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NO. COA05-1468

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v.

Burke County
No. 04 CRS 3069

TONY GENE HARRISON,
Defendant.

Appeal by defendant from judgments entered 6 April 2005 by Judge Richard D. Boner in the Superior Court the Burke County. Heard in the Court of Appeals 26 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Michael E. Casterline, for defendant-appellant.

HUDSON, Judge.

On 6 April 2005, a jury found Tony Gene Harrison ("defendant") guilty of robbery with a firearm, conspiracy to commit robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury. Defendant was sentenced to 77 to 102 months imprisonment for the robbery and conspiracy convictions and 29 to 44 months imprisonment for the assault conviction. Defendant appeals. As discussed below, we conclude defendant's trial was free from error.

The State's evidence at trial tended to show the following:

On the evening of 18 November 2003, two employees were working at a Domino's Pizza store in Valdese, North Carolina. Wesley Scott Jett, the store manager on duty that evening, testified that he was washing dishes at approximately 10:30 p.m. when two men with hoods over their heads walked into the store. He testified that one of the men was black and was approximately five feet, eight or nine inches in height. The other man was white and was approximately six feet in height. The white man, who was eventually identified as defendant, pointed a gun toward the employees, demanded all of the store's money, and instructed them to place the money into a bag held by the unarmed robber. Mr. Jett complied and walked to the front counter, opened the cash drawer, set the till out, and placed the money into the bag. Thereafter, defendant continued to point a gun at Mr. Jett as he backed away toward the door. As defendant approached the door, he pulled the gun up, then back down, and fired, striking Mr. Jett in his right forearm.

The State sought to illustrate Mr. Jett's testimony by the use of several photographs of the Domino's Pizza store. Defendant objected because the State failed to provide the photographs to defendant in response to his pretrial request for voluntary discovery. After hearing the arguments of counsel, the trial court allowed the State to introduce the photographs for illustrative purposes only. Mr. Jett then testified further about the robbery using the photographs of the store to illustrate and explain his testimony. One of the photographs was later used to illustrate and explain the testimony of a police officer who responded to the

robbery.

Jacob Scronce, the other employee working at the Domino's Pizza store on the evening of 18 November 2003, testified he was beginning to clean the store when he heard the door chime indicating the door was being opened. He "peeped" his head around the corner and observed two men with what looked to be pillow cases over their heads. He testified that one of the men pointed a gun at him and demanded that he "put the money in the bag." Mr. Scronce then ducked back around the corner at which time Mr. Jett walked up to the front counter. Mr. Scronce then went out the back door. He testified he only saw the men for approximately two or three seconds and he could not identify them.

Anthony Allred testified that he and some other men, including defendant, had been riding around in a vehicle on the evening of 18 November 2003 when they decided to rob a store. He admitted he was the other person who entered the Domino's Pizza store with defendant that evening and committed the armed robbery.

Steven Vallini testified he was also in the vehicle with defendant, Mr. Allred, and the other men on the evening of the armed robbery. He identified the weapon used in the robbery as a gun that had belonged to him until he sold it to Mr. Allred a few days before the robbery. A detective with the Burke County Sheriff's Office recovered the firearm and identified it at trial as a .22 caliber revolver.

Defendant assigns error to the admission of photographic evidence of the Domino's Pizza store, which was used to illustrate

the testimony of Mr. Jett and a police officer. In support of this assignment, defendant argues that the trial court erred by failing to sanction the State by excluding the photographic evidence for its failure to timely provide the photographs to defendant in response to defendant's pretrial request for voluntary discovery. We disagree.

Here, the State undertook to make voluntary discovery when it responded to discovery requests by defendant. Thus, under N.C. Gen. Stat. § 15A-902(b), the State's voluntary response was deemed to have been made under court order. See *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d 662, 667 (1987). Accordingly, the trial court was authorized to impose a variety of sanctions set forth in N.C. Gen. Stat. § 15A-910 for the State's failure to provide defendant with the photographs of the Domino's Pizza store in a timely manner. *Id.* This statute provides a trial court may:

- (1) Order the party to permit the discovery or inspection, or
- (2) Grant a continuance or recess, or
- (3) Prohibit the party from introducing evidence not disclosed, or
 - (3a) Declare a mistrial, or
 - (3b) Dismiss the charge, with or without prejudice, or
- (4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910 (2003). "The decision as to which sanctions to apply, or whether to apply any of the sanctions at all, however, rests with the discretion of the trial court." *Carson*, 320 N.C. at 336, 357 S.E.2d at 667 (citation omitted); see

also *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988) (the trial court is not required to impose any sanctions for abuse of discovery orders). "The trial court may be reversed for an abuse of discretion in this regard only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Carson*, 320 N.C. at 336, 357 S.E.2d at 667.

Before determining the admissibility of the photographs, the trial court heard arguments of counsel outside the presence of the jury. Defense counsel argued that the photographs should be excluded because the State failed to provide them to defendant in response to his pretrial discovery request. In his request, defendant specifically requested permission to inspect and copy, *inter alia*, all "photographs . . . which are within the possession, custody, or control of the State relevant to these charges and which are intended for use by the State as evidence at trial . . ." The prosecutor represented to the trial court that the original crime scene photographs had been destroyed and were not in existence at the time of defense counsel's discovery request. According to the prosecutor, the photographs he sought to use at trial were taken approximately three weeks before trial and he received them approximately one week before trial.

The trial transcript reveals the trial court carefully considered the circumstances of this matter before allowing the State to introduce the photographs for illustrative purposes. The trial court allowed defense counsel additional time to personally view the Domino's Pizza store and take his own photographs for use

at trial. The trial court also agreed to instruct State's witness Mr. Jett to accompany defense counsel to the store and explain what was depicted in each of the State's photographs. Further, the trial court agreed to recess court early that day to facilitate defense counsel's trip to the store. After defense counsel visited the store, the trial court informed defense counsel he could recall a witness for purposes of rebutting the State's evidence if he chose to do so. Although defense counsel took some photographs of the store during his visit, he did not use his photographs at trial and he declined to recall a State witness for purposes of rebutting the State's evidence.

Under the circumstances of this case, we conclude the trial court's decision to allow the photographs for illustrative purposes was not so arbitrary that it could not have been the result of a reasoned decision. As such, we conclude the trial court did not abuse its discretion in failing to sanction the State by prohibiting its use of the photographs. We overrule this assignment of error.

Defendant's remaining assignments of error are not addressed in his brief to this Court and are deemed abandoned. See N.C.R. App. P. 28(b)(6).

No error.

Judges MCCULLOUGH and STEELMAN concur.

Report per Rule 30(e).