An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA01-875

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Lincoln County
No. 96 CRS 3813

REBECCA BARNETTE,
Defendant.

On a writ of certiorari from judgment entered 16 March 1998 by Judge James U. Downs in Lincoln County Superior Court. Heard in the Court of Appeals 22 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Jerry M. Trammell, for defendant-appellant.

HUDSON, Judge.

Defendant was found guilty of robbery with a dangerous weapon and was sentenced on 16 March 1998 to imprisonment for a minimum term of 48 months and a maximum term of 67 months. Her petition for a writ of certiorari was allowed by this Court on 17 November 2000.

The State presented evidence tending to show that at approximately 3:30 a.m. on 7 October 1995, two men wearing masks and camouflage clothing, and armed with a pistol and shotgun entered the Gasland USA Number Two convenience store located near a drugstore and ordered the attendant to give them all of the money

in the cash register. The attendant removed all of the money from the register, placed it in a bag, and handed the bag to one of the men. The men then exited the store.

Defendant subsequently gave a statement on 11 July 1996 to Investigator Jerry Hallman of the Lincolnton Police Department in which she indicated that on 7 October 1995 she accompanied her future husband, Claude Barnette, Jr. (Claude), and Tracy Keeler (Keeler) to a Gasland convenience store in Lincolnton and waited outside in their vehicle while Keeler and Claude, wearing masks and camouflage clothing, and armed with a shotgun and pistol, went into the store and robbed it. The men ran out of the convenience store and got into the car, which was parked outside the drugstore next to the convenience store. She drove them home to Cherryville. Claude gave her $40 in cash, gave some money to Keeler and Keeler's girlfriend, and placed the remainder in their safe.

During her testimony, defendant denied driving a vehicle to the convenience store so that Keeler and Claude could commit a robbery. She testified that she gave the inculpatory statement to retaliate against her husband, who had made her angry.

We first reach defendant's assignment of error by which she contends the trial court erred in denying her motion to dismiss the charge at the close of the State's evidence. She argues the evidence fails to show that she perpetrated the robberies or aided and abetted the actual perpetrators.

By presenting evidence, defendant waived her motion to dismiss made at the close of the State's evidence and, thus, she is

prohibited from challenging the denial of that motion on appeal. *See State v. Stocks,* 319 N.C. 437, 438, 355 S.E.2d 492, 493 (1987). She has not presented an assignment of error regarding the denial of her motion to dismiss made at the conclusion of the evidence. Therefore, the issue of the sufficiency of the evidence is not properly presented for review.

Notwithstanding defendant's failure to preserve this assignment, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure (1999), we waive the strict requirements of the rules and consider the issue. In deciding a motion to dismiss, the court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. *See State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The court must disregard contradictions and discrepancies in the evidence, leaving them for jury resolution. *See id.* The test is the same whether the evidence is direct, circumstantial, or both. *See State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982). If the evidence supports a reasonable inference of guilt, then the court must deny the motion and allow the jurors to determine whether the evidence satisfies them beyond a reasonable doubt of the defendant's guilt. *See State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981).

A person is guilty of a crime by aiding and abetting if: "(1) [] the crime was committed by another; (2) [] the defendant knowingly advised, instigated, encouraged, procured, or aided the

other person; and (3) [] the defendant's actions or statements caused or contributed to the commission of the crime by the other person." *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). The defendant "must aid or actively encourage the person committing the crime" or communicate to the perpetrator his intent to assist. *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). The defendant's intent to aid "may be inferred from [the defendant's] actions and from his relation to the actual perpetrators." *Id.*

The evidence in this case shows that defendant accompanied her husband and their housemate, Keeler, to the convenience store, knowing that they planned to rob the store; that she waited in the vehicle while the two men robbed the store; that she transported the robbers away from the scene; and that she shared in the proceeds of the robbery. Based upon the foregoing evidence, a jury could reasonably find defendant guilty of the crime as an aider and abettor. The court therefore properly denied the motion to dismiss.

Defendant's remaining contention is that the court erred by permitting the State to impeach its own witness through examining the witness by the use of leading questions regarding prior statements made by the witness to the prosecutor. During direct examination of the witness, the following colloquy occurred:

> Q. Did you have an occasion to talk to Rebecca Barnette about the robbery at the Gasland Number Two, on October the 7th, 1995?
> A. No, not really.
> Q. Did she ever tell you anything about the

robbery at Gasland on October the 7th, 1995?
A. Not really.
Q. When you say, "not really", what do you mean?
A. She never come right out and told me, no.
Q. Did you discuss the robbery at the Gasland on October the 7th, 1995, with her?
A. I asked her about it one time.
Q. Where was you when you asked her about it?
A. I can't remember.
Q. Why did you have an occasion to ask her about it?
A. I was told about it.
Q. By who?
A. Tracy Keeler.
. . .
Q. Well, what did you ask Ms. Barnette about the robbery, if anything?
A. I can't remember exact words.
Q. Well, as best you can recall, what did you ask her or tell her?
A. If they did it.
Q. And when you say -- you asked if they did it --
...
Q. -- what were you referring to?
A. The robbery.
Q. And what was her response?
...
A. I can't remember.
Q. Ma'am, do you recall meeting with me last week?
A. (Witness nodding head up and down.)
Q. Did you have any difficulty remembering what was said in that meeting? Now, I'll ask you again, Ms. Pruitt, what was her response when you asked her about the robbery at Gasland Number Two on October the 7th, 1995?
MR. PHILLIPS: OBJECTION. Asked and answered.
THE COURT: OVERRULED.
A. She just -- she didn't come right out and say that they did it.
Q. Tell me what she said.
A. I can't remember.
...
Q. Do you recall telling me that when you were talking about the robbery with Ms. Barnette, she indicated that she didn't want to do it? Do you remember saying that? You need to say yes or no.
A. Yes.
Q. Did she tell you she was afraid of her husband if she did not go along with the

robbery?
MR. PHILLIPS: OBJECTION.
THE WITNESS: Yes.
...
THE COURT: OVERRULED.
Q. Do you remember telling me that the men got out of the car?
MR. PHILLIPS: OBJECTION
THE COURT: Wait a minute. Do you remember her telling you that she told her that?
MR. SHAFFER: Yes, sir.
THE COURT: OVERRULED.
THE WITNESS: Yes.
Q. Do you remember telling me that she told you her husband had a shotgun?
MR. PHILLIPS: OBJECTION
THE COURT: OVERRULED.
THE WITNESS: Uh-huh. (Affirmative)
Q. Do you remember telling me that she said she thought about leaving?
MR. PHILLIPS: OBJECTION.
THE COURT: OVERRULED.
THE WITNESS: Yes.
Q. And do you remember telling me -- that she told you the men returned to the car and she drove off?
MR. PHILLIPS: OBJECTION.
THE COURT: OVERRULED.
THE WITNESS: Yes.

Defendant argues the prosecutor was bound by the witness' testimony that she could not remember the contents of her conversation with defendant.

As defendant acknowledges in her brief, a party may impeach its own witness under our Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 607 (1999). Even before the adoption of the rules, counsel could "refresh the recollection" of a hesitant, evasive, or unwilling witness by calling the witness' attention to prior inconsistent statements of the witness. *See* 1 Brandis & Broun on North Carolina Evidence, § 152 (5th ed. 1998). A prosecutor could impeach his own witness when he is "surprised by a witness whose

testimony in court was contrary to what he had a right to expect." *State v. Anderson*, 283 N.C. 218, 225, 195 S.E.2d 561, 566 (1973). In this situation the examiner could ask leading questions to refresh the memory of the witness. *See State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 236 (1974). It is settled that the decision to allow leading questions is within the discretion of the trial judge. *See State v. Marlow,* 334 N.C. 273, 286-87, 432 S.E.2d 275, 282-83 (1993). We find no abuse of discretion in the case at bar. This assignment of error is overruled.

No error.

Judges GREENE and TYSON concur.

Report per Rule 30(e).