

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-614

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Cleveland County
No. 04 CRS 56320, 56321

LEROY DIMAIL CANSLER

Appeal by defendant from judgments entered 26 January 2006 by Judge Nathaniel J. Poovey in Cleveland County Superior Court. Heard in the Court of Appeals 11 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General David P. Brenskelle, for the State.

Bryan Gates for defendant-appellant.

LEVINSON, Judge.

Leroy Dimail Cansler (defendant) was found guilty of two counts of robbery with a dangerous weapon.

At approximately 11:30 p.m. on 23 August 2004, three shirtless men armed with two pistols and a shotgun approached Wanda Bowen, James Johnson, and Johnnie Ray Johnson outside the M&K Variety store in Shelby. They ordered Ms. Bowen, a store employee, to open the store and to show them where the bank bag was kept. The three men took the bank bag, Ms. Bowen's purse and .22 caliber pistol, and the wallet of James Johnson. Ms. Bowen and James Johnson subsequently identified defendant as one of the perpetrators. Ms.

Bowen identified defendant as the person armed with a shotgun.

Officers of the Shelby Police Department arrived shortly thereafter to investigate. At approximately 11:53 p.m., a dog with the canine unit arrived at the scene. The dog was taken to a location where the perpetrators were last seen and was commanded to track their scent. The dog proceeded across a parking lot to a hedgerow and dragged out a tee shirt. The dog then dove back into the hedgerow and dragged out a shotgun by its butt end. Officers found a second tee shirt in the same bush line. All of these items were located approximately 45 to 50 yards from the store.

By the sole assignment of error brought forward, defendant contends the court erred by admitting into evidence the shotgun retrieved by the dog. He argues a sufficient foundation was not laid for its admission into evidence. Specifically, he argues a showing was not made that the shotgun was the same one used in the commission of the robbery.

Before an item of real evidence may be admitted, a two-prong showing must be made: (1) the item must be identified as being the same object involved in the incident in question; and (2) the item must not have undergone any material change. *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). "Determining the standard of certainty required to show that the item offered is the same as the item involved in the incident and that it is in an unchanged condition lies within the trial court's sound discretion." *State v. Fleming*, 350 N.C. 109, 131, 512 S.E.2d 720, 736 (1999). "A trial court may be reversed for an abuse of

discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682 (1986).

Mr. Johnson and Ms. Bowen testified that one of the perpetrators carried a "long shotgun" or a "real long gun." The tracking dog pulled out a shotgun from some bushes about 50 yards from the store and in the direction toward which the perpetrators were seen running from the store. The dog also found two tee shirts in the bushes. Mr. Johnson described the perpetrators as wearing tee shirts over their mouths. Another witness for the State, Ms. Monica Lattimore, testified that at approximately midnight or 12:30 a.m. on 24 August 2004 defendant, dressed in a white tee shirt, came to her residence and asked Timothy Felton, who was residing at her house, "to go uptown and get the shotgun out of the bushes[.]" Ms. Lattimore also testified that earlier in the evening, defendant called her husband and asked him to participate with him in a robbery of a store later that night.

Based upon the foregoing evidence, the jury could reasonably conclude that the shotgun retrieved by the dog was the same as the one used to perpetrate the robbery. We hold the court did not abuse its discretion by admitting the evidence.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).