

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1511

NORTH CAROLINA COURT OF APPEALS

FILED: 18 September 2007

STATE OF NORTH CAROLINA

v.

Buncombe County
No. 03 CRS 56368

AARON JONWAN BREWTON

Appeal by defendant from judgment entered 20 April 2006 by Judge Jerry Cash Martin in Buncombe County Superior Court. Heard in the Court of Appeals 6 June 2007.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

CALABRIA, Judge.

Aaron Jonwan Brewton ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of first degree murder. We find no error.

At approximately 5:30 p.m. on 24 May 2003, George Boston ("the victim") was shot and killed while sitting on a motorcycle outside the Deaverview Apartments in Asheville. Someone ("the shooter") who wore a white towel or garment around his head that obscured his identity, emerged from behind one of the apartment buildings and fired at the victim with a pistol. The victim's sister, Kimberly Boston ("Kimberly Boston"), followed the shooter and watched him

enter the passenger side door of a gold P.T. Cruiser, which then drove away. However, Kimberly was able to see the vehicle's license plate number, which she then gave to authorities.

Despite the shooter's disguise, two witnesses, Marcellus Boston ("Marcellus") and Brad Littlejohn ("Littlejohn"), testified that they saw the shooter "from the eyes down" and identified him as defendant. Two other witnesses, Kimberly Boston and Shane Penley, testified that they did not see the shooter's face, but both stated that they believed the shooter was defendant based on his body type.

Following his trial in Buncombe County Superior Court, the jury returned a verdict finding defendant guilty of first degree murder. Judge Jerry Cash Martin then entered judgment upon the jury verdict, sentencing defendant to life imprisonment in the North Carolina Department of Correction. From that judgment, defendant appeals.

On appeal, defendant first argues the trial court erred by denying defendant's motions to dismiss for insufficient evidence. Our courts have established the following standard in reviewing a trial court's denial of a motion to dismiss:

In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence. The court must determine whether substantial evidence supports each essential element of the offense and the defendant's perpetration of that offense. If so, the motion must be denied and the case submitted to the jury. "'Substantial evidence' is that amount of relevant evidence

that a reasonable mind might accept as adequate to support a conclusion."

State v. Hairston, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000) (internal citations omitted).

Here, the State was required to produce substantial evidence to support each element of first degree murder. Our statute defines first degree murder as follows:

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony[.]

N.C. Gen. Stat. § 14-17 (2005).

In the instant case, the State's evidence showed that a man emerged from behind an apartment building and intentionally shot the victim before fleeing in a waiting car. Four witnesses identified defendant as the shooter. Two stated that they saw the shooter from the eyes down and recognized him as defendant. Two others stated that they recognized the shooter as defendant by his "body demeanor." As such, there was sufficient evidence to support a jury finding that defendant was guilty of first degree murder. Any weaknesses in the eyewitness identifications relate to the weight of the evidence, and it is the province of the jury to weigh evidence. This assignment of error is overruled.

Defendant next contends the trial court abused its discretion when it denied defendant's request to inform the jury that the matter was on retrial after the jury in the first trial was unable to reach a unanimous verdict.

Defendant argues that the court should have granted his request to instruct the jury of the previous mistrial under N.C. Gen. Stat. § 15A-1213 (2005), which requires the trial court to "identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice." *Id.*

Defendant further relies on *State v. Carter*, 30 N.C. App. 59, 226 S.E.2d 179 (1976), in which this Court determined it was not error for the court to read a first degree murder indictment to the jury when the State proceeded on the charge of second degree murder. *Carter* is not applicable to the case *sub judice*, and in no way supports an assertion that the trial court abused its discretion in denying defendant's request.

The fact that defendant had previously been tried for first degree murder, resulting in a deadlocked jury, was in no way relevant to defendant's retrial. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005).

Further, we will not determine that a trial court abused its discretion unless the court's decision was "manifestly unsupported by reason." *State v. Williams*, 361 N.C. 78, 81, 637 S.E.2d 523, 525 (2006). Even if the trial court's decision was erroneous, which we have determined it was not, the court's decision to deny defendant's request was not "manifestly unsupported by reason." As such, this assignment of error is without merit.

Defendant lastly argues the trial court erred in sustaining the prosecutor's objection to defense counsel's eliciting from the State's lead investigator's determination of the alleged time that defendant arrived at his uncle's house. Defendant contends that the trial court erred by sustaining the objection because the objection was not hearsay and therefore should have been admitted. Defendant argues, and we agree, that although the prosecutor did not state a ground supporting the objection, the context makes it clear the appropriate ground was hearsay. The relevant exchange was as follows:

Q Let me ask you this: You talked to Harvey Brewton, the man that owned the house then, is that right?

A Yes, sir.

Q Before you arrested my client?

A I talked to him a couple of days later.

Q Did you make a report or summary from your interview of Mr. Harvey Brewton?

A Yes, sir.

Q And in gathering your information from Mr. Brewton, did you determine from talking to him that my client arrived about 5:00?

[The prosecutor] Objection.

THE COURT The Court will sustain it.

Although defendant made no offer of proof, "the substance of the evidence . . . was apparent from the context within which questions were asked," as required by N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2005). Therefore, defendant has preserved this issue for appellate review.

In support of his argument, defendant points to *State v. Oliver*, 334 N.C. 513, 527, 434 S.E.2d 202, 209 (1993), in which our Supreme Court determined that an officer's determination based upon an interview was not hearsay. We believe *Oliver* is distinguishable from the case *sub judice* and that here the trial court properly sustained the prosecutor's objection. In *Oliver*, the witness testified that the declarant was unable to add anything further. As such, no statement was sought to be admitted. "The testimony merely contained the officer's conclusion based on his interview with [the declarant]." *Id.*

Here, defendant sought to elicit an out of court statement by defendant's uncle that defendant arrived at his uncle's home at 5:00 p.m. Such a statement goes beyond an officer's conclusion based on an interview since the officer's conclusion would be based entirely on the statement. As such, the statement would amount to an out of court statement offered for the truth of the matter

asserted and is thus hearsay. This assignment of error is overruled.

No error.

Judges GEER and JACKSON concur.

Report per Rule 30(e).