An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1444

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

STATE OF NORTH CAROLINA
Plaintiff,

v. Alamance County
Nos. 06CRS059198

JEFFREY WAYNE MILES,
Defendant.

Court of Appeals

Appeal by defendant from judgment entered on or about 15 August 2007 by Judge Steve A. Balog in Alamance County Superior Court. Heard in the Court of Appeals 17 April 2008.

Slip Opinion

Attorney General Roy A. Cooper, III, by Assistant Attorney General, Tenisha S. Jacobs, for the State.

Terry F. Rose for defendant-appellant.

STROUD, Judge.

Defendant Jeffrey Wayne Miles appeals from the entry of judgment following a jury trial whereby defendant was found guilty of one count of misdemeanor larceny in violation of N.C. Gen. Stat. § 14-72(a). Defendant contends that the trial court erred by: (1) denying his motion to dismiss for insufficient evidence, (2) allowing the State to reopen over defendant's objection, after having rested, its case-in-chief in order to present additional evidence of ownership of the property in question, and (3) allowing a lay witness, Mary White ("Ms. White"), to testify that she "felt

like [defendant] had taken the merchandise." After careful review of the record we conclude that defendant received a fair trial, free of reversible error.

I. Factual Background

The State presented evidence at trial tending to show the following: On 20 October 2006, defendant entered the Dollar General store on Ramada Road in Burlington, Alamance County. He gathered merchandise into large bags and into his pockets, bypassed the cash registers, and left the store without paying for the merchandise. Ms. White, a customer in the store, observed defendant's actions in the store and watched him leave the store, get into his car, and drive away. Ms. White followed defendant and called 911 to report defendant's actions to the authorities. Ms. White continued to follow defendant until Officer Enos Henderson of the Burlington Police Department responded, conducted an investigatory stop and arrested defendant.

On 15 August 2007 defendant was tried before a jury in Superior Court, Alamance County. The jury found defendant guilty of misdemeanor larceny. The trial court sentenced defendant to 120 days. Defendant appeals.

II. Legal Analysis

A. Motion to Dismiss

Defendant argues that the misdemeanor larceny charge should have been dismissed on the grounds that the State failed to present substantial evidence that the goods in his possession belonged to someone else. We disagree.

In ruling on a motion to dismiss for insufficient evidence, "the trial court should consider if the [S]tate has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator." *State v. Replogle*, 181 N.C. App. 579, 580-81, 640 S.E.2d 757, 759 (2007) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007) (citation and quotation marks omitted).

Furthermore, when evaluating whether evidence is substantial for the purpose of determining whether to deny a motion to dismiss on that basis, "the evidence should be viewed in the light most favorable to the [S]tate, with all conflicts resolved in the [S]tate's favor. If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *Replogle*, 181 N.C. App. at 581, 640 S.E.2d at 759 (citation, quotation marks and ellipses omitted). The court's evaluation of the evidence may rest on "circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture." *State v. Boomer*, 33 N.C. App. 324, 327, 235 S.E.2d 284, 286, *cert. denied*, 293 N.C. 254, 237 S.E.2d 536 (1977). "Contradictions and discrepancies [in the evidence] do not warrant dismissal of the case but are for the jury to resolve." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (citation omitted),

cert. denied, 537 U.S. 833, 154 L. Ed. 2d 50 (2002). "This is true even though the evidence may support reasonable inferences of the defendant's innocence." *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244-45 (2007) (citation and quotation marks omitted). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, ___ N.C. App. ___, ___, 650 S.E.2d 29, 33 (2007) (citation omitted).

Larceny is "a wrongful taking and carrying away of the personal property of another without his consent with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently." *State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (citation, ellipses and quotation marks omitted). Subject to exceptions not relevant to the instant case, misdemeanor larceny involves property worth one thousand dollars or less; felony larceny involves property worth more than one thousand dollars. N.C. Gen. Stat. § 14-72(a) (2005).

In the instant case, the State presented evidence that Ms. White, a customer in the Ramada Road Dollar General store, saw defendant bypass the cash register and walk out of the store with cloth and plastic bags in his hands which were "not the yellow Dollar General bags" used by the store. Ms. White further testified that she saw defendant place the bags in his car and that she followed defendant until Officer Henderson of the Burlington Police Department had arrived.

Officer Henderson testified that he stopped defendant's car and discovered bags in defendant's possession which fit Ms. White's

description of the bags defendant carried out of the store. Officer Henderson further testified that he searched defendant's vehicle and found various pieces of merchandise bearing Dollar General price tags and that defendant did not have a receipt for these items. Officer Henderson testified that he inventoried and photographed each of these items, which the State introduced into evidence as State's Exhibits 1 through 4.

Finally, Mr. Jeffery Faucette, manager of the Ramada Road Dollar General store, testified and identified the various items of merchandise shown in State's Exhibits 1 through 4 as being the property of Dollar General, Inc., like that sold in the Ramada Road store. In particular, Mr. Faucette identified from the photographs the cloth bags which Officer Henderson found in defendant's vehicle as having been discovered missing from the Ramada Road store following defendant's arrest. Furthermore, Mr. Faucette testified that he also knew that the CD players visible in State's Exhibit 4 were the property of the Ramada Road store because despite having received a shipment of CD players on 20 October 2006, and having sold none, all of the CD players in his store were missing after defendant had been in the store.

Viewing this evidence in the light most favorable to the State, we conclude it is substantial evidence that defendant wrongfully took and carried away of the personal property of Dollar General, Inc. *Carswell*, 296 N.C. at 103, 249 S.E.2d at 428. Accordingly, we conclude the trial court did not err when it denied defendant's motion to dismiss the charge of misdemeanor larceny.

B. The State's Presentation of Additional Evidence

Defendant argues that the trial court abused its discretion by allowing the State to reopen its case over defendant's objection. Defendant contends that if the State introduces additional evidence after it rests, the additional evidence is limited to evidence "to clear up a misunderstanding or to corroborate evidence already presented," and may not be used "to establish an element of the crime." We disagree.

"The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict." N.C. Gen. Stat. § 15A-1226(b) (2005). "Th[is] statute is clear authorization for a trial judge, within his discretion, to permit a party to introduce additional evidence at any time prior to the verdict." *State v. Quick*, 323 N.C. 675, 681, 375 S.E.2d 156, 159 (1989) (finding no abuse of discretion when the trial court permitted the State to reopen its case for the limited purpose of showing the defendant's knowledge of a "break-up letter" written to him by the murder victim the day before her death); *see also State v. Wise*, 178 N.C. App. 154, 162-63, 630 S.E.2d 732, 736-37 (2006) (finding no abuse of discretion when the trial court allowed the State to reopen its case to present evidence that the defendant was released from prison after the effective date of the sex offender registration law which he was charged with violating).

Defendant cites no authority and we find none for the proposition that additional evidence is limited to that which clears up a misunderstanding or corroborates evidence already

presented and may not be used to establish an element of the offense. In fact, this Court decided a case with very similar facts in *State v. Hudson*, 19 N.C. App. 440, 199 S.E.2d 161, *cert. denied*, 284 N.C. 256, 200 S.E.2d 656 (1973). Hudson, the defendant, was tried for larceny. 19 N.C. App. at 440, 199 S.E.2d at 162. After the defendant moved to dismiss, the trial court allowed the State to reopen its case over the defendant's objection "for the specific purpose of showing the ownership of the property in question." 19 N.C. App. at 441, 199 S.E.2d at 162. The defendant was convicted and subsequently appealed. 19 N.C. App. at 440-41, 199 S.E.2d at 162. On review, this Court held the defendant's "contention ha[d] no merit" because the record "fail[ed] to disclose that the trial judge abused his discretion in permitting the State to reopen its case." 19 N.C. App. at 441-42, 199 S.E.2d at 162-63.

Although *Hudson* was decided prior to the 1977 enactment of N.C. Gen. Stat. § 15A-1226(b), we discern no substantive difference between the current statute and the common law rule stated in *Hudson*: "The trial court had discretionary power to permit the introduction of additional evidence after both parties had rested and arguments had been made to the jury." 19 N.C. App. at 442, 199 S.E.2d at 163 (citation and quotation marks omitted). Accordingly, we hold that the trial court did not abuse its discretion *sub judice* when it allowed the State to reopen its case for the purpose of showing ownership of property alleged to have been stolen.

C. Lay Witness Testimony

Finally, we turn to the issue of whether the trial court properly allowed a lay witness, Ms. White, to testify that she "felt like [defendant] had taken the merchandise." Defendant argues that the trial court erred by allowing this testimony by Ms. White, because her statement constituted an inadmissible opinion according to N.C. Gen. Stat. § 8C-1, Rule 701. We disagree.

"Rule 701 bars opinion testimony from a lay witness, except for 'opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.'" *State v. Gobal*, ___ N.C. App. ___, ___, 651 S.E.2d 279, 285 (2007) (quoting N.C. Gen. Stat. § 8C-1, Rule 701), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008). This Court has recognized that because "[b]roadly speaking, opinion testimony is a belief, thought, or inference drawn from a fact. . . . labeling testimony as fact or opinion is often difficult where a witness is attempting to communicate the impressions made upon his senses by what he has perceived." ___ N.C. App. at ___, 651 S.E.2d at 285 (citations, quotation marks and brackets omitted). However, it is well-settled that "[t]he instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of *fact*, and are admissible in evidence." *State*

v. Lloyd, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001) (citation omitted) (emphasis added).

On review, we conclude that Ms. White's testimony that she "felt like [defendant] had taken the merchandise" was an instantaneous conclusion of her mind and therefore a matter of fact, because it was based on her observations that defendant walked behind the register toward the exit of the store with cloth and plastic bags in his hands instead of the "yellow Dollar General bags" used by the store; that defendant had not gone through the check-out line with his bags; and that defendant walked out of the store with these bags. Accordingly, we conclude that the trial court did not err when it allowed Ms. White to testify to her instantaneous conclusion about defendant's conduct.

III. Conclusion

For the foregoing reasons we conclude that the trial court did not err: (1) by denying defendant's motion to dismiss for insufficient evidence, (2) in allowing the State to reopen over defendant's objection, after having rested, its case-in-chief in order to present additional evidence as to the ownership of the property in question, and (3) in allowing a lay witness, Ms. White, to testify that she "felt like [defendant] had taken the merchandise." Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).