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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-259

Filed: 2 October 2018

Randolph County, No. 16 CRS 54000

STATE OF NORTH CAROLINA

v.

CHARLES LAWRENCE TERRY, JR.

Appeal by defendant from judgment entered 25 October 2017 by Judge Lindsay R. Davis in Randolph County Superior Court. Heard in the Court of Appeals 27 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kyu-Eun (“Dana”) Lee, for the State.

Richard Croutharmel for defendant.

DIETZ, Judge.

Defendant Charles Lawrence Terry, Jr., appeals his conviction for obtaining property by false pretenses. Terry argues that a law enforcement officer’s testimony, identifying him as the man in a surveillance video, was an impermissible lay opinion. He also argues that the trial court should have granted a motion to dismiss for insufficient evidence.

As explained below, Terry failed to preserve his objection to the officer's testimony, and the State presented sufficient evidence to survive a motion to dismiss. We therefore find no error in the trial court's judgment.

Facts and Procedural History

On 22 June 2016, Defendant Charles Lawrence Terry, Jr., and Harold J. Brundage, III, entered a Walmart store in Randleman. Brundage approached a bank teller at the Wood Forest National Bank branch located inside the Walmart. Terry sat on a bench nearby, where he could not be seen by either the teller or the bank's security cameras. Brundage presented the teller with a \$247.81 check made out to "Harold J. Brundage" for "misc work." The check was signed by "Charles L. Terry Jr." and was drawn from a closed account at another bank.

Wood Forest requires individuals cashing a check from another bank to have an account with them. Brundage did not have a Wood Forest account, but Brundage's father, Harold Brundage, Jr., did. Brundage provided his father's name, bank account information, and answers to his security questions to the teller because he did not have photo identification. After determining that Brundage's signature appeared to match the signature on the account, the teller cashed the check. Brundage left the bank counter, met with Terry, and the two left the Walmart together.

A few weeks later, Brundage's father received his bank statement and discovered his account had a negative balance. Since he had not given anyone

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permission to access his account, Brundage's father contacted the Randleman Police Department to report the incident. He also reported his suspicion that his son may have been involved with the fraudulent transactions, due to their similar names.

Detective Gene Henderson of the Randleman Police Department investigated the complaint. Detective Henderson obtained security video from both Wood Forest and Walmart. The Wood Forest video showed only Brundage conducting his transaction with the teller, while the Walmart video showed both Terry and Brundage entering and leaving the store together.

Detective Henderson was familiar with Brundage because he had encountered him in previous criminal investigations. He was not familiar with Terry. Because Terry's name appeared on the cashed check, Detective Henderson located a Division of Motor Vehicles photograph of "Charles L. Terry, Junior" and concluded that the man in the security video was the same man in the DMV photograph.

Law enforcement arrested Terry, and the State indicted him for obtaining property by false pretenses. At trial, the State introduced copies of both the Wood Forest and Walmart surveillance videos as exhibits. Over Terry's objection, Detective Henderson narrated while the Walmart video played for the jury, identifying Terry as Brundage's companion in the video.

At the close of the State's evidence and at the close of all the evidence, Terry made motions to dismiss, which were denied by the trial court. On 25 October 2017,

the jury found Terry guilty of obtaining property by false pretenses. The trial court sentenced him to 11 to 23 months in prison. Terry appealed.

Analysis

I. Admission of Detective Henderson’s identification of Terry

Terry argues that the trial court erred by allowing Detective Henderson to offer his lay opinion identifying Terry as Brundage’s companion in the Walmart surveillance video. As explained below, this argument is not preserved for appellate review.

When the State sought to admit Detective Henderson’s testimony in the trial court, Terry objected and argued that “Rule 1002, commonly known as the best evidence rule, provides that to prove content of a recording, the original is required except as otherwise provided. The best evidence rule requires that secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available.”

After hearing this argument concerning Rule 1002 of the Rules of Evidence, the trial court discussed appellate cases with the parties. Terry again emphasized that his argument was based solely on Rule 1002 of the Rules of Evidence: “the best evidence rule prohibits Detective Henderson from identifying anybody.” The trial court then overruled Terry’s objection.

“[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount on appeal.” *State v. Fuller*, __ N.C. App. __, __, 809 S.E.2d 157, 162 (2017). This rule serves to ensure that alleged errors occurring before the trial court are brought to the court’s attention so that the court may rule on them and, if necessary, cure the error.

Here, Terry never asserted that Detective Henderson’s testimony was an impermissible lay opinion at trial; his only basis for his objection was Rule 1002. On appeal, by contrast, Terry abandons his Rule 1002 argument and contends that the testimony was an impermissible lay opinion. This is precisely the sort of “horse swapping” that is prohibited by our issue preservation rules. Because Terry’s evidentiary argument on appeal was not properly raised and preserved before the trial court, it is waived.

II. Denial of motion to dismiss

Terry next argues that the trial court erred by denying his motion to dismiss. He contends that the State presented insufficient evidence that he was the perpetrator of the charged offense because none of the State’s witnesses identified him as the “Charles L. Terry, Jr.,” named in the indictment. We disagree.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s

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motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

At trial, Detective Henderson identified Terry as the person charged with this offense:

Q. And what steps did you take to identify that person?

A. Well, at that point that's where I went and started to see if I could determine who Mr. Terry was and why the account was closed. The first thing I did is I pulled up the DMV photo of Mr. Terry.

Q. And did you compare that with the video?

A. Yes, sir, I did. As soon as I saw it, I recognized as the person that was with Mr. Brundage coming out of the store.

Q. And that person was who?

A. Charles L. Terry, Junior, the defendant.

This testimony is sufficient to permit a reasonable juror to conclude that Terry was the perpetrator of the charged offense. *Id.* Accordingly, the trial court properly denied Terry's motion to dismiss.

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Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).