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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-257

Filed: 7 January 2020

Wake County, No. 15 CRS 222446

STATE OF NORTH CAROLINA

v.

ANTHONY CRAVON WEBSTER

Appeal by defendant from judgment entered 5 December 2017 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.*

*Jarvis John Edgerton, IV, for defendant.*

ARROWOOD, Judge.

Anthony Cravon Webster (“defendant”) appeals from judgment entered on his conviction for second-degree murder. Defendant contends the trial court erred by dismissing and replacing a juror without allowing defendant to rehabilitate the juror, and by allowing lay witness testimony about what a surveillance video depicted. Because the record on appeal does not show defendant gave oral notice of appeal,

defendant has filed a petition for *writ of certiorari* requesting our review. For the following reasons, we grant the petition, but find the trial court committed no error.

I. Background

On 2 November 2015, defendant was indicted for first-degree murder. On 27 November 2017, defendant was tried before a jury. The evidence at trial tended to show the following.

On 26 September 2015, defendant was deceived and robbed by Deeshone Gilmore (“Deeshone”) and Demetrius Johnson (“Johnson”). Defendant had arranged to buy marijuana from Deeshone, however, unbeknownst to defendant, Deeshone and Johnson conspired to take defendant’s money without giving him any marijuana in exchange. On the night of 26 September, Johnson approached defendant and Deeshone as they sat waiting in a car. Johnson shook hands with defendant and took \$950.00 in cash from him. Johnson then departed without giving defendant the marijuana he was promised. Defendant called Johnson a few minutes later, asking where the marijuana was. Johnson told defendant he was not going to deliver the marijuana because defendant had used counterfeit money to pay for marijuana in a prior drug deal with Johnson. Defendant then reported to Raleigh Police that he had been robbed and told Officer David Garner that an unknown man had taken \$950.00 from his car and run away. Deeshone continued the deception, telling defendant he

did not know what happened and promising he would try to get the marijuana for him.

Deeshone and Johnson later split the money they had stolen from defendant. Deeshone subsequently arranged another illegal transaction with defendant, offering to sell defendant a handgun at a discounted price of \$200.00 in order to make up for the prior marijuana deal. However, Deeshone and Johnson were again attempting to deceive defendant, planning to instead sell him a BB gun rather than the promised handgun. On the night of 7 October 2015, Deeshone met defendant and defendant's brother, Tyshad Lawson ("Lawson"), outside of a Z's Food Mart ("Z Mart") convenience store, also known as "Weebob's." Defendant informed Deeshone that this time he would only hand over the money after the gun was produced. Deeshone telephoned Johnson to report this, and Johnson told Deeshone he was on his way there but did not have the BB gun with him. Johnson resolved to just rob defendant again.

Johnson arrived at the Z Mart and was greeted by defendant. He then snatched the money from defendant's hands, pushed him, and started running away. Defendant chased after Johnson, following him into a dark area behind the Z Mart, where he pulled out a gun and shot at Johnson. Deeshone, Lawson, and defendant then ran across the street, whereupon defendant told Deeshone he wanted his money back or the gun he was promised. Deeshone called his mother and requested a ride

home to retrieve the gun for defendant. Deeshone's sister, Daisia Means ("Means"), arrived in a car shortly thereafter and Deeshone and defendant got into the car while Lawson stayed behind. Means, who was dating Johnson, asked where Johnson was. Deeshone told her that Johnson should be back at their house. During the car ride, Means heard defendant tell Deeshone, "Bruh, what you think I'm gonna do? If somebody push me, you don't think I'm gonna buck off?"

When they arrived at Deeshone's home, defendant waited outside while Deeshone went in to get the BB gun and look for Johnson. After realizing Johnson was not in the home, Deeshone returned to defendant with the BB gun and handed it to him. Defendant refused to accept the BB gun, and demanded his money back instead. Deeshone and defendant then returned to the Z Mart, and Deeshone discovered Johnson's body behind the store. Deeshone ran to the front of the Z Mart to get help, telling several people that someone had been shot. Afterwards, he called his mother to tell her Johnson was injured and appeared to have hit his head on a rock or glass. Means and Deeshone's mother drove to the Z Mart and went to the area behind the store. There, they found Johnson lying on the ground, with his pants pulled down and the pant pockets pulled out. Deeshone's mother called the police.

Michael Gilmore ("Michael") was a Z Mart customer present on the scene at the time Deeshone discovered Johnson's body. Michael testified he overheard defendant say "I hit him in the head, Bruh" to another man. Raleigh Police later

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### *Opinion of the Court*

identified defendant as a suspect in Johnson's murder based on surveillance footage from the Z Mart, the robbery report defendant previously filed on 26 September 2015, and statements from Deeshone. Defendant was subsequently arrested and placed in the Wake County Detention Center while awaiting trial. While in the Detention Center, defendant told fellow inmate Anthony Jones that he had shot and killed a man in October 2015 behind the Z Mart because the man attempted to rob him during a drug deal.

At the close of all the evidence on 4 December 2017, the trial court received reports that an unknown person had photographed or filmed members of the jury outside the courtroom that day and the day prior. The trial court questioned each concerned member of the jury to ascertain whether they would be able to perform their duty and be fair and impartial in rendering a verdict. Following this inquiry, the trial court dismissed and replaced jurors 1 and 9. The jury subsequently found defendant guilty of second-degree murder. Defendant was sentenced to a minimum of 221 months to a maximum of 278 months in prison.

### II. Discussion

On appeal, defendant contends the trial court erred by dismissing and replacing juror 1 without an adequate basis and without allowing defendant to rehabilitate the juror. Defendant further contends the trial court committed plain error when it allowed lay witness testimony as to what a surveillance video depicted.

As an initial matter, we address this Court’s jurisdiction to consider the merits of this appeal. Defendant asserts he gave oral notice of appeal at the conclusion of his sentencing hearing, but that such notice is not included in the record because the court reporter stopped recording too early. Nevertheless, defendant filed a petition for *writ of certiorari* requesting our review in the event we found there was insufficient evidence defendant took proper and timely action pursuant to N.C.R. App. P. 4. A party’s failure to enter notice of appeal in compliance with Rule 4 deprives this Court of jurisdiction. *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011). However, this Court has discretion under Rule 21 to issue a *writ of certiorari* “when the right to prosecute an appeal has been lost by failure to take timely action.” N.C.R. App. P. 21(a)(1) (2019). We therefore exercise our discretion to grant defendant’s petition.

1. Dismissal and Replacement of Juror

We now consider the merits of this appeal. Defendant’s first contention on appeal is that the trial court committed reversible error by dismissing and replacing juror 1 after denying defendant an opportunity to rehabilitate the juror. We disagree.

“The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and defendant may receive a fair trial.” *State v. Nelson*, 298 N.C. 573, 593, 260 S.E.2d 629, 644 (1979) (citation omitted). “The trial court’s discretion in supervising the jury continues beyond jury selection and extends to

decisions to excuse a juror and substitute an alternate.” *State v. Davis*, 325 N.C. 607, 628, 386 S.E.2d 418, 429 (1989) (citing *Nelson*, 298 N.C. at 593, 260 S.E.2d at 644). “Trial courts’ ‘decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error.’ ” *State v. Knight*, \_\_ N.C. App. \_\_, \_\_, 821 S.E.2d 622, 629 (2018) (quoting *Davis*, 325 N.C. at 628, 386 S.E.2d at 429 (1989)). An abuse of discretion occurs when a trial court’s decision is “so arbitrary that it could not have been the result of a reasoned decision.” *State v. Richardson*, 341 N.C. 658, 673, 462 S.E.2d 492, 502 (1995) (citing *State v. McLamb*, 313 N.C. 572, 576, 330 S.E.2d 476, 479 (1985)).

N.C. Gen. Stat. § 15A-1215(a) (2017) provides: “[i]f before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel.” Thus, the trial court may “replace a juror with an alternate juror should the original one become disqualified or be discharged for some reason.” *Richardson*, 341 N.C. at 672-73, 462 S.E.2d at 502.

In the present case, following closing arguments juror 1 and several other jurors reported seeing someone photograph or film them as they exited the courtroom for lunch. The State requested that the trial court conduct an inquiry of the jurors who had expressed concern to determine whether they were still capable of

performing their duty. The trial court agreed an inquiry was necessary, and subsequently conducted individual *voir dire* of each juror and alternate while the courtroom was closed to the public. The trial court's *voir dire* of juror 1 occurred, in pertinent part, as follows:

THE COURT: . . . I just want to find out from you exactly what happened as this jury was leaving for lunch. So, first, why don't you tell me that.

JUROR NO. 1: Sure. We were all leaving as a group because we had limited time and a few of us noticed, not just one, that as we were leaving, we were fairly certain that we were having our video or photos taken and it wasn't just by one. It made us all very nervous. By the time we got to the elevator, a few of us looked at each other and just kind of read it off each other. And then it was also said that this morning, a few things were said to two of them this morning when they were coming in.

. . . .

THE COURT: Okay. Do you believe that [this situation is] going to affect your personal ability to be fair and impartial and to do your job in this case?

JUROR NO. 1: I know that I'm uncomfortable.

THE COURT: All right. I have decided -- I haven't decided everything I'm going to do, but one thing that I'm certainly going to do is to make sure that the jury has escort from the deputies when they're leaving the courtroom all the way to their cars. You'll be taken down the staff elevators from now on and not have to go mingle with the public while you're here. To what degree does that address your concern?

JUROR NO. 1: I mean, it helps. Had it been from the get-



go, I think it would have been a lot more comfortable because coming to and from, I mean, we would pass people every day out here. We would have to sit within the same 30, 40 feet as the people who were coming here, and I don't know which side they were on. I have no clue. Never spoke with them, but it still makes you uncomfortable because during jury selection, you're asking our name, what we do, where we work, where our spouses work, where we live, and all this was being said in the presence of people and I'm very uncomfortable.

THE COURT: Okay.

JUROR NO. 1: Like I said, I don't know what side who is on, but it's irrelevant when you're that uncomfortable because obviously both sides can't win, both sides can't lose. It's not a one direction for everybody.

....

THE COURT: ... Do you have any other concerns or anything that you think I need to know in helping me decide what to do next?

JUROR NO. 1: No, sir. Only, you know, in the future, just -- I would hope, if I had to do this again, which I'm sure I will, that your personal information is not public like that. I feel like it was very advertised.

THE COURT: Well, we do that because we have to.

JUROR NO. 1: Okay.

THE COURT: For what it's worth --

JUROR NO. 1: I meant, other people. I didn't realize --

THE COURT: I understand that. That's why I specifically don't let anybody ask you specifically where you live, those sorts of things, and your personal information is not in

written form anywhere in the public record.

JUROR NO. 1: Right, but a lot of these cities around here are very small.

Prior to the trial court's *voir dire* of the other jurors, defense counsel requested that the trial court conduct further inquiry of jurors who indicate that they do have an issue and the trial court agreed to do so. All jurors except jurors 1 and 9 unequivocally indicated that being photographed would not prevent them from being fair and impartial or impact their ability to do their duty as a juror. Juror 9 unequivocally indicated that being filmed made her feel uncomfortable and unsafe, and that it would prevent her from exercising her duty as a juror. At the conclusion of the *voir dire* of all the jurors, defense counsel requested that more inquiry be made of juror 1. The trial court denied the request. After electing not to declare a mistrial, the State moved to strike jurors 1 and 9 and defendant moved to strike juror 9 only. In the trial court's discretion, it decided to excuse both jurors and replace them with alternates.

We hold the trial court did not abuse its discretion in dismissing and replacing juror 1. Our Supreme Court has recognized that:

[t]he trial court has the opportunity to see and hear the juror on *voir dire* and, having observed the juror's demeanor and made findings as to his credibility, to determine whether the juror can be fair and impartial. For this reason, among others, it is within the trial court's discretion, based on its observation and sound judgment, to determine whether a juror can be fair and impartial.

*State v. Yelverton*, 334 N.C. 532, 543, 434 S.E.2d 183, 189 (1993) (citation omitted). Here, the trial court listened to juror 1's responses and observed her demeanor and, based on these observations, ultimately decided juror 1 could not be fair and impartial. Though juror 1 may not have stated "I am unable to be fair and impartial," the record shows juror 1 did repeatedly say that she was very uncomfortable serving as a juror given the circumstances. By the end of the trial court's inquiry, juror 1 was still expressing a fear of having been exposed to people who she did not "know which side they were on." Under these facts, it was reasonable for the trial court to conclude that juror 1 was unable to perform her duty and be fair and impartial. In addition, though counsel for defense requested additional inquiry be made of juror 1, he also conceded "I'm not exactly sure what more we can ask her." Accordingly, the trial court did not abuse its discretion, and defendant's assignment of error is overruled.

## 2. Surveillance Video Testimony

Defendant's second argument on appeal is that the trial court committed plain error by allowing narrative testimony of a surveillance video by a lay witness as to what they believed was depicted in the video. We disagree.

We review a trial court's rulings on the admission of lay witness opinion testimony for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). Where a party fails to object to the admission of evidence, as defendant did here, we review 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). The error must be one that is “so basic, so prejudicial, so lacking in its elements that justice cannot have been done.” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). In addition, the defendant must establish prejudice, such that had the error not been committed, the jury would have probably reached a different result. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

“Under the North Carolina Rules of Evidence, the jury is charged with determining what inferences and conclusions are warranted by the evidence.” *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009) (citation omitted). “Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury.” *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). Thus, Rule 701 limits lay opinion testimony “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 (2017). North Carolina courts have

allow[ed] lay opinion testimony identifying the person, usually a criminal defendant, in a photograph or videotape where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury’s fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony.

*Buie*, 194 N.C. App. at 730, 671 S.E.2d at 354 (internal quotation marks and citation omitted).

The following factors are relevant to determining whether lay opinion testimony identifying a person in a photograph or video is admissible:

(1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

*State v. Belk*, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009) (citing *United States v. Dixon*, 413 F.3d 540, 545 (6th Cir.2005)). In addition, "lay opinion identification testimony is more likely to be admissible . . . where the surveillance photograph is of poor or grainy quality, or where it shows only a partial view of the subject." *Id.* at 416, 689 S.E.2d at 442 (quoting *Dixon*, 413 F.3d at 545).

In *Belk*, we held the trial court erred in admitting a police officer's lay witness testimony of surveillance footage. In that case, there was no evidence that the individual depicted in the footage had disguised his appearance or that the defendant had altered his appearance prior to trial. *Id.* at 417, 689 S.E.2d at 442. In addition, the footage was clear and of great quality, and the features of the individual in the footage were not obscured. *Id.* Moreover, the testifying officer had had only minimal

contact with the defendant, consisting of three brief encounters including one in which she passed by the defendant in her patrol car. *Id.* at 417-18, 689 S.E.2d at 442-43. We thus held admission of the officer's testimony of the surveillance footage was error given there was "no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify [the] [d]efendant as the individual in the surveillance footage." *Id.* at 418, 689 S.E.2d at 443.

In *Buie*, we also held it was error for the officer to testify as to what was depicted in a surveillance video. 194 N.C. App. at 733, 671 S.E.2d at 356. There, we determined the officer was in no better position than the jury to determine what the poor quality surveillance video illustrated because the officer based his testimony solely on his viewing of the video, not on any first-hand knowledge or perception. *Id.* Compare *State v. Thorne*, 173 N.C. App. 393, 399, 618 S.E.2d 790, 795 (2005) (upholding the admission of testimony by a police officer that the gait of the suspect observed in a surveillance video was similar to defendant's gait because the officer was trained to notice differences in the ways people walked and had observed the defendant's gait in the past). However, we found the error was not prejudicial because there was other substantial evidence to support the jury's verdict and the court gave a limiting instruction to the jury that it was not required to agree with the officer's opinion testimony of what the video depicted. *Id.* at 733-34, 671 S.E.2d at 356-57.

The present case is distinguishable from both *Belk* and *Buie*. Here, Detective Issa Smith offered lay opinion testimony as to what surveillance footage recovered from the Z Mart depicted. The surveillance footage was of poor quality, impacted by a gray fog making it difficult to clearly see the features of the individuals in the footage. Detective Smith, familiar with defendant's appearance because she interviewed defendant the day after Johnson's murder, identified defendant as one of the individuals in the footage. Thus, unlike the facts of *Belk* and *Buie*, the officer here was able to identify defendant based on first-hand knowledge or perception of defendant which enabled her to identify him despite the foggy quality of the footage. Though there was no evidence presented at trial that defendant disguised his appearance at the time of the offense or altered his appearance prior to trial, these factors are not dispositive. Ultimately, we find Detective Smith's level of familiarity with defendant, combined with the poor quality of the surveillance footage, support the trial court's decision to admit the testimony. Accordingly, the trial court did not abuse its discretion.

Even assuming, *arguendo*, that Detective Smith was not in a better position than the jury to identify defendant as one of the individuals in the surveillance footage, admitting her testimony was harmless error. Similar to *Buie*, there was other substantial evidence tying defendant to Johnson's murderer. Deeshone Gilmore, Daisia Means, Michael Gilmore, and Anthony Jones all provided testimony

from which the jury could base a finding of defendant's guilt. We therefore hold any error was harmless.

III. Conclusion

For the foregoing reasons, we find no error, and no plain error.

NO ERROR.

Judges STROUD and BROOK concur.

Report per Rule 30(e).