

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1122

Filed: 21 July 2020

Forsyth County, No. 18CRS 1466-67, 18CRS051294

STATE OF NORTH CAROLINA

v.

BRADRICK KENTAE BENNETT, Defendant.

Appeal by Defendant from judgment entered 19 March 2019 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 29 April 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne, for the State.*

*Mark L. Hayes for the Defendant.*

DILLON, Judge.

Defendant Bradrick Bennett appeals from a judgment finding him guilty of robbery with a dangerous weapon.

I. Background

On 28 July 2017, Caroline Skipwith was working as a cashier at a gas station in Winston-Salem. That night, Ms. Skipwith saw Defendant exit the store with a

case of beer without paying. Ms. Skipwith followed Defendant out of the store and yelled that he had to pay for the beer. Defendant kept walking to his car, and Ms. Skipwith followed him. She tried to grab the case of beer, but Defendant was able to put the case of beer in his vehicle. According to Ms. Skipwith, Defendant reached in his pants and pulled out what she thought was a small handgun but did not point it at Ms. Skipwith. Defendant said to her, “You don’t want to do this.”

Ms. Skipwith backed away. She went back into the store and called 911. Ms. Skipwith described the perpetrator to police as a tall black male with shoulder length salt and pepper dreadlocks who had a raspy voice. She initially told the police that the robbery suspect had pointed a gun to her chest; however, she clarified at trial that he had merely pulled a gun from his pants to threaten her. Further, when initially shown a line-up that included Defendant, Ms. Skipwith chose a different person as the perpetrator of the robbery. Later at trial, she identified Defendant as the person who robbed the gas station.

When the Winston-Salem Police Department was attempting to identify the suspect from surveillance footage taken from the gas station, they sent an email to all officers with still images from the video footage. Officer A. N. Norman “instantly recognized the suspect” as Defendant from their many previous interactions, including: (1) speaking with Defendant at a hospital after he had been stabbed, (2) interacting with Defendant at the Law Enforcement Detention Center, and (3)

arresting Defendant after encountering him on the street. These interactions amounted to at least two hours and forty minutes of contact with each other. Officer Norman's identification of Defendant led to his arrest in this case.

Defendant was convicted of robbery with a dangerous weapon. He timely appealed to our Court.

## II. Analysis

Defendant makes several arguments on appeal, which we address in turn.

### A. Officer Norman's Lay Opinion

Defendant argues that the trial court incorrectly allowed Officer Norman's lay testimony concerning his identification of Defendant. We disagree.

We review a trial court's decision on the admissibility of lay witness testimony for abuse of discretion. *See State v. Wilson*, 322 N.C. 117, 135, 367 S.E.2d 589, 600 (1988). "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. Elliot*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006).

Normally, a lay witness giving testimony in the form of an opinion is not admissible because it "invade[s] the province of the jury." *State v. Fulton*, 299 N.C. 491, 494, 263 S.E.2d 608, 610 (1980). However, our Court has stated that a lay witness may opine as to the identification of a person

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.

*State v. Belk*, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009).

In addition, the following factors are to be weighed in allowing this type of lay opinion testimony:

- (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. Collins*, 216 N.C. App. 249, 256, 716 S.E.2d 255, 260 (2011). Lastly, it is also appropriate for us to consider "the clarity of the surveillance image and completeness with which the subject is depicted" therein. *See Belk*, 201 N.C. App. at 416, 689 S.E.2d at 442.

We agree with the State that Officer Norman's lay testimony was helpful to the jury and was not outweighed by possible undue prejudice to Defendant. The trial court considered the *Collins* factors and determined that they weighed in favor of allowing Officer Norman's testimony: (1) Officer Norman had a high level of familiarity with Defendant due to their numerous interactions at close range and (2)

Officer Norman was familiar with Defendant's appearance as he looked on the footage. Further, the trial court specifically found that "the video was not the best video. That the still shots from inside the convenience store were the best pictures, were most clear."

Defendant argues that Officer Norman's testimony was highly prejudicial, as it gave the impression that Defendant had committed other crimes. Although Officer Norman did not reveal details of her interactions with Defendant, Defendant claims that the jury could deduce what type of interactions a police officer would likely have with someone in a building for an extended period of time. However, we disagree that the trial court erred in determining that any prejudice outweighed the probative value of her testimony.

The trial court's determination to allow Officer Norman to testify was the result of a reasoned decision. Thus, the trial court did not abuse its discretion in allowing Officer Norman to testify as to her identification of Defendant in the footage from the robbery.

#### B. Jury Instruction on Misdemeanor Larceny

Defendant argues that the trial court should have instructed the jury on the lesser charge of misdemeanor larceny. We disagree.

We review *de novo* challenges to a trial court's decision regarding jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Our

courts have consistently held that “due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.” *State v. Arnold*, 329 N.C. 128, 139, 404 S.E.2d 822, 829 (1991) (emphasis in original). However, if “the State’s evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense.” *State v. Clevinger*, 249 N.C. App. 383, 392, 791 S.E.2d 248, 255 (2016).

Here, Defendant argues that the State’s evidence was not clear and positive for every element of robbery with a dangerous weapon, and therefore, the lesser included instruction should have been given. Defendant specifically argues that the State’s threshold was not met for the sixth and seventh elements as they were stated to the jury:

Sixth, that the defendant had a firearm in his possession at the time he obtained the property or it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant’s conduct represented it to be.

And seventh, that the defendant obtained the property by endangering or threatening the life of that person with the firearm.

In particular, Defendant attacks the reliability of Ms. Skipwith's testimony and the lack of video evidence of his possession of a gun at the robbery, as the surveillance video did not show a gun being pointed at Ms. Skipwith.

While it is true that Ms. Skipwith initially told police that Defendant pulled out a gun and pointed it at her chest, the fact remains that she testified at trial that Defendant threatened her with what appeared to be a gun. Defendant did not present any evidence to contradict her testimony, and affirmative video evidence to corroborate Ms. Skipwith's testimony was not required. It was for the jury to decide what weight to give Ms. Skipwith's testimony, but her potential unreliability alone did not warrant a jury instruction for a lesser included offense. *See State v. Rhinehart*, 322 N.C. 53, 59, 366 S.E.2d 429, 432-33 (1988) (holding that when the State's evidence is positive as to each element of the crime charged and there is no *conflicting* evidence relating to any element, then the trial court is not required to instruct on a lesser included offense); *see also State v. Porter*, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009) ("The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense."). The consistency in Ms. Skipwith's story – that she saw Defendant display what appeared to her to be a gun and that she felt threatened – is what satisfied the clear and positive threshold for the sixth and seventh elements of robbery with a dangerous weapon.

III. Conclusion

We conclude that the trial court did not abuse its discretion in allowing Officer Norman to give lay opinion testimony. Further, we disagree that the trial court was required to instruct the jury on the charge of misdemeanor larceny.

NO ERROR.

Judges BERGER and HAMPSON concur.

Report per Rule 30(e).