

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-413

NORTH CAROLINA COURT OF APPEALS

Filed: 17 November 2009

STATE OF NORTH CAROLINA

v. Pitt County
Nos. 08CRS051592-94,
DONOVAN PATRICK WILLIAMS, 08CRS051700, 08CRS051706
Defendant.

Appeal by defendant from judgments entered on or about 22 August 2008 by Judge Clifton W. Everett, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 26 October 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Susannah P. Holloway, for the State.

Sue Genrich Berry, for defendant-appellant.

STROUD, Judge.

Donovan Patrick Williams ("defendant") appeals from judgments entered 22 August 2008 pursuant to his guilty plea to possession of a firearm by a felon and a jury verdict finding him guilty of discharging a firearm into an occupied vehicle, communicating threats, ethnic intimidation, misdemeanor possession of stolen property, carrying a concealed handgun, and two counts of misdemeanor assault with a deadly weapon. The trial court found defendant had a prior record level of III for felony sentencing purposes and a prior conviction level of III for misdemeanor sentencing purposes. Defendant stipulated to the existence of two

aggravating factors for felony sentencing purposes. The trial court sentenced defendant in the aggravated range to a term of 129 to 164 months imprisonment for the conviction of discharging a firearm into an occupied vehicle, and a consecutive term in the aggravated range of 20 to 24 months imprisonment for the conviction of possession of a firearm by a felon. The trial court consolidated defendant's misdemeanor convictions into two judgments for sentencing purposes and sentenced defendant to two consecutive terms of 150 days imprisonment, the first of which the court ordered to begin at the expiration of defendant's sentence for possession of a firearm by a felon. Defendant gave notice of appeal in open court.

At trial the State's evidence tended to show that on the night of 14 February 2008, defendant and two associates drove to a Wal-Mart in Greenville, North Carolina. After shopping at the store, defendant approached the victims, a black male and white female, in the parking lot. Defendant asked the male victim if he thought it made him "cool" to be dating a white girl. Defendant yelled several racist remarks and pulled out a small silver handgun, threatening the victims. At that time, several other shoppers exited the store, and the victims moved toward them for assistance. Defendant quieted down and the victims made their way to their vehicle, a Ford Explorer. Defendant made a sexual remark to the female victim and walked to his car. As they drove away, the black male, who was driving the Explorer, saw defendant raise his arm

toward them, saw a small white flash of light, and then heard a "pinging sound" on the driver's side door.

Almost immediately upon driving away, the victims saw and flagged down a passing police officer. They gave a description of defendant and the car he was in, and shortly thereafter police officers stopped a car in which defendant was riding as a passenger. Officers took the driver of the car, his female passenger, and defendant into custody. Upon searching defendant, the officers discovered a small, .22 caliber silver semi-automatic handgun concealed in defendant's pants. At trial, the driver of the car testified that he did not see defendant fire at the victims, but heard a shot behind him and upon turning around saw defendant standing with a gun, pointing it toward the Ford Explorer. The female passenger of the car also testified that at the time of the shooting, she saw a flash of light, "[s]omewhere close to [defendant's] head" and heard a loud noise.

Defendant argues on appeal that the trial court erred or abused its discretion in overruling his objection at trial and permitting Detective Curtis Liverman to testify that the hole he observed in the door of the victims' vehicle was consistent with the size of a hole that would be made by a .22 caliber bullet. Defendant contends this testimony violated his right to a fair trial as guaranteed by the North Carolina and United States Constitutions. Defendant further contends the testimony was inadmissible opinion testimony which was speculative and lacked sufficient foundation. We disagree.

We first note that at trial, defense counsel objected to the admission of Detective Liverman's testimony on the basis of lack of foundation and that Detective Liverman was not an expert witness. Defense counsel did not raise an objection on any constitutional grounds and we will not consider his arguments related to constitutional questions for the first time on appeal. *State v. Call*, 353 N.C. 400, 421, 545 S.E.2d 190, 204, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001) ("Constitutional questions not raised and passed upon at trial will not be considered on appeal.").

Rule 701 of the North Carolina Rules of Evidence provides that opinion testimony from non-expert witnesses is limited to those opinions "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." N.C. Gen. Stat. § 8C-1, Rule 701 (2007). We review a trial court's admission of lay witness opinion testimony for an abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. rev. denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Here, Detective Liverman testified that the hole he observed in the door of the victims' vehicle was consistent with the size of a hole that would be left by a .22 caliber bullet penetrating the

side of the vehicle. Detective Liverman further testified that he was familiar with .22 caliber firearms and that during his years as a police officer had seen "numerous cases where vehicle houses were shot with different caliber weapons, also with .22's, and [the hole] appeared to be consistent with the size of [a .22 caliber] projectile." Detective Liverman went on to state that a .22 caliber bullet tends to disintegrate upon penetration of a hard surface, which explained the lack of an exit hole on the other side of the vehicle's door and the lack of any recovered bullet or bullet fragments. On cross examination, defense counsel vigorously challenged Detective Liverman's testimony, attacking his experience, investigation methods, and opinions.

Detective Liverman's testimony was based upon his personal observation of the hole in the vehicle and his prior experience with the size of holes left by various caliber bullets when they penetrate an automobile. Given that the size of a hole left by a .22 caliber bullet when it penetrates the side of an automobile is not common knowledge, Detective Liverman's testimony was certainly helpful to a clear understanding of a relevant issue. His testimony was only that the size of the hole was "consistent" with the size of a hole that would be left by a .22 caliber bullet, and left for the jury the determination of whether the hole was actually caused by a .22 caliber bullet, and if so, who fired the shot. Accordingly, Detective Liverman's testimony was competent and admissible evidence and the trial court did not abuse its

discretion in admitting his lay opinion testimony into evidence.
This assignment of error is overruled.

No error.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).