NO. COA01-1159

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

STATE OF NORTH CAROLINA

v. New Hanover County
No. 00 CRS 12407

BRANDON MAURICE BROWN

Appeal by defendant from judgment entered 21 April 2001 by Judge Charles H. Henry in Superior Court, New Hanover County. Heard in the Court of Appeals 12 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christine M. Ryan, for the State.

Sofie W. Hosford for the defendant-appellant.

WYNN, Judge.

Defendant was tried for robbery with a firearm, first-degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury. Before trial, defendant moved to suppress evidence of pretrial and in-court identification. The trial court conducted a *voir dire* hearing and, after making written findings of fact and conclusions of law, denied the motion to suppress.

At trial, Ignicio Bejar testified that on 21 June 2000 at a time when it was "fixing to get dark," defendant approached him

outside of his apartment, put a gun in his back, and demanded his money. When Bejar told defendant he had no money, defendant ordered him to get money from his apartment where his wife, four-year-old son, niece and some small children were located. At the apartment, Bejar asked his wife, Minerva Zemora Bejar, in English for money, and when she hesitated he asked in Spanish. Thereafter, defendant pushed him inside and pointed a gun at Bejar's wife and said he would kill her. Bejar turned, grabbed the gun and struggled with defendant; defendant dropped the gun, regained it and shot Bejar in the face. Thereafter, Ms. Bejar threw her purse at defendant, who picked it up and ran away. Bejar spent three days in the hospital recuperating from his injuries.

Bejar and his wife later identified defendant as the assailant in separate photo lineups. Ms. Bejar also identified defendant as the assailant in court.

At trial, defendant testified, denying that he owned or possessed a firearm on the date of the incident. He further denied any involvement in the robbery and assault of the Bejars.

After the charge conference and before closing arguments, the State moved to reopen its case to allow the trial court to take judicial notice of the time the sun set on 21 June 2000. The defense did not object to this motion, and the trial court took judicial notice that the sun set on 21 June 2000 at 7:27 p.m. Eastern Standard time, or 8:27 p.m. daylight savings time in Wilmington, North Carolina.

The jury found defendant guilty of robbery with a firearm,

first degree burglary, and assault with a deadly weapon inflicting serious injury. The trial court respectively sentenced him under record level two to a minimum of 72 months and a maximum of 96 months, a minimum of 72 months and a maximum of 96 months, a minimum of 24 months and a maximum of 38 months--each term to run consecutively. Defendant appealed to this Court.

The issues on appeal are whether the trial court erred in: (I) denying defendant's motion to dismiss at the close of the State's evidence; (II) allowing the State to reopen its case to permit the trial court to take judicial notice of the official time of sunset; and (III) denying defendant's motion to suppress pretrial and in-court identification of defendant. For the reasons stated below, we conclude that defendant received a fair trial, free from prejudicial error.

First, defendant contends that the trial court erred in denying his motion for nonsuit at the close of State's evidence because the State failed to present sufficient evidence that this offense occurred in the nighttime. We disagree.

"A motion for nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Pallas*, 144 N.C. App. at 277, 286, 548 S.E.2d 773, 780 (2001), (quoting *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975)). "Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit." *State v. Pallas*, 144 N.C.

App. at 286, 548 S.E.2d at 780. "[I]f there is substantial evidence--whether direct, circumstantial, or both--to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied." *State v. McKinney*, 288 N.C. at 117, 215 S.E.2d at 582 (1975).

In testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, the reviewing court must determine whether there is substantial evidence of each essential element of the offense and substantial evidence that the defendant was the perpetrator of the offense. *See State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). "[I]f the State fails to present substantial evidence that the crime charged occurred during the nighttime, a defendant is entitled to have charges of burglary against him dismissed." *State v. Smith*, 307 N.C. 516, 518, 299 S.E.2d 431, 434 (1983).

The offense of first-degree burglary consists of six elements: (1) the breaking, (2) and entering, (3) in the nighttime, (4) into a dwelling house or sleeping apartment of another, (5) which is actually occupied at the time of the offense, and (6) with the intent to commit a felony therein. *State v. Barnett*, 113 N.C. App. 69, 74, 437 S.E.2d 711, 714 (1993). In North Carolina, there is no statutory definition of nighttime; however, our courts adhere to the common law definition of nighttime as that time after sunset and before sunrise "when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *State v.*

Barnett, 113 N.C. App. at 74, 437 S.E.2d at 714 (citations omitted); *see also State v. Smith*, 307 N.C. at 519, 299 S.E.2d at 434. Thus, "if the State fails to present substantial evidence that the crime charged occurred during the nighttime, a defendant is entitled to have charges of burglary against him dismissed." *State v. Bowers,* 135 N.C. App. 682, 687, 522 S.E.2d 332, 336 (1999) (citations omitted).

In the present case, there was sufficient evidence presented to allow a reasonable jury to conclude that the assault took place at nighttime. Ignicio Bejar testified that it was either dark or "fixing to get dark" at the time of the assault on 21 June 2000. Captain Lyle Johns, under cross-examination by the defense, testified that he received an initial emergency call regarding Mr. Bejar at around 9:13 p.m.; and Ms. Bejar testified that her husband's cousins, who were in a different room in the apartment, placed the call for assistance, which had been initiated prior to defendant fleeing the apartment. Moreover, the trial court took judicial notice that the time of sunset was 8:27 p.m. Daylight Savings Time according to the U.S. Naval Observatory official times for sunset. Viewing this evidence in the light most favorable to the State, we find the evidence sufficient to establish the nighttime element necessary to sustain a conviction of first-degree burglary. *See State v. Bowers*, 135 N.C. App. at 688, 522 S.E.2d at 336.

Next, defendant contends that the trial court erred in allowing the State to reopen the case to permit the trial court to

take judicial notice of the official time of sunset. We disagree.

In the present case, defendant failed to object and waived his right to challenge the trial court taking judicial notice of the official time of sunset. Thus, defendant must establish plain error by showing that it was a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982); *see also State v. Dale*, 343 N.C. 71, 468 S.E.2d 39 (1996). Before granting relief based on the plain error rule, "the appellate court must be convinced absent the error the jury probably would have reached a different verdict." *State v. Walker,* 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

Rule 201 (b) of the North Carolina Rules of Evidence provides in pertinent part that "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2001). The rule also permits a trial court to take judicial notice whether requested or not, and requires a trial court to take judicial notice if "requested by a party and supplied with the necessary information." Moreover, "[j]udicial notice may be taken at any stage of the proceeding." N.C. Gen. Stat. § 8C-1, Rule 201 (f). Particularly pertinent to the subject appeal, our courts have regularly taken judicial notice of

the official times for sunrise or sunset in burglary cases. *See State v. Garrison*, 294 N.C. 270, 280, 240 S.E.2d 377, 383 (1978); *State v. Barnett*.

> The exact time of sunset and the current phase of the moon on a particular date are not facts "generally known." They are, however, facts which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Thus, it was the responsibility of defendant's counsel, upon his request that the trial court take judicial notice of the moon phase and time of sunset, to provide that information to the trial court in "a document of such indisputable accuracy as [would] justif[y] judicial reliance."

State v. Canady, 110 N.C. App. 763, 766, 431 S.E.2d 500, 501 (1993) (internal citations omitted).

In the present case, there was conflicting testimony as to the amount of darkness outside during the assault as well as the exact time. The evidence presented by the State tended to show that the assault took place between 8:30 p.m. and 9:10 p.m. Yet, viewing all of the evidence, even if the trial court had not taken official U.S. Naval Observatory time of sunset, there was substantial evidence in the record that would have permitted a jury to find that the offense took place at nighttime. Moreover, after supplying the official time of sunset, the trial court then instructed the jury that they could but were not required to find that data conclusive. Thus, this assignment of error is rejected.

Finally, defendant contends that the trial court erred in denying his motion to suppress the pretrial and in-court identifications of him. We disagree.

In reviewing the trial court's ruling on a motion to suppress identification testimony, the findings of fact are binding if supported by competent evidence. *See State v. Freeman*, 313 N.C. 539, 544, 330 S.E.2d 465, 471 (1985). "The proper test is whether in the totality of the circumstances a procedure is so unnecessarily suggestive and conducive to irreparable misidentification that it offends fundamental standards of decency and justice. If an identification procedure is not impermissibly suggestive, the inquiry is ended." *Id.* (Citations omitted).

> We have held that even if the pretrial procedure is suggestive, that suggestiveness rises to an impermissible level only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification. The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. [Citation omitted].

State v. Grimes, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-295 (1983).

In the present case, the record on appeal shows that defendant failed to offer any evidence that the photo lineups were improper. The State's evidence tended to show that prior to trial defendant filed a motion to suppress the evidence of pretrial and in-court identification. The trial court held a *voir dire* regarding defendant's motion to suppress. The trial court denied the motion

to suppress and made written findings of facts and conclusions of law.

At the suppression hearing, Ignacio Bejar testified that defendant approached him with a gun while he was outside cleaning his truck. When Bejar told defendant that he did not have money, defendant told him to go inside of his apartment to get some. Bejar looked at defendant's face; subsequently, Bejar went to his apartment with defendant following him and when he opened the door, he asked his wife for $50. Once inside the apartment, defendant and Bejar wrestled over the gun, which gave Bejar an opportunity to see defendant up close, approximately 10 to 12 inches away. During the struggle, the lights were on in the apartment so Bejar had no difficulty seeing defendant's face. During the struggle, defendant shot Bejar in the head.

While in the hospital, Bejar was approached by Investigator Gronau, who asked him to identify the assailant from pictures. Bejar was medicated and in pain and was unable to comply. On 26 June 2000, Investigator Gronau visited Bejar after he was home. Investigator Gronau showed Bejar six photographs on a sheet of paper. He asked Bejar if he saw the man who shot him on that paper. Bejar quickly identified a photograph of defendant as his assailant, and signed and dated it. He told the investigator that he was one hundred percent certain that he had identified his assailant. When giving his description of the assailant, Bejar described him as skinny, with fully braided hair, approximately 18-20 years old.

Investigator Gronau testified that defendant had generally fit the description given to police by the family after the shooting. He had generated a photo lineup which included defendant and five other random suspects with similar features. He also testified on the night of the shooting, he received a verbal description of the suspect from Bejar's wife. Ms. Bejar described the suspect as a young, black male, with short dreads or braids. Later that night, Investigator Gronau provided Ms. Bejar with a computer terminal and showed her how to review the photographs of black males in the computer. There were approximately 1,700 photos of black males in the system at the time Ms. Bejar reviewed it. She selected defendant's picture as the one who shot her husband.

Investigator Gronau showed a photo lineup to Ms. Bejar which was in a different order than that shown to Bejar. The lineup contained the photo that she had selected from the computer. Ms. Bejar again identified defendant as the attacker from the photo lineup. A third witness, Maria Vargas viewed stored photographs on the computer on the night of the shooting but was unable to identify any individual with certainty. So she was not shown the photo lineup.

The trial court's findings of fact state that all six photographs consisted of similar black and white computer generated pictures of the head and shoulders of six black males. All of them appeared to be in their late teens to early twenties. The trial court further found that nothing was said by Gronau to direct or single out defendant to the witnesses. The trial court concluded

that the identification by Ms. Bejar was not inherently credible, given all of the circumstances of the witness' ability to view the defendant at the time of the crimes; and that credibility of the identification evidence was for the jury to weigh. The trial court further concluded that the pretrial identification procedure was not so impermissibly suggestive as to have violated defendant's right to due process; and that the pretrial identification procedure was reliable and did not produce substantial likelihood of misidentification given the totality of the circumstances. We hold that the trial court's findings sufficiently show that the identification procedure was not impermissibly suggestive. *See State v. Roberts*, 135 N.C. App. 690, 693-96, 522 S.E.2d 130, 133 (1999), *disc. review denied*, 351 N.C. 367, 543 S.E.2d 142 (2000).

Even assuming, *arguendo*, that the identification procedure was impermissibly suggestive, defendant has failed to show that it created a substantial likelihood of irreparable misidentification. Applying the five factors from *State v. Cain*, *supra*, the Bejars had the opportunity to view the assailant in good lighting conditions; their prior descriptions to police of defendant matched defendant's physical appearance; they demonstrated a high level of certainty about their identification of defendant; and they viewed photographic array shortly after the crime. Moreover, less than a year after the assault, the witnesses made in-court identifications of defendant and indicated that they were certain of their accuracy. After a review of the aforementioned factors, we find no error in the trial court's denial of defendant's motion to

suppress the pretrial and in-court identifications of defendant.

In summation, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges Hudson and Campbell concur.

Report per Rule 30(e).