NO. COA14-940

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

STATE OF NORTH CAROLINA

v.

Cabarrus County
No. 13 CRS 50775, 756

DEMARIO LAMONT SNEAD,
Defendant.

Appeal by defendant from judgment entered 13 March 2014 by Judge Christopher W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 21 January 2015.

Roy Cooper, Attorney General, by Grady L. Balentine, Jr., Special Deputy Attorney General, for the State.

Brock & Meece, P.A., by C. Scott Holmes, for defendant-appellant.

TYSON, Judge.

Demario Lamont Snead ("Defendant") appeals from convictions of felony larceny and conspiracy to commit felony larceny. We vacate the judgment in part and remand for entry of judgment on a lesser included offense and for resentencing. We find no error in Defendant's conviction of conspiracy to commit felonious larceny and affirm Defendant's guilty plea and conviction as an habitual felon.

I. Factual Background

On 1 February 2013, a theft was reported at Belk Department Store ("Belk") at Carolina Mall in Concord, North Carolina. The store's video surveillance system recorded the theft and showed two men entered the store at approximately 4:58 p.m. One of the men, identified as Defendant, is seen grabbing an armful of Polo-style shirts and running out of the store. The other man is shown grabbing a pile of hooded sweatshirts.

On 4 March 2013, Defendant was indicted for felony larceny. On 25 March 2013, Defendant was indicted for attaining habitual felon status. On 10 February 2014, a superseding indictment was entered for the felony larceny charge that added the charge of conspiracy to commit felony larceny. The superseding indictment stated, in pertinent part, as follows:

> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above, the defendant named above unlawfully, willfully and feloniously did steal, take and carry away store merchandise, clothing including but not limited to Ralph Lauren Polo shirts, the personal property of Belk, Inc., such property having a value in excess of $1,000.
>
> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above, the defendant conspire [sic] with others to commit the crime of felony larceny 14-72(a)

> against Belk, Inc. by stealing and taking away store merchandise, including but not Limited [sic] to Ralph Lauren Polo shirts, the personal property of Belk, Inc., such property having a value in excess of $1,000.

A. State's Evidence

A jury trial was held in Cabarrus County Superior Court on 11 March 2014. Toby Steckler ("Mr. Steckler"), regional loss prevention manager for Belk, testified he was familiar with the operation of the video surveillance system. He explained that the system was an "industry standard digital video recorder," which allowed for live monitoring and recording. He further stated the images produced by the video recorders were water-marked to ensure against tampering and displayed a time and date stamp. He also testified that he reviewed the surveillance camera video recording after the theft was reported.

During ***voir dire***, Mr. Steckler testified that, after viewing the video and based on his familiarity with the layout of Belk stores and Belk merchandise displayed on the table from which the shirts were taken, he believed the shirts stolen were Ralph Lauren Polo shirts. He also stated the stacks of shirts on the table would have consisted of six to eight shirts per stack, valued at $85 to $89.50 per shirt.

During Mr. Steckler's testimony, the trial court intervened and excused the jury to engage in a discussion with the prosecutor, Defendant's counsel, and Mr. Steckler. During this discussion, the trial court asked Mr. Steckler whether he had reviewed the surveillance video directly from the monitor or after it had been copied onto a disk. Mr. Steckler responded "I'm not sure. Yes. Yes." Mr. Steckler also testified the recording equipment was in working order on the date of the theft.

However, Mr. Steckler later testified he was not present at the store when the incident occurred. The video recording was admitted as substantive evidence of the crimes over Defendant's objection.

After the video recording was admitted into evidence, it was shown and published to the jury, while Mr. Steckler gave a narration of the images. He described the layout of the store and stated the videotape showed Defendant in the Ralph Lauren Polo section. He testified that the fair market value of the Ralph Lauren Polo shirts on the date of the theft would have been between $85 and $89.50 each. When the prosecutor asked Mr. Steckler whether he could tell from the videotape how many shirts were taken, Mr. Steckler replied, "An exact amount, no, sir." Mr.

Steckler testified that he "estimate[d] between 20 and 30 of the Polo shirts" were taken by Defendant.

B. Defendant's Evidence

Defendant testified and admitted he had stolen seven shirts from Belk on 1 February 2013. He stated, although he could not recall from which table he took the shirts, he knew they were not Ralph Lauren Polo shirts. Defendant explained the woman he was with "got mad at [him] because they wasn't [sic] the right kind of shirts that she wanted."

On 13 March 2014, the jury returned verdicts finding Defendant guilty of felonious larceny and conspiracy to commit felonious larceny. Defendant has a long criminal record and was wearing electronic monitoring from a prior offense during the theft. Defendant also admitted to two other "snatch and grab" larcenies committed at Macy's and Dick's Sporting Goods the same day as the incident at Belk. Defendant pled guilty to having attained the status of habitual felon.

The trial court sentenced Defendant to an active term of 84 to 113 months imprisonment for his felonious larceny and habitual felon convictions, to run consecutively and beginning at the end of any other sentences. He was also sentenced to a concurrent term of 33 to 52 months imprisonment for the conspiracy and

habitual felon convictions. Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by (1) admitting into evidence the surveillance videotape, which was not properly authenticated; and (2) allowing Mr. Steckler to provide lay opinion testimony outside his personal knowledge of the value of the stolen property.

A. Authentication of Surveillance Videotape

Defendant argues the trial court erred by admitting the surveillance videotape into evidence for substantive purposes without being properly authenticated. We agree.

1. Standard of Review

A trial court's determination as to whether a videotape has been properly authenticated is reviewed *de novo* on appeal. *State v. Crawley*, 217 N.C. App. 509, 719 S.E.2d 632 (2011). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (citation omitted), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

2. Analysis

Video recordings are admissible into evidence for both

substantive and/or illustrative purposes provided that the offeror lay a proper foundation. N.C. Gen. Stat. § 8-97 (2013).

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes); (2) proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape; (3) testimony that the photographs introduced at trial were the same as those the witness had inspected immediately after processing (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. Cannon, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (citations and internal quotation marks omitted), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

When reviewing the foundation for admissibility of a video recording, our precedents have defined three significant areas of inquiry: "(1) whether the camera and [recording] system in question were properly maintained and were properly operating when the [recording] was made, (2) whether the video [recording] accurately presents the events depicted, and (3) whether there is an unbroken chain of custody." *State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001).

(a) Foundation

Defendant argues the State failed to lay a proper foundation for the admission of the surveillance video recording. He asserts the State failed to offer any information about the history of maintenance on the camera and recording system or its operation. At trial, Mr. Steckler, the sole authenticating witness, explained how Belk's video surveillance system worked and testified that he had reviewed the video images after the incident. Mr. Steckler also testified that the video equipment was "working properly" on the day of the incident.

However, the State's witness admitted he was not at the store at the time or on the date of the incident, nor was he the person in charge of maintaining the video recording equipment and ensuring its proper operation. The State did not offer any other evidence that the video equipment was properly maintained or operating correctly when the incident occurred.

The State failed to offer any other evidence of chain of custody. Mr. Steckler testified that he "reviewed the video after it was burned [sic] off onto a CD." However, the State did not offer any evidence of who "burned" the recording onto the compact disc ("CD"), how or when it was copied, or who took custody of the CD after it was copied. Although Mr. Steckler reviewed the video

on CD shortly before trial and was able to identify it as the same video he had previously viewed, we have held that this testimony fails to establish an adequate chain of custody. *Id.* at 27, 550 S.E.2d at 15-16 (holding that State had not shown adequate evidence of chain of custody where "[n]o testimony was presented from any witness who handled the tape," despite one witness' testimony that video shown in court was the same video she watched after the incident).

Mr. Steckler could not testify whether the images on the video recording accurately presented the events depicted because he was not present at the time or on the date of the incident. *See Mason*, 144 N.C. App. at 23, 550 S.E.2d at 13 (holding employee could not attest to accuracy of videotaped robbery scenes because she had been unable to see actual robbery).

The State did not offer testimony of any employees who were present at the time of the incident depicted in the video recording. Mr. Steckler's testimony, without more, was insufficient to properly establish the chain of custody. We conclude the trial court improperly admitted the video recording as substantive evidence. *State v. Sibley*, 140 N.C. App. 584, 586, 537 S.E.2d 835, 838 (2000) (holding video recording not properly authenticated, and thus inadmissible, where "[t]he State did not

call any witnesses to testify that the camera was operating properly or that the information depicted on the videotape was an accurate representation of the events at the time of filming").

(b) Prejudice

Having concluded that the State failed to lay a proper foundation for admission of the video recording as substantive evidence, we review whether the erroneous admission of the videotape prejudiced Defendant. 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) (2013). "Where it does not appear that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless." *Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16 (citation omitted).

If it appears reasonably possible that the jury would have reached a different verdict without the erroneously admitted evidence, the error is reversible. *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001). With Defendant's admission of the larceny, the main issue before the jury was the value of the stolen merchandise. In order to be convicted of felonious larceny, the State was required to prove that Defendant stole property or

merchandise valued *in excess of $1,000*. N.C. Gen. Stat. § 14-72(a) (emphasis added).

Mr. Steckler estimated, solely based on his review of the video, that approximately twenty to thirty Ralph Lauren Polo shirts were taken from the table. Defendant testified that he stole seven shirts and they were not Ralph Lauren Polo shirts.

Mr. Steckler testified that his estimation of the number of shirts taken was based on how the video depicted the stacking of the shirts. The erroneously admitted video recording was the *only* evidence the State offered which tended to establish the total value of the shirts stolen. The State conceded that Mr. Steckler's opinion regarding the value of the stolen merchandise was "based on his review of the video."

We cannot conclude there is no reasonable possibility the jury would have found that the value of the stolen merchandise exceeded $1,000 without Mr. Steckler's estimate of the number and value of shirts stolen. His testimony was based solely upon his review of the erroneously admitted video recording.

The video recording was the only evidence offered to establish the value of the property stolen to support Defendant's conviction of felonious larceny. Since this testimony was the only evidence of value of the stolen goods before the jury, Defendant was

prejudiced by the erroneous admission of the video recording as substantive evidence. *Sibley*, 140 N.C. App. at 587, 537 S.E.2d at 838 (holding that admission of videotape was prejudicial where it constituted the only evidence to support Defendant's conviction of possession of a firearm).

B. Lay Opinion Testimony

Defendant also argues the trial court erred by allowing Mr. Steckler to render an opinion before the jury regarding the value of the stolen merchandise, where such opinion was not based on his personal knowledge.

1. Standard of Review

We review the admissibility of lay opinion testimony for abuse of discretion. *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009). An abuse of discretion occurs when the trial judge's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (citation and quotation marks omitted), *disc. review denied,* 359 N.C. 414, 613 S.E.2d 26 (2005).

2. Analysis

Under Rule 701 of the North Carolina Rules of Evidence, witness lay opinion testimony "is limited to those 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." N.C. R. Evid. 701. In allowing lay opinion testimony, we have held: "statements, while reflecting either poor memory or indistinct perception, are nonetheless competent and admissible because they were rationally based on the firsthand observation of the witness, rather than mere speculation or conjecture." *State v. Davis*, 77 N.C. App. 68, 73, 334 S.E.2d 509, 512 (1985) (citation omitted).

In *Buie*, we held that an officer's narration of a video and his opinions regarding the contents of the video constituted "inadmissible lay opinion testimony that invaded the province of the jury." 194 N.C. App. at 732, 671 S.E.2d at 355. Here, as in *Buie*, Mr. Steckler "offered his opinion, at length, about the events depicted in the surveillance [recording]." The State correctly asserts Mr. Steckler's testimony concerning the price of each of the Ralph Lauren Polo shirts on the date of the incident was based on his own perception because it was "based upon his review of Belk's internal reporting."

However, Mr. Steckler's testimony of the total value of the stolen merchandise was based solely on his review of the surveillance video. The trial court stated in the record: "this

witness has testified that he does not know of his own knowledge, independent knowledge what was on that table."

This testimony "was not based on any firsthand knowledge or perception by [Mr. Steckler], but rather solely on [his] viewing of the surveillance video." *Id.* at 733, 671 S.E.2d at 356. The admission of Mr. Steckler's testimony, based upon his review of the video, regarding the total number of shirts stolen and the cumulative value of the stolen merchandise was error.

Having found the trial court erroneously admitted Mr. Steckler's lay opinion testimony, we must determine whether Defendant was prejudiced by this error. N.C. Gen. Stat. § 15A-1443(a); *State v. Wilson*, 121 N.C. App. 720, 723, 468 S.E.2d 475, 478 (1996) ("A defendant wishing to overturn a conviction on the basis of error relating to non-constitutional rights has the burden of showing a reasonable possibility that a different result would have been reached at trial absent the error.").

Defendant argues this error was prejudicial because Mr. Steckler's lay opinion was the only evidence before the jury of the total value of the stolen merchandise to raise the level of his larceny charge from a misdemeanor to a felony. Without the admission of the video recording and Mr. Steckler's opinions regarding the amount and total value of the stolen merchandise,

formed while reviewing the video, Defendant has shown a reasonable possibility a different verdict would have resulted.

Without Mr. Steckler's opinion, the State presented no other evidence to establish the value of the stolen property exceeded $1,000, an essential element of felonious larceny. N.C. Gen. Stat. § 14-72(a) (2013). The jury could have reasonably reached a different conclusion about the number of shirts taken, the kind of shirts taken, and the total value of the merchandise stolen. We conclude the admission of this lay opinion testimony, under these facts, was prejudicial to Defendant.

C. Lesser Included Offense

These errors do not require us to remand for a new trial. Defendant admitted at trial he stole shirts from Belk on 1 February 2013, and he is one of the persons depicted in the surveillance video recording. With these admissions, the only contested issue at trial was the total value of the stolen merchandise. All of the essential elements for a conviction of misdemeanor larceny, a lesser included offense of felonious larceny, were established at trial. The trial court also instructed the jury on the lesser included offense of misdemeanor larceny.

We vacate Defendant's conviction of felonious larceny and remand this case for entry of judgment and resentencing on the

lesser included offense of misdemeanor larceny. *See State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (vacating judgment of first degree burglary and remanding for entry of judgment on lesser included offense of second degree burglary where evidence insufficient to prove an additional essential element of greater offense); *State v. Hatcher*, __ N.C. App. __, __, 750 S.E.2d 598, 602 (2013) (remanding for resentencing on lesser included offense of involuntary manslaughter where evidence was insufficient to find defendant acted with malice in shooting victim but evidence was sufficient to find defendant unintentionally killed victim); *State v. Clark*, 137 N.C. App. 90, 97, 527 S.E.2d 319, 323 (2000) (remanding for resentencing on lesser included offense of attempted trafficking by possession where evidence insufficient to establish greater offense of trafficking in marijuana by possession); *State v. Suggs*, 117 N.C. App. 654, 662, 453 S.E.2d 211, 216 (1995) (remanding for resentencing on lesser included offenses of conspiracy and solicitation of misdemeanor assault where evidence was insufficient for one element of greater offenses of conspiracy and solicitation to commit assault with a deadly weapon inflicting serious injury).

D. Conspiracy and Habitual Felon Convictions

The jury also returned a verdict of guilty on Defendant's

conspiracy to commit felonious larceny charge. Our review of the record, including Defendant's testimony that he did not steal "the right kind of shirts that [the woman he was with] wanted" and he went to Belk on 1 February 2013 "with the guy that I know by the name of Chicago" with the intent of "tak[ing] anything I could get my hands on" shows there was sufficient evidence that a jury could return a verdict of guilty on the conspiracy charge. There is no error in Defendant's conviction of conspiracy to commit felonious larceny, and it remains undisturbed. *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (holding that it is not necessary that the unlawful act be completed in order for the State to prove conspiracy). Defendant pled guilty to being an habitual felon. His conviction of having attained habitual felon status is affirmed. These convictions may be taken into consideration by the trial court upon resentencing.

Conclusion

The trial court's judgment is vacated in part and remanded for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny. We find no error in Defendant's conspiracy to commit felonious larceny conviction and affirm his habitual felon conviction.

VACATED IN PART AND REMANDED FOR ENTRY OF JUDGMENT AND RESENTENCING FOR LARCENY; NO ERROR IN PART FOR CONSPIRACY; AFFIRMED IN PART FOR HABITUAL FELON.

Judges ELMORE and DAVIS concur.