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NO. COA11-47  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v.

Durham County  
No. 09 CRS 52613

STEPHON LAMONT JACOBS

Appeal by defendant from judgment entered 22 September 2010 by Judge Donald W. Stephens in Durham County Superior Court. Heard in the Court of Appeals 22 August 2011.

*Attorney General Roy Cooper, by Assistant Attorney General David W. Boone, for the State.*

*Richard E. Jester for defendant-appellant.*

MARTIN, Chief Judge.

Defendant appeals from judgment entered upon his convictions for identity theft and obtaining property by false pretenses. After careful review, we affirm.

The evidence at trial tended to show that on the night of 16 October 2009, Samantha Feichter's purse and wallet were stolen from her car while she was at work. Before she could cancel her credit card, it was used to make several purchases,

including a purchase totaling \$59.27 at Los Primos Supermarket on 17 October 2009. Ms. Feichter had never been to that supermarket, and she had not given permission to anyone to use her credit card on that date.

Elvin Delacruz, a cashier at Los Primos Supermarket, testified that he recognized defendant and that, on 17 October 2009, he rang up the \$59.27 purchase which defendant then paid for with Ms. Feichter's credit card. Mr. Delacruz testified that because defendant was a regular shopper at the store, when he did not produce any form of identification when asked for it, he "let him slide" and completed the transaction.

Miguel Collado, the owner of Los Primos SuperMarket, also testified. He was not at the store on 17 October 2009. However, he testified that, in the ordinary course of business, employees at his store kept copies of each transaction's receipt. The State introduced into evidence the store's copy of a receipt from 17 October 2009 for \$59.27. The receipt listed Ms. Feichter's credit card account number.

A security video camera at the Los Primos Supermarket captured the transaction. When the State sought to introduce the store videotape, defendant objected and requested a *voir*

*dire* on the tape's admissibility. After questioning the witness, the trial court allowed the videotape to be admitted.

Defendant did not present any evidence. The jury found defendant guilty of identity theft and obtaining property by false pretenses and not guilty of breaking and entering a motor vehicle with intent to commit larceny. The trial court consolidated the offenses for judgment and sentenced defendant to a term of a minimum of nine months and a maximum of eleven months' imprisonment. Defendant appeals.

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Defendant's sole contention on appeal is that the trial court improperly admitted the security videotape of the transaction at Los Primos Supermarket. A videotape may be introduced as substantive evidence only if a proper foundation is laid. N.C. Gen. Stat. § 8-97 (2009); *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). This requirement

can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed, *Campbell v. Pitt County Memorial Hospital*, 84 N.C. App. 314, 352 S.E.2d 902, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987) (illustrative purposes); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . . ," *State v. Luster*, 306

N.C. 566, 569, 295 S.E.2d 421, 423 (1982); (3) testimony that "the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing," *State v. Kistle*, 59 N.C. App. 724, 726, 297 S.E.2d 626, 627 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E.2d 694 (1983) (substantive purposes); or (4) "testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area 'photographed,'" *State v. Johnson*, 18 N.C. App. 606, 608, 197 S.E.2d 592, 594 (1973).

*Cannon*, 92 N.C. App. at 254, 374 S.E.2d at 608-09.

Defendant argues that because Mr. Collado testified that he was not at his store when defendant conducted the transaction with Ms. Feichter's credit card and because Mr. Collado did not recognize defendant, his testimony did not establish that the "videotape fairly and accurately illustrate[d] the events filmed." Defendant also argues that the videotape's foundation was lacking as there was no testimony concerning the checking and operation of the video camera. Finally, defendant argues that the trial court unduly influenced the jury in that "[i]n lieu of coaching the State's counsel, the [c]ourt took over and accomplished[ed] what counsel had failed to do" and that "[w]ithout the [c]ourt's questions, the admission of the video was not even close to proper." We disagree.

Mr. Collado testified that on 17 October 2009 the store's cameras were working properly. He testified that one camera is located directly above each register while another camera is located inside the customer service desk in order to provide a wide angle view of the entire front of the store, including both registers. He then testified, over objection, that the transaction in question was actually captured by one of the store's video cameras. He testified that he personally observed his son copy the security video of the 17 October 2009 transaction onto the copy provided to the investigating officer. He had viewed the video and it was "[e]xactly the copy that [he and his son] provided [to law enforcement]" and up until this point, the video had been in the custody of law enforcement. After this testimony, the State moved to introduce the video into evidence, and defendant objected and requested a *voir dire*. The following discussion then took place:

THE COURT: Well, just clarification. Mr. Collado, do your cameras focus and record the events that occur at the registers? Is that what they --

THE WITNESS: Yes.

THE COURT: -- record that?

THE WITNESS: Yes, sir.

THE COURT: You're satisfied that your cameras were functioning correctly and accurately on that day?

THE WITNESS: Yes, sir.

THE COURT: You're satisfied that this is a

correct depiction of the events that occurred at that transaction?

THE WITNESS: Yes, sir.

THE COURT: Objection's overruled. Request denied. Let it be received.

This testimony was sufficient for the trial judge to find that the State had laid a proper foundation to introduce the videotape into evidence. Additionally, we hold that the trial court did not err by unduly influencing the jury when it asked Mr. Collado two questions further clarifying the testimony that he had just given.

Furthermore, we note that even had a proper foundation been lacking, the erroneous admission of a videotape does not require reversal if the error is not prejudicial. *State v. Mason*, 144 N.C. App. 20, 27-28, 550 S.E.2d 10, 16 (2001). An error is not prejudicial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2009). Here, even assuming that the videotape had been improperly admitted, its admission was not prejudicial given testimony by Ms. Fleitcher that her card was used by a person unknown to her without her permission to make a \$59.27 purchase at Los Primos Supermarket on 17 October 2009 and testimony by the cashier that defendant used Ms. Feichter's

credit card on 17 October 2009 to purchase items in the amount of \$59.27. The cashier asked defendant for his identification according to the store's procedure; however, defendant regularly bought groceries at Los Primos Supermarket and when he did not produce any form of identification, the cashier "let him slide" and completed the transaction. In light of this testimony, there is no reasonable possibility that, had the challenged videotape not been admitted, a different result would have been reached at trial. Defendant's arguments have no merit.

No error.

Judges HUNTER, JR. and THIGPEN concur.

Report per Rule 30(e).