

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-443

NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v.

New Hanover County
Nos. 09 CRS 58144-45

DAMIAN LAQUAN JOHNSON

Appeal by Defendant from judgments entered 9 November 2010 by Judge Jack W. Jenkins in New Hanover County Superior Court. Heard in the Court of Appeals 12 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Richard E. Jester for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

On 17 August 2009, the New Hanover County Grand Jury returned indictments charging Damian Laquan Johnson ("Defendant") with first-degree kidnapping, first-degree rape, two counts of first-degree sexual offense, and robbery with a

dangerous weapon. The evidence at trial tended to show the following: On 11 July 2009, Defendant met with Corie Batts ("Batts"), a confidential federal informant working with the Wilmington Police Department ("WPD"). When Defendant mentioned needing money, Batts responded, "You got to hit a lick," *i.e.*, commit a robbery. The following day, Batts dropped Defendant off in downtown Wilmington.

Near midnight, Defendant observed "Jane,"¹ a young woman walking by herself downtown. Defendant approached Jane with a handgun, led her at gunpoint to a nearby church, and forced her to perform fellatio while he held the gun to her temple. Defendant also forced Jane to remove her shorts and underwear and raped her vaginally and anally. Defendant threatened to shoot Jane if she made any noise. Defendant took Jane's underwear, tank top, purse, and cell phone before fleeing.

Disoriented and in shock, Jane returned home. The next morning, Jane went to a local hospital where she told WPD Detective Michael Overton ("Overton") and nurse Jessica McAlear ("McAlear") about the assault. McAlear took samples for a sexual assault kit. DNA tests later revealed Defendant's DNA on Jane's rectal swabs and her shorts.

¹The victim is referred to by the pseudonym "Jane" to protect her identity.

With Jane's help, a WPD sketch artist prepared a drawing of her assailant, which was circulated. Batts saw the drawing and believed it depicted Defendant. To confirm his suspicions, Batts met with Defendant and recorded their conversation using the audio and video capabilities on his cell phone. During the recorded conversation, Defendant laughed about forcing Jane to perform fellatio. Defendant also said he hit Jane across her head with his gun and threatened her. Defendant then removed a revolver from his pants and demonstrated how he struck Jane. Based on Batts' information and the cell phone recording, WPD officers identified Defendant as a suspect.

On 18 July 2009, Jane identified Defendant in a photo lineup, stating she was 90% certain he was her assailant. The photo lineup was conducted by a WPD employee not familiar with the case while Overton stood some twenty feet away across a large open room at the station. When Defendant was arrested later that day, he had a revolver in his back pocket.

Before trial, Defendant moved to suppress Jane's identification of him. The trial court denied the motion. Defendant testified at trial and admitted forcing Jane to perform fellatio but claimed he had only threatened her with a

BB gun. He denied holding the gun to her head, touching her vagina or anus, and taking her clothing.

The jury found Defendant not guilty of first-degree kidnapping, but guilty of first-degree rape, two counts of first-degree sexual offense, and robbery with a dangerous weapon. The trial court imposed a sentence of 288 to 355 months for the first-degree rape conviction, consolidated the remaining convictions, and imposed an additional sentence of 288 to 355 months to run consecutively with the first. The court also ordered that Defendant register as a sex offender and enroll in lifetime satellite-based monitoring. Defendant appeals.

Discussion

Defendant brings forward three arguments on appeal: (1) that the State violated his due process rights and N.C. Gen. Stat. § 15A-1054(c) by failing to disclose Batts' federal plea agreement, and that the trial court erred in (2) denying Defendant's motion to suppress the results of the photo lineup and (3) admitting the revolver found in Defendant's pocket in evidence over his objection. We find no error.

I. Plea Agreement

Defendant first argues that the State violated his due process rights and N.C. Gen. Stat. § 15A-1054(c) because he was

not informed of a plea agreement made between Batts and the federal government. We disagree.

"A constitutional question not presented and passed upon at trial will not ordinarily be considered on appeal." *State v. Howell*, 169 N.C. App. 741, 746, 611 S.E.2d 200, 204 (2005) (citation omitted). Here, Defendant did not raise any due process objection or argument regarding Batts' testimony at trial. Thus, his constitutional claims are not properly before us, and, accordingly, we dismiss this argument.

Defendant's contention of a statutory violation is unavailing. North Carolina General Statute section 15A-1054 codifies and sanctions the common practice of prosecutors offering plea deals or concessions to witnesses who testify for the State. N.C. Gen. Stat. § 15A-1054 (2009). Subsection (c) provides:

When a *prosecutor* enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify.

N.C. Gen. Stat. § 15A-1054(c) (emphasis added).

Here, Batts, a witness for the State, testified that the State had not promised him anything for his testimony, and Defendant does not allege any arrangement between Batts and the prosecutor. Instead, Defendant asserts that the statute was violated because Batts had a plea deal with the *federal* government.² However, the plain language of this subsection indicates that it applies only to arrangements entered into by *prosecutors*, representing the State. N.C. Gen. Stat. § 15A-1054(c). Accordingly, this argument is overruled.

II. Motion to Suppress

Defendant next argues that the trial court erred by denying his motion to suppress Jane's identification of him based on statutory violations during the photo lineup. We disagree.

This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. If so, the trial court's conclusions of law are binding on appeal.

²Prior to jury selection, the prosecutor informed the trial court that Batts' federal defense counsel had sent both the prosecutor and Defendant's trial counsel a copy of Batts' federal plea agreement. Trial counsel extensively cross-examined Batts about the agreement, including handing Batts a copy of the plea agreement, asking him to identify it, and questioning him about specific provisions in it.

State v. Veazey, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009) (internal citations, quotation marks and brackets omitted). Defendant does not allege that any findings are not supported by competent evidence, or that the findings do not support the conclusions of law. Instead, he simply asserts that "the process used to obtain identification through the photo lineup did not meet the new statutory requirements and the lineup should have been suppressed." We are not persuaded.

Section 15A-284.52 of our General Statutes establishes procedures for identification by photo lineup and provides, in pertinent part: "There shall not be anyone present during the . . . photographic identification procedures who knows the suspect's identity, except the eyewitness and counsel as required by law." N.C. Gen. Stat. § 15A-284.52(b)(13) (2009). Further, the statute states that "[f]ailure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification." N.C. Gen. Stat. § 15A-284.52(d)(1). In addition, non-compliance is "admissible in support of claims of eyewitness misidentification [and if such evidence is admitted,] the jury shall be instructed that it may consider credible evidence of . . . noncompliance to determine the reliability of

eyewitness identifications." N.C. Gen. Stat. § 15A-284.52(d)(2)-(3).

Here, at the pretrial motion hearing, the court found that, in standing twenty feet away across a large open room, Overton had been "present" during the photo lineup in violation of subsection (b)(13). The trial court then granted Defendant each of the remedies listed in subsection (d): that Defendant would have "leeway" to cross-examine the State's witnesses about the lineup procedure, and that if he did so, the jury would be instructed it could consider the noncompliance in evaluating the reliability of Jane's identification of Defendant.³ However, because Overton was "not in the immediate vicinity" of Jane during the photo lineup, the court also found that the "technical violation" of the statute had no impact on her identification of Defendant. Thus, the trial court denied Defendant's motion to suppress the identification. In light of the trial court's use of each remedy prescribed by the statute and its conclusion that Overton's presence had no impact on Jane's identification, we see no error in the denial of Defendant's motion. Accordingly, this argument is overruled.

³At trial, Defendant did not dispute Jane's identification of him and admitted during his testimony that he had forced her to perform fellatio.

III. Admission of the Revolver

Defendant next argues that the trial court erred in admitting into evidence the revolver found in Defendant's pocket at his arrest. Specifically, Defendant contends the gun was irrelevant and the court erred in overruling his objection to it. We disagree.

Evidence is admissible at trial if it is relevant and its probative value is not substantially outweighed by, among other things, the danger of unfair prejudice. Relevant evidence is defined as any 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. Rule 401 sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence. Thus, even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.

State v. Wallace, 104 N.C. App. 498, 501-02, 410 S.E.2d 226, 228 (1991) (internal citation and quotation marks omitted), *appeal*

dismissed and disc. review denied, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

Here, the type of gun used in the crimes was a contested issue at trial. Defendant testified that he used a BB gun, while the State asserted that he used the revolver. Jane was unsure about the exact type of gun involved, but was certain it was a handgun. In addition, Batts testified that Defendant bragged about hitting Jane in the head with a gun, was carrying a revolver during their conversation, and used the revolver to demonstrate how he struck Jane. Defendant had a revolver, a type of handgun, in his back pocket when he was arrested a few days later. We conclude that the revolver on Defendant's person at his arrest was highly relevant. This meritless argument is overruled.

NO ERROR.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).