

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-576
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

STATE OF NORTH CAROLINA

v.

Davidson County
No. 11 CRS 52116

SHELDON O'BRIAN MCSPADDEN

Appeal by defendant from judgment entered 5 January 2012 by Judge Vance Bradford Long in Davidson County Superior Court. Heard in the Court of Appeals 26 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General David Leon Gore, III, for the State.

Harrington, Gilleland, Winstead, Feindel & Lucas, LLP, by Anna S. Lucas, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Sheldon O'Brian McSpadden appeals from judgment entered upon a jury verdict finding him guilty of possession with intent to sell and deliver cocaine and selling cocaine. Defendant argues the trial court erred when it allowed the jury, during its deliberations, to view a still frame from a video which showed him selling cocaine to an undercover officer.

Defendant contends the still image constitutes evidence that was modified and manipulated from the manner in which it was presented at trial, and the court violated his Sixth Amendment right to confront the witnesses against him by showing the manipulated still video frame to the jury. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1233(a), "[t]he trial court has the discretionary authority to allow the jury, upon request, to reexamine material received in evidence and to review portions of the testimony." *State v. McVay*, 174 N.C. App. 335, 339-40, 620 S.E.2d 883, 886 (2005). "[A] court's ruling under N.C. Gen. Stat. § 15A-1233(a) is a discretionary decision and it ordinarily will be reviewed only for an abuse of discretion." *Id.* at 340, 620 S.E.2d at 886. "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).

At trial, the State introduced into evidence, for substantive purposes and without objection from defendant, a video recording of the purchase of cocaine from defendant by an undercover officer. The video was played during the testimony of the undercover officer, and it was paused at one point to

identify defendant. During its deliberations the jury requested to see the paused picture of the defendant from the video as it was originally presented. Defendant's trial counsel objected to the viewing, stating that the jury had been presented the evidence and that it was up to the jurors to make a decision, and the prosecutor admitted that it had no way of pinpointing the exact point at which the video was paused during the undercover officer's testimony. The trial court overruled defendant's objection and directed the prosecutor to prepare the video to be shown to the jury and to pause it so that defendant's face could be seen. The prosecutor conferred with the officer and set up the video to show the still image at about the spot where it had originally been paused during the officer's testimony, although the prosecutor conceded that it could have been off by "a second in either direction[.]" The jury was then permitted to view the paused video with no further objection from defendant.

We find no abuse of discretion in the trial court's showing of the paused video showing defendant's face. The prosecution may not have paused the video at exactly the same instant it was paused during the officer's testimony. However, defendant has not shown that the paused recording as viewed by the jury during

its deliberations was manipulated in any way such that the jury saw the recording in a form that was not presented at trial.

Additionally, defendant's constitutional argument under the Sixth Amendment is not properly before this Court as his trial counsel did not object on this basis at trial. *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) ("[C]onstitutional error will not be considered for the first time on appeal."). Moreover, we note that defendant's Sixth Amendment argument would be without merit had he raised such an objection at trial because he had ample opportunity to cross-examine the undercover officer regarding the video recording when it was introduced at trial. Accordingly, we hold the trial court did not err in allowing the jury to view the paused video recording during its deliberations.

Defendant also argues the trial judge expressed an impermissible opinion on the evidence when he stated, "Members of the jury, I have selected this portion [of the video recording] for you to view, a paused picture of a face appearing in the window of [the undercover officer's car]." Defendant contends the trial court's statement likely caused the jury to give undue weight to the still image because the trial judge had

told them that he selected the image. Defendant's argument is misplaced.

It is well established that a trial judge "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2011).

Whether [a] judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant. . . . [I]t is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results.

State v. Blackstock, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). Here, the trial judge's statement that he chose the point at which the video recording was paused does not constitute an opinion as to a factual issue in the case, defendant's guilt, the weight of the evidence in the case, or a witness's credibility. The judge's statement was entirely neutral as to the content of the evidence presented to the jury and merely informed the jury that he made the ultimate decision regarding at what moment the video was paused for their viewing.

Accordingly, we overrule this argument and hold defendant received a fair trial, free from error.

No error.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).