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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-585

Filed 20 February 2024

New Hanover County, Nos. 20CRS55384-87 22CRS1397

STATE OF NORTH CAROLINA

v.

ANTHONY JEROME WALKER

Appeal by defendant from judgment entered 29 July 2022 by Judge G. Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 24 January 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alan D. McInnes, for the State.

Ryan Legal Services, PLLC, by John E. Ryan III, for the defendant-appellant.

TYSON, Judge.

Anthony Jerome Walker (“Defendant”) appeals from the jury’s verdicts and the judgments entered thereon for four counts of habitual larceny and attaining habitual felon status. Our review discloses no error.

I. Background

Several home improvement stores located in Wilmington noticed a series of

thefts that appeared to be conducted by the same individual. Lowe's Home Improvement Stores ("Lowe's") security footage recorded a tall, middle-aged, black male with a thin physique shoplifting on 21 May 2019. In the video footage, the perpetrator placed two DeWalt power tools, collectively totaling \$168, into a canvas bag he had brought into the store. The perpetrator left the store without paying for the tools.

Stacey Willetts ("Willetts"), Lowe's senior asset protection investigator, received a notification *via* the online employee theft-reporting tool regarding the potential theft. Willetts reviewed the security footage, made copies of the recording, and forwarded a copy to Wilmington Police Detective Joshua Trantham ("Det. Trantham"). Willetts frequently communicated with Det. Trantham throughout 2019 and early 2020, and Det. Trantham informed Willetts a suspect had not been identified or arrested.

Approximately one year after this incident where Willetts had submitted the video footage to law enforcement, Lowe's loss prevention department received several tips from the online theft reporting tool regarding shoplifting activity during the early hours on Saturday mornings. Damien Vuotto ("Vuotto"), an asset protection agent for Lowe's, reviewed security footage from 2 May 2020. The footage revealed a tall, thin, middle-aged black man concealing and stealing merchandise valued at approximately \$549.

Vuotto attempted to intercept the suspect on 16 May 2020, an upcoming

Saturday morning. Vuotto and his assistant arrived at the store later than they planned, and they were unable to directly observe any shoplifting activity. However, when reviewing security footage from that morning, Vuotto identified a man fitting the same description as the perpetrator of the 2 May 2020 shoplifting theft “selecting about \$1,900 worth of tools and exiting the building” without paying earlier that morning.

Vuotto made subsequent plans to monitor the store the following Saturday on 23 May 2020. On that day, a tall, thin, middle-aged, black male, who was wearing the same clothes as the man in the security footage from 16 May 2020, entered Lowe’s around 8:00 a.m. Vuotto observed the man place one Craftsman tool and one DeWalt tool inside his shopping cart, conceal the tools in a bag, and exit the store through the “lumber” exit without paying for the tools. Vuotto and his assistant confronted the male in the parking lot and confiscated the merchandise off his shoulder, but the male escaped on a red bicycle, which was one of the means of transportation depicted in the surveillance footage from prior thefts. Vuotto subsequently informed his supervisor regarding the incident and submitted a report to the Wilmington Police Department.

Defendant was not connected to the prior three shoplifting incidents until September 2020. Defendant was observed and confronted by a loss prevention agent after allegedly attempting to steal several power tools from a Home Depot Store in Wilmington. Defendant allegedly repeatedly assaulted Christopher Howell

(“Howell”), who was a loss prevention officer employed by a Kohl’s Store, located in the same shopping center as the Home Depot. The Home Depot loss protection agent attempted to protect Howell from Defendant’s assaults, until Defendant eventually evaded both Howell and the Home Depot agent. A former law enforcement officer apprehended and held Defendant until law enforcement officers arrived upon the scene. While Defendant was in custody, law enforcement officers connected him to the prior larcenies at Lowe’s.

Defendant was indicted on 19 January 2021 for nine counts of habitual larceny and one count of assault by strangulation. Defendant was also indicted on 31 May 2022 for attaining habitual felon status based on felonies Defendant had committed in the early 2000s, including one count of felony fleeing or alluding arrest and two counts, committed nearly four years apart, of possession with intent to sell and distribute counterfeit controlled substances, pursuant to N.C. Gen. Stat. § 14-7.1 (2023).

A trial was held on 22 July 2022, and Defendant proceeded *pro se*. The State dismissed five habitual larceny charges and their respective habitual felon status counts throughout the course of trial.

At trial, Willetts testified regarding the 21 May 2019 incident, the video surveillance system at Lowe’s, and the copies of the security footage she had downloaded and submitted to law enforcement officers. Willetts also testified regarding the contents of the videotape. In response to a non-leading question

inquiring about the surveillance footage, Willetts stated the video showed “the defendant exiting the department with products in that bag.” Defendant failed to object to this testimony. Willetts later referred to the person in the video as the “defendant,” and the trial court *sua sponte* stated the following: “Sustained. Jurors will disregard the witness characterization of the individual as the defendant.”

Vuotto also testified regarding his investigation of the repeated thefts at Lowe’s. Vuotto identified Defendant as the suspect he directly confronted outside the store on 23 May 2020. During his testimony on direct examination regarding the surveillance footage he examined, Vuotto described the person depicted in the footage as the “suspect” instead of Defendant. On direct examination, Vuotto never identified the suspect in the videos relating to the 2 May 2020 and the 16 May 2020 incidents as being the Defendant. When Defendant cross-examined Vuotto, Defendant inquired:

[Defendant]: I was just wondering. You say on May the 28th and the 23rd – let me make sure the dates are right. You said you called detective – Officer Hayes and you stated you didn’t know who took those items at the time?

[Vuotto]: Sure.

[Defendant]: So what brought you to the conclusion that the defendant took them?

[Vuotto]: So you’re identified as part of the shoplifting at the Home Depot in connection to the strangulation case, and that information was cross referenced to our video footage and you were identified in that matter.

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[Defendant]: But in both of those – I don't understand. How did y'all – did the camera tell y'all that it was me?

[Vuotto]: So we put our evidence together and filed it with the Wilmington Police Department, and then the police department makes that justification at the end of the day.

[Defendant]: So you didn't make the justification?

[Vuotto]: No. We connected the evidence with the police department in connection to the assault and larceny case at Home Depot.

[Defendant]: And Wilmington Police Department determined who the person is on the picture, not Lowe's or –

[Vuotto]: Correct, at the end of the day. We don't do final – as loss prevention, we don't [have] any final say on who a subject is without police investigation. Police always have to do the final investigation.

Notably, the State dropped the habitual larceny and assault charges related to the Home Depot incident. During the re-direct examination of Vuotto, the State limited Vuotto's identification of Defendant to the 23 May 2020 incident, where Vuotto directly confronted Defendant:

[The State]: So you didn't know the defendant's name back in May of 2020.

[Vuotto]: Correct.

[The State]: But sitting here now and having had your back and forth with the defendant, is that the person that you encountered May 23rd, 2020 that you've been talking about?

[Vuotto]: Correct, and that name came in connection with

the arrest in September.

[The State]: But you recognized him from that incident, correct?

[Vuotto]: Correct.

After Vuotto's testimony, the trial court excused the jury and expressed concerns regarding Vuotto's identification of Defendant as the individual in all three videos. The trial court conducted a *voir dire* of Vuotto. Following the *voir dire*, the trial court did not strike any of Vuotto's testimony or provide any limiting instructions to the jury regarding Vuotto's testimony.

Det. Trantham testified regarding his investigation of the Lowe's shoplifting incidents initiated by Willetts in 2019, along with the subsequent shoplifting reports from Lowe's and Home Depot in 2020. Det. Trantham testified the person in the videos had the same physical description: a tall, slender, middle-aged black male. He explained the suspect wore a face mask in all three of the May 2020 thefts and was wearing a hat in two of the thefts. He also discussed the similarities between all of the larceny incidents: the same type of merchandise was stolen; the suspect used a metal ladder to remove items from the top shelf; the suspect placed the stolen items in a tote; the suspect "wore the exact same clothing, a gray T-shirt with a white stripe across the top half, tan pants, and gray Nike shoes" for two of the May 2020 incidents; and the suspect depicted in the surveillance footage captured on 2019 and the 23 May 2020 had a similar gait and mannerisms.

The trial court also conducted a hearing outside of the presence of the jury regarding Det. Trantham's ability to testify regarding his ability to identify Defendant in the surveillance footage. Afterwards, the trial court instructed the jury Det. Trantham's testimony identifying Defendant as the individual in the surveillance footage may only be considered for the limited purpose of providing context for Det. Trantham's course of conduct throughout his investigation.

Defendant was convicted on four counts of habitual larceny pursuant to N.C. Gen. Stat. § 14-72(b)(6) on 29 July 2022 for incidents occurring on 21 May 2019, 2 May 2020, 16 May 2020, and 23 May 2020. He was also convicted of attaining habitual felon status. The trial court imposed two terms of imprisonment, 115 to 150 months and 103 to 136 months to run consecutively, and two terms of 115 to 150 months to run concurrently with the first two terms.

Defendant gave oral notice of appeal on 29 July 2022 in open court.

II. Jurisdiction

Jurisdiction lies in this court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Lay Opinion Testimony

Defendant argues the trial court plainly erred by allowing three lay witnesses to testify regarding Defendant's identity.

A. Standard of Review

Criminal defendants must make a "timely request, objection, or motion" to

preserve an issue for appellate review. N.C. R. App. P. 10(a)(1).

On appeal, “[p]reserved legal error is reviewed under the harmless error standard of review. Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error.” *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted).

This Court will only review an issue for plain error when a defendant has “specifically and distinctly contended” the contested action amounted to plain error. N.C. R. App. P. 10(a)(4). Additionally, plain error review is limited to instructional and evidentiary errors. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (“Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error.” (citation omitted)).

To prevail under the plain error standard of review, a criminal defendant must demonstrate the error at trial was “fundamental” and “had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* at 518, 723 S.E.2d at 334 (citation omitted). “Under the plain error rule, [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) (citation omitted).

“We review a trial court’s ruling on the admissibility of lay opinion testimony for abuse of discretion.” *State v. Belk*, 201 N.C. App. 412, 417, 689 S.E.2d 439, 442 (2009) (citing *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000)

(explaining “whether a lay witness may testify as to an opinion is reviewed for abuse of discretion”)).

B. Analysis

Defendant argues the trial judge plainly erred by allowing Willetts, Vuotto, and Det. Trantham to testify, as lay witnesses, that they identified Defendant as the person depicted in the surveillance recordings.

“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). Admissible lay opinion testimony “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 (2023).

Here, the trial court conducted a *voir dire* hearing and an evidentiary hearing outside of the presence of the jury to determine whether Vuotto and Det. Trantham could testify regarding their ability to independently identify the suspect in the surveillance footage as the Defendant. The trial court also intervened *ex mere moto* to instruct the jury to disregard Willetts’ testimony regarding the identification of Defendant as the individual depicted in the videos.

Further, the trial court provided the following jury instructions regarding lay opinion testimony and the identification of Defendant:

Photographs were introduced into evidence in this

case for the purpose of illustrating and explaining the testimony of a witness. These photographs may not be considered by you for any other purpose. Videos were introduced into evidence in this case. These videos may be considered by you as evidence of facts that they illustrate or show.

I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

Evidence has been received from a witness in the form of an opinion. You may only consider the opinion of a witness that is rationally based on the perception of the witness and helpful to a clear understanding of the witness testimony or the determination of a fact in issue.

Defendant has not demonstrated either error or prejudice to show, “that absent the error, the jury probably would have reached a different result.” *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. Defendant’s argument is without merit and overruled.

IV. Conclusion

Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. Defendant demonstrates no reversible or prejudicial error in the jury’s verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges WOOD and STADING concur.

Report per Rule 30(e).