

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1283

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

STATE OF NORTH CAROLINA

v.

Pender County
No. 04 CRS 52268

MICHAEL A. MCIVER

Appeal by defendant from judgment entered 30 March 2005 by Judge Ben Alford in Pender County Superior Court. Heard in the Court of Appeals 20 April 2006.

Attorney General Roy Cooper, by Director of Victims and Citizens Section, William M. Polk, for the State.

Daniel F. Read for defendant-appellant.

CALABRIA, Judge.

Michael A. McIver ("defendant") appeals from a jury verdict finding him guilty of robbery with a dangerous weapon. We find no error.

At trial on 30 March 2005, the State presented evidence that on 15 September 2004, Deputy Ernest Derrock of the Pender County Sheriff's Department ("Deputy Derrock") investigated an armed robbery at Pizzas 2U ("Pizzas") in the Spring Branch Junction shopping center ("center") in Hampstead, North Carolina. Specifically, Deputy Derrock interviewed witnesses and "secured the scene until [the detectives] got there" including protecting the

sidewalk next to Pizzas where money was found. Another witness, Douglas Heffernan ("Mr. Heffernan"), owner of the center where Pizzas is located, testified from personal knowledge of the operation and location of three video surveillance cameras in the center located in the front of the building where Pizzas was situated. During Mr. Heffernan's testimony, the State played a videotape covering the area in front of the sidewalk by Pizzas ("the video") to the jury. Mr. Heffernan testified that the video captured the image of a black male in dark pants and a white, untucked shirt outside the entrance of Pizzas at 8:49 p.m. Later, at nearly 8:53 p.m., the video showed a person in dark pants entering Pizzas, then exiting shortly after that time. Mr. Heffernan further testified that he noticed this person in the video appeared to have "a bit of white coming out from under his coat" and more importantly, a gun in one hand and money in the other after exiting Pizzas.

Ludmila London ("Ms. London"), the owner of Pizzas, testified the person who robbed her "had very long fingers [and] very dark skin on his fingers." Also, Ms. London remembered "he had a bandana cover[ing] his face" and he wore a white shirt and black jacket. Ripley Lopresti, an employee at Pizzas, testified that the man he recognized in the two still photographs retrieved from the video resembled the man he had encountered outside behind Pizzas just prior to the robbery.

Britt Carter, an agent with the Pender County Sheriff's Office Vice and Narcotics Unit ("Agent Carter"), testified she canvassed

the area surrounding Pizzas after the armed robbery and noticed a black male, meeting the description of the defendant, walking on St. John's Church Road. Agent Carter described what she observed. "[Defendant] was ... looking around, messing with his hands, acting nervous." At this point, she identified herself and her employment "with the Sheriff's Office," approached the defendant and asked several times if she could talk with him. At first, he replied "no." Defendant then told Agent Carter he would talk with her at his house, but when Agent Carter returned to her vehicle to follow him, defendant "began running." Agent Carter followed defendant in her vehicle, through several homeowner's yards, to his home. When Agent Carter arrived at his home, she confronted the defendant. He remained silent and never offered any information regarding the armed robbery. Agent Carter testified that after she watched the video, she believed the defendant was the same person as the person in the video. In addition, Agent Carter also identified the defendant from the two still photographs retrieved from the video. The defendant did not testify or present any evidence.

I. Motion to Dismiss and Jury Instruction:

Defendant argues the trial court erred in denying his motion to dismiss and in instructing the jury on flight. However, defendant failed to preserve either assignment of error for appellate review. According to N.C. R. App. P. 10(c)(1) (2005), "[e]ach assignment of error shall ... state plainly, concisely and without argumentation *the legal basis* upon which the error is

assigned." (emphasis added). However, defendant's pertinent assignments of error state

1. The trial court erred in denying the [d]efendant's motion to dismiss.
2. The trial court erred in instructing the jury on flight.

Thus, in violation of Rule 10(c)(1), neither the first or the second assignment of error provides a legal rationale upon which the alleged error is predicated. See *Dep't of Transp. v. Rowe*, 353 N.C. 671, 674, 549 S.E.2d 203, 207 (2001) (stating "Rule 10(c) of the North Carolina Rules of Appellate Procedure requires that an appellant state the legal basis for all assignments of error.") In *Munn v. N. C. State Univ.*, __ N.C. __, 626 S.E.2d 270 (2006), *rev'g for reasons stated in* __ N.C. App. __, 617 S.E.2d 335 (2005) (Jackson, J., dissenting), our Supreme Court recently reaffirmed the importance of closely adhering to the Rules of Appellate Procedure. Consequently, because defendant's assignments of error one and two violate N.C. R. App. P. 10(c)(1), they are dismissed. See *State v. Buchanan*, 170 N.C. App. 692, 693, 613 S.E.2d 356, 356 (2005) ("hold[ing] that Defendant's failure to comply with Rule 10(b)[,] by failing to renew his Motion to Dismiss at the close of all evidence[,] mandates a dismissal of this appeal.")

II. Videotape:

Defendant argues the trial court erred by failing to preserve a playable copy of a videotape in the court file. Defendant contends his due process rights, as well as meaningful appellate review, were denied. We disagree.

Defendant cites to *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000) where our Supreme Court stated "the absence of a *complete transcript* does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal." (emphasis added). In the instant case, however, defendant was provided with a complete transcript which enabled him to engage in meaningful appellate review. Thus, *Lawrence* is inapplicable here. Furthermore, defendant stipulated that the photographs, State's exhibits numbers two and three, retrieved

from the video ... were published to the jury and admitted into evidence, and that the images thereon are representative of, and more or less as sharp as, the other images of people on the video that was shown to the jury.

Consequently, the defendant's stipulations acknowledge the still photographs presented to the jury were a substitution that is representative of the video shown to the jury. Thus, this Court can engage in meaningful review of this defendant's appeal without the original video because the still photographs produced from the video are included in the record. Moreover, Agent Carter identified defendant from the still photographs in question. Finally, defendant fails to cite any authority for his particular premise that the lack of a reviewable video on appeal denied him meaningful appellate review. Pursuant to N.C. R. App. P. 28(b)(6) (2005), this assignment of error is subject to being abandoned. For the foregoing reasons, we overrule this assignment of error.

No error.

Judges McCULLOUGH and STEELMAN concur.

Report per Rule 30(e).