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NO. COA06-90

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

New Hanover County
No. 04 CRS 69310

BRYANT JEROME RIVERS

Appeal by defendant from judgment entered 28 September 2005 by Judge Kenneth F. Crow in New Hanover County Superior Court. Heard in the Court of Appeals 11 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

Robert J. McAfee for defendant-appellant.

CALABRIA, Judge.

Bryant Jerome Rivers ("defendant") appeals from a judgment entered upon jury findings of guilty of malicious conduct by a prisoner. We find no error. The State's evidence tended to show that on 23 December 2004, Officer Wayne Foster ("Officer Foster") of the Wilmington Police Department was dispatched to North 30th Street to assist a county agent to serve defendant with a warrant. When Officer Foster arrived, defendant was handcuffed and in the custody of a New Hanover County Sheriff's Deputy. Officer Foster turned on his patrol vehicle's video camera and wireless microphone and exited his vehicle. After Officer Foster confirmed that there

was an outstanding warrant for defendant's arrest, Officer Foster secured defendant in the back seat of his patrol vehicle. While defendant sat in the patrol vehicle, a woman named Lisa Autry ("Autry") walked up to Officer Foster. Officer Foster observed abrasions on her face. After speaking with Autry, Officer Foster charged defendant with assault on a female.

Upon entering his patrol vehicle, Officer Foster noticed saliva on the windshield, radio, steering wheel, and computer. Defendant was in the backseat screaming and using profanity. Officer Foster took defendant out of the vehicle, put defendant in handcuffs with defendant's arms behind his back, and placed a medical mouth cover on defendant. Defendant continued to shout as the officer secured defendant in the patrol vehicle. Defendant yelled, "When [I] get[] this mask off, [I'm] going to spit in your . . . eye." While Officer Foster drove to the police station, defendant worked the mask off his face, then spit at the officer through the protective grate, hitting Officer Foster on his head, face, ear, and arm. Officer Foster stopped his patrol vehicle and, with the help of another officer, replaced defendant's mask with a "spit hood" and repositioned defendant in the backseat of his patrol vehicle. The patrol vehicle's video camera captured the incident.

Based on these facts, the State charged defendant with malicious conduct by a prisoner. A grand jury subsequently returned indictments on the charge, and this matter was heard on 26 September 2005 in New Hanover County Superior Court. At trial,

defendant denied intentionally spitting on Officer Foster and testified that the spit may have come out of his mouth because he was asthmatic. However, defendant admitted telling Officer Foster: "I will punish you" [;] and "[w]hen I get this mask off, I'm going to spit in your . . . eye." During cross-examination of defendant, the State played parts of a video captured on the camera in the patrol vehicle of Officer Foster. The jury subsequently found defendant guilty as charged, and the trial court sentenced defendant to a minimum of twenty-five months to a maximum of thirty months in the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant contends the trial court erred in allowing the State to introduce the patrol vehicle's video. At trial, the State offered two short video segments. The first segment showed defendant's actions while Officer Foster placed defendant into custody. The second segment showed Officer Foster finding the saliva in his vehicle, putting the mask on defendant, and placing defendant in the backseat. It also showed defendant working the spit mask loose and spitting towards the front seat of the patrol vehicle, where Officer Foster testified he was seated. Defendant objected at trial to the admission of the segments asserting that the video was more prejudicial than probative under N.C. R. Evid. 403 (2005). As to the first segment showing his arrest, defendant also argued that the segment was cumulative under N.C. R. Evid. 403 since defendant had entered into a written stipulation that he "was in the custody of Wilmington Police

officer W. Foster on December 23, 2004." The trial court employed a balancing test as contemplated by N.C. R. Evid. 403 and concluded that each segment was more probative than prejudicial, noting that the video shows defendant's motive, opportunity, and state of mind.

On appeal, defendant asserts that the first segment of the video was "cumulative and unfairly prejudicial" under Rule 403. He also asserts the second segment of the video was "unfairly prejudicial" under N.C. R. Evid. 403 since it was "incomplete" because Officer Foster was seated outside of the view of the video when defendant allegedly spat upon the officer. We note that defendant failed to object when the first segment was initially played during the cross-examination of defendant; thus, he cannot challenge the trial court's determination to admit that evidence on appeal. See *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (standing for the proposition evidence admitted over objection after the same evidence had been previously admitted or is later admitted without objection loses the benefit of the objection). Moreover, defendant did not argue before the trial court that the second segment was incomplete, and thus, did not preserve this specific argument for appellate review. N.C. R. App. P. 10(b)(1). See *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) (quoting *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) ("The defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal").

By his arguments, defendant has preserved the question of

whether the second segment was cumulative and whether its probative value was substantially outweighed by its prejudicial effect under N.C.R. Evid. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2006). Our Supreme Court has stated that "relevant evidence is properly admissible . . . unless the judge determines that it must be excluded, for instance, because of the risk of 'unfair prejudice.'" *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986) (emphasis omitted). "Whether to exclude relevant evidence pursuant to Rule 403 is a decision within the trial court's discretion and will remain undisturbed on appeal absent a showing that an abuse of discretion occurred." *State v. Ward*, 354 N.C. 231, 264, 555 S.E.2d 251, 272 (2001) (citation omitted).

In the instant case, the record does not reflect that the probative value of the video was outweighed by any undue prejudice. The video not only depicted defendant's actions while defendant was placed into custody and was seated in the patrol vehicle but also corroborated the testimony of Officer Foster. We note that "[e]vidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). There is no indication that the video was suggestive, confusing, or misleading, nor is there any indication that the

video provided an improper basis for the jury's verdict. Additionally, defendant's stipulation as to the element of custody does not preclude the use of the video to prove other elements of the offense, such as the element that the defendant "acted knowingly and willfully." See *State v. Crouse*, 169 N.C. App. 382, 386-87, 610 S.E.2d 454, 457, review denied, 359 N.C. 637, 616 S.E.2d 923 (2005) (stating the elements of malicious conduct by a prisoner are: "(1) a person in custody (2) knowingly and willfully (3) threw, emitted, or caused to be used as a projectile, bodily fluids or excrement (4) at a government employee (5) in the performance of his duties"). A defendant's knowledge and the willfulness of his conduct are intangible states of mind that may be determined from the surrounding circumstances, including the defendant's statements and behavior before and after the act in question, as well as his manner of performing the act. *Id.*, 169 N.C. App. at 389, 610 S.E.2d at 459. Therefore, we conclude that the trial court did not abuse its discretion in allowing the introduction of the video.

Defendant has failed to argue his remaining assignments of error on appeal, and we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6).

No error.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).