IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-63

Filed: 1 October 2019

Caldwell County, No. 17 CRS 50227

STATE OF NORTH CAROLINA

v.

JUDY POTTER NORRIS

Appeal by defendant from judgment entered 8 August 2018 by Judge Hugh B. Lewis in Caldwell County Superior Court. Heard in the Court of Appeals 7 August 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Stacey A. Phipps, for the State.*

*Joseph P. Lattimore for defendant.*

DIETZ, Judge.

Defendant Judy Potter Norris appeals her convictions for robbery with a dangerous weapon and second-degree kidnapping, raising a series of arguments concerning the trial evidence and jury charge. Several of those arguments were not preserved by objection at trial.

As explained below, we hold that the trial court properly admitted testimony by a law enforcement officer who explained that he believed a NASCAR sweatshirt and camouflage mask he found while searching Norris's home were "identical" to those worn by the robbery suspect in surveillance video.

We likewise hold that the trial court did not err, and certainly did not plainly err, by admitting testimony of a prior inconsistent statement by Norris's son that was admissible under the Rules of Evidence, and by omitting a pattern jury instruction on identity that was not requested by any party and that was unnecessary under our case law. We therefore find no error in the trial court's judgment.

**Facts and Procedural History**

On 19 January 2017 around 7:30 p.m., Gary Atkins was working the night shift as a clerk at Granite Falls Market Basket, a gas station and convenience store. A dark colored PT Cruiser pulled into the parking lot and an armed female in a camouflage mask got out and approached Atkins. The woman pointed a gun at Atkins and told him he was being robbed. She then ordered Atkins into the bathroom, which she seemed to be familiar with, and locked the deadbolt from the outside, trapping Atkins inside. Atkins used his cell phone to call 911. Two officers, Sergeant Lail and Officer Ferguson, arrived on the scene about 10 minutes later.

Atkins identified his assailant as female based on her voice, eyes, and blonde hair sticking out from the mask. The robbery was captured on the store's surveillance

video. The video showed the robber's face covered by a camouflage mask and the robber wearing a sweatshirt with "Busch 97" on it. The video also showed the robber unsuccessfully try to open the cash register drawer using a code before ultimately entering a "no sale" transaction to get the drawer open.

The store manager reviewed the video and recognized the robber as Defendant Judy Potter Norris, a former employee of the store. Among other identifying factors such as general height and body features, the manager noticed that the robber was not wearing shoes. The manager had recently seen Norris in the store buying beer and also not wearing shoes at that time.

Based on the information gathered at the scene, Sergeant Lail and Officer Ferguson went to Norris's nearby apartment around 8:20 p.m., less than an hour after the robbery. When they arrived, they noticed a PT Cruiser parked outside. The officers knocked on the door and asked for permission to enter from Norris and her adult son. They both invited the officers inside and gave them permission to look around.

While looking around Norris's home, the officers found a NASCAR sweatshirt with "Busch 97" on it, a camouflage face mask, and three plastic bins in Norris's closet similar to ones taken in the robbery. Norris's son could not locate one of his guns, a .22 caliber pistol, because it was not where he had left it.

Ultimately, the State indicted Norris for robbery with a dangerous weapon and second-degree kidnapping. The case went to trial and the jury convicted Norris on both charges. The trial court sentenced Norris to 48 to 70 months in prison. Norris appealed.

## Analysis

### I. Officer's lay opinion testimony

Norris first argues that the trial court erred by permitting Officer Ferguson to testify that the sweatshirt and face mask he found in Norris's bedroom were "identical" to those worn by the robber in the surveillance video. Norris contends that this lay opinion testimony should not have been admitted because the officer was in no better position than the jury to draw that inference from the surveillance footage. We reject this argument.

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Under Rule 701, "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear

understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701. Under this rule, "a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of fact." *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975). These shorthand statements "are admissible even though the witness must also state a conclusion or opinion in rendering them." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981).

This issue often arises when a witness, typically a law enforcement officer, testifies that a person or object matches something visible in a surveillance image or video. In this context, an officer's lay opinion testimony is *not* admissible where "it was not based on any firsthand knowledge or perception by the officer, but rather solely on the detective's viewing of the surveillance video." *State v. Buie*, 194 N.C. App. 725, 733, 671 S.E.2d 351, 356 (2009). But an officer's lay opinion testimony *is* admissible if the officer is "offering his interpretation of the similarities between evidence he had the opportunity to examine firsthand and a videotape." *Id.*

In other words, if Officer Ferguson had never seen the Busch 97 sweatshirt and camouflage mask until prosecutors displayed them during his trial testimony, the officer could not testify that those objects were identical to the ones in the

surveillance video. An officer in that situation is no better suited than the jury to compare this evidence and decide if it is the same.

But this case is different. Officer Ferguson viewed a surveillance video of a robbery as part of his investigation that showed a robber with a sweatshirt and mask with many notable characteristics. Then, less than an hour later, Officer Ferguson searched the home of a suspect and discovered a sweatshirt and mask that had so many features matching the ones in the video that the officer determined the items were "identical." At trial, Officer Ferguson explained to the jury both that he determined the objects were identical and why he made that determination, discussing the features of the items he discovered and how they matched what he had seen in the video earlier in the investigation.

Because Officer Ferguson's testimony was based on his personal observations during the investigation of the robbery, because he was in a better position than the jury to draw inferences based on what he saw, and because his statement that the items were "identical" to those in the video was a shorthand statement summarizing a variety of collective observations occurring in the moment, the trial court did not err by permitting this testimony. *Buie*, 194 N.C. App. at 733, 671 S.E.2d at 356.

In any event, even if the trial court erred, that error was harmless. This court may not order a new trial based on an evidentiary error unless the error was prejudicial, meaning "there is a reasonable possibility that, had the error in question

not been committed, a different result would have been reached at trial." *State v. Babich*, __ N.C. App. __, __, 797 S.E.2d 359, 364 (2017). Here, there was considerable evidence of Norris's guilt even if we remove the sweatshirt and mask altogether. In light of this evidence, Norris has not met her burden to show that, absent the error, there is a reasonable possibility that the jury would not have found her guilty.

## II. Admission of prior inconsistent statement

Norris next argues that the trial court committed plain error by admitting testimony from Officer Ferguson concerning a prior inconsistent statement by Norris's son.

Norris concedes that she did not object to this alleged evidentiary error and therefore we review it only for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* In other words, the defendant must show that, "absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 516–17, 723 S.E.2d at 333.

Under Rule 607, "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607. "[T]he impeaching proof must be *relevant* within the meaning of Rule 401 and Rule 403 and *must in fact be impeaching*." *State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987). "A prior inconsistent statement is admissible to contradict a witness's testimony, although it may not be considered as substantive evidence." *State v. Banks*, 210 N.C. App. 30, 40, 706 S.E.2d 807, 815–16 (2011).

This Court has observed that "the better practice continues to be for the trial court, before allowing impeachment of the State's own witness by a prior inconsistent statement, to make findings and conclusions with respect to whether the witness's testimony is other than what the State had reason to expect" and whether the prior inconsistent statement is relevant under Rules 401 and 403 and in fact impeaching. *Bell*, 87 N.C. App. at 633, 362 S.E.2d at 292. Nevertheless, this Court has not required trial courts to make these findings on their own initiative in every case, and this Court has upheld admission of a witness's prior inconsistent statement even when the trial court did not do so. *Id.*

Here, during the State's case in chief, Norris's son testified that he did not know if his mother left the home during the general time period when the robbery occurred. The State later called Officer Ferguson, who testified that when he

interviewed Norris's son several hours after the robbery, Norris's son explained that "a couple of hours ago" his mother "went driving down the road."

The challenged testimony unquestionably was relevant and highly probative to the jury's evaluation of the credibility of Norris's son. It also was proper impeachment evidence because it contradicted the son's testimony that he was unaware of Norris's whereabouts during the time frame of the robbery. Thus, this testimony was admissible under the Rules of Evidence. The trial court's decision not to intervene on its own initiative during this testimony, to make findings or offer a limiting instruction not requested by any party, is consistent with our case law and certainly is not the type of "fundamental" error at trial that rises to the level of plain error.

## III. Jury instruction on identity

Finally, Norris contends that the trial court committed plain error by failing, on its own initiative, to give a pattern jury instruction on identity. Norris argues that, because "identification was the central, controverted issue in the case," the court had a duty to provide that instruction despite the fact that Norris did not request it. We reject this argument as well.

As explained above, plain error applies only to fundamental errors at trial that "seriously affect the fairness, integrity or public reputation of judicial proceedings."

*Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. There was no error here at all, much less this sort of fundamental error.

To be sure, "[r]egardless of requests by the parties, a judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). But our Supreme Court, in analogous cases, has held that an identity instruction is not required even if the defendant specifically requested it. *State v. Shaw,* 322 N.C. 797, 803–04, 370 S.E.2d 546, 549–50 (1988).

In *Shaw*, our Supreme Court found no error in a case where "the identity of the perpetrator of the crimes charged was a substantial feature of the case" and "an instruction to the jury on identification was warranted." *Id.* at 803, 370 S.E.2d at 549. The Court explained that "the jury was not misled as to the standard to be applied in determining the guilt or innocence of defendant." *Id.* at 804, 370 S.E.2d at 550. Although the trial court failed to give the pattern jury instruction on identification as requested by the defendant, "[t]he trial judge . . . repeatedly informed the jury that to return a guilty verdict, they must be satisfied that *this* defendant committed the crime charged." *Id.*

Here, too, the trial court made clear that "[t]he State must prove to you that *the defendant* is guilty beyond a reasonable doubt," and that the State must prove each element of the offenses "beyond a reasonable doubt" and find that each element

was committed by "*the defendant*." (Emphasis added.) Considered as a whole, the jury charge properly instructed the jury that they must find beyond a reasonable doubt that Norris was the perpetrator of the charged offenses before returning a guilty verdict. *See id*. at 803–04, 370 S.E.2d at 549–50. "[T]he jury was not misled as to the standard to be applied in determining the guilt or innocence of defendant." *Id.* at 804, 370 S.E.2d at 550. Accordingly, we find no error, and certainly no plain error, in the trial court's decision not to include, on the court's own initiative and without request from any party, a pattern jury instruction on identity in the jury charge.

**Conclusion**

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

NO ERROR.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).