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NO. COA01-1102

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v.

Mecklenburg County  
Nos. 00CRS100441-42

CARLOS MAURICE NEELY

Appeal by defendant from judgments entered 9 April 2001 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 May 2002.

*Attorney General Roy A. Cooper, III, by Associate Attorney General Margaret P. Eagles, for the State.*

*Eric A. Bach for defendant-appellant.*

HUNTER, Judge.

Carlos Maurice Neely ("defendant") was charged with assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon. The State's evidence tended to show that on the morning of 19 July 1999, Latonya Kearney ("Kearney") stopped by the home of Maurice Hill ("Hill") to ask whether he had any marijuana to sell. When Hill responded that he did not, she left.

Kearney returned to Hill's residence around noon. She and Hill shared a marijuana cigarette on the porch before entering the

house. Once inside, Hill went into his bedroom while Kearney used the bathroom and then the phone. Hill's bedroom was illuminated by a television and by sunlight coming through two windows, which were partially covered by shades. Kearney joined Hill in his bedroom and she performed oral sex on him. As Kearney and Hill lay in the bed, a man, later identified as defendant, barged into the bedroom carrying a nine millimeter gun. Kearney ran out of the room and defendant shut the door behind her.

Defendant stood four feet from Hill, pointed the gun at him and demanded drugs. When Hill told defendant that he did not have any drugs, defendant shot him in the leg. Defendant again demanded drugs from Hill. Hill subsequently gave defendant approximately \$100.00 and a small bag of marijuana. Afterwards, defendant attempted to shoot Hill in the head and chest, but his gun jammed. Defendant then struck Hill in the back of the head and shoulder with his gun. Defendant fled the residence, entered a vehicle occupied by Kearney and another male, and drove away. Two of Hill's neighbors saw a man matching defendant's description flee Hill's residence.

Hill staggered out of his house and sought help from his neighbors. Hill was transported to the hospital, where he gave a statement and a description of defendant to the police. Kearney also gave a statement to the police. Kearney identified her friend's boyfriend (defendant) as the perpetrator and gave the police his address. On 16 September 1999, Officer Gerald Esposito of the Charlotte-Mecklenburg Police Department brought a

photographic lineup to Hill. A picture of defendant was included in the photographic lineup. Officer Esposito testified that Hill "looked at [the lineup] for a few seconds, took his index finger and put it right on Mr. Neely's photograph and said that's the guy, I'll never forget him."

Defendant did not present any evidence. A jury found defendant guilty as charged. The trial court sentenced defendant to 96 to 125 months' imprisonment for the assault with intent to kill inflicting serious injury conviction and 77 to 102 months' imprisonment for the robbery with a dangerous weapon conviction. Defendant appeals. We find no error.

Defendant first contends the State violated his due process rights by failing to disclose that he was the only person in the photographic lineup with gold teeth. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). Although defendant argues the State had an obligation to inform him of the defects in the photographic lineup, defendant, nevertheless, concedes "no material harm can be shown." Because defendant concedes the error was not prejudicial, this assignment of error is overruled.

Defendant next contends the trial court erred by denying his motion to suppress both the out-of-court and in-court identifications of defendant in violation of his right to due

process. "Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). A positive identification must be suppressed only if the photographic lineup itself is both (1) impermissibly suggestive and (2) so suggestive that "irreparable misidentification" is likely. *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987). The failure of either requirement defeats defendant's due process claim. In determining whether this substantial likelihood exists, our courts look at the totality of the circumstances, guided by five factors:

- 1) The opportunity of the witness to view the criminal at the time of the crime;
- 2) the witness' degree of attention;
- 3) the accuracy of the witness' prior description;
- 4) the level of certainty demonstrated at the confrontation; and
- 5) the time between the crime and the confrontation.

*Id.* at 99-100, 357 S.E.2d at 634 (citing *Manson v. Brathwaite*, 432 U.S. 98, 114-15, 53 L. Ed. 2d 140, 154 (1977)).

Defendant argues the photographic lineup was impermissibly suggestive because he was the only individual who had a gold tooth. However, "[t]he mere fact that defendant ha[s] specific identifying characteristics not shared by the other participants

does not invalidate the lineup.'" *State v. Roberts*, 135 N.C. App. 690, 693, 522 S.E.2d 130, 132 (1999) (quoting *State v. Gaines*, 283 N.C. 33, 40, 194 S.E.2d 839, 844 (1973)), *appeal dismissed and disc. review denied*, 351 N.C. 367, 543 S.E.2d 142 (2000). Therefore, the fact that defendant was the only person pictured with gold teeth "does not render the photographic lineup impermissibly suggestive *per se*." *Id.* at 693-94, 522 S.E.2d at 132. At the *voir dire* hearing, the officer who compiled the photographic lineup testified that the lineup was based upon the physical characteristics of the suspect found in the police report. The officer further testified that gold teeth were not included in the description of the assailant in the police incident report and, therefore, they were not a characteristic that he focused on when compiling the photographic lineup. Finally, after reviewing the lineup, the officer testified that he was unable to determine from the pictures used whether as many as three of the men had a gold tooth. Accordingly, we conclude that this was not an impermissibly suggestive lineup.

Even assuming *arguendo* that the photographic lineup was impermissibly suggestive, the circumstances here show there was not a substantial likelihood of irreparable misidentification. Hill had an opportunity to view the assailant from four feet away in the early afternoon sunlight. Hill's description of the assailant matched defendant's general appearance. Furthermore, when police showed Hill the photographic lineup, he identified defendant almost immediately and stated, "that's the guy, I'll never forget him."

Accordingly, the trial court did not err in denying defendant's motion to suppress the pretrial identification.

Defendant also contends Hill's in-court identification of him should have been suppressed because it was tainted by the impermissibly suggestive photographic lineup. In-court identifications are generally admissible, yet they may be excluded "if 'tainted by a prior confrontation in circumstances shown to be "unnecessarily suggestive and conducive to irreparable mistaken identification.'" " *State v. Caporasso*, 128 N.C. App. 236, 239, 495 S.E.2d 157, 160 (1998) (citations omitted). In view of our holding that the suggestiveness of the pretrial identification did not, in the totality of the circumstances, rise to a level conducive to irreparable mistaken identification, we hold that any effect of the pretrial identification on Hill's in-court identification is not a basis for its exclusion.

Finally, defendant contends the trial court erred by denying his motion to dismiss based on insufficiency of the evidence. The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the

State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

To prevail on the charge of assault with a deadly weapon with intent to kill inflicting serious injury, the State must present substantial evidence of the following elements: (1) an assault; (2) with a deadly weapon; (3) an intent to kill; and (4) infliction of a serious injury. In his brief, defendant argues the State failed to present sufficient evidence of intent to kill. We disagree.

"An intent to kill is a mental attitude, and ordinarily it must be proved . . . by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.'" *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (quoting *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956)). "In the context of G.S. § 14-32(a), an intent to kill may be inferred from 'the nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances.'" *State v. Peoples*, 141 N.C. App. 115, 118, 539 S.E.2d 25, 28 (2000) (quoting *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982)).

Here, defendant shot the victim in the leg at close range with a nine millimeter automatic gun. The evidence tended to show that

after the victim gave defendant his money and marijuana, defendant tried to shoot the victim in the head and the chest, but his gun jammed. Unable to shoot the victim again, defendant struck the victim in the head with the butt of his gun. Defendant's intent to kill the victim can be inferred from his conduct and the deadly nature of the weapon used. Accordingly, the trial court properly denied defendant's motion to dismiss.

No error.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).