

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted). Put another way, the “defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

We are not convinced that the jury would have probably reached a different result. In *State v. Patterson*, ___ N.C. App. ___, ___, 791 S.E.2d 517, 520, *disc. rev. denied*, ___ N.C. ___, 794 S.E.2d 328 (2016), the defendant contended that the court improperly admitted lay opinion testimony when it allowed a law enforcement officer

STATE V. GILCHRIST

Opinion of the Court

to identify the defendant in surveillance video, testify that the defendant could be seen holding a computer bag in the surveillance video, and identify the defendant in a photographic still made from a surveillance videotape. In concluding there was no reasonable possibility that the jury could have reached a different result absent admission of the evidence, this Court observed that (1) the jury was afforded the opportunity to view the surveillance video footage and to make its own comparison between the appearance of the perpetrator in the footage and the defendant in court, and; (2) other evidence, including the identification testimony of an eyewitness, was admitted that placed the defendant at the scene of the crime. *Id.* at ___, 791 S.E.2d at 521–22.

Here, the surveillance footage was shown to the jury so it could make its own determination. Moreover, McDonnell intercepted defendant with the merchandise in his possession, and positively identified defendant. The two police officers corroborated McDonnell’s testimony concerning the arrest of defendant and the resistance he presented. The two officers identified defendant as the person they arrested. Accordingly, we hold that the court did not commit plain error by allowing McDonnell to describe the surveillance footage as it was played for the jury.

NO PLAIN ERROR.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).