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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-268

Filed: 2 February 2016

Pasquotank County, No. 13 CRS 51905

STATE OF NORTH CAROLINA

v.

LENAY FELTON, Defendant.

Appeal by defendant from judgment entered 2 October 2014 by Judge W. Russell Duke, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn H. Shields, for the State.

Marie H. Mobley for defendant-appellant.

GEER, Judge.

Defendant Lenay Felton appeals from his conviction of one count of misdemeanor larceny. On appeal, defendant argues that the trial court committed plain error by admitting surveillance camera footage into evidence without it being properly authenticated. However, in *State v. Jones*, 176 N.C. App. 678, 627 S.E.2d 265 (2006), this Court found no plain error when the defendant failed to object on the grounds of authentication to the admission of a videotape because the defendant

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failed to show that if he had objected, the State would have been unable to supply the necessary foundation for admission of the video. Because the same reasoning applies in this case, we hold that defendant has failed to establish that the trial court's admission of the surveillance camera footage into evidence constituted plain error.

Facts

Defendant was charged with one count of misdemeanor larceny on 4 November 2013. The warrant for arrest stated that defendant unlawfully and willfully stole, took, and carried away 20 cartons of Newport cigarettes, the personal property of Erps Truck Stop, such property having a value of \$900.00. Defendant was convicted in Pasquotank County District Court on 24 March 2014 and gave notice of appeal the same day to superior court. Defendant received a jury trial on 2 October 2014. The State's evidence at trial tended to show the following facts.

The State first called Mr. Monte Clifton Erps, who ran Erps Truck Stop in Pasquotank County and had been doing so for about 40 years. Mr. Erps testified that his business had three or four surveillance equipment systems installed to monitor the store. He further stated that he usually gets the surveillance systems from Sam's Club and installs them himself and that they will record and store around 10 days of video. Additionally, Mr. Erps testified that he has several cameras mounted in his store and that he is able to go back and review video from those cameras during the 10-day time period. Mr. Erps testified that he periodically reviews video recordings,

particularly “[w]henEVER something happens like a gas drive off or if [he] think[s] somebody has done some shoplifting[.]” To watch the footage, “[y]ou have a search -- you have got a little mouse and it’s like a computer, can put it on search and then you can go to the day you want and the time that you want and hit play and watch the footage.”

Mr. Erps testified further that around 25 October 2013, he had an opportunity to review his recording system. He testified over defendant’s objection regarding what he saw on the surveillance video:

Q. If you will think back to last year around October 25th of 2013, did you have an opportunity to review your recording system?

A. Yes, ma’am.

Q. When you reviewed it can you describe what you saw?

A. Saw these--

[DEFENSE ATTORNEY]: Objection.

THE COURT: Overruled.

BY [PROSECUTING ATTORNEY]:

Q. You can answer, sir?

A. Okay. I saw these people come to the store, they went over near the lottery station which is where you might would mark your lottery tickets. And the clerk was busy and while the clerk was busy the cigarettes were right over there, the Newport cigarettes were right over there

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and they would slip cartons of Newports out and put them in their clothes.

After reviewing the footage, Mr. Erps called the Pasquotank Sheriff's Office and spoke with Investigator Aaron Wallio. Mr. Erps explained that he gave Investigator Wallio access to his video camera system in order to view the video. He also stated that he was not a technologically savvy person, so Investigator Wallio helped record the event on a CD. When asked at trial whether the people in the video paid for the cigarette cartons, Mr. Erps responded, without any objection from defense counsel, "No, ma'am." When asked on cross-examination when these events occurred, Mr. Erps responded that he had been on vacation the week of the incident and that he came back to work on Monday morning to a note from his clerk. Upon further questioning, Mr. Erps stated: "It allegedly occurred I think on a Friday night and a Saturday night."

The State also called Investigator Wallio as a witness. Investigator Wallio testified that he was responsible for investigating a larceny that occurred at Erps Truck Stop on 30 October 2013. When he arrived at the gas station, Investigator Wallio spoke with Mr. Erps, who described to Investigator Wallio what he saw on the surveillance video. Investigator Wallio reviewed four security cameras. When asked what part of the store those cameras captured, Investigator Wallio explained that one captured the front door, one showed the gas pumps, one showed the cigarette rack

and lottery station, and one was from the back of the store where coolers and drinks were located.

After reviewing the surveillance system videotapes, Investigator Wallio downloaded the footage onto a DVD. When asked to identify State's Exhibit 1, Investigator Wallio stated that it was the DVD he created of the security footage from Erps Truck Stop. Investigator Wallio testified that he had a chance to review the DVD prior to court and that the DVD had not been substantially changed or altered since he recorded it. Investigator Wallio testified further that the DVD fairly and accurately depicted what he saw on the camera that day.

Investigator Wallio, without objection, then testified that he was able to identify two people when he viewed the videotape, one of which was defendant:

BY [PROSECUTING ATTORNEY]:

Q. Investigator Wallio, when you reviewed the videotape did you recognize anybody in the videotape?

A. Yes, sir. I identified two people.

Q. And who are those two people?

A. Lenay Felton and Jermaine Major.

Q. When you are referring to Lenay Felton, are you referring to the defendant?

A. Yes, sir, I am.

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Investigator Wallio also testified, without objection, as to what he observed defendant doing on the videotape:

Q. What did you observe Mr. Felton do on the videotape?

A. Mr. Felton and Mr. Major both entered the store. When they come into the store Mr. Felton proceeded to the lottery. They go to the back to the drink cooler. After that Mr. Felton proceeds to the lottery station where it appears he's filling out a lottery ticket. You can see him look to the left and the right several times, looks like he's scanning the store. The point [sic] of the video he actually opened the cigarette cabinet and pulls out cartons of Newport cigarettes and sits them on the lottery station. While they're sitting there he again appears to be filling out lottery tickets. Again he looks to the left and the right, kind of scans the store, starts taking cartons of cigarettes, pulls his pants and you see him stuff cartons of cigarettes inside his pants.

The DVD of the surveillance videos was admitted into evidence and published for the jury for the purpose of illustrating and explaining Investigator Wallio's testimony. Investigator Wallio, over the objection of defendant's trial counsel, explained during the trial what the videos showed:

Q. What did it show?

A. When Mr. Felton actually comes in the frame you see--

[DEFENSE ATTORNEY]: Objection, video speaks for itself.

THE COURT: Overruled. Ladies and gentlemen, the video that you saw that is in evidence

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for the purpose of illustrating and explaining the testimony of the witness. You may use it for that purpose.

Investigator Wallio then went into detail explaining what he saw in the video, reiterating his previous testimony.

BY [PROSECUTING ATTORNEY]:

Q. What did the video show?

A. Mr. Felton comes in the frame, you see him enter the store wearing a green coat. He actually turns to the right and you see him look at the cameras. You see Mr. Jermaine Major come in, he's wearing a black coat, he's wearing a hat, you actually see him look to the camera. You see them walk around the store for a minute, they go to the soda machine, soda cooler. Mr. Major actually goes to the lottery counter first. Or excuse me --

Q. And the second video that you show, what part of the store was that?

A. That would be camera number two and that is actually the camera positioned over the cooler in the back, actually goes back toward the entryway of the store and you see the lottery station and the cigarette cabinet on the left.

Q. What did that video show?

A. In that video you can see Mr. Major approach the lottery station first followed by Mr. Felton. Then you see Mr. Major actually walk off, you see him walk around the store throughout the video, actually walk up to the counter like he's filling out a lottery ticket and providing cover for Mr. Felton. You see Mr. Felton as I described standing at the lottery station, see him look to the left and the right a few times throughout the video. He appears to

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be filling out a lottery ticket. At some point in the video you actually see him open the cigarette cabinet, see him pull out cartons of Newport cigarettes and he places them on the lottery station. Again he appears to be filling out a lottery ticket, at which time you see him again look to the left and the right a few times at which point he starts taking the cartons of cigarettes and you see him stuffing them inside of his pants.

Finally Investigator Wallio was asked whether he ever saw defendant pay for the cigarettes:

Q. And at any time on any of the videos do you see him pay for those cigarettes?

A. No, sir.

Defendant did not testify or present any evidence. At the close of the State's evidence, and again at the conclusion of all the evidence, defendant's trial counsel made motions to dismiss, both of which were denied. The jury found defendant guilty of the one count of misdemeanor larceny.

Defendant was subsequently sentenced to 120 days in prison, which was suspended for 24 months on the condition that he serve 30 days in the custody of the Sheriff of Pasquotank County. Defendant was also ordered to submit to house arrest with electronic monitoring for 24 months and to pay the balance of his indebtedness, plus the probation supervision fee. Defendant timely appealed to this court.

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On appeal, defendant first argues that the trial court committed reversible error by admitting the surveillance camera footage into evidence without it being sufficiently authenticated. In criminal cases, “an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4).

Since no objection was made at trial as to the authentication of the surveillance video, defendant asks that we review the admission of the video for plain error.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

The standard for admission of a videotape was first articulated in *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (internal citations and quotation marks omitted), *rev’d on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990), in which this Court held:

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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; (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; 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.

Although defendant argues that the State failed to meet the requirements this Court previously established for authentication of videotapes, this Court has concluded that any such error does not amount to plain error. In *State v. Jones*, 176 N.C. App. 678, 683, 627 S.E.2d 265, 268 (2006), the defendant had similarly failed to make an objection at trial regarding the foundation offered for admission of a videotape. This Court pointed out in *Jones* that “[c]ases addressing the admissibility of surveillance videotapes suggest it is a relatively straightforward matter to lay the necessary foundation.” *Id.*, 627 S.E.2d at 268-69. Consequently, this Court reasoned, if the defendant’s trial counsel had made a timely objection, “the State could have supplied the necessary foundation through testimony of the police officer . . . or other witnesses.” *Id.*, 627 S.E.2d at 268. The Court, therefore, concluded:

Since defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that the videotape in this case is inaccurate or otherwise flawed, we decline to conclude the omissions discussed above amount to plain error. Any error in the introduction of the

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videotape “into evidence without adequate foundation is not the type of exceptional case where we can say that the claimed error is so fundamental that justice could not have been done.”

Id. at 684, 627 S.E.2d at 269 (quoting *State v. Cummings*, 352 N.C. 600, 620-21, 536 S.E.2d 36, 51-52 (2000)).

Jones controls the outcome in this case. Defendant has, like the defendant in *Jones*, failed to show that the State could not have supplied the necessary foundation if a timely objection had been made. Therefore, any error in the admission of the videotape does not constitute plain error. *See also State v. Jackson*, 229 N.C. App. 644, 651, 748 S.E.2d 50, 56 (2013) (applying *Jones* and holding insufficiency of foundation did not amount to plain error where likely State could have produced additional testimony to overcome an objection if defendant had raised one); *State v. Howard*, 215 N.C. App. 318, 327, 715 S.E.2d 573, 579-80 (2011) (relying on *Jones* and finding that if defendant objected at trial to evidence in dispute on appeal, State could have properly authenticated evidence); *State v. McNeil*, 165 N.C. App. 777, 785, 600 S.E.2d 31, 36-37 (2004) (concluding that, when trial court admitted unauthenticated judgment sheets of defendant’s prior convictions, defendant failed to show plain error when he had opportunity to inspect judgment sheets at trial and offered no evidence they were not authentic or that prior convictions had not occurred), *aff’d on other grounds*, 359 N.C. 800, 617 S.E.2d 271 (2005).

Moreover, we note that defendant's argument on appeal regarding the videotape appears to be inconsistent with trial counsel's strategy at trial. During testimony by Investigator Wallio regarding what the videotape he viewed showed, defendant's attorney objected, stating: "*Objection, video speaks for itself.*" (Emphasis added.) In making this objection, defense counsel was urging that the jury should just watch the video, rather than listen to the testimony of the witness regarding what was seen on it. In other words, defense counsel's objection -- that the "video speaks for itself" -- effectively was an argument for the admission of the video and cannot be reconciled with a claim that the videotape should be excluded based on the laying of an inadequate foundation. Defendant essentially invited any error and, therefore, cannot argue that the admission of the videotape amounted to plain error. *See State v. Jones*, 213 N.C. App. 59, 67, 711 S.E.2d 791, 796 (2011) ("Moreover, 'a defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review.'" (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001))).

II

In addition, defendant claims that the trial court erred by allowing Mr. Erps and Investigator Wallio to narrate the contents of the surveillance video and to offer their lay opinion as to what the video showed. First, in regard to Mr. Erps, we note

that defendant's trial counsel only made general objections to that testimony, without providing any basis for the objections:

Q. If you will think back to last year around October 25th of 2013, did you have an opportunity to review your recording system?

A. Yes, ma'am.

Q. When you reviewed it can you describe what you saw?

A. Saw these--

[DEFENSE ATTORNEY]: Objection.

THE COURT: Overruled.

.....

A. Okay. I saw these people come to the store, they went over near the lottery station which is where you might would mark your lottery tickets. And the clerk was busy and while the clerk was busy the cigarettes were right over there, the Newport cigarettes were right over there and they would slip cartons of Newports out and put them in their clothes.

Q. Did you know these people?

A. No, ma'am.

.....

Q. And what do you recall, remember him doing?

A. Well there was someone with these people, the two people that were stealing the cigarettes that I knew--

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[DEFENSE ATTORNEY]: Objection.

THE COURT: What was that?

[DEFENSE ATTORNEY]: Objection.

THE COURT: Overruled.

Rule 10(a)(1) of the Rules of Appellate Procedure states that “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” This Court has held that “ ‘[a] general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence.’ ” *State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (quoting *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996)). Here, as in *Perkins*, “[d]efendant’s counsel gave no basis for the objections and the transcript does not clearly demonstrate grounds for the objections.” *Id.* Consequently, defendant failed to properly preserve any issue related to those generalized objections for appeal.

We, therefore, review the admission of Mr. Erps’ testimony for plain error. On appeal, defendant argues that the trial court erred by allowing Mr. Erps to testify as to the contents of the video and essentially narrate the film. However, Mr. Erps simply relayed what he saw when he watched the video after becoming informed

about an incident. Since the jury had the opportunity to watch the same video, which was admitted into evidence, and defendant has made no argument on appeal that Mr. Erps' testimony was in any way inconsistent with what the video showed, defendant has failed to demonstrate that the jury would have probably reached a different verdict had Mr. Erps' testimony describing what he saw been excluded. Defendant has, therefore, failed to show that admission of this testimony rose to the level of plain error.

Defendant also argues that the following question posed to Mr. Erps and his answer constituted plain error:

Q. Did the people pay for the cigarette cartons?

A. No, ma'am.

As to this testimony, defendant has failed to show any error at all. There is no indication in the record that Mr. Erps' statement was solely based on his viewing of the surveillance tape. Mr. Erps was the store manager and had been for many years; it is certainly conceivable that he could have ways of knowing whether cigarette cartons had been paid for other than just by watching a surveillance tape. Since defendant has failed to show that no possible basis existed for Mr. Erps' assertion that defendant had not paid for the cigarettes other than the videotape, defendant has not established that the testimony was inadmissible.

With respect to Investigator Wallio, defendant also objects on appeal that he should not have been allowed to narrate what he saw on the video. Again, defendant has not shown on appeal that the jury would have probably reached a different verdict in the absence of the challenged testimony, especially in light of defense counsel's objection that the "video speaks for itself" and Mr. Erps' testimony. *See State v. Dean*, 196 N.C. App. 180, 194, 674 S.E.2d 453, 463 (2009) ("[T]he plain error rule may not be applied on a cumulative basis, but rather a defendant must show that each individual error rises to the level of plain error.").

In addition, defendant challenges Investigator Wallio's identification of defendant and the other person he saw in the video. This Court noted in *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009) (internal quotation marks omitted):

The current national trend is to allow lay opinion testimony identifying the person, usually a criminal defendant, in a photograph or videotape where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony.

Moreover, in *State v. Collins*, 216 N.C. App. 249, 256, 716 S.E.2d 255, 260 (2011) (quoting *State v. Belk*, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009)), this Court held:

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In analyzing the admissibility of lay opinion testimony identifying a defendant as the person in a videotape, courts in the majority trend weigh the following factors:

(1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

Here, Investigator Wallio relied on his own prior knowledge of defendant when he identified defendant as one of the men depicted in the video. Applying *Collins* to the present case, Investigator Wallio indicated a general familiarity with defendant and prior knowledge of defendant's identity that put him in a better position than the jury to identify defendant. In addition, defendant has not argued at trial or on appeal that defendant's appearance at trial was any different than it was at the time of the offense. Investigator Wallio, in testifying that he recognized defendant in the surveillance video, simply stated that he had prior knowledge of who defendant was that helped him make an identification in the course of his investigation of the alleged incident at Erps Truck Stop.

We conclude that Investigator Wallio, therefore, had an adequate basis for identifying defendant as one of the men portrayed in the video. The fact that

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Investigator Wallio did not explain how he knew defendant is immaterial since defendant did not object on that basis below, a decision that was quite likely strategic. Defendant has, therefore, failed to show that Investigator Wallio's identification of defendant in the video was plain error, and we hold that defendant received a trial free of prejudicial error.

NO ERROR.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).